**UNITED STATES OF AMERICA**
**NATIONAL LABOR RELATIONS BOARD**

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| DANA CORPORATION,<br>(Respondent Employer), | ) | |
| and | ) | |
| INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO<br>(Respondent Union) | ) | Case Nos. 7-CA-46965, 7-CA-47078, 7-CA-47079, 7-CB-14083, 7-CB-14119, 7-CB-14120. |
| and | ) | |
| GARY SMELTZER, JOSEPH MONTAGUE, & KENNETH GRAY,<br>(Employee Charging Parties) | ) | |

# CHARGING PARTIES' REPLY BRIEF

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The issue is whether a union can lawfully enter into an agreement with an employer governing what terms and conditions of employment the union can obtain for future-represented employees. The issue goes to the basic construct of collective bargaining contemplated in the National Labor Relations Act ("Act"), and in particular, under § 8(a)(2), 29 U.S.C. § 158(a)(2).

The Opposition Briefs filed by Dana and the UAW[1] miss the "elephant in the room" by focusing on the impact their "Letter of Agreement" (or "Agreement") has on the § 7 rights of Dana employees to choose or reject UAW representation in an organizing campaign. While the coercive impact of the Agreement on the § 7 rights of unorganized employees is an important issue, the greatest iniquity is the *control* the Agreement grants Dana over what terms of employment the UAW can obtain for employees during collective bargaining negotiations with Dana.

Collective bargaining is predicated on a union acting as the representative of employees vis-a-vis their employer. "The bargaining representative . . . is responsible to, and owes complete loyalty to, the interests of all whom it represents." Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). This fealty requires that the union be independent of the employer with which it bargains.

> The statute recognizes two parties to a labor bargaining compact. It requires that the employees in bargaining be completely independent of the employer so that in the bargaining, labor will be represented by persons or organizations having only its interest in mind, and acting wholly uninfluenced by fear or favor, of or from the management.

NLRB v. Brown Paper Mill Co., 108 F.2d 867, 870 (5th Cir. 1970).

Section § 8(a)(2) protects the agency relationship between a union and employees that underlies collective bargaining by ensuring that employers–whether through domination, interference, or provision of support–do not have any control or influence over the union with which

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[1] "UAW" or "Union" refers to Respondent International Union, United Automobile and Agricultural Implement Workers of America, AFL-CIO, and "Dana" refers to Respondent Dana Corp.

the employer bargains.[2] A union subject to such control is incapable of acting solely in the interests of represented employees, as "it is an agent which possesses two masters."[3] The conflict of interest undermines the integrity of the bargaining process, for "[c]ollective bargaining is a sham when an employer sits on both side of table." NLRB v. Penn. Greyhound Lines, 303 U. S. 261, 268 (1938).

Here, the Letter of Agreement grants Dana contractual control–enforceable through binding arbitration and § 301 of the Act, 29 U.S.C. § 185–over how the UAW represents future-organized employees during collective bargaining negotiations with Dana. *See* Agreement, § 4.2.; CP Br. 6-8, 17-19. Dana has the power to prohibit the UAW from seeking or obtaining numerous terms of employment for employees, such as improved healthcare benefits or voluntary overtime, even if such terms are desired by the employees "represented" by the UAW. Id. at §§ 4.2.1 and 4.2.4.

The Agreement violates the text and spirit of § 8(a)(2). Dana's authority over how the Union can act as the representative of Dana employees "intefere[s] with the . . . administration" of the Union, as it interjects the Employer into the relationship between the Union and future organized employees. The UAW cannot solely represent the interests of Dana employees during collective bargaining negotiations with Dana when it is subject to Dana's control.

The UAW vigorously defends pre-recognition agreements on the grounds that they permit employers to "know as much possible about what representation will mean before deciding whether to support of oppose such representation." UAW Br., 16, 14-16. This is somewhat ironic, for organized labor fought to ensure its independence from employers when the NLRA was being

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[2] *See* Brown Paper Mill, 108 F.2d at 871 (Section 8(a)(2) prohibits unions which are "supported, controlled or influenced, though ever so slightly, by the management"); Nassau & Suffolk Contractors Ass'n., 118 N.L.R.B. 174, 187 (1957) ("an employer is under a duty to refrain from any action which will . . . place him even in slight degree on both sides of the bargaining table").

