United States Government
NATIONAL LABOR RELATIONS BOARD
REGION 7
477 Michigan Avenue - Room 300
Detroit, MI 48226-2569

Telephone (313) 226-3200
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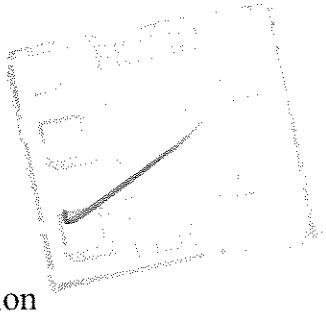
June 3, 2005

National Labor Relations Board
Office of Executive Secretary
Attn: Lester A. Heltzer
1099 14th Street, N.W.
Washington, D.C. 20005-3419



Re: Dana Corporation
Cases 7-CA-46965, 7-CA-47078,
7-CA-47079

and

International Union, United
Automobile, Aerospace, and
Agricultural Implement Workers of
America (UAW), AFL-CIO
Cases 7-CB-14083, 7-CB-14119,
7-CB-14120

Dear Mr. Heltzer:

Enclosed are the original and eight (8) copies of the Exceptions to the Decision of the Administrative Law Judge and Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge.

As indicated on the last page, the parties have been served by regular mail.

Sincerely,

Sarah Pring Karpinen

Sarah Pring Karpinen
Counsel for the General Counsel

SPK/mkw
Enclosures

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June 3, 2004

I certify that on the 3rd day of June, 2005, I placed into the U.S. mail copies of Exceptions to the Decision of the Administrative Law Judge and the Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge and served copies of this document on each of the following parties by Regular Mail:

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/s/ Melissa Walsh
Melissa Walsh, Mail Clerk

1059

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

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., An Individual **Cases 7-CA-46965**
7-CB-14083

Charging Party

and

JOSEPH MONTAGUE, An Individual **Cases 7-CA-47078**
7-CB-14119

Charging Party

and

KENNETH A. GRAY, An Individual **Cases 7-CA-47079**
7-CB-14120

Charging Party

EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

SARAH PRING KARPINEN
COUNSEL FOR THE GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
REGION 7

EXCEPTIONS

1. Exception is taken to the ALJ's procedural dismissal of the complaint by finding that the General Counsel failed to comply with Section 102.15 of the Board's Rules and Regulations by not pleading the "act" of recognition as unlawful in the complaint (ALJD, p. 6, lines 36-42).

2. Exception is taken to the ALJ's dismissal of the complaint on the merits by finding that Respondents' conduct could not constitute unlawful assistance in the absence of a finding of unlawful recognition. (ALJD, p. 6, lines 41-42; p. 8, lines 43-44).

3. Exception is taken to the ALJ's dismissal of the complaint on the merits by finding that Respondents' conduct did not violate the Act because the Letter of Agreement at issue was not a complete collective bargaining agreement. (ALJD, p. 8, lines 11-13).

4. Exception is taken to the ALJ's alternative dismissal of the complaint by finding that Respondents' conduct was lawful under ***Kroger Co.***, 219 NLRB 388 (1975). (ALJD, p. 9, lines 23-27)

5. Exception is taken to the ALJ's decision to revoke the General Counsel's subpoenas in their entirety on the grounds that the information sought was not relevant to any allegation in the complaint. (Tr. 26-28)

6. Exception is taken to the ALJ's exclusion of relevant evidence with regard to the manner in which the Letter of Agreement was introduced to employees at the St. Johns plant, the confidentiality with which its terms were kept, and employee opposition to the agreement and Respondent Union. (Tr. 42, 44, 46, 49, 50, 53, 54, and 56)

7. Exception is taken to the ALJ's failure to find that Respondents' conduct in negotiating terms and conditions of employment at a time when Respondent Union did not have majority status constituted unlawful assistance in violation of Sections 8(a)(2) and 8 (b)(1)(A) of the Act.

8. Exception is taken to the ALJ's recommended Order dismissing the complaint. (ALJD, p. 10, lines 15-20)

Respectfully submitted this 3rd day of June 2005

Sarah Pring Karpinen

Sarah Pring Karpinen
Counsel for the General Counsel
National Labor Relations Board, Region 7
477 Michigan Avenue-Room 300
Detroit, MI 48226-2569

1079

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

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., An Individual — Cases 7-CA-46965, 7-CB-14083

Charging Party

and

JOSEPH MONTAGUE, An Individual — Cases 7-CA-47078, 7-CB-14119

Charging Party

and

KENNETH A. GRAY, An Individual — Cases 7-CA-47079, 7-CB-14120

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

SARAH PRING KARPINEN
COUNSEL FOR THE GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
REGION 7

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I. SUMMARY OF ARGUMENTS

Administrative Law Judge William G. Kocol (hereafter ALJ) recommended dismissal of the consolidated complaint in this case on several bases: procedural grounds; a conclusion that Respondent Employer did not unlawfully assist Respondent Union; a conclusion that Respondent Employer did not unlawfully recognize Respondent Union; and, alternatively, a conclusion that bargaining between the parties was lawful under ***Kroger Co.***, 219 NLRB 388 (1975). The ALJ erred on all counts.

The ALJ erred in dismissing the consolidated complaint on procedural grounds that the General Counsel did not plead the "act" of unlawful recognition in the consolidated complaint. The consolidated complaint properly pled, and Respondents understood, that by entering into a Letter of Agreement containing specific terms and conditions of employment when Respondent Union did not have majority status, Respondent Employer provided unlawful assistance to Respondent Union by dealing with it over specific terms and conditions of employment, and Respondent Union unlawfully accepted such assistance. The ALJ's dismissal of the case on the pleadings alone was in error.

