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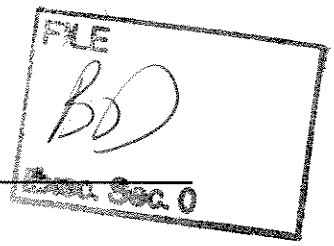
UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD



DANA CORPORATION,

(Respondent Employer),

and

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

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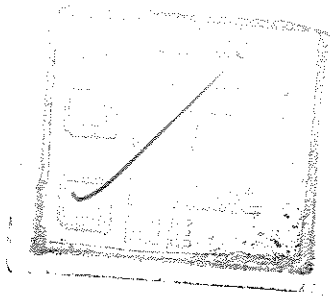

Cases: 7-CA-46965
7-CB-14083
7-CA-47078
7-CB-14119
7-CA-47079
7-CB-14120

and

Gary L. Smeltzer, Jr., An Individual,
Joseph Montague, An Individual,
Kenneth Gray, An Individual,

(Charging Parties).

RESPONDENT EMPLOYER'S ANSWERING BRIEF TO CHARGING PARTIES AND GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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RESPONDENT EMPLOYER'S ANSWERING BRIEF TO CHARGING PARTIES AND GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent Employer, Dana Corporation ("Dana"), by counsel, hereby submits this Answering Brief to Charging Parties and General Counsel's Exceptions to the Administrative Law Judge's Decision in the above-captioned case pursuant to 29 C.F.R. § 102.46 (2002).

SUMMARY OF ARGUMENT

The Letter of Agreement is consistent with the letter and purpose of the National Labor Relations Act ("the Act") because it preserves Dana's employees' freedom of choice with regard to union representation and because it does not grant recognition to the UAW prematurely or in any way restrain the exercise of employees' Section 7 rights. On the contrary, the Letter of Agreement expressly guarantees the right of employees to make a rational and uncoerced decision about union representation.

Recognizing this, the Administrative Law Judge ("ALJ") properly dismissed the Complaint in its entirety on three separate grounds: (1) the General Counsel failed to plead in the Complaint the very acts he claims are unlawful; (2) the Respondents did not engage in any unlawful conduct, distinguishing the decision in Majestic Weaving, 147 N.L.R.B. 859 (1964), enf. denied 355 F.2d 854 (2nd Cir. 1966); and (3) alternatively, because the Letter of Agreement is lawful under Kroger, Co., 219 N.L.R.B. 388 (1975). (ALJD pp. 6-10). The National Labor Relations Board ("Board") should affirm the Decision on each of these grounds.

First, the ALJ properly dismissed the Complaint on procedural grounds because the General Counsel alleged that it was Dana's supposed grant of recognition to the UAW that violated the Act, an allegation not pled in the Complaint. (ALJD p. 6). Because it is the General Counsel's responsibility to draft a clear and concise complaint that adequately informs

the parties of the acts claimed to constitute a violation of the Act, the dismissal on this ground is appropriate. 29 C.F.R. § 102.15(b) (2002).

Second, the ALJ correctly dismissed the case on substantive grounds because he concluded that the Letter of Agreement was not unlawful. (ALJD pp. 6-8). In so ruling, the ALJ held that Majestic Weaving is distinguishable from this case because there: (1) the employer granted exclusive bargaining status to the union before it attained majority status; and (2) the employer and the union negotiated a full collective bargaining agreement.

Finally, the ALJ dismissed the case on the alternative ground that the Letter of Agreement is lawful because it does no more than what Kroger expressly permits. Under Kroger, an employer and a union may include an "additional facilities" clause in their collective bargaining agreement extending that agreement's specific terms and conditions of employment to employees at other facilities, should those employees choose union representation. Because Dana and the UAW could have included an "additional facilities" clause in their Master Agreement that would have applied specific terms and conditions to the employees at Dana's St. Johns, Michigan facility, the ALJ reasoned that the Letter of Agreement, which does significantly less, is lawful under Kroger's rationale.

Affirming the ALJ's decision will harm no one, because Dana's employees have always retained their right to make an uncoerced decision about whether to select the UAW, or any other union, as their bargaining

representative. This is demonstrated by the fact that the facility at issue here, in St. Johns, Michigan, to this day remains a non-union plant, in spite of the existence of the Letter of Agreement. In contrast, should the Board reverse the decision of the ALJ, not only will it disrupt labor/management relations between Dana and the UAW, it will cast doubt on any efforts between employers and unions to enter into voluntary recognition and neutrality agreements, thereby undermining one of the fundamental tenets of national labor policy. The Board, therefore, should affirm the dismissal of the Complaint in its entirety.

FACTUAL BACKGROUND

I. DANA'S RELATIONSHIP WITH THE UAW

Dana manufactures automotive parts and light and heavy duty components for industrial and off-highway vehicles in approximately ninety facilities in the United States. (Tr. 61). Dana also has a longstanding collective bargaining relationship with the UAW, which is embodied in numerous collective bargaining agreements between the parties. (Tr. 62). For example, Dana and the UAW are parties to a Master Agreement that covers three units in two locations, as well as six other collective bargaining agreements, some of which are patterned on the Master Agreement, covering approximately 2,300 employees. (Tr. 62-63).

In the past, the collective bargaining relationship between Dana and the UAW has been difficult in many respects. Faced with attempts by the UAW to organize its workers, Dana often resisted, and the result was a

confrontational relationship, resulting in several rounds of lengthy litigation. See, e.g., International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Dana Corp., 278 F.3d 548 (6th Cir. 2002); International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Dana Corp., 697 F.2d 718 (6th Cir. 1983).

Recently, Dana recognized that a contentious relationship with the UAW, the collective bargaining representative of many of its employees, has negatively affected Dana's performance in the extremely competitive automotive parts industry. (Tr. 61). As a result, on August 6, 2003, Dana and the UAW entered into the Letter of Agreement at issue in this case. (Joint Exh. 1).

II. THE ST. JOHNS, MICHIGAN FACILITY

Dana's facility in St. Johns, Michigan, an engine parts plant, employs approximately 325 people and is one of the facilities covered by the Letter of Agreement. (Tr. 63; Joint Exh. 1, Schedule 1). Although the UAW has attempted to organize the employees at the St. Johns facility, it has been unsuccessful. (Tr. 40). Dana has not recognized the UAW or any other union at the St. Johns facility, and the UAW has never requested such recognition. (Tr. 63-64). There is no collective bargaining agreement in place at St. Johns, and Dana does not consult with the UAW or any other third party when determining the terms and conditions of employment at St. Johns. (Tr. 64).

III. THE LETTER OF AGREEMENT

The Letter of Agreement between Dana and the UAW outlines a procedure by which the UAW may undertake efforts to organize Dana's non-union plants. It obligates Dana to remain neutral during the UAW's organizing efforts and to provide the UAW with employee addresses and access to Dana's facilities. Significantly, the Letter of Agreement does *not* grant the UAW recognition at any of Dana's facilities. Rather, Dana and the UAW took great care to protect employees' rights to decide whether or not they wanted the UAW to represent them. Indeed, the Letter of Agreement specifically states that Dana may *not* recognize the UAW as the exclusive representative of employees in the absence of a showing that a majority of the employees have expressed their desire to be represented by the UAW. (Joint Exh. 1, Art. 3.1). In addition, the Letter of Agreement expressly recognizes that freedom of choice is of "paramount concern" to Dana and the UAW, prohibits intimidation or coercion of employees in making such a decision, and forbids discrimination against employees based on their decision. (Id. at Purpose ¶ 4; Art. 2.1.3.3). Finally, to ensure that the UAW has in fact obtained majority support before recognition is granted, the card check procedure included in the Letter of Agreement provides for a neutral arbitrator to review the cards to ascertain majority status. (Id. Art. 3).