[3] 79 Cong. Rec. 2332 (February 20, 1935) (Rep. Boland), *reprinted at* 2 Legislative History of the National Labor Relations Act 1935 (hereinafter "LHNLRA"), 2443.

enacted, and gained such independence with § 8(a)(2). Now, the UAW seeks to roll back § 8(a)(2) so that it can curry employer favor towards Union organizing with commitments to behave in a manner favorable to management's interests. Desperate times apparently bring desperate measures.

Contrary to the UAW, § 8(a)(2) must be enforced to prevent Unions from selling their fealty to employers in exchange for organizing assistance (*i.e.*, "bargaining to organize"). Here, the UAW agreed to restrictions on the terms of employment it could secure for Dana employees in exchange, *quid pro quo*, for Dana's assistance with organizing those very employees. Agreement, §§ 2.1.3 & 3.1. The Union thereby not only compromised its integrity as a collective bargaining representative, but did so to purely satiate its selfish interest in gaining more members and compulsory dues payers. In order to prevent the proliferation of "bargaining to organize" schemes like the Agreement, it is imperative that the Board condemn pre-recognition bargaining as repugnant to the Act.

## I. Charging Parties' Claims Are Within the Ambit of the Complaint.

The Complaint alleges that Dana violated §§ 8(a)(1) and (a)(2) of the Act, and the UAW § 8(b)(1)(A), by entering into an agreement "that sets forth terms and conditions of employment to be negotiated in a collective bargaining agreement should [the UAW] obtain majority status as the exclusive bargaining representative of certain of [Dana's] employees." Complaint, ¶ 9. All "theories" advanced by Charging Parties and the General Counsel for why this conduct violates the identified provisions of the Act are within the Complaint and properly before the Board.

The Complaint focuses on the "bargaining" portion of Respondents' "bargaining to organize" Agreement, not the organizing assistance provided by Dana to the UAW. The cases cited by Respondents in which portions of union organizing agreements were ostensibly enforced are thereby off point *See* UAW Br., 6-8; Dana Br., 22-24. Moreover, the General Counsel Memoranda relied on by Dana have no precedential value. *See* Fun Striders, Inc., 250 N.L.R.B. 52, n.1 (1980).

## II. The Agreement is a "Bargaining to Organizing" Scheme In Which The UAW Agreed To Binding Bargaining Concessions in Exchange for Organizing Assistance.

The UAW states that it negotiated the Agreement for the benefit of employees, and that the "Union obtained no institutional benefit in the agreement." UAW Br., 40. This claim is nothing short of jaw dropping. Every substantive term of the Agreement is either (1) a UAW bargaining concession or (2) a Dana commitment to assist UAW organizing.

The provisions of the Agreement that regard employee terms and conditions of employment are all *restrictions* and *limitations* on what the UAW can secure for employees upon becoming their exclusive bargaining representative.[4] Not one of the terms require any improvement in employee working conditions. The terms are all bargaining concessions to Dana.

The UAW agreed to these concessions in return for Dana providing affirmative assistance to UAW organizing campaigns against Dana employees.[5] The UAW obtained nothing of value for employees, but instead traded employee interests to satisfy the Union's self-interest in organizing.

Dana claims that the Agreement merely sets out "principles" of bargaining. Dana Br., 6-9. This is belied by the strict, non-permissive language of the Agreement.[6] Moreover, the terms of the

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[4] The UAW agreed to not seek employee health insurance coverage superior to that implemented by Dana on January 1, 2004, id. at §§ 4.2.1; to several mandatory contract terms desired by Dana, id. at § 4.2.4; to effectively cap total wages and benefits to those of a facilities' competitors and comparable Dana facilities, id. at § 4.2.6; and to not strike in with regard to the first contract, id. at § 2.1.3.1.

