UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DANA CORPORATION,
Respondent Employer,
and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO,
Respondent Union,
and

GARY L. SMELTZER, JR	Cases 7-CA-46965
and	7-CB-14083
JOSEPH MONTAGUE	7-CA-47078
and	7-CB-14119
KENNETH A. GRAY,	7-CA-47079
Charging Parties.	7-CB-14120

AMICUS BRIEF OF AMERICAN RIGHTS AT WORK

This amicus brief is submitted on behalf of American Rights at Work ("ARAW"), in response to the Board's March 30, 2006 Notice and Invitation to File Briefs in the above captioned proceeding.

Interest of Amicus

ARAW is a non-profit organization, chaired by Wayne State University Professor and former Congressman David Bonior, that engages in research, analysis and public advocacy concerning the legal and human rights of workers throughout the United States. Among other things, ARAW studies the development and implementation of federal law governing labor relations and workers' organizing rights under the National Labor Relations Act, and publicizes the practical impact of legal policy on workers and employers. For several years we have investigated the experiences of companies and workplaces committed to "high road" or "high

performance" labor relations policies and practices. Those lawful and well established practices include labor-management cooperation programs, voluntary recognition protocols, interest-based bargaining, and other non-adversarial approaches to employee organizing and collective bargaining. Our research has identified numerous high-road companies that compete successfully in the global economy, achieving profitability and performance while respecting worker's rights to organize and bargain collectively through their chosen union representatives. A sampling of these well regarded employers appears in ARAW's publication, The Labor Day List: Partnerships That Work (September 2005) (available online at <http://www.araw.org/srb/ldl.cfm>).

The Board's solicitation of public input in this case may raise a number of legal and policy issues potentially affecting high-road, non-adversarial labor relations practices. As an organization devoted to labor and employment policy, and as an analyst of non-adversarial labor relations, ARAW has an interest in this matter and wishes to provide its perspective.

This Case Does Not Challenge the Legality of Voluntary Recognition and Neutrality Pacts

We begin with the understanding that this case does not challenge the legality of agreements for voluntary recognition based on proof of majority support through union authorization cards or other means not involving a formal NLRB election. Nor does this case challenge the legality of commitments by unions and employers to avoid negative campaigning in connection with employees' organizing efforts. The allegations and dispositive legal issues in Dana II are narrow and fact-dependent, and ARAW will not attempt to re-argue points of law that the parties address at length in their briefs.

Those narrow issues, however, are sometimes obscured in a broader, ongoing political and policy debate. Whether intended or not, each grant of review or solicitation of public briefing by the NLRB tends to invite hostile attacks on lawful, well established avenues for achieving lawful workplace representation without resort to NLRB elections and protracted litigation before the Board. While we seek to provide some background context regarding the importance of non-NLRB labor relations models and processes, we urge the Board to focus on the specifics of Dana II, avoiding broader policy excursions or disruption of settled law.

High-Road, Non-Adversarial Recognition Processes Are a Part of Many Successful Business Models

The workplace warfare model of employee organizing and representation, featuring hostile anti-union campaigns by employers and fight-to-the-death litigation before the NLRB and the federal courts, can make a mockery of "employee choice." In the 21st Century American workplace, that adversarial model is increasingly giving way to more cooperative, less disruptive and costly means of vindicating employees' rights to organize and bargain collectively. Strong and competitive enterprises in a variety of sectors and industries throughout the country – including Cingular Wireless, Harley-Davidson, Mittal Steel, Lear Corporation, Johnson Controls, Kaiser Permanente, and United States Steel[1] – have embraced cooperative labor relations and non-adversarial, non-NLRB avenues for union representation as a component of business success.

Voluntary recognition agreements – that is, commitments to recognize a union voluntarily based on demonstration of majority support in the form of employees' signed authorization cards,

[1] Memoranda from Nikki Daruwala, Director, Socially Responsible Business Program, American Rights at Work (April 21, 2006).

union membership applications, private election results, or other lawful proof – are a well established element of the non-adversarial model. Recognition agreements often include or are paired with mutual commitments between employers and unions to honor a code of conduct so that organizing campaigns take place in an atmosphere of civility and mutual respect, not merely a context free of lawbreaking, coercion or interference. Such conduct codes might, for example, prohibit the parties from disparaging each other, prohibit the union from campaigning in a disruptive manner, forbid the use of anti-union consultants, and call for an issues-oriented campaign. Under this approach to organizing, both parties cooperate in setting appropriate rules and maintaining a climate that gives employees a chance to decide freely whether or not to form a union, without pressure or interference from either side.

