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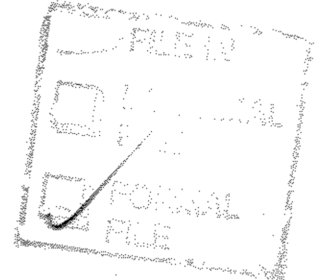
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.



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
Charging Party
Cases 7-CA-46965
7-CB-14083

and

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

and

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

COUNSEL FOR THE GENERAL COUNSEL'S REPLY 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

1. **The Union and Employer are unsuccessful in their attempt to distinguish *Majestic Weaving*; it cannot be limited to cases where an employer explicitly grants exclusive recognition by words or writing.**

Respondent Union and Respondent Employer challenge the General Counsel's reliance on ***Majestic Weaving***, 147 NLRB 859, 860 (1964), enf. den. on other grounds, 355 F. 2d 854 (2d Cir. 1966) by arguing that the violation in that case rests on a finding that the employer expressly granted exclusive recognition to a nonmajority union prior to engaging in negotiations. Thus, they claim that the Section 8(a)(2) violation found there is limited to circumstances where an employer explicitly grants, by word or writing, exclusive recognition to a minority union and then engages in collective-bargaining negotiations. (Respondent Union's Brief in Opposition to the General Counsel's Exceptions, "U. Brf.," at 10-12; Respondent Employer's Answering Brief to the General Counsel's Exceptions, "ER. Brf.," at 25-26.) The parties ignore the facts of that case and thus mischaracterize the Board's holding. The description of the recognition in ***Majestic Weaving*** (***Id.*** at 866) contains no suggestion that the employer specifically told the union that it agreed to recognize it as the employees' "exclusive" collective bargaining representative. Rather, the Trial Examiner recounts simply that an employer representative told a union agent that he "had no objections in beginning to negotiate and discuss a proposed contract, provided [the union] could show at the 'conclusion' that they represented a majority." The parties agreed on dates for negotiations and thereafter negotiated terms of a contract. Id. at 866-67. Thus, it was the agreement to negotiate that the Board found was "oral recognition" as exclusive representative and that agreement, followed by the actual negotiation of contract terms, was unlawful support within the meaning of Section 8(a)(2). Id. at 860. This grant of exclusive representative status

applies in equal measure here, where Dana similarly engaged in premature collective bargaining over employees' terms and conditions of employment with a minority union.

As noted in the General Counsel's Brief in Support of Exceptions ("GC Brf." at 19-20), the Board has clearly acknowledged that collective bargaining negotiations evidence tacit recognition. ***Nantucket Fish Co.***, 309 NLRB 794, 795 (1992), relied on by the Union (U. Brf. at 25-26) is not to the contrary. There, the General Counsel's allegation that the employer granted recognition to a minority union rested solely on an employer agent's ambiguous statement. The Board's conclusion that the ambiguous statement did not constitute a "clear, express, unequivocal statement of recognition" (***Id.*** at 795) was merely an aid to resolving whether recognition had been granted in that instance. It does not govern a determination that recognition was granted when, as here, it is undisputed that Respondent Employer bargained with a minority union.

2. Cases cited by the Union and Employer enforcing agreements between an employer and a union which is not the exclusive bargaining representative do not justify the parties' conduct here.

Respondent Union (U. Brf. at 11-13, 17 n.11) and Respondent Employer (ER. Brf. at 31) argue that because courts have in some circumstances enforced agreements between an employer and a nonmajority union, the parties here acted lawfully in entering into a Letter of Agreement setting forth mandatory terms and conditions of employment at a time when Respondent Union did not represent a majority of bargaining unit employees. The General Counsel's claim of illegality here is not affected by the validity of the approach in the cited cases. In ***Retail Clerks v. Lion Dry Goods***, 369 U.S. 17 (1962), the Supreme Court enforced through Section 301 a strike settlement agreement entered into by an employer and a union that had previously been the majority representative but was

not entitled to that status at the time of the agreement. 369 U.S. at 20-21. Nevertheless, that agreement arose out of the bargaining relationship that had previously existed: it vitally affected the unit employees by resolving divisive issues left open at the end of the strike. Moreover, it contemplated no continued dealings with the union as exclusive representative unless the union established its majority status. The Court concluded that enforcement of the contract was consistent with section 301's policy of permitting enforcement of agreements between employers and labor organizations (not just exclusive bargaining representatives) as a means of securing labor peace. ***Id.*** at 28-29. The agreement in that case did not, as here, provide the union with a "deceptive cloak of authority" in the eyes of the employees ***(International Ladies' Garment Workers Union v. NLRB (Bernhard-Altmann)***, 366 U.S. 731, 736 (1961)) nor did it otherwise guide the parties' future relationship. ***Consolidated Edison Co. v. NLRB***, 305 U.S. 197, 236-37 (1938), (cited U. Brf. at 17 n.11) is equally inapposite. There, the Supreme Court upheld the legality of a collective bargaining agreement with a minority union that applied by its own terms only to union members. As the Court noted, the contract did not make the union the employees' exclusive bargaining representative. ***Id.*** Unlike ***Consolidated Edison***, however, the Letter of Agreement here would be binding on the Union in its role as exclusive bargaining representative and the terms dealt with in the agreement would cover <u>all</u> employees, not just those who are members of Respondent Union.