[5] This includes Dana's commitment to conduct captive audience meetings on company time and property on behalf of the UAW, *see* Agreement, § 2.1.3.5; provide UAW organizers with access to Dana facilities, id.; provide the UAW with personal information about employees targeted for unionization, id., § 2.1.3.1; inform employees that the UAW will help Dana secure business from its customers, id., § 2.1.2.7; forbid its supervisors from saying anything negative about the UAW, id,. § 2.1.2; and recognize the UAW pursuant to a "card check" and without a secret-ballot election, id., §§ 3.1.4 - 3.1.8.

[6] *See e.g.,* Agreement, § 4.2.1 ("the Union *commits that in no event* will bargaining between the parties erode current solutions and concepts in place or scheduled to be implemented January 1, 2004, at Dana's operations" (emphasis added); id. at § 4.2.4 ("The parties *agree* that in labor agreements

(continued...)

Agreement are enforceable under the "final and binding" arbitration provisions of § 5.1.2.4, and under § 301 of the Act.[7] Dana has the power to secure an order from an arbitrator and/or a federal court compelling the UAW to abide by the concessions it pre-negotiated in the Letter of Agreement (unless, of course, the Board finds the Agreement to be unlawful).

## III. An Employer Enjoying Contractual Control Over a Union is Unlawful Under § 8(a)(2).

### A. Enforcing § 8(a)(2) Against the Agreement Will Not Affect Legitimate Bargaining.

The Agreement violates § 8(a)(2) because it grants Dana contractual control over how the UAW can represent future-organized employees in collective bargaining negotiations with Dana. *See* pp. 1-3, *infra*; CP Br., 14-19. Respondents' primary defense is the hyperbolic claim that enforcing § 8(a)(2) against pre-recognition agreements would render all collective bargaining agreements ("CBAs") unlawful. *See* UAW Br., 35-36; Dana Br., 19-20.[8] This claim is baseless, for an employer does not "interfere in the . . . *administration*" of a union under § 8(a)(2) by entering into a CBA with a union that is acting solely as the representative of its employees.

A pre-recognition agreement is distinct from a CBA in that a union enters a pre-recognition agreement solely on behalf of itself, and not as the proxy of employees. The terms of the agreement that relate to how the union will conduct itself as the future bargaining representative of employees inherently governs the relationship *between* the union and future represented employees. The

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[6](...continued)
bargained pursuant to this letter, the following conditions *must be included* . . . ") (emphasis added).

[7] *See* International Union, UAW v. Dana Corp., 278 F.3d 548 (6th Cir. 2002); Service Employees Int'l Union v. St. Vincent Medical Center, 344 F.3d 977 (9th Cir. 2003); New York Health & Human Serv. Union, 1199/SEIU v. NYU Hosp. Center, 343 F.3d 117 (2nd Cir. 2003).

[8] Respondents also argue that most § 8(a)(2) cases involve agents of the employer participating in union affairs, and not an agreement like the one at issue here. UAW Br., 36; Dana Br., 19-20 This is a distinction without a difference. If agents of an employer merely participating in union negotiating efforts "interfere[s]" with a union, then certainly an agreement granting an employer contractual control over a union's negotiating efforts constitutes "interfere[nce]" under § 8(a)(2).

employer is interjected into the internal "administration" of the union in violation of § 8(a)(2), as the employer partially controls how the union can represent future-organized employees. The union is thereby "lacking in independence" because it "owes a dual obligation to employers and employees. It is an agent which possesses two masters." (citation at p.2, n.3, *infra*).

By contrast, in a legitimate CBA the union serves only one "master:" represented employees. Unions enter into CBAs with employers solely as the agent or proxy of represented employees. A CBA therefore does not interfere with the internal "administration" of the unions, *i.e.*, the relationship between the union and represented employees, under § 8(a)(2).

An example illustrates the point. A union's duty to represented employees is akin to the relationship "between attorney and client." Air Line Pilots v. O'Neill, 499 U.S. 65, 74-75 (1991). An attorney can enter into agreements on behalf of his clients, just as a union can enter into CBAs on behalf of represented employees. However, an attorney can *not* enter into an agreement with a third party governing how the attorney will represent future clients vis-a-vis that party. It would be a conflict of interest and a gross violation of ethical norms, as the agreement plainly interferes with the future relationship between the attorney and his clients. The exact same is true for pre-recognition agreements that govern how a union can represent employees.[9]

Finally, Respondents' own § 8(a)(2) theory is untenable. Its basis is that employer control over a union is permissible when pursuant to mutual agreement of the parties. UAW Br, 36-38; Dana Br., 18-19. However, a union's acceptance of employer control or support is not exculpatory, but rather is an unfair labor practice under § 8(b)(1)(A). *See* Duane Reade Inc., 338 N.L.R.B. No.