Of course, voluntary recognition pacts and campaign codes of conduct are not new. To the contrary, they are longstanding, legitimate avenues for representation and collective bargaining that federal labor law unquestionably approves.[2] As legal scholar James Brudney discussed in his recently published study, however, these non-adversarial approaches have grown

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[2] There is no question that "[v]oluntary recognition is a favored element of national labor policy." NLRB v. Broadmoor Lumber Co., 578 F.2d 238, 241 (9th Cir. 1978). Accord, NLRB v. Lyon & Ryan Ford, 647 F.2d 745, 750 (7th Cir. 1981). Thus, the federal courts have repeatedly rejected the argument that NLRB elections provide the only legitimate avenue for selecting an exclusive bargaining representative, see NLRB v. Parma Water Lifter Co., 211 F.2d 258, 261 (9th Cir. 1954) ("it is well settled that the designation may be made by other means, one of the most common of which is the signing of union authorization cards"). Likewise, the courts have consistently upheld private pacts that establish customized standards of conduct and that remove disputes from NLRB adjudication. See, e.g., Service Employees Int'l Union v. St. Vincent's Medical Center, 344 F.3d 977 (9th Cir. 2003); Int'l Union, UAW v. Dana Corp., 278 F.3d 548 (6th Cir. 2002); United Steelworkers of America v. AK Steel Corp., 163 F.3d 403 (6th Cir. 1998); Hotel & Rest. Employee Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561 (2d Cir. 1993); Hotel Employees, Rest. Employees Local 2 v. Marriott Corp., 961 F.2d 1464, 1469 (9th Cir. 1992). See also George N. Davies, "Neutrality Agreements: Basic Principles of Enforcement and Available Remedies," 16 Lab. Law. 215 (2000).

in popularity in recent years, and in many sectors they now serve as a predominant avenue for vindication of workers' representational aspirations. According to Brudney, over 80% of new organizing in recent years has occurred outside the NLRB representation election process, and fewer than one-fifth of the reported 3 million workers added to the AFL-CIO from 1998 to 2003 were organized through that NLRB process.[3] In the labor relations arena, as in other aspects of commercial enterprise, flexibility and transparency – the ability to customize procedures, define timetables and address certain consequences and risks upfront – are valuable attributes of non-adversarial, non-governmental processes.

The American business community has sound reasons to continue exploring these alternatives to institutionalized, ritual conflict. Employers who have experienced neutrality and card-check recognition agreements attest that this process significantly reduces costly, drawn-out disputes that all too often characterize NLRB election proceedings. Other motivations cited by companies for agreeing to neutrality and card-check recognition include adding value to their business, the ability to secure or expand business with customers who care about workers' union status, and the role of labor organizations in providing qualified, skilled labor.[4] In short, while labor and management have not abandoned and will not abandon NLRB processes, American workers, employers and labor organizations are continuing to develop a range of other, much

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[3] James Brudney, "Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms," 90 Iowa Law Rev. 819, 824-28 (2005).

[4] See Brudney, supra at 835-40; Adrienne E. Eaton & Jill Kriesky, "Dancing With the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements," in Justice on the Job: Perspectives on the Erosion of Collective Bargaining in the United States (Richard N. Block, with Sheldon Friedman, Andy Levin, and Michelle Kaminski, eds., W. E. Upjohn Institute for Employment Research, 2006).

needed option to serve their needs in a fast-changing global economy.

The Board Should Not Limit Labor Relations Flexibility by Repealing or Restricting Well-Established Law and Practice

Against this background, we strongly oppose any suggestion that the NLRB should hamstring innovation, and eliminate flexibility and choice, by changing the law so as to curtail or impede the use of voluntary recognition and neutrality pacts.[5] This is particularly important given the NLRA's and the Agency's obvious limitations,[6] and given the statutory improvements that would be required to protect fully the essential rights of organizing and collective bargaining. Under these circumstances, it makes no sense – and would be profoundly bad policy – for the NLRB to close all routes to worker representation other than a petition to the Board. Indeed, such an attempt would reverse the basic priorities contemplated and established by the NLRA itself. Under Section 9(a) of the Act, Congress authorized employees to resort to the NLRB's representation election processes after they request, but are denied, *voluntary recognition* from their employer.[7] Where enlightened employers are willing to grant voluntary recognition – as is often the case today – neither the statute nor the legislative intent can justify

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[5] We find especially disturbing, for example, the gratuitous attacks on the fundamental legality of agreements to waive NLRB elections and grant voluntary recognition invited in Shaw's Supermarkets, 343 NLRB No. 105 at 2 (December 8, 2004). Such extreme and disruptive positions do not serve the purposes of the NLRA and only diminish the Board's credibility.

[6] See, e.g., Human Rights Watch, Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards (2000).

[7] Section 9(a) allows the Board to process a petition "by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (I) wish to be represented for collective bargaining *and that their employer declines to recognize their representative* . . . ." 29 U.S.C. § 159(a) (emphasis added).

placing new obstacles in the parties' way.

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