Respondent Union is equally unavailing in its related argument (U. Brf. at 20-21) that the negotiated terms did not violate Section 8(a)(2) because they were not terms and conditions of employment but "little more than vague, aspirational goals." In reality, the negotiated terms, involving some of the more significant aspects of any collective

bargaining agreement, limited Respondent Union's freedom to seek different terms at the bargaining table. For instance, in Article 4.2.1, Respondent Union committed not to attempt to improve employee health benefits -- including premium sharing, deductibles, and out of pocket maximums -- that Dana had previously implemented or scheduled for implementation. In Article 4.2.2, Respondent Union committed to a contract duration of between four and five years. In Article 4.2.4, Respondent Union committed to allow Respondent Employer to impose mandatory overtime on employees. These issues are among the mainstay of any collective bargaining agreement. And these and other contractual commitments are no less binding (U. Brf. at 20; ER. Brf. at 9) merely because both parties can subsequently agree to modify them at the table or during the contract term. After all, parties to any agreement can later agree to amend terms.

3. Respondent Union's policy arguments ignore the Supreme Court's concerns about imbuing minority unions with a favored status.

Respondent Union's policy arguments (U. Brf. at 14-17) in favor of pre-majority bargaining do not take into consideration the Supreme Court's countervailing concerns articulated in ***Bernhard-Altmann***. Respondent Union posits a benefit to employees and employers in allowing employer and unrepresentative minority unions to "enter into agreements conditional on a showing of majority support." (U. Brf. at 16-17.) Yet, the Union simply ignores the Supreme Court's countervailing concerns that installing a minority labor organization accords it the status of a favored, inside union. ***Bernhard-Altmann***, 366 U.S. at 737 ("There could be no clearer abridgment of Section 7" than to impress a minority union "upon the nonconsenting majority.") Respondent Union's promise of a free flow of ideas among parties of roughly equal power is belied by the reality of this case, in which an employer and union combined to agree on the terms

under which employees would work and then resisted disclosing the details of that agreement while the union sought employee support. This simply installs a minority collective bargaining representative on unit employees – conduct squarely prohibited by Section 8(a)(2) .

4. **The evidentiary record demonstrates that Respondent Employer accorded the minority Respondent Union undue status in the eyes of employees; in any event, the ALJ erred in excluding the General Counsel's further evidence on this point.**

Respondent Union argues (U. Brf. at 17-19) that even if Respondent Employer's conduct of negotiating the Letter of Agreement with a minority union falls within the ambit of Section 8(a)(2), no violation can be found without record evidence establishing that employees were aware of the negotiations, thereby granting Respondent Union a privileged status in the eyes of the employees. The record, however, is sufficient to find a violation here. First, the parties' conduct of negotiating terms and conditions of employment with a minority union is the type of conduct found to constitute unlawful assistance in ***Majestic Weaving***. Furthermore, Respondent Employer issued a press release (Charging Party Exhibit 4) publicizing that the parties had entered into a "partnership agreement," that the subject of that agreement included "collective bargaining and representation principles," and that the parties had agreed on an "approach" to collective bargaining that would "ensur[e] that labor agreements negotiated by the parties are competitive." (CP Exh 4 at 1).This statement clearly implied that Respondent Employer and Respondent Union had negotiated regarding working conditions, as, indeed, a review of the specifics of the agreement confirms.

At trial, Counsel for the General Counsel attempted to elicit further evidence that employees knew of the existence of the Agreement, had sketchily reviewed it and sought

further access to it. This evidence would reinforce the record evidence that Respondent Employer violated Section 8(a)(2) by holding Respondent Union out to employees as its preferred insider. The Administrative Law Judge rejected that evidence, Counsel for the General Counsel made an offer of proof and excepted to the Judge's exclusion of the evidence (Exception 6).

5. The Board properly should order the parties to rescind their agreement as it is written, for all affected locations.

Respondent Union (U. Brf. at 45-47) and Respondent Employer (ER. Brf. at 43-45) err when they contend that rescission of their Letter of Agreement is inappropriate. By its own terms, the agreement applies to a variety of Dana facilities throughout the country. As the General Counsel has argued, the agreement constitutes Section 8(a)(2) assistance. It is entirely appropriate to order the parties to rescind an unlawful agreement wherever it is or will be put into place.

Respectfully submitted this 11th day of August 2005

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August 11, 2005

I certify that on the 11th day of August, 2005, Reply Brief in Support of Exceptions to the Decision of the Administrative Law Judge was electronically filed and I served copies of this document on each of the following parties by Federal Express overnight delivery:

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