In the Letter of Agreement, Dana and the UAW also agreed that certain *principles* would be addressed in any collective bargaining agreement to be negotiated if and only after the UAW demonstrated its majority status

in a particular facility. (Joint Exh. 1, Art. 4). These general principles embody the parties' common understanding that any collective bargaining agreement must be competitive to allow a facility to have a reasonable opportunity to succeed and grow. (Id. Art. 4.2.4).

The General Counsel and Charging Parties argue that the Letter of Agreement sets forth specific terms and conditions of employment. However, even a cursory examination reveals that the Letter of Agreement contains no such agreed upon terms. Instead, only the following broad principles, which would require further negotiation, are addressed:

- "Healthcare costs that reflect the competitive reality of the supplier industry and product(s) involved" — the parties agreed to address the costs of healthcare and not "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" but the Letter of Agreement does not address numerous questions arising out of insurance programs, such as the level and kind of benefits provided, HMO alternatives, etc.

- "Minimum classifications" — the parties agreed that there would be minimum job classifications, but came to no agreement regarding how many classifications there would be at a facility or how a classification would be defined. Job classifications are a function of numerous circumstances peculiar to each facility; for example, an assembly operation is completely different from a foundry.

- "Team-based approaches" — team based approaches can be dealt with in a collective bargaining agreement in dozens if not hundreds of different ways, for example, through compensation programs, work rules, and the evaluation of employees.

- "The importance of attendance to productivity and quality" — the parties agreed to address the importance of attendance, but did not agree to any specifics, such as progressive discipline policies, attendance infractions, or bonuses for good attendance.

- "Dana's idea program (two ideas per person per month and 80% implementation)" — again, there is no detail about how this would be approached, what rewards or incentives would be used, or even whether it would be detailed in a collective bargaining contract or continued as currently implemented at a particular facility.

- "Continuous improvement" — how parties deal with this issue could range from a long term goal in a collective bargaining relationship (e.g., we understand the need to keep this in mind as we negotiate agreements) to specific provisions in areas of compensation, work rules and the training of employees.

- "Flexible compensation" — the parties agreed to address appropriate methods of flexible compensation, but did not set any terms or conditions regarding such. Flexible compensation can include bonuses, incentives, piecework compensation, skills based and merit programs, as well as numerous other approaches to compensating employees.

- "Mandatory overtime" — the parties agreed that mandatory overtime would be addressed in a future collective bargaining agreement in some fashion, but did not determine how. The Letter of Agreement does not address the circumstances of when and how mandatory overtime would be used, how it would relate to voluntary overtime, or whether there could be substitutes for mandatory overtime such as the use of temporary workers.

It is clear that these general concepts, which leave the specifics to bargaining, do not amount to terms and conditions of employment. In fact, the Letter of Agreement lacks all of the essential elements of a collective bargaining agreement, such as wages, pension, vacation, sick and other leave, union security and dues, layoff, work rules, and procedures for grievance arbitration.

Although the Letter of Agreement also provides for contracts of a minimum four year duration, nothing precludes the parties from agreeing to longer or even shorter contracts once negotiations for a collective bargaining

agreement commence. (Joint Exh. 1, Art. 4.2.2). Similarly, the parties remain completely free to negotiate other related terms such as contract re-openers on wages. Indeed, all of the principles contained in the Letter of Agreement remain subject to negotiation, negotiations that will only occur if Dana's employees select the UAW as their bargaining representative.

The General Counsel and Charging Parties also take issue with the provision in the Letter of Agreement that provides for interest arbitration as an alternative to strikes and lock-outs in the negotiation of the first contract. This provision does not undermine employee rights because the provision applies only to those employees at a particular facility who select the UAW as their representative, knowing of the interest arbitration provision. (Joint Exh. 1, Art. 4.2.5-4.2.7).[1] Prior to the UAW obtaining majority support, the no-strike obligation applies only to the UAW's own right to strike for such purposes as to force recognition, not to Dana's unrepresented employees.[2]

IV. THE COMPLAINT AND PROCEEDINGS BELOW

On December 16, 2003, Gary L. Smeltzer, Jr., an employee at St. Johns, filed unfair labor practice charges against both Dana and the UAW (collectively "Respondents"), alleging: (1) that Dana provided unlawful assistance to the UAW by entering into the Letter of Agreement; (2) that Respondents infringed on the employees' Section 7 rights by remaining

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1 As the ALJ noted, all interested employees by now know of the terms of the Letter of Agreement. (ALJ Decision (hereinafter, "ALJD" or "Decision") p. 9).

2 The UAW's no-strike obligation is triggered by its request of the list of employees at any particular facility. (Joint Exh. 1, Section 2.1.3.1).

neutral in the face of employee petitions stating that they did not want to be represented by the union; and (3) that Respondents restrained employees in their right to rescind previously signed authorization cards. (General Counsel Exh. 1(B)). Shortly thereafter, similar charges were filed by Dana employees Joseph Montague and Kenneth A. Gray. (General Counsel Exh. 1(F)). Mr. Gray's charge also alleged that Respondents "gerrymandered" a proposed bargaining unit to make it easier for the UAW to win a card check election. (Id.).

Despite the breadth of the charges, the General Counsel issued a complaint on only one narrow issue, as articulated in the three substantive paragraphs of the Complaint:

> 9. On 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 operated by Respondent Employer, including the St. Johns facility.
>
> 10. 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.
>
> 11. By the conduct described in paragraphs 9 and 10, Respondent Employer has been rendering unlawful assistance to a labor organization, in violation of Sections 8(a)(1) and (2) of the Act.

(General Counsel Exh. 1(N)).

The Complaint does not raise any issue regarding the negotiations of the Letter of Agreement. The Complaint simply alleges that the Letter of Agreement is invalid on its face and that by entering into and maintaining the Letter of Agreement, Dana has violated Sections 8(a)(1) and (2) of the Act. As shown below, counsel for the General Counsel and the Charging Parties, both at the hearing before the Administrative Law Judge and in their exceptions, attempt to raise claims outside of the Complaint that should be rejected.

V. THE ADMINISTRATIVE LAW JUDGE'S DECISION

After a hearing and full briefing by the parties, the ALJ rendered his decision on April 11, 2005, ruling in Respondents' favor on all points and dismissing the Complaint in its entirety. (ALJD pp. 6-10). The ALJ gave three separate grounds for his Decision: (1) the case should be dismissed on procedural grounds because the General Counsel failed to plead in the Complaint the very act he claims is unlawful; (2) the case should be dismissed on the merits because the Letter of Agreement is not unlawful under Majestic Weaving; and (3) alternatively, the case should be dismissed on the merits because the Letter of Agreement is lawful under Kroger. (Id.). The Charging Parties and General Counsel have raised a multitude of exceptions to each of the three grounds for the Decision. None of their arguments are persuasive.