The ALJ also erred in his finding that the case failed on the merits because Respondent Employer did not explicitly recognize Respondent Union and the parties did not negotiate a full collective bargaining agreement. Recognition and the negotiation of a full collective bargaining agreement are not required for a finding of unlawful assistance under the Act. Under ***Majestic Weaving***, 147

NLRB 859, 860 (1964), enforcement denied on other grounds, 355 F. 2d 854, 859-860 (2d Cir. 1966), it is unlawful for an employer to bargain over specific terms and conditions of employment with a union that does not have majority status. The ALJ should have found that Respondents' negotiation of specific terms and conditions of employment in a unit where Respondent Union did not represent a majority of employees was unlawful under ***Majestic Weaving***.

The ALJ further erred in his alternative finding that the Letter of Agreement was lawful under ***Kroger Co.***, 219 NLRB 388 (1975). The legality of a ***Kroger*** clause extending a collective bargaining agreement to unrepresented facilities owned by an employer lies in the relationship of that clause to the unit for which the clause was negotiated. A lawful ***Kroger*** clause vitally effects the terms and conditions of employees in a represented unit. The agreement in this case did not arise out of, or bear any relationship to, mandatory bargaining in any existing unit.

The ALJ further erred in granting the petitions of Respondent Employer and Respondent Union to revoke the General Counsel's subpoena on the grounds that the information sought was not relevant. Under Section 102.31(b) of the Board's Rules and ***Perdue Farms, Inc.***, 323 NLRB 345, 348 (1997), aff'd in relevant part 144 F.3d 830, 833-834 (D.C. Cir. 1998), subpoenaed information should be produced if it relates to any matter in question, can provide background information, or lead to other evidence potentially relevant to an allegation in the complaint. The documents sought by the General Counsel included the Letter of

Agreement alleged to be unlawful, along with documents showing how the agreement was negotiated and applied at the St. Johns plant.

The ALJ erred in refusing to allow any testimony as to the manner in which the agreement was presented to employees, evidence that its terms were kept confidential, and evidence that a majority of employees at the plant signed a petition protesting the agreement and stating that they did not want to be represented by Respondent Union. All this evidence was relevant to the issue of unlawful assistance and the derivative impact on employees' Section 7 rights.

Finally, the ALJ erred in failing to find that Respondents' conduct constituted unlawful assistance in violation of Sections 8(a)(2) and 8(b)(1)(A) and in recommending that the consolidated complaint be dismissed.

II. BACKGROUND

Respondent Employer is an Ohio corporation engaged in the manufacture and non-retail sale of parts for the automotive industry. The instant matter involves Respondent Employer's manufacturing facility located at 916 West State Street, St. Johns, Michigan. That facility manufactures automotive engine parts (Tr. 63). [1] Approximately 305 employees work at the St. Johns plant (Tr. 63). Respondent Union has never represented a majority of the employees at the plant (Tr. 63). Organizing attempts began at the St. Johns facility in 2002. Those efforts have been unsuccessful (Tr. 41).

[1] References to the record are as follows: Tr=Transcript; GC=Counsel for the General Counsel Exhibit; R=Respondent Exhibit; JT=Joint Exhibit; ALJ=Administrative Law Judge; ALJD=Administrative Law Judge Decision.

Respondent Employer operates approximately 90 manufacturing plants in the United States and Canada (Tr. 61). Respondent Union currently represents employees at eight of those plants (Tr. 62). Employees at Respondent Employer's Pottstown, Pennsylvania and Lima, Ohio plants are covered by a master agreement between Respondent Employer and Respondent Union. That agreement covers three separate bargaining units: two production units, and one office and clerical unit (Tr. 62). Respondent Union also represents employees at six of Respondent Employer's other plants. Employees at these facilities have separate collective bargaining agreements and are not covered by the master agreement (Tr. 63).

The Letter of Agreement

On August 6, 2003, Respondent Employer and Respondent Union entered into a Letter of Agreement [JT 1]. The agreement outlines neutrality and card check procedures to be used at certain unorganized facilities owned by Respondent Employer. It also contains mutual understandings with regard to terms to be included in future collective bargaining agreements at those facilities. Respondent Employer was represented in the negotiations by Rick Harmon, controller of Respondent Employer's strategic business unit; Chris Buter, manager of labor relations; and David C. Warders, vice president of labor relations. Respondent Union was represented by Bob King, vice president, and Wendy Jacobs-Fields and John Rucker, his assistants (Tr. 72). The negotiations took place over a period of about three days (Tr. 72).

Schedule 1.3 of the agreement divides Respondent Employer's facilities into three classifications. Level #1 is defined in Schedule 1.3.1 as "non-union Dana automotive related assembly or machining facilities located within the United States which manufacture products for Ford, General Motors and/or DaimlerChrysler, or UAW represented foreign owned facilities." [JT 1, p. 15]. The St. Johns plant is listed as a Level #1 facility. Level #1 is divided under schedule 1.3 into two phases. The St. Johns plant is included in "Phase I" and is named as one of the seven facilities where "current organizing campaigns will continue..." [JT 1, p. 15, at Schedule 1.3.5] In Schedule 1.3.6, Respondent Union agrees not to conduct an organizing campaign at more than seven Level #1 facilities at a time. [JT 1, p. 15].

Schedule 1.3.7 states that Respondent Union will not conduct organizing campaigns at any Level #2 facility (which are defined in Schedule 1.3.2 as those Dana facilities "that do not make products for the Big 3 or UAW represented foreign owned facilities and Distribution Centers.") until it has exhausted its organizing attempts at all of the Level #1 facilities. [JT 1, p. 16]. Schedule 1.3.10 states that Respondent Union will not make any attempt to organize Level #3 facilities (which are defined in Schedule 1.3.3 as those facilities that manufacture or assemble product sold to non-union foreign automotive assembly facilities for a domestic or foreign market") during the term of the Letter of Agreement. [JT 1, p. 16]. Schedule 1.3.8 of the agreement states that, "[u]nless mutually agreed otherwise, this Agreement, with the exception of Schedule 1.3, will not apply to

Level #2 and Level # 3 Company facilities." [JT 1, p. 16]. Schedule 1.3.9 states that any organizing campaigns at Level #2 facilities "will be subject to the 2003 Dana Corporation-UAW Master Agreement Letter on Neutrality." [JT 1, p. 16]