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[9] The UAW also claims that enforcing § 8(a)(2) would preclude unions from entering into contracts unrelated to collective bargaining. UAW Br., 36. Of course, such agreements by definition do not touch upon the union's relationship with represented employees, and thus do not interfere with the "administration" of the union. Returning to the union / attorney analogy, an attorney is free to enter agreements unrelated to his relationship with his clients. The same is true for unions.

140 (2003). A union cannot agree to be dominated, interfered with, or supported by an employer, because a union cannot waive its fiduciary duty of complete loyalty to represented employees.

B. Employer or Employee Preference for A Union Under Employer Control Is Not Exculpatory Under § 8(a)(2).

It is telling that the UAW has adopted two of the principal arguments that proponents of "company unions" used in their futile struggle against the enactment and enforcement of § 8(a)(2). First, that pre-recognition agreements promote *employee* free choice because "employees will know what will happen if they unionize." UAW Br., 14. Second, that pre-recognition agreements benefit *employers* who may, for example, not "conduct an anti-union campaign so long as it can be certain that the union will not seek a larger contribution toward employees' health insurance." Id. at 16.

The Supreme Court recognized from outset that employee preference for a company controlled union is no defense to § 8(a)(2). *See* NLRB v. Newport News, Shipbuilding & Dry Dock Co., 308 U.S. 241, 250-51 (1939); NLRB v. Link Belt Co., 311 U.S. 584, 588 (1941). When promulgating § 8(a) "Congress heard extensive testimony from employees who expressed great satisfaction with their employee representation plans and committees," but Congress "nonetheless enacted a broad proscription of employer conduct in § 8(a)(2)." Electromation v. NLRB, 35 F.3d 1148, 1164 (7th Cir. 1994) (citations to legislative history omitted).

Employer preference for unions submissive to their business interests is not a defense under § 8(a)(2) claim, but rather is one of the dangers § 8(a)(2) exists to curb. Employers being less likely to oppose union organizing efforts if they can "reach an agreement about what unionization will actually mean," UAW Br, 14, only proves that employers will likely "shop around" for a preferred union based on which offers the best "sweetheart" deal if pre-recognition bargaining was lawful.

## IV. An Organizing Objective Does Not Justify Pre-Recognition Bargaining or Kroger.

The UAW argues that Houston Division, Kroger Co., 219 N.L.R.B. 388 (1975) should be upheld because unionized employees have an interest in the employer's non-union facilities being organized. UAW Br., 28-34. This is non-sequitur because, even if true, organizing being a legitimate end would not excuse the UAW's use of unlawful means to that end. *See* Connell Construction Company, Inc., v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 625 (1975) (union organizing "goal was legal," but "the methods the union chose [to pursue this goal] are not immune from antitrust sanctions simply because the goal is legal."). The rights of non-union employees cannot be sacrificed to appease the ostensible interests of unionized employees.

If the Board should reach the issue, the organizing of additional facilities should be found an *impermissible* subject of bargaining. A union pursuing its self-interests during collective bargaining negotiations with an employer is incompatible with a union's fiduciary duty to bargain solely on behalf of represented employees. *See* CP Br., 35-36. Indeed, it is axiomatic that an agent cannot simultaneously bargain both for itself and those it represents (*i.e.*, engage in "self-dealing"), as the agent may put its own interests before those it represents. Here, the Letter of Agreement demonstrates the danger of allowing unions to trade away employee interests to further the union's institutional self-interest in gaining more members and compulsory dues payers.[10]

## V. The UAW Violates Its Duty of Fair Representation by Agreeing To Concessions at the Expense of Employees in Exchange for Organizing Assistance.