LEGAL ARGUMENT

The sole issue before the Board in this case is whether the Letter of Agreement entered into by Dana and the UAW on August 6, 2003 itself constitutes an unlawful pre-recognition contract in violation of Sections 8(a)(1) and (2) and Section 8(b)(1)(A) of the National Labor Relations Act ("the Act"). (ALJD p. 6). As demonstrated below, the Letter of Agreement is not an unlawful pre-recognition contract and does not "interfere with, restrain, or coerce" employees in their choice regarding union representation. Moreover, by entering into the Letter of Agreement, Dana did not "dominate or interfere with" or otherwise provide any unlawful assistance to the UAW. The Board, therefore, should affirm the ALJ's Decision.

I. THE ALJ PROPERLY DISMISSED THE COMPLAINT ON PROCEDURAL GROUNDS

The ALJ dismissed the Complaint for its failure to include the specific alleged unlawful acts relied upon by the General Counsel. The General Counsel identified the unlawful acts in this case as "Dana's granting of exclusive bargaining status to the UAW" and "the UAW's conduct in accepting recognition." (General Counsel's Brief to the Administrative Law Judge p. 8). However, as the ALJ properly recognized, the Complaint did not raise any such allegation. (ALJD p. 6; General Counsel Exh. 1(N) ¶¶ 9-10 (alleging that Dana "entered into and maintained [the] Letter of Agreement...at a time when Respondent Union did not represent a majority

of the employees")). The Complaint does *not* allege that Dana has ever recognized the UAW.3

There can be no doubt that the General Counsel is required to identify the acts he alleges to be unlawful in the Complaint. See, e.g., 29 C.F.R. § 102.15(b) (2002) (complaint must contain "[a] clear and concise description of *the acts which are claimed to constitute unfair labor practices....*") (emphasis added); Majestic Weaving, 355 F.2d 854, 861 (2nd Cir. 1966) ("The complaint issued by the General Counsel gave no notice that the mere fact of negotiation with Local 815 was claimed to constitute unlawful assistance."); N.L.R.B. v. H.P. Townsend Mfg. Co., 101 F.3d 292, 294 (2nd Cir. 1996) (the General Counsel "must inform the respondent of the acts forming the basis of the complaint"). It is ironic that here the General Counsel has failed to include in the Complaint the acts he now claims are unlawful, in light of his extensive reliance on Majestic Weaving, because the Second Circuit denied enforcement in Majestic Weaving precisely because the General Counsel there failure to properly plead the allegedly unlawful acts. Majestic Weaving, 355 F.2d at 854 ("However, we do not need to decide that serious substantive issue, since we deny enforcement on a procedural ground."). Because the Complaint did *not* allege that Dana recognized or granted exclusive bargaining status to the UAW, the ALJ properly dismissed the Complaint.

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3 At various points in their exceptions, Charging Parties and the General Counsel allege that the negotiations between Dana and the UAW were unlawful and that the manner in which the Letter of Agreement was communicated to employees was unlawful. As with recognition, the Complaint makes no mention of the negotiations or the communications with employees, and for this reason, the ALJ was correct in rejecting their arguments.

The General Counsel argues that this dismissal is inappropriate because he is not required to plead his legal theories and because he claims, without support, that Dana and the UAW "understood" what he failed to plead. (General Counsel's Exceptions to the Decision of the ALJ ("GCE") pp. 9, 11). With respect to his first argument, whether or not Dana recognized the UAW is plainly a question of fact, not a legal theory. Because the General Counsel failed to allege the acts he now contends are unlawful, the Complaint must fail.

The General Counsel's second argument, that "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," (GCE p. 9) (emphasis added), also fails. Just as the Complaint does not allege that Dana has recognized the UAW at St. Johns, the Complaint also does not mention the negotiations between Dana and the UAW at all, much less allege that any such negotiations were unlawful. Instead, the Complaint's substantive allegations begin with the assertion that Dana "entered into and has maintained" the Letter of Agreement on or about August 6, 2003, which undoubtedly occurred *after* any such negotiations. Thus, there can be no claim that the Complaint fairly encompasses activity prior to entry into the Letter of Agreement.

Further, the General Counsel cannot excuse this failure by suggesting that the Respondents "understood" what the General Counsel omitted from his Complaint. He offers no evidence as to the Respondents' understanding, and in fact, it is clear from the proceedings below that Dana does not and has never understood the Complaint to have put Respondents' negotiations at issue. The time for giving notice of the matters of fact and law at issue in the case is in the Complaint, not in the "General Counsel's post-Complaint theory of the case unveiled in a post-hearing brief." Majestic Weaving, 355 F.2d at 861 (internal quotations omitted). The General Counsel is the master of the Complaint: he cannot now argue that it should be read to allege what it plainly does not.

II. THE ALJ CORRECTLY RULED THAT RESPONDENT'S CONDUCT IN ENTERING INTO THE LETTER OF AGREEMENT WAS NOT UNLAWFUL

After careful consideration of the text of the Letter of Agreement, the ALJ determined that there had been no recognition of the UAW by Dana and correctly ruled that the Respondents' conduct in entering into the Letter of Agreement was not unlawful. (ALJD p. 6). The ALJ further ruled that, contrary to the claims of the General Counsel and Charging Parties, Majestic Weaving did not require a contrary result. (ALJD pp. 6-8). Because the Letter of Agreement furthers the policies underlying the National Labor Relations Act and does not violate Sections 8(a)(1) or (2), the ALJ's decision should be affirmed.

A. Dana Has Not Recognized or Provided Any Unlawful Assistance to the UAW.

It is undisputed that Dana has never recognized the UAW and that the UAW has never sought recognition as the collective bargaining representative of Dana's employees at the St. Johns facility. (Tr. 63). In fact, the uncontradicted testimony is that the UAW has never, and indeed may never, persuade a majority of the employees at St. Johns to accept the UAW as their representative. (Tr. 63-64). Further, Dana does not consult with the UAW over terms and conditions at the St. Johns facility. (Id.). In light of this factual background, the claims of the Charging Parties and the General Counsel that the Respondents have engaged in some type of "sweetheart" deal that adversely affects the employees' right to select the union of their choice – or no union at all – is necessarily suspect because those employees have made known their uncoerced decision to be free of union representation loud and clear. (CPE p. 27; GCE p. 11).

The Letter Agreement itself is not and cannot be read to be evidence of any recognition by Dana of the UAW, contrary to the arguments of the Charging Parties and the General Counsel. As the Letter of Agreement expressly states, "[t]he parties understand that the Company may not recognize the Union as the exclusive representative of employees in the absence of a showing that a majority of the employees in an appropriate bargaining unit have expressed their desire to be represented by the Union." (Joint Exh. 1, Art. 3.1). Moreover, there is nothing in the Letter of

Agreement that suggests that the relationship between the UAW and Dana is or must be exclusive, a condition that is inherent to the concept of "recognition."