The Letter of Agreement contains numerous provisions outlining card check and neutrality procedures to be used at the Level #1 facilities. Article 2.1.1 of the agreement states that Respondent Employer "will adopt a position of Neutrality in the event the Union undertakes activities seeking to represent employees working in the Company's facilities covered by this agreement." [JT 1, p. 3] Article 2.1.3.1 states that Respondent Employer "will provide the Union with a list of all employees (both full-time and part-time) in the Bargaining Unit at a particular facility within one (1) week of the Union's request for such list." [JT 1, p. 3] Article 2.1.3.5 states that Respondent Employer "will provide the union with access to employees during the workday in non-work areas...." [JT 1, p. 3]. Article 3 of the agreement outlines the guidelines the parties will use in determining whether the Union has obtained majority support from employees. Article 3.1.4 states that "demonstration of majority support within the appropriate Bargaining unit shall be made by determining support with Employee Authorization forms." [JT 1, p. 7]

Article 4 of the agreement states that, after proof of majority status is made under Article 3, Respondent Employer "agrees to bargaining with the Union promptly...The Company and the Union will bargain on an expedited basis for the first contract, and shall make every effort to arrive at a first contract within six (6)

months following proof of majority status." [JT 1, p. 7-8]. Article 4 also contains mutual understandings between Respondents about certain terms that will be part of any future collective bargaining agreement. Article 4.2.1 states that, with regard to healthcare, "the Union commits that in no event will bargaining between the parties erode current solutions and concepts already in place or scheduled to be implemented January 1, 2004 at Dana's operations which include premium sharing, deductibles and out of pocket maximums." [JT 1, p. 8].

Article 4.2.2 of the agreement states: "The Union and the Company agree that the minimum duration of any agreement will be four (4) years and will discuss durations up to five (5) years." [JT 1, p. 8]. Article 4.2.4 states: "The parties agree that in labor agreements bargained pursuant to this Letter, the following conditions must be included for the facility to have a reasonable opportunity to succeed and grow." The listed provisions include: "Healthcare costs that reflect the competitive reality of the supplier industry and product(s) involved; Minimum classifications; Team-based approaches; The importance of attendance to productivity and quality; Dana's ideas program (two ideas per person per month and 80% implementation); Continuous improvement; Flexible Compensation and Mandatory overtime when necessary (after qualified volunteers) to support the customer." [JT 1, p. 9]

Article 4.2.3 of the agreement states: "In the event the Company and the Union are not able to reach an agreement within five (5) months following certification, the parties agree to submit the unresolved issues to a joint UAW

Dana Contract Competitiveness Committee comprised of three (3) Company and three (3) Union members." [JT 1, p. 9]. Article 4.2.5 states: "In the event that the Company and the Union are not able to reach an agreement on the terms of the first contract within six (6) months following certification, the Company and the Union agree that they will submit the unresolved issues to the Neutral for interest arbitration...." [JT 1, p. 9]. Article 4.2.6 states that the Neutral will be presented with "a list of unresolved issues as reflected in the final offers made at the bargaining table. The Neutral shall select between the final offer made by the Company and the final offer made by the Union." [JT 1, p. 9]. Section 4.2.7 states: "The decision of the Neutral shall be final and binding on the parties." [JT 1, p. 10].

Article 6.1 of the Letter of Agreement states:

> The Union agrees that it will not engage in any strike or work stoppage, and the Company agrees that it will not engage in any lockout, during the period beginning on the date the Union requests the list of employees as described in section 2.1.3.1, through the resolution of the first contract at each facility, either by mutual agreement to such contract or in accordance with the procedures described in Article 4. [JT 1, p. 12].

In December 2003, Respondent Union requested a list of employees at the St. Johns facility pursuant to Article 2.1.3.1 of the Letter of Agreement. (Tr. 68). Respondent Union did not have the support of a majority of the employees at the St. Johns plant at the time it requested the list. (Tr. 68).

Finally, Article 12 of the agreement, entitled "Confidentiality" states: "Neither party can disclose this Agreement, or its contents or any actions taken hereunder, without the consent of the other." [JT 1, p. 14].

III. EXCEPTIONS 1-3:

A. The General Counsel did not fail to comply with Section 102.15 of the Board's Rules and Regulations by not pleading the "act" of recognition as unlawful in the consolidated complaint. (Exception 1)

The consolidated complaint properly pled, and Respondents understood, that Respondent Employer rendered unlawful assistance to Respondent Union by negotiating over specific terms and conditions of employment at a time when Respondent Union did not have majority status, and Respondent Union unlawfully accepted such assistance. The ALJ erred in finding that there was a "need in this case to establish unlawful recognition in order to prevail" and dismissing the case on procedural grounds because the General Counsel did not plead the "act" of recognition as unlawful in the consolidated complaint. (ALJD, p. 6, lines 41-42)

The General Counsel complied with Section 102.15 of the Board's Rules and Regulations, which requires a complaint to contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices." The complaint in this case did contain such a clear and concise description. Paragraph 9 of the consolidated complaint states as follows:

> On or about August 6, 2003, Respondent Employer entered into and has maintained a Letter of Agreement with Respondent Union that sets forth terms and conditions of employment to be negotiated in a collective bargaining agreement should Respondent Union obtain majority status as the exclusive bargaining representative of certain

> of Respondent Employer's employees. The Letter of Agreement pertained to approximately 70 facilities owned by Respondent Employer, including the St. Johns facility [***GC 1(m)***]

Paragraph 10 of the consolidated complaint alleges:

> Respondent Union and Respondent Employer entered into the Letter of Agreement at a time when Respondent Union did not represent a majority of the employees employed by Respondent Employer at the St. Johns facility. ***Id.***

Paragraph 11 alleges:

> By the conduct described in paragraphs 9 and 10, Respondent Employer has been rendering unlawful assistance to a labor organization, in violation of Section 8(a)(1) and (2) of the Act. ***Id.***

Paragraph 12 alleges:

> By the conduct described in paragraphs 9 and 10, Respondent Union has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(b)(1)(A) of the Act. ***Id.***

The Board's rules with regard to pleadings are "flexible, not formulaic." ***Omahaline Hydraulics Co.*** 342 NLRB No. 86, slip op. at 9, fn. 18 (Aug. 31 2004), citing ***Boilermakers Local 363*** (***Fluor Corp.***), 123 NLRB 1877, 1913 (1959). Section 102.15 of the Board's Rules and Regulations requires only that the complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed."