The UAW misconstrues the duty of fair representation issue by focusing on whether the bargaining concessions it made in the Agreement are reasonable or not. UAW Br., 39-41. The prospective breach of fiduciary duty is the UAW agreeing to concessions in exchange for organizing

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[10] In the alternative, organizing is at best a permissible subject of bargaining. *See* Pall Biomedical Corp. v. NLRB, 275 F.3d 116 (DC Cir. 2002).

assistance, and thus placing the Union's self-interest before that of employees. *See* Aguinaga v. United Food & Commercial Workers, 993 F.2d 1463 (10th Cir. 1993). Whether the concessions are economically reasonable or not is irrelevant.

An example illustrates the point. Assume that a union agreed to a $1 / hr. raise in a CBA in exchange for a $100,000 payoff from the employer. This is a glaring breach of the duty of fair representation, irrespective of whether a $ 1 / hr. raise is a good deal or not. A fiduciary cannot justify self dealing with claims that the deal ultimately reached may have been reasonable for all parties. The same is true here. The UAW cannot justify making bargaining concessions at employee expense to satiate its self-interest in organizing by arguing that the concessions it made were economically reasonable.

## VI. Majestic Weaving Held Pre-Recognition Bargaining to Be Unlawful Under the Act.

Respondents argue that Majestic Weaving Co., 147 N.L.R.B. 859 (1964) held premature recognition to be unlawful under the Act, but did not hold that pre-recognition *bargaining* was unlawful. This claim is (1) contrary to the facts of the case, wherein no recognition was found, Id. at 873; (2) belied by the Board expressly overruling its earlier decision finding pre-recognition bargaining lawful in Julius Resnick, Inc., 86 N.L.R.B. 38 (1949), 147 N.L.R.B. at 860 n.3; and (3) is contrary to the Board "hold[ing] that the Respondent's *contract negotiation* with a nonmajority union constituted unlawful support within the meaning of Section 8(a)(2) of the Act." Id. at 860.[11]

Respondents erroneously rely on Retail Clerks v. Lion Dry Goods, 369 U.S. 17 (1962). The only issue in the case was whether union agreements other than CBA's are enforceable under § 301

[11] Indeed, counsel for the Amicus AFL-CIO has written that "[n]egotiations over non-Board recognition procedure often spill over to discussing the terms of a future collective bargaining agreement, should the union demonstrate majority support. Under Majestic Weaving, however, this is an unfair labor practice." Jonathan P. Hiatt and Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176-77 (1996).

of Act. The legality of the agreement under the NLRA was not at issue or considered, as the Court itself stated: "This issue does not touch upon whether minority unions may demand that employers enter into particular kinds of contracts." Id. at 28. Lion Dry Goods has no bearing on legality of pre-recognition bargaining. In fact, the case only proves that the pre-negotiated concessions in the Agreement are fully enforceable by Dana against the UAW (and against future-represented) unless the Agreement is found unlawful by the Board.[12]

Respectfully submitted this 10th day of August, 2005.[13]

William L. Messenger,
National Right to Work Legal Defense Foundation
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
(703) 321-9319 (fax)

*Counsel for Charging Parties*

[12] The ALJ's discussion of Majestic Weaving in Eltra Corp., 205 N.L.R.B. 1035 (1973) is not probative because the Board declined to review, must less adopt, that portion of the ALJ decision. Id. at 1035 n.1. It is also dicta, as the ALJ acknowledged that he did not need to reach the issue. Id. at 1039-40.

[13] All Respondent' contentions not addressed in this reply brief are hereby denied for the reasons stated in Charging Parties Brief in Support.

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Charging Parties' Rely Brief was sent via Federal Express to the following on August 10, 2005:

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 N.W. 14th Street
Washington, DC 20570
(8 copies)

Sarah Pring Karpinen
Counsel for the General Counsel
Region 7, National Labor Relations Board
Patrick V. McNamara Federal Building,
477 Michigan Ave., Room 300
Detroit, MI 48226

Stanley Brown, Esq.
Emily J. Glendinning, Esq.
Hogan & Hartson, LLP
8400 Greensboro Drive
McLean, VA 22102

Betsey A. Engel, Esq.
Blair K. Simmons, Esq.
International Union, United Automobile and Agricultural Implement Workers of America
8000 East Jefferson Ave.,
Detroit, MI 48214

William L. Messenger