In addition, the Letter of Agreement does not in any way erode Dana's employees' right to choose their bargaining representative. Although Charging Parties and the General Counsel take issue with many of the terms in the Letter of Agreement, those terms have not and will never be applied to the St. Johns facility unless they choose to be represented by the UAW. For example, while the Charging Parties allege that the Letter of Agreement has effectively "capped" the wages for employees who choose representation in the future, it has done no such thing. (CPE at p. 7). First, even if the term could be read as alleged by the Charging Parties, it does not restrain the exercise of the employees' Section 7 rights. It simply would mean that the employees would, if they wanted different terms, pick a different bargaining representative. But the Agreement does *not* put any cap on wages and benefits. The provision cited by the Charging Parties, Art. 4.2.6, simply enunciates several standards that the neutral arbitrator should consider when selecting which of the two contract proposals to select, and expressly contemplates an *increase* in wages and benefits. On the one hand, the arbitrator should consider the competitive environment under which Dana is operating. (Joint Exh. 1, Art. 4.2.6). On the other hand, it should consider that "all parties understand that an increase in wages and benefits is the

customary result of collective bargaining provided the economic climate of the automotive industry and/or the financial performance of the facility in question supports such increase." (Id.).

Finally, contrary to the Charging Parties' contention, the Letter of Agreement does not provide Dana with unlawful contractual "control" over the UAW in violation of Section 8(a)(2). Although it is true that Section 8(a)(2) was implemented in order to prevent the "company-dominated union," (CPE p. 15), there is *no* evidence of such domination here. To claim that Dana "dominates" the UAW or that the UAW is the "marionette" of Dana (CPE p. 16) is simply ludicrous. The Charging Parties offer no support in the legislative history or otherwise for their novel claim that *any* agreement between an union and an employer in advance of recognition would constitute allegedly unlawful "contractual control."

Charging Parties also argue that "[a]n employer 'interferes with the formation or administration of any labor organization' in violation of § 8(a)(2) when it has contractual authority over how the union conducts itself as the exclusive bargaining representative of employees." (CPE p. 14). The first problem with this argument is plain at first glance: according to Charging Parties, every collective bargaining agreement would violate Section 8(a)(2) because every collective bargaining agreement gives employers "contractual authority" over the terms and conditions of employment a union may demand for its members. (CPE p. 17). In other words, Charging Parties appear to

argue that any contract between an employer and a union violates Section 8(a)(2) because the union effectively cedes "control" to the employer.4 This absurd argument should be summarily rejected.

Charging Parties' argument also contains a second flaw. Charging Parties argue that the Letter of Agreement is unlawful because "it prohibits the UAW from demanding or obtaining certain terms and conditions of employment during collective bargaining negotiations with Dana, even if the employees the UAW 'represents' desire such terms." (CPE p. 17). Kroger Co., 219 N.L.R.B. 388 (1975), however, explicitly permits an employer and a union to do just that — to sign a collective bargaining agreement that applies all of its terms and conditions of employment to an after acquired facility. Under Kroger's central holding, employees at a newly acquired facility are subject to the terms and conditions set forth in the Master Agreement, even if they do not "desire" those terms.

Charging Parties, however, do not address Kroger, and indeed, provide no legal support for their argument. The first case Charging Parties cite does not even contain the language for which it is cited. (CPE p. 16) (citing Valley Mould & Iron Corp. v. N.L.R.B., 116 F.2d 760 (1940)). Charging Parties' other cases are inapplicable because they address prohibitions on employee supervisors acting as union officials or negotiators. See General Steel Erectors, Inc., 297 N.L.R.B. 723 (1990) (employer violated Section 8(a)(2) by

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4 The General Counsel also argues that the Letter of Agreement constituted unlawful assistance in violation of Section 8(a)(2). Because the General Counsel's brief does no more than set forth this allegation, Dana will confine its response to Charging Parties' arguments.

permitting one of its supervisors to serve the union in many capacities, including as president); Vanguard Tours, 300 N.L.R.B. 250 (1990), enf. in part, 981 F.2d 62 (2nd Cir. 1992) (supervisor also functioned as grievance representative and union negotiator); Nassau & Suffolk Contractors Ass'n, Inc., 118 N.L.R.B. 174 (1957) (supervisors served on union's negotiating committee). The legislative history Charging Parties cite also goes to the prohibition against employers or their agents simultaneously representing the employer and the union. (CPE pp. 15-16). None of Charging Parties' "authorities" stand for the proposition that a contract between an employer and a union such as the Letter of Agreement violates Section 8(a)(2).

The examples Charging Parties cite for their assertion that the Letter of Agreement constitutes undue control or influence by Dana over the affairs of the UAW do not support their theory. For instance, Charging Parties contend that the Letter of Agreement grants Dana significant "leverage" because, they claim, the UAW's organization of future plants is dependent upon Dana's pleasure or displeasure with future collective bargaining agreements. (CPE p. 8). The Charging Parties interpretation of Art. 9.1 misreads the Agreement. Rather, a Partnership Committee comprised of equal numbers of Dana and UAW representatives is charged with deciding whether any collective bargaining agreements entered into under the Letter of Agreement have "materially harmed the financial performance of the facility covered" which will determine whether the UAW may proceed to the

next level of organizing. If the Partnership Committee cannot agree, then the issue is submitted to a neutral arbitrator for resolution. With equal membership on the Partnership Committee, and a final decision issued by a neutral, Dana's power is equal to that of the UAW, no more and no less. (Joint Exh. 1, Art. 9). Thus, with power equal to that of the UAW, Dana does not exert any extraordinary control of the bargaining process. Finally, nothing in this section (or any other) of the Letter of Agreement restrains the employees' right to select a union representative of their choice. Should they choose not to have these conditions imposed, they need only refrain from selecting the UAW as their bargaining representative, just as they have done at St. Johns.

Senator Robert F. Wagner, the primary author of the National Labor Relations Act, commented that Section 8(a)(2)'s prohibition was designed to prevent the "sham or dummy union which is dominated by the employer, which cannot change its rules or regulations without his consent, and which cannot live except by the grace of the employer's whims." 79 CONG. REC. 2372 (1935). There is nothing in the Letter of Agreement that renders the UAW a "dummy union" or foists the UAW on the St. Johns employees, as the facts of this case clearly show. And there is nothing in Section 8(a)(2) that prevents employees and unions from narrowing issues of disagreement or negotiating a framework for avoiding future disputes where, as here, the employees make

the decision on union representation. The Board, therefore, should affirm the decision.

B. The Letter of Agreement Furthers National Labor Policy.

The paramount labor policy underlying the Act is the promotion of "industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers." N.L.R.B. v. American Nat'l Ins. Co., 343 U.S. 395, 401-402 (1952). By entering into this Letter of Agreement, the Respondents here have done just as hoped: they have entered into a voluntary agreement governing their relationship in order to establish an orderly election process without the typical confrontational approach to organizing and to avoid the possibility of a damaging strike over the first contract. Prior to this case, the Board, the General Counsel, and the courts have routinely acknowledged that agreements akin to the Letter of Agreement, including neutrality, recognition, and other agreements designed to avoid labor disputes, "advance the national labor policy of promoting voluntary recognition and of honoring voluntary agreements reached between employers and unions." See, e.g. Verizon Wireless, Advice Mem. (Jan. 7, 2002).5

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5 See Snow & Sons, 134 N.L.R.B. 709, 710 (1961), enfd. 308 F.2d 687 (9th Cir. 1962) (enforcing card-check procedure); Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561 (2d Cir. 1993) (enforcing neutrality agreement containing card–check and arbitration provisions); Bethlehem Steel Corp., Advice Mem., 2000 WL 1741752 (Jun. 26, 2000) (employer may provide union with employee addresses and access to employer's facilities); Hotel Employees, Rest. Employees Union, Local 2 v. Marriott Corp., 961 F.2d 1464 (9th Cir. 1992) (nothing in relevant statutes or N.L.R.B. decisions suggest that employers and unions may not enter into neutrality agreements); Kroger Co., 219 N.L.R.B. 388 (1975)