The Board has consistently found that a complaint is not subject to the strict standards applicable to pleadings in other legal contexts. ***Artesia Ready Mix***

Concrete, Inc., 339 NLRB 1224, 1226 (2003). The pleadings in this case contained a clear description of the acts alleged to be in violation of the Act. The Letter of Agreement was identified by date, along with a description of its content. That part of the General Counsel's legal theory, that Respondent Employer tacitly recognized Respondent Union by negotiating with it over specific terms and conditions of employment, was not included in the complaint is not fatal to the case. A complaint need not include the legal theory of the General Counsel. ***Omahaline Hydraulics Co.,*** supra; ***Davis Supermarkets, Inc. v. NLRB***, 2 F.3d 1162, 1169 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994).

B. Respondents' conduct constituted unlawful assistance under *Majestic Weaving*. (Exceptions 2 and 3)

1. Pre-majority negotiation of terms and conditions of employment is unlawful assistance.

Respondents, by entering into the August 6 Letter of Agreement, interfered with the Section 7 right of St. Johns employees to have a free choice in their selection of bargaining representative. At a time when both parties admit Respondent Union did not have majority status, Respondents negotiated substantive terms and conditions of employment, most of which were concessionary in nature, in exchange for card check and neutrality procedures that would expedite the recognition process at the plant.

A finding of unlawful support or assistance under Section 8(a)(2) may be based on the tendency of the employer's conduct to coerce employees in the exercise of their Section 7 rights. ***Duane Reed, Inc.***, 338 NLRB 943, 944 (2003);

Ryder Dedicated Logistics, Inc., 1996 WL 33321415, fn. 3 (NLRB Div. of Judges); ***NLRB v. Link-Belt Co.***, 311 U.S. 584, 588 (1941); ***Sheraton-Kauai Corp. v. NLRB***, 429 F.2d 1352, 1357 (9th Cir. 1970). Respondent Employer's actions in bargaining with Respondent Union when Respondent Union did not represent a majority of employees at the St. Johns plant constituted interference with its employees' Section 7 rights and unlawful support of Respondent Union in violation of the Act. Respondent Union's conduct violated Section 8(b)(1)(A).

The Respondents' conduct in negotiating the agreement was unlawful under ***Majestic Weaving Co.***, 147 NLRB 859, 860 (1964), enforcement denied on other grounds, 355 F. 2d 854, 859-860 (2d Cir. 1966), where the Board held that an employer's negotiations with a nonmajority union constituted unlawful support under Section 8(a)(2) of the Act. In ***Majestic Weaving Co.***, the Board held that it is a violation of the Act for an employer to engage in contract negotiations with a union before it has attained majority status, even if the contract is conditioned upon the union attaining majority status. ***Id.*** at 860.

The facts of ***Majestic Weaving*** are analogous to this case. In ***Majestic Weaving***, the parties started "negotiating a tentative agreement" before the union had reached majority status. ***Id.*** at 873. The ALJ, noting that the employer conditioned the signing of any collective bargaining agreement on the union's showing of majority status, held that the "mere willingness to discuss tentative contract proposals" did not interfere with employee rights or constitute unlawful assistance to the Union. ***Id.*** The Board disagreed.

In this case, Respondents did more than "discuss tentative contract proposals." They made substantive agreements with regard to terms and conditions of employment for employees that Respondent Union did not represent. That the agreement required Respondent Union to demonstrate majority status before any collective bargaining agreement would be negotiated is immaterial under ***Majestic Weaving***. Respondents reached agreement on numerous provisions that would be contained in any future collective bargaining agreement. By negotiating such provisions with Respondent Union before it attained majority status, Respondent Employer provided Respondent Union a "deceptive cloak of authority" in the eyes of employees. ***International Ladies' Garment Workers' Union v. NLRB (Bernard- Altmann)***, 366 U.S. 731, 736 (1961).

The Letter of Agreement at issue went beyond the kind of agreement with regard to neutrality and card check found lawful under the Act. See ***The New Otani Hotel & Garden***, 331 NLRB 1078, 1082 (2000); ***HERE, Local 217 v. J.P. Morgan Hotel,*** 996 F.2d 561 (2d Cir. 1993). Such a partnership agreement "merely establishes that an employer will remain neutral in the face of a union organizational campaign. Its execution- even when coupled with a card check agreement- does not create a collective bargaining agreement, not even one conditioned on the union's obtaining majority status." ***The New Otani Hotel & Garden,*** supra, citing ***HERE Local 2 v. Marriott Corp.***, 961 F.2d 1464, 1469 (9th Cir. 1992). Here, Respondents went beyond such permissible procedural agreements and negotiated substantive terms and conditions of employment.

The agreement limits the gains that the employees might realize at the bargaining table should a majority of them sign authorization cards. It sets the duration of any future collective bargaining agreement to a minimum of four years, and determines that, if a contract is not signed within six months of a showing of majority status, a third party will make a binding decision about the final terms of the collective bargaining agreement. These terms constitute substantive agreements between Respondents to set terms and conditions of employment for the St. Johns employees.

The language of the agreement demonstrates that the parties intended the terms to be more than mere principles. For example, in Article 4.2.1, "the Union ***commits that in no event*** will bargaining between the parties erode current solutions and concepts already in place or scheduled to be implemented January 1, 2004 at Dana's operations which include premium sharing, deductibles and out of pocket maximums." [JT 1, p. 8] (emphasis added). A commitment not to erode current healthcare practices under any circumstances is more than a vague statement that Respondents commit to work together to contain healthcare costs. It is a firm agreement from Respondent Union not to even attempt to eliminate the employer's use of certain cost containment measures that would normally be on the table during negotiations.