Indeed, innovative agreements such as the Letter of Agreement repeatedly have been found lawful in the face of claims that they violate Sections 8(a)(1) and (2) and Section 8(b)(1)(A) of the Act. See, e.g. Verizon Wireless, Advice Mem. (Jan. 7, 2002); Bethlehem Steel Corp., Advice Mem. (Jun. 26, 2000); Westin Diplomat Hotel, Advice Mem. (Apr. 19, 2002). The General Counsel's decision in Pittsburgh Fulton Renaissance Hotel, Advice Mem. (Feb. 7, 2002) is particularly instructive. In Pittsburg Fulton, the General Counsel dismissed a charge that a union had violated Section 8(b)(1) by entering into a neutrality agreement with an employer that contained, as does the Letter of Agreement, a clause prohibiting strikes and compelling binding arbitration. Despite the inclusion of this arbitration provision, with which the General Counsel takes issue here, the General Counsel expressly found that "the terms of the neutrality agreement left the choice of Union representation in the hands of the employees and therefore does not coerce or restrain employees in the exercise of their Section 7 rights." Pittsburgh Fulton at 4. As in Pittsburg Fulton, the Letter of Agreement expressly leaves the choice of Union representation to the employees and, as the facts of

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(employer and union may contract for card-check provision in advance of union organizing); Westin Diplomat Hotel, Advice Mem. (Apr. 19, 2002) (employer did not violate Section 8(a)(2) by providing benefits to union by signing neutrality agreement where agreement contained limitations on union's conduct); Pittsburgh Fulton Renaissance Hotel, Advice Mem. (Feb. 7, 2002) (holding that card-check agreement incorporating neutrality provisions and no-strike clause did not violate Section 8(a)(1)); International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Dana Corp., 278 F.3d 548 (6th Cir. 2002) (federal labor policy was not violated by employer's voluntary agreement to remain silent during union organizing); Verizon Info. Sys. & Communications Workers of America, 335 N.L.R.B. 558 (2001) (national labor policy favors voluntary agreements between employers and unions).

shown, the employees at St. Johns have exercised that choice by rejecting representation.

Despite this clear case law, Charging Parties contend that Respondents' conduct is contrary to national labor policy because, they allege, it will encourage employers and unions to negotiate "sweetheart" deals at the expense of employees. (CPE pp. 29-31). As the ALJ agreed, there is no incentive for the UAW to negotiate a substandard contract because it would be contrary to its goal of persuading employees to join the union. (Tr. 33). Charging Parties also challenge the Letter of Agreement because it was not immediately distributed to the St. Johns employees. (CPE pp. 30-31). There can be no doubt, however, that the St. Johns employees have had access to the terms of the Letter of Agreement for some time and still have *not* chosen union representation. Thus, there is no claim here that the St. Johns employees have been duped into choosing union representation by a "secret" agreement. 6

C. The Ruling in Majestic Weaving Does Not Render the Letter of Agreement Unlawful.

The General Counsel and Charging Parties argue that Majestic Weaving prohibits negotiations between an employer and a union in advance of the union achieving majority status. (CPE p. 21; GCE p. 18). Such an

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6 Merk v. Jewel Food Stores, Div. of Jewel Co, Inc., 945 F.2d 889 (7th Cir. 1991), the sole case cited by Charging Parties, is completely inapposite. In Merk, the employer and the union negotiated a full, written collective bargaining agreement but also entered into a secret, oral agreement that permitted the employer to reopen the issue of wages that altered the terms of the collective bargaining agreement. Id. at 891. Here, Respondents have entered into neither a full collective bargaining agreement, nor any secret agreement that purports to change those terms.

expansive reading is not supported by the decision itself and would be contrary to national labor policy. In any event, Majestic Weaving does not compel a finding that Respondents' conduct in this case was unlawful.

The ALJ ruled that Majestic Weaving is distinguishable from this case for two reasons: (1) the employer in Majestic Weaving, unlike Dana, granted exclusive bargaining status to the union before it attained majority status; and (2) in Majestic Weaving, the employer and the union negotiated a full collective bargaining agreement whereas Dana and the UAW did not. (ALJD p. 8). Charging Parties and the General Counsel's exceptions to this holding are without merit.

1. In Contrast to Majestic Weaving, Dana Has Not Recognized the UAW at the St. Johns Facility.

The parties do not dispute that there was no formal recognition in this case. Instead the Charging Parties and the General Counsel take issue with the ALJ's decision because, they claim, the decision in Majestic Weaving was not conditioned on a finding of unlawful recognition or exclusive bargaining status. This argument, however, is contrary to the plain language of the Board's opinion, which found a violation because the parties engaged in "contract negotiation *following an oral recognition agreement.*" Majestic Weaving, 147 N.L.R.B. at 860 (emphasis added); see also id. (explaining the unlawful conduct as Respondent's "negotiat[ing] with Local 815, despite its minority status, as the *exclusive representative* of its employees in a production and maintenance unit.") (emphasis added). Thus, the Board's

decision plainly rested on its finding that the employer had in fact recognized the union and treated it as the exclusive representative of the employees. Neither has happened here, and thus, Majestic Weaving is properly distinguishable.

Charging Parties' argument that the Majestic Weaving decision does not rely on a finding of recognition wrongly relies on portions of the Trial Examiner's decision that were expressly overruled by the Board in making its decision. See CPE pp. 20, 23 (citing to the Trial Examiner's finding, at p. 873, that there was no evidence of recognition prior to the execution of the collective bargaining agreement). The General Counsel makes a similar argument, relying on the findings of the Trial Examiner. (GCE pp. 17-18). In fact, the Board rejected the Trial Examiner's conclusion that there was no violation of Section 8(a)(2) and found instead that there was a violation by negotiating with the union "as the exclusive representative of its employees" after entering into an "oral recognition agreement." Majestic Weaving, 147 N.L.R.B. at 860-61. In reality, it does not matter whether the conduct described in the opinion – that of a union seeking recognition, and an employer acceding to the demand to negotiate a collective bargaining agreement on the condition that the union have majority support prior to the execution – is described as "formal recognition" or "oral recognition." There is no doubt that the employer in Majestic Weaving agreed to negotiate the terms of a collective bargaining agreement with one union for the purpose of

entering into that agreement without change after the union gained majority support. That situation does not exist here.

Not only has Dana not expressly recognized the UAW at St. Johns, but it also did not "tacitly" or "implicitly" recognize the union by entering into the Letter of Agreement, contrary to the claims of the General Counsel. (GCE pp. 19-21). Although the Complaint does not make any allegation regarding the negotiations of the Letter of Agreement, the General Counsel asks the Board to ignore this flaw and instead to *imply* the existence of unlawful negotiations from the terms of the Letter of Agreement itself. Nothing in the Letter of Agreement amounts to "tacit" recognition of the UAW, particularly in light of its express disclaimer of recognition. Nor do the cases cited by the General Counsel support his argument. In Lyon & Ryan Ford, Inc. v. Automobile Mech. Local 701, 246 N.L.R.B. 1 (1979), the Board affirmed the decision of the ALJ finding a violation of Section 8(a)(5) by the employer *withdrawing* voluntary recognition. The ALJ based this finding on the facts that the union representative came to the employer with signed authorization cards demonstrating majority status, brought with him a copy of the Master Agreement the union had implemented with other dealers, negotiated with the employer over wages and benefits as set forth in that Master Agreement, and reached an agreement on categorization of workers. The Lyon decision does not suggest that general principles agreed upon in a neutrality agreement constitute "implicit" or "tacit" recognition.

Another case relied upon by the General Counsel, Int'l Union of Oper. Engineers, Local 150 v. N.L.R.B. (Terracon), 361 F.3d 395 (2004), demonstrates that Respondents' conduct in entering into the Letter of Agreement was not implicit recognition. In Terracon, the union sought representation from an employer, presented it with signed authorization cards for a majority of the employees, and requested that the employer sign a Voluntary Recognition Agreement. Terracon, 361 F.3d at 397. Although it refused to sign the agreement, the employer engaged in some informal discussions with the union that "touched upon issues of import," and were designed to educate Terracon "about the Union and the employees' interests." Id. at 401. Although in Terracon, the union and employer discussed wages, safety issues, better training and insurance, the Board found that these discussions did not amount to bargaining sufficient to find voluntary recognition. Id. at 400-01.

Significantly, the court recognized that this conclusion furthered national labor policy favoring voluntary recognition because, otherwise, "employers might refrain from meeting with union representatives at all for fear of saying too much and inadvertently recognizing the union [and that such a rule] would lead to a decline in unionization, subverting the objectives of the NLRA." Id. At 401. Terracon is also significant because of *when* it says implicit recognition may occur: "[i]mplicit voluntary recognition occurs when an employer's statement or conduct clearly and unequivocally demonstrate

that it has made a commitment to enter into negotiations with a union." Id. at 399. Notably absent from the General Counsel's brief is any suggestion that the Letter of Agreement demonstrates Dana's unequivocal commitment to negotiate with the union for a collective bargaining agreement, because it is clear that Dana has made no such commitment unless and until the UAW demonstrates majority status as a particular facility.

In addition, the decision in Ednor Home Health, Inc., 276 N.L.R.B. 392 (1985), does not assist the General Counsel. In finding no recognition, the ALJ noted "two important omissions" from the evidence: (1) any statement by the employer "which even remotely connotes recognition of the Union" and (2) any "explicit testimony" of the union representative that he understood the union had been recognized. Id. at 394. As in Ednor, the General Counsel has produced no evidence that Dana said or did anything to recognize the UAW and no evidence that the UAW understood it had been recognized. All the evidence is to the contrary, including the plain terms of the Letter of Agreement.

2. The Letter of Agreement Is Not a Collective Bargaining Agreement.

The ALJ also held that Majestic Weaving does not control this case because, unlike in Majestic Weaving, Dana and the UAW did not negotiate a "complete and whole" collective bargaining agreement. (ALJD p. 8) (describing the Letter of Agreement as a "far cry" from a collective bargaining agreement). There can be no doubt that the ALJ's fact finding is correct; it is

plain as day that the Letter of Agreement, unlike the contract at issue in Majestic Weaving, simply could not be implemented after recognition of the UAW as a collective bargaining agreement. The collective bargaining agreement in Majestic Weaving spelled out terms such as holidays, breaks, vacations, rates of pay, pension and welfare and dues check off clauses. Majestic Weaving, 147 N.L.R.B. at 867. Here, there are no wages, benefits, or other specific terms and conditions of employment contained in the Letter of Agreement. 7

The General Counsel and the Charging Parties do not contend that the Letter of Agreement constitutes a complete collective bargaining agreement akin to that in Majestic Weaving. Instead, they argue that these substantive differences are irrelevant because "it is the very act of negotiating prior to union recognition that is unlawful [under Majestic Weaving]." (GCE p. 18; CPE pp. 23-24). This argument stretches the holding of Majestic Weaving well beyond the language of the decision. 8

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7 Although not relied upon by the ALJ, there is another significant factual difference that distinguishes this case from Majestic Weaving. In Majestic Weaving, a second union, which actually attained majority status, competed for recognition with the Teamsters. Here, there is no allegation that Dana selected the UAW over any other union to enter into the Letter of Agreement.

8 Charging Parties cite to commentators, including the General Counsel of the AFL-CIO, to support their argument that Majestic Weaving prohibits *all* pre-recognition discussions touching on terms and conditions of employment. (CPE p. 22). First, the understanding of the law espoused by commentators, no matter who they are, cannot be considered an authoritative statement of the law. Even so, however, Mr. Hiatt does *not* opine that the types of general principles agreed upon in the Letter of Agreement would be unlawful under Majestic Weaving. Moreover, he predicts in his article that the Majestic Weaving decision "will come under increasing scrutiny" because of its conflict with the decision in Kroger that results in the very "illogical" result urged on the Board by the Charging Parties and the General Counsel. Jonathan P. Hiatt and Lee W. Jackson, Union Survival Strategies for the Twenty-First Century, 12 LAB. LAW. 165, 176-77 (1996).

First, in Majestic Weaving, the Board held that pre-recognition negotiations *of a collective bargaining agreement* are unlawful, not that *all* negotiations between an employer and a union prior to recognition are unlawful. Majestic Weaving, 147 N.L.R.B. at 860 ("we hold 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 861 ("Respondent violated Section 8(a)(2) by assisting Local 815 in obtaining its majority and by negotiating with Local 815 for a *contract* while it was a majority union"); id. at 867 (emphasis added). Were the Board to accept the expansive reading of Majestic Weaving urged by Charging Parties and the General Counsel, it would necessarily invalidate all neutrality and voluntary recognition agreements because, as a matter of course, they are negotiated prior to the recognition of the union. As discussed above, this would impede, as opposed to further, national labor policy that *encourages* voluntary recognition. See American Nat'l Ins. Co., 343 U.S. at 401-402.

In addition, the General Counsel and Charging Parties' arguments in this regard fail because the legality of the negotiations between Dana and the UAW was not raised in the Complaint, and is therefore not at issue in this proceeding. See Part I, supra. Majestic Weaving, 355 F.2d at 861 (denying enforcement of the Board's order finding a violation because the Complaint

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Similarly, the other article cited by Charging Parties, titles the section on the Majestic Weaving decision as "The Need for Reform," and similarly recognizes that the conflict with Kroger is "untenable." Andrew Strom, Rethinking the N.L.R.B.'s Approach to Union Recognition Agreements, 15 BERKELEY J. EMP. & LAB. L. 50, 58 (1994).

did not give notice of the fact that the negotiations were claimed to be unlawful). Thus, because he did not put the negotiations between Respondents at issue, the General Counsel cannot now claim that it is those very negotiations that violate the Board's Majestic Weaving holding. For all of the foregoing reasons, the ALJ correctly held that Majestic Weaving does not control this case. 9