Article 4.2.4 of the agreement states: "The parties agree that in labor agreements bargained pursuant to this Letter, the following conditions ***must be included*** for the facility to have a reasonable opportunity to succeed and grow."

[JT Ex. 1, p. 9] (emphasis added). Such language indicates more than a mere willingness between the parties to discuss such matters. It demonstrates a firm commitment to include certain provisions beneficial to Respondent Employer, including team-based approaches, continuous improvement, flexible compensation, and mandatory overtime. All of these terms would be open for negotiation in a collective bargaining situation unfettered by such a pre-recognition agreement.

Other sections of the agreement similarly suggest that the parties made firm agreements with regard to terms to be included in any future collective bargaining agreement. In Article 4.2.2 of the agreement, Respondents agreed that "the ***minimum duration*** of any agreement will be four (4) years...." [JT 1, p. 8] (emphasis added). In Article 4.2.5, Respondents "***agree that they will submit***...unresolved issues to the Neutral for interest arbitration." (emphasis added) In Article 4.2.7, they agreed that the Neutral's decision "***shall be*** final and binding on the parties." [JT 1, p. 10] (emphasis added). By executing the Letter of Agreement, the parties effectively closed the door to negotiating a contract of less than four years in duration or to a means of dispute resolution other than the use of interest arbitration in the event they failed to reach a contract within six months.

Article 6 of the Letter of Agreement also provides that Respondent Union agrees not to strike during negotiations for, or interest arbitration over, a first contract at each facility. [JT 1, p. 12] This constituted an unlawful agreement with

a minority Union over a mandatory condition of employment: a no-strike clause effective during contract negotiations or interest arbitration.

Under ***International Ladies' Garment Workers' Union***, there "could be no clearer abridgement of Section 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity", than to impress a minority union "upon the nonconsenting majority." ***Id.*** at 737. By virtue of the Letter of Agreement, Respondent Union became more than "merely an outsider seeking entrance." ***NLRB v. Golden Age Beverage***, 415 F.2d 26, 30 (5th Cir. 1969). It became a privileged insider seeking employee authorization cards in order to ratify terms already agreed upon before the employees had authorized Respondent Union as their bargaining representative. Respondents' negotiation of specific terms and conditions of employment demonstrate that Respondent Employer unlawfully assisted Respondent Union and granted it privileged status in the eyes of employees. This unlawful assistance presented the employees with a "fait accompli depriving [them] of their guaranteed right to choose their own representative." ***International Ladies' Garment Workers' Union***, supra at 736.

2. The ALJ's reasoning in dismissing this complaint allegation was erroneous.

The ALJ erred in holding that ***Majestic Weaving*** is not controlling. He states that that case is not controlling "for at least two reasons. First, the Board there concluded that the employer had recognized the union apart from negotiating a contract....Second, the collective bargaining contract there was complete and

whole; the letter of agreement in this case is a far cry from a collective bargaining agreement." (ALJD, p. 8, lines 8-13) Both reasons for finding that ***Majestic Weaving*** is not controlling are in error. First, the Board did not base its finding of unlawful assistance in ***Majestic Weaving*** on a finding of unlawful recognition. Second, while the ALJ is correct in noting that ***Majestic Weaving*** involved a complete collective bargaining agreement, the execution and maintenance of that agreement was found by the Board to be a separate violation from the finding of unlawful assistance for negotiating with a nonmajority union. ***Majestic Weaving,*** supra, at 860. In addition, the ALJ inappropriately indicated that, rather than unlawfully assisting Respondent Union, Respondent Employer merely noted its preference for Respondent Union.

a. The Board's holding in *Majestic Weaving* was not conditioned upon a finding of unlawful recognition.

In ***Majestic Weaving***, the Board found that "contract negotiation with a nonmajority union constituted ***unlawful support*** within the meaning of Section 8(a)(2) of the Act." ***Id.*** at 860 (emphasis added). The Board did not condition its finding upon a finding that the employer recognized the union. A careful reading of the ALJ's decision in ***Majestic Weaving*** demonstrates that there was no clear recognition agreement between the parties in that case. The decision states that a representative of the union contacted the employer and stated that the union "desired recognition and would like to negotiate a contract." The employer responded that it "had no objections in beginning to negotiate and discuss a proposed contract provided Local 815 could show at the 'conclusion' that they

represented a majority of the employees." ***Id.*** at 866. Nowhere in the ALJ's decision is there evidence of a formal recognition agreement between the union and employer prior to the union's attainment of majority status. Nor does the Board mention any evidence of formal recognition in its decision.

b. Respondents' conduct was unlawful even though they did not negotiate a complete collective bargaining agreement.

The ALJ's refusal to apply ***Majestic Weaving*** to this case because a complete collective bargaining agreement did not result from the parties' negotiations was in error. The Board's finding of unlawful assistance in ***Majestic Weaving*** was not dependent on a finding that the parties had negotiated a full collective bargaining agreement. After finding that the employer unlawfully assisted the union by engaging in negotiations with it before it reached majority status, the Board held:

> We ***also*** find that the resulting contract was an invalid union-security agreement in view of Local 815's assisted majority, and that the execution and maintenance of that contract have interfered with the Section 7 rights of employees in violation of Section 8(a)(1) of the Act. ***Id.*** at 861 (emphasis added).

While the parties in ***Majestic Weaving*** did, as the ALJ states in his decision, negotiate a full collective bargaining agreement, the Board held that the execution and maintenance of that agreement was a separate violation from its finding that the employer unlawfully assisted the union by engaging in negotiations with a nonmajority union.

c. Respondents' conduct went beyond the kind of lawful cooperation allowed in *Coamo Knitting Mills*.

As the ALJ mentions in his decision, the Board has held that it is not unlawful for an employer to indicate its preference for a certain union. (ALJD, p. 8, lines 36-37) The ALJ cites ***Coamo Knitting Mills***, 150 NLRB 579, 581, 595 (1964); see also ***Longchamps Inc.***, 205 NLRB 1025 (1973). The conduct of Respondents in this case went beyond the kind of cooperation found permissible in those cases. As discussed above, Respondent Employer did more than merely state a preference for Respondent Union. Respondents negotiated over, and reached substantive agreements with regard to, significant terms and conditions of employment. The lawful preference discussed in ***Coamo Knitting Mills*** is not applicable to this case. Respondents' conduct constituted unlawful bargaining under ***Majestic Weaving***, supra.

C. By Negotiating, Respondent Employer Tacitly Recognized The Minority Union.

Respondent Employer's actions in unlawfully assisting Respondent Union by negotiating over terms and conditions of employment amounted to tacit recognition of Respondent Union. Evidence that bargaining has occurred is one way to establish that an employer has implicitly recognized a union. ***Lyon & Ryan Ford, Inc.***, 246 NLRB 1, 4 (1979); ***International Union of Operating Engineers, Local 150 v. NLRB (Terracon, Inc.)***, 361 F.3d 395, 400 (7th Cir. 2004), enforcing 339 NLRB 221 (2003). In deciding whether such recognition has been granted, the Board looks at whether or not there is evidence of "give-and-

take" exchange and compromise between the parties concerning substantive terms and conditions of employment. See ***Ednor Home Care, Inc.***, 276 NLRB 392, 393 (1985); ***International Union of Operating Engineers, Local 150***, supra.

There is evidence of exchange and compromise in the Letter of Agreement. Concessions were made with regard to any future collective bargaining agreement. Those concessions were made at the expense of employees that Respondent Union did not yet represent. The concessions included sacrificing the employees' right to strike from the date that Respondent Union requested a list of employees in order to begin to gather cards under the neutrality and card check provisions of the agreement. The agreement also included concessions such as healthcare cost containment measures, mandatory overtime, and minimum job classifications.

Such terms are on their face clearly favorable to Respondent Employer and not its employees. By Respondents agreeing to the above-mentioned terms and conditions of employment, the employees would be presented with a fait accompli as to those terms and conditions should Respondent Union obtain majority status. Respondent Union would be precluded from modifying those terms and conditions of employment even if the unit employees are not agreeable to including them in the contract.

The ALJ notes that Article 3.1 of the Letter of Agreement states that recognition was not granted and that Respondents "confirmed that throughout these proceedings." (ALJD, p. 7, lines 5-7) The conduct of the parties in negotiating the agreement and the Letter of Agreement as a whole, carries more

weight than a conclusionary statement in one article of the agreement and self-serving assertions made by Respondents during the hearing. Respondent Employer tacitly recognized Respondent Union by negotiating over terms and conditions of employment. The give-and-take nature of the negotiations, as evidenced by the agreement itself, demonstrates tacit recognition.

Finally, the ALJ's reasoning that there is no concept of partial recognition in labor law (ALJD, p. 7, lines 39-40) is fundamentally flawed. If the Board follows this logic, then a union and employer could agree to virtually everything, but there would be no recognition, and therefore no violation, if the agreement did not rise to a full collective bargaining agreement. Respondents met and bargained over specific terms and conditions of employment. That they did not negotiate a full collective bargaining agreement does not bar a finding that Respondent Employer unlawfully assisted Respondent Union by granting it tacit recognition and favored status in the eyes of employees.

IV. THE LETTER OF AGREEMENT IS NOT LAWFUL UNDER *KROGER*. (Exception 4)

As an alternative grounds for dismissal, the ALJ held that any bargaining by Respondents was lawful under ***Kroger Co.***, 219 NLRB 388 (1975). In reaching this decision, the ALJ points to the existing collective bargaining relationship between Respondents at the facilities represented by Respondent Union. The ALJ's alternative ruling is in error. Respondents did not demonstrate any relationship between the Letter of Agreement and any existing unit. There was no showing that the agreement arose out of mandatory bargaining at any represented

facility, and no showing that the terms of the agreement vitally affected the terms and conditions of employment of employees in any existing unit.

Under ***Kroger*** and its progeny, it is lawful for employers and unions to negotiate after-acquired store clauses which extend the terms of an existing collective bargaining agreement to a new facility if and when the union reaches majority status. A ***Kroger*** clause is lawful because it is the product of arms-length, mandatory bargaining between an employer and a union representing a majority of employees in a given shop or group of shops where it can be shown that the product of negotiations vitally affects the terms and conditions of employees in the represented unit.

In ***Pall Biomedical Products Corp.***, 331 NLRB 1674, 1675-1676 (2000), enforcement denied on other grounds 275 F.3d 116 (D.C. Cir. 2002), the Board explained ***Kroger*** as an application of the principle that a union bargaining for a contract in a unit that it already represents may insist that the employer bargain about provisions to extend that contract to new facilities when that clause is directed at the concerns of the represented unit and vitally affects their terms and conditions of employment. Unlike the circumstances of the present case, with a lawful ***Kroger*** clause, there is no taint of unlawful assistance in the negotiations that produced the basic contract, and thus no coercive pressure on the employees at the newly acquired stores to accept the contract because their employer had bargained with the union as their representative before it had majority status.

The Letter of Agreement under review in this case only governs facilities where Respondent Union does not represent a majority of employees. Respondents have not claimed or demonstrated that the agreement bears any relation to their master agreement or individual agreements at represented facilities. Therefore, there can be no finding that the Letter of Agreement vitally affects the terms and conditions of employment of employees at those facilities, and the agreement cannot be found lawful under ***Kroger***.

V. THE ALJ ERRED IN REVOKING THE GENERAL COUNSEL'S SUBPOENAS. (Exception 5)

Prior to the hearing, the General Counsel issued subpoenas to Respondent Employer and Respondent Union [GC 2 and GC 3] seeking a number of documents, including an original or true copy of the Letter of Agreement and original or true copies of proposals, notes, tentative agreements and other written records of the negotiations between Respondents in reaching the Letter of Agreement. In addition, the General Counsel sought correspondence, notes, fliers and other records of meetings conducted by Respondent Employer or Respondent Union with employees at the St. Johns plant with regard to the agreement, and other evidence that the agreement had in fact been invoked at the plant.