III. THE ALJ PROPERLY RULED IN THE ALTERNATIVE THAT THE LETTER OF AGREEMENT IS LAWFUL UNDER KROGER

The ALJ properly held that the Letter of Agreement is lawful under Kroger Co., 219 N.L.R.B. 388 (1975), because Respondents did less than what Kroger permits. (ALJD p. 9). In Kroger, the Board held that "additional facilities" clauses are valid where "employees affected are not denied their right to have a say in the selection of their bargaining representative." Kroger, 219 N.L.R.B. at 388. The Board's only requirement was that the clause be conditioned on the union obtaining majority authorization – a condition that the Board was willing to read into an agreement if it were absent. Id. In fact, the Board held that "national labor policy requiring the Board to respect the integrity of collective-bargaining agreements" *favors* enforcing the validity of these additional store clauses. Id. at 389. Moreover, the Board's Order required that the employer apply the existing collective

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9 The General Counsel also argues that the ALJ was wrong to cite Coamo Knitting Mills, 150 N.L.R.B. 579 (1964), because Dana's conduct exceeded the type of labor/management cooperation Coamo permits. (GCE p. 19). Whether or not Dana's conduct exceeded the limits of Coamo, however, is irrelevant in light of the other well-settled case law that does permit Dana's conduct. Accordingly, merely stating that Dana's conduct has gone beyond Coamo does not further the General Counsel's argument.

bargaining agreements with *all* of their terms and conditions to the employees at these new stores, irrespective of the fact that the collective bargaining agreements had been negotiated well before these employees had decided whether or not to become represented. Id. at 390.

Under Kroger, Dana could have negotiated a clause in its Master Agreement with the UAW that would have applied the Master Agreement's very specific terms and conditions of employment to the St. Johns facility, should the St. Johns facility be organized in the future. (ALJD p. 9). The employees at St. Johns, if they chose the UAW to represent them, would then be subject to terms and conditions of employment that were negotiated before they made this choice. As counsel for Charging Parties and the General Counsel have admitted, this would be entirely lawful under Kroger. (Tr. 11; 14-15).

The Letter of Agreement, however, does not apply a complete collective bargaining agreement to employees who select the UAW. Because the Letter of Agreement sets forth only broad principles to be discussed in the context of bargaining, it does significantly less that the typical Kroger clause, and therefore more strongly protects the rights of as yet unrepresented employees because they will not be made subject to a pre-existing collective bargaining agreement should they choose to be represented by the UAW.

Charging Parties and the General Counsel wrongly argue that Kroger is either inapplicable or, in the alternative, should be overruled. (CPE pp. 31-35; GCE pp. 21-23).

A. Kroger is Not Contrary to Section 8(a)(1) or Section 8(a)(2).

By arguing that the clauses permitted by Kroger violate Sections 8(a)(1) and (2), and thus asking the Board to overrule Kroger, Charging Parties essentially concede that Dana's conduct is lawful under Kroger. However, Charging Parties cite no case law for their proposition that Kroger itself is contrary to the text and intent of Sections 8(a)(1) and (2). (CPE pp. 33-34). The Board plainly disagreed in issuing its decision in Kroger, 219 N.L.R.B. at 389 ("national labor policy favors enforcing" additional store clauses).

In addition, conspicuously absent from Charging Parties' brief is any discussion of Eltra Corp., 205 N.L.R.B. 1035 (1973), in which the Board specifically held that an additional facilities clause did not violate Section 8(a)(2). In Eltra, the employer and the union agreed that a National Agreement – and the terms and conditions therein – would apply to any additional units in the event the union was certified or recognized as the bargaining agent for those units. Eltra, 205 N.L.R.B. at 1036. The parties agreed that they would negotiate local agreements for additional units that could not conflict with the terms of the National Agreement. Id. The ALJ, whose decision was affirmed by the Board, concluded that it did not violate

Sections 8(a)(1) or (2) for the employer to agree in advance that a collective bargaining agreement would cover future employees, provided those employees designated the union as their bargaining representative. Id. at 1040. Thus, the decision in Eltra defeats Charging Parties' contention in this regard.

Eltra also damns Charging Parties' argument that Kroger should be overruled because it is incompatible with Majestic Weaving. (CPE p. 31). In Eltra, the ALJ considered Majestic Weaving, but found that it did *not* invalidate the additional facilities clause at issue because the violation in Majestic Weaving was based upon recognition of a minority union. Id. at 1039. Because there was no such premature recognition in Eltra, the ALJ held and the Board affirmed that Majestic Weaving did not control. In other words, Eltra specifically held that after acquired facility clauses, such as the kind permitted by Kroger, do not violate Majestic Weaving. Charging Parties' unsupported argument to the contrary cannot stand in light of this clear precedent.

B. The Letter of Agreement is Lawful Whether Majestic Weaving or Kroger Applies.

Charging Parties and the General Counsel argue that Kroger does not apply here because, unlike in Kroger, the Letter of Agreement did not at its inception apply to any currently represented employees. For this reason, they argue Majestic Weaving more properly controls this case because here,

as in Majestic Weaving, the negotiations between the employer and the union applied only to unrepresented employees. This argument fails.

First, nothing in the Kroger decision or the policy underlying the decision suggests or requires that its application be limited to situations in which the employer and the union with whom it has a pre-existing bargaining relationship apply a full and complete agreement to newly represented employees. Rather, the underlying policy of advancing voluntary recognition would suggest that where an employer is not willing to agree to an additional facilities clause, it should be permitted to agree to broad concepts with the union as part of a voluntary recognition agreement.

Moreover, the General Counsel did not draw this distinction in General Motors Corp., Advice Mem. (June 2, 1986), in which he dismissed Section 8(a)(2) charges against an employer that entered into an agreement with a union setting forth terms and conditions of employment that would apply only to unrepresented employees at a Saturn facility that had yet to be built. This stand alone agreement recognized the union as the bargaining agent for these not yet hired employees and set forth a wage scale, holidays, vacation, and working hours and provided job security depending upon an employee's length of employment. In dismissing the Section 8(a)(2) charges, the General Counsel relied on Kroger and read into the agreement the condition that the union achieve majority status. Thus, the argument in this case that Kroger does not apply here because the Letter of Agreement affects only

unrepresented employees is belied by the General Counsel's refusal to issue a complaint in General Motors Corp..

Even if the Charging Parties and General Counsel are correct that Kroger does not affirmatively permit the Letter of Agreement, they have not shown that the Letter of Agreement is unlawful under Majestic Weaving or otherwise. Because the General Counsel has failed to meet his burden of establishing a violation of the Act, the Board should affirm the Decision. See Des Moines Union, Teamsters Local No. 358 v. N.L.R.B., 381 F.3d 767, 769 (2004) ("The General Counsel bears the burden of establishing a violation of the Act.").

IV. THE CHARGING PARTIES' ADDITIONAL ARGUMENTS WERE PROPERLY REJECTED BY THE ALJ

At the hearing and in their briefs, Charging Parties make a number of additional claims about the Letter of Agreement not argued by the General Counsel. The ALJ properly rejected these arguments because they were not raised in the Complaint. (ALJD p. 10). See Boyle's Famous Corned Beef Co. v. N.L.R.B., 400 F.2d 154, 164 (8th Cir. 1968) ("It offends elemental concepts of procedural due process to grant enforcement to a finding neither charged in the complaint nor litigated at the hearing.") (internal citations and quotations omitted). Because the ALJ's decision is procedurally correct, and because the additional arguments do not compel a finding that the Letter of Agreement is unlawful, this aspect of the Decision should also be affirmed.