In a conference call the day before the hearing, and again on the record, the ALJ granted Respondents' motions to revoke the General Counsel's subpoenas in their entirety. Aside from the Letter of Agreement, which Respondents agreed to provide, the ALJ found that "none of the information sought by the subpoena is relevant to any allegation in the complaint." (Tr. 26)

Under Section 102.31 of the Board's Rules, subpoenaed information should be produced if it relates to any matter in question, can provide background evidence, or lead to other evidence potentially relevant to any allegation in the complaint. The information sought need only be "reasonably relevant." ***Perdue Farms, Inc.***, 323 NLRB 345 (1997), aff'd in relevant part, 144 F.3d 830, 833-834 (D.C. Cir. 1998).

The information sought by the General Counsel was relevant to whether Respondent Employer unlawfully assisted Respondent Union by negotiating the Letter of Agreement. Bargaining notes, notes from meetings at the plant and correspondence between the parties would all shed light on whether unlawful assistance occurred and what the parties intended to accomplish with the Letter of Agreement. Even if the ALJ believed that all of the documents sought would be inadmissible at trial, there was no reason to believe that the information could not have possibly led to admissible evidence.

The ALJ further erred in making an inappropriately timed ruling on Respondent Employer's motion to revoke during a February 7 conference call. During the conference call (summarized on the record at TR 27-28), Counsel for the General Counsel informed the ALJ that she and counsel for Respondent Employer had reached a compromise with regard to the subpoena, with the exception of the issue of a protective order over the documents. Instead of ruling on the issue of the protective order, the ALJ informed Respondent Employer that he planned to grant its Petition to Revoke in its entirety, thereby destroying any

chance of a voluntary settlement between Respondent Employer and the General Counsel. At the least, the ALJ should have offered to review the documents in camera and issued a ruling as to the protective order before revoking the subpoena.

VI. THE ALJ ERRED IN EXCLUDING RELEVANT EVIDENCE. (Exception 6)

An administrative law judge "must guard against expediting a hearing by limiting either party in the full development of its case." ***Indianapolis Glove Co.***, 88 NLRB 986, 987 (1950). A judge may not "cut off lines of inquiry and limit the response of witnesses to such an extent that the development of the case may have been hampered" ***Better Monkey Grip Co.***, 113 NLRB 938, 940 (1955) (footnote omitted), or limit testimony in a manner that "precludes a fair determination" of the merits of parties' cases." ***Dayton Power & Light Co.***, 267 NLRB 202, 202 (1983).

The ALJ erred in not allowing testimony as to the manner in which the Letter of Agreement was introduced to employees at the St. Johns plant (Tr. 42, 53, and 54), and the confidentiality with which its terms were kept (Tr. 44, 49, 50, 56), or as to a petition signed by a majority of employees at the plant protesting the agreement and stating that they did not want to be represented by the UAW (Tr. 46). The ALJ refused to allow testimony as to the manner in which the Letter of Agreement was presented to employees at the St. Johns plant, ruling that because there was no independent allegation in the complaint regarding the way in which employees learned about the agreement, such testimony would not be relevant. (Tr. 42) He also refused to allow testimony from two Charging Parties

with regard to the confidentiality with which the terms of the agreement were kept from employees at the plant (Tr. 44, 49, 50, 56), and rejected an exhibit and testimony offered to demonstrate that a majority of employees at the plant signed a petition rejecting Respondent Union and the Letter of Agreement. (Tr. 46)

It is well settled that conduct that is not independently alleged in the complaint "may be used to shed light on the motive for other conduct that is alleged to be unlawful." ***Meritor Automotive, Inc.***, 328 NLRB 813, 813 (1999), citing ***American Packaging Corp.***, 311 NLRB 482, fn. 1 (1993). The manner in which the agreement was introduced to the employees and the confidentiality with which its terms were kept, while not independently alleged as violations in the consolidated complaint, shed light on the impact the agreement had on the Section 7 rights of the employees. That a majority of the employees signed a petition stating that they did not support Respondent Union or wish to be governed by the agreement demonstrates that employees felt it necessary to take steps to protest a perceived lack of free choice of bargaining representative.

At trial, Counsel for the General Counsel called Charging Parties Gary Smeltzer and Joseph Montague as witnesses to testify as to the manner in which employees were informed of the agreement and that they circulated a petition among employees protesting the agreement and UAW representation. That testimony was presented along with a copy of the petition (GC 4), which was rejected by the ALJ. Thereafter, Counsel for the General Counsel made an offer of proof with respect to the testimony of Smeltzer and Montague.

Specifically, the offer of proof was that the testimony of witnesses Smeltzer and Montague would have shown that Respondents presented the agreement to employees in such a manner as to impress upon them that Respondent Union and Respondent Employer had a bargaining relationship that had resulted in a secret agreement that limited employee rights despite the fact that Respondent Union did not have the support of a majority of the St. Johns employees. Smeltzer and Montague would have testified that the agreement was announced to employees at plantwide meetings on August 7, 2003. (Tr. 43, 54). Employees were not given specific details about the agreement or given copies, and all questions were directed to Respondent Employer's corporate legal department. (Tr. 43, 54).

In the weeks that followed, employees heard rumors about the contents of the agreement and that it contained no-strike language and a "baseball arbitration" system to resolve any first contract disputes. (Tr. 47). Smeltzer heard that other employees had been allowed to view the agreement at Respondent Union's hall, but he was not allowed to do so. (Tr. 44). He also asked Respondent Employer to allow him to view the agreement and was refused. (Tr. 44).

Thereafter, Smeltzer and Montague circulated a petition, which a majority of employees signed, protesting the agreement and rejecting Respondent Union as their representative. (Tr. 47), [GC 4 (rejected)]. That petition was sent to Respondents in November 2003. (Tr. 48). On December 8, 2003, Respondents held a joint, plantwide meeting at which the agreement was discussed. David Warders, vice president of labor relations, told employees that there were business

advantages to working with Respondent Union to strengthen their business. (Tr. 55). Respondent Union vice-president Bob King also spoke at the meeting. He did not provide specific details about the agreement, but did state that it had a no-strike clause. (Tr. 49). Employees were not given copies of the agreement at the meeting. (Tr. 49, 56).

Around the time of the December 8 meeting, four months after the Letter of Agreement was negotiated, employees were told they could see the Letter of Agreement by making an appointment with the human resources department to review the agreement on non-work time. (Tr. 50, 56). Smeltzer and Montague viewed the agreement in the human resources office after making appointments. They were not allowed to copy it or take notes. (Tr. 50, 57).

The ALJ erred in not admitting the above testimony and exhibit into evidence. It would have shown that the Letter of Agreement was presented in such a way as to give employees the impression that Respondents had a special insider relationship that was being kept secret from the employees. Employees were not given copies of the agreement and until December 2003 had to rely on rumors as to what it contained. When the employees were finally allowed to view the agreement, they had to make an appointment with the human resources office to do so, and were not allowed to copy the agreement or take notes. Such conduct left the impression that Respondents had met without the knowledge or approval of St. Johns employees and bargained a secret agreement that impacted their terms and conditions of employment.

VII. RESPONDENTS' CONDUCT IN NEGOTIATING TERMS AND CONDITIONS OF EMPLOYMENT CONSTITUTED UNLAWFUL ASSISTANCE IN VIOLATION OF SECTION 8(a)(2), UNLAWFUL INTERFERENCE IN VIOLATION OF SECTION 8(a)(1) AND UNLAWFUL RESTRAINT AND COERCION IN VIOLATION OF SECTION 8(b)(1)(A). (Exceptions 7 and 8).

The National Labor Relations Act gives employees "freedom of choice and majority rule" in their selection of a bargaining representative. ***International Ladies' Garment Workers' Union v. NLRB (Bernard- Altmann)***, 366 US. 731, 737 (1961). There "could be no clearer abridgement of Section 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity," than to impress a union selected by a minority of employees "upon the nonconsenting majority." ***Id.***

Respondent Employer, by negotiating specific terms and conditions of employment with Respondent Union at a time when both admit that Respondent Union did not represent a majority of employees at the St. Johns plant, unlawfully assisted Respondent Union in violation of Section 8(a)(2) of the Act and unlawfully interfered with the Section 7 rights of its employees in violation of Section 8(a)(1). Respondent Union, by accepting the unlawful assistance and negotiating with Respondent Employer, unlawfully coerced and restrained employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A). The ALJ erred in dismissing the consolidated complaint.

VIII. CONCLUSION

For the reasons advanced above, we respectfully ask the Board for a finding that Respondent Employer unlawfully assisted Respondent Union in violation of Section 8(a)(2) of the Act and unlawfully interfered with the Section 7 rights of its employees in violation of Section 8(a)(1), and Respondent Union unlawfully restrained and coerced employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A).

We also respectfully ask for reversal of the ALJ's grant of the Respondents' motions to revoke the General Counsel's subpoenas in their entirety and his failure to allow the General Counsel to develop the record at the hearing with regard to the manner in which the Letter of Agreement was negotiated, the way in which it was introduced to employees, and the confidentiality with which its terms were kept, and with regard to a majority of employees not supporting Respondent Union or wanting to be governed by the Letter of Agreement.

Finally, we request that the Board order the parties to cease and desist from enforcing the August 6, 2003 Letter of Agreement in its entirety. The Supreme Court has acknowledged that there are "cases where a forbidden provision is so basic to the whole scheme of a contract and so interwoven with all its terms that it must stand or fall as an entirety." ***NLRB v. Rockaway News Supply Co.***, 343 U.S. 71, 78 (1953). Such a case exists here.

It is clear from the document that Respondent Union's concessions on substantive terms and conditions were a quid pro quo for Respondent Employer's

agreement on neutrality, card check and recognition. In describing the "purpose" behind the agreement, Respondents acknowledged the "mutually beneficial commitments...to increase productivity, efficiency and quality of operations," on the one hand, and a "commit[ment] to an expeditions procedure for determining majority status" on the other (JT 1, pp 1-2).

This quid pro quo is illustrated by the structure of the agreement. Article 4, in which the parties set parameters on substantive terms and conditions of employment is, by its own terms, applicable only when the Respondent Union achieves majority status under the procedures set forth in Article 3, the neutrality and card check provisions. Moreover, although the ALJ's erroneous revocation of the General Counsel's subpoena prevented presentation of record evidence as to the negotiations for the Letter of Agreement, it is logical to infer that Respondent Union would have had no incentive to agree to limit its bargaining demands as set forth in Article 4 had Respondent Employer not agreed to neutrality and a card check agreement, and vice versa. Thus, the agreement as structured by the parties constitutes a single, integrated document with interwoven parts, some facially unlawful, others not so. The Letter of Agreement comprises a package that must be rescinded. See ***NLRB v. Custom Sheet Metal & Service Co.***, 666 F.2d 454, 460-61 (10th Cir. 1981)(employer not ordered to sign collective bargaining agreement that contained single unlawful clause that limited employment to applicants with union referrals; illegal provision "forms the very foundation on which the agreement rests"); ***Corvair***, 111 NLRB 1055, 1058 (1955) (parties

maintained unlawful contract provisions requiring payment of union assessments and denial of grace period for reinstated employees; unlawful provisions invalidated entire union security clause, where they were "integral parts" of union security scheme).

We also respectfully ask the Board to order the parties to cease applying the Letter of Agreement at all relevant Dana facilities, not just its St. Johns, Michigan location. The agreement, including the unlawful recognition and pre-majority bargaining provisions, applies to all Dana plants set forth in Schedule 1.3, including, but not limited to, the St. Johns facility.

Respectfully submitted this 3rd day of June 2005

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