A. The Letter of Agreement Does Not Promise Benefits or Threaten Reprisal Based on Exercise of Section 7 Rights.

Charging Parties also argue that the Letter of Agreement is unlawful because, they contend, it "promise[s] benefits, or threaten[s] reprisal based on employees' exercise of their § 7 rights." (CPE pp. 25-26). Their contention is contradicted by the language of the document itself. In its statement of purpose, the Letter of Agreement sets out that the employees' "freedom to choose [union representation] is a paramount concern of Dana as well as the UAW" and contains other provisions protecting both union opponents and supporters from threats, intimidation, or discrimination. (Joint Exh. 1 at Purpose ¶ 4). In addition, Dana commits not to provide support or assistance to any person or group supporting or opposing the selection of the Union. (Joint Exh. 1 at Art. 2.1.2.5, 2.1.2.6, 2.1.3.3 and 2.1.3.4).

Notably absent from Charging Parties' argument is any description of what they claim are the alleged "benefits" or "reprisals" that would inure to employees should they exercise their right to choose the UAW as their bargaining representative. Nor could they make any such argument based on the Letter of Agreement. The general concepts described in the Letter of Agreement do not promise to confer any specific or definite benefit on the employees' should they choose the UAW, nor does it threaten any adverse consequence should they vote against UAW representation. (Joint Exh. 1, Art. 4). Obviously, permitting the employees to know, in advance of selecting their bargaining agent, that the agent supports the "idea program" (or

current concepts in health care, or mandatory overtime) only allows *more* freedom of choice, not less, for the employees.

Unsurprisingly, Charging Parties offer no legal support for this position. The vast majority of the cases cited by Charging Parties stand for the wholly unsurprising proposition that an employer may not offer benefits or threaten reprisals in order to persuade employees *not* to join a union. The benefits or reprisals at issue in those cases were offers of things of value, such as increased wages or holidays or threats of ominous consequences, such as reporting employees to immigration officials or worsened working conditions. 10 None of the alleged benefits or reprisals contained in the case law cited by Charging Parties remotely resembles the concepts included in the Letter of Agreement, the specific application of which remain to be negotiated in a collective bargaining agreement. The final case cited by Charging Parties, Sunbeam Corp., 99 N.L.R.B. 546 (1952), is even more removed from the instant case. In Sunbeam, the Board found that an employer violated Section 8(a)(2) by negotiating a contract with one of three

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10 See N.L.R.B. v. Exchange Parts Co., 375 U.S. 405 (1964) (employer offered wage, holiday and vacation incentives to employees not to join the union); Allegheny Ludlum Co., 320 N.L.R.B. 484 (1995) (employer threatened more onerous working conditions if employees selected the union); Medo Photo Supply Corp. v. N.L.R.B., 321 U.S. 678 (1944) (employer offered wage increases to employees to induce them to leave the union); N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969) (court held that employer unlawfully offered benefits and threatened discharge based on union membership where statements implied that the employer would take action solely on its own initiative for reasons unrelated to economic necessities and known only to the employer); N.L.R.B. v. Rich's of Plymouth, Inc., 578 F.2d 880 (1978) (employer's offer of pay increase in order to discourage union membership was unlawful); Coca-Cola Bottling Co., 132 N.L.R.B. 481 (1961) (employer was alleged to have bought beer for and given cash to employees to persuade them to vote against the union); Del Ray Tortilleria, Inc., 272 N.L.R.B. 1106, 1109 (1984) (complaint alleged that employer promised raises to employees for rejecting union and threatened to report illegal aliens for supporting the union).

competing unions that promised wage increases in order to induce the employees to select the employer's favored union. Sunbeam, 99 N.L.R.B. at 554.

Finally, Charging Parties' argument that the Letter of Agreement impermissibly promises benefits to employees in order to induce them to select the UAW as their bargaining agent conflicts entirely with the main premise of the Charging Parties and the General Counsel's arguments – that the Letter of Agreement is essentially a "sweetheart" deal for Dana and the UAW that sells out the employees. These positions are irreconcilable: either the Letter of Agreement promises something so enticing to employees that they will be unduly influenced to select the UAW or it is a terrible deal for employees because it creates a sham or dummy, company controlled union. It plainly cannot be both. In this case, however, it is neither. The Letter of Agreement neither induces employees to select the UAW nor discourages union membership. It upholds employee choice above all else. For these reasons, the ALJ's decision on this issue should be upheld as well.

B. The Letter of Agreement Does Not Require the UAW to Violate the Duty of Fair Representation.

Charging Parties also argue that the UAW has or will inevitably violate its duty of fair representation by entering into the Letter of Agreement. (CPE pp. 26-29). This argument fails for two substantive reasons. First, and most obviously, the UAW does not owe the St. Johns employees a duty of representation because it did not and does not represent

any employees at the St. Johns facility. Charging Parties even concede this point. (CPE p. 27) (acknowledging that unions owe their loyalty to "the interests of all whom it represents"). Second, there can be no finding of a breach of the duty of fair representation here because the Charging Parties have made no showing, and indeed no argument, that the UAW's conduct was "arbitrary, discriminatory, or in bad faith." See Vaca v. Sipes, 386 U.S. 171, 190 (1967).

V. THE ALJ PROPERLY DECIDED QUESTIONS OF FACT AND EVIDENTIARY MATTERS

Both Charging Parties and the General Counsel object to the ALJ's decisions to revoke their respective subpoenas and to limit testimony at the hearing. Because the ALJ appropriately limited the scope of the evidence produced to that which addressed the narrow issue raised in the Complaint, the ALJ's evidentiary decisions should be affirmed. 11

A. The ALJ Properly Revoked the Subpoenas *Duces Tecum.*

On February 7, 2005, the ALJ revoked subpoenas *duces tecum* served by the Charging Parties and General Counsel because "none of the information sought by the subpoena is relevant to any allegation in the complaint." (Tr. 26). The subpoenas sought a broad range of internal company documents, including bargaining history documents,

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11 Charging Parties raise a number of other exceptions to the ALJ's decision which do not require discussion or are substantively addressed elsewhere in this Brief. For example, Charging Parties' contention that the ALJ improperly accepted the Respondents' characterization of the Letter of Agreement's purpose is baseless. (CPE p. 11). In using the word "purpose," the ALJ is merely using the heading the Letter of Agreement itself uses. (ALJD p. 3, "It sets forth its purpose as..."; Joint Exh. 1 p. 1). The Decision does no more than recognize that the Letter of Agreement speaks for itself.

correspondence between Dana and the UAW, documents related to organizing activity at the St. Johns facility, and documents wholly unrelated to the St. Johns facility. Dana sought revocation of the subpoenas because they sought information that was well beyond the scope of the Complaint, which, as discussed above, alleged only that the Letter of Agreement itself was unlawful.

A subpoena should be revoked where it is not limited to the materials clearly pertinent to the proceeding or where the materials are not shown to be necessary to the successful handling of the case. Champ Corp., 219 N.L.R.B. 803, 817 (1988) (citing Jacobs Transfer, 227 N.L.R.B. 1231, 1244 (1977)); see also Lundy Packing Co. v. N.L.R.B., 856 F.2d 627, 630 (4th Cir. 1988) (affirming revocation of subpoena where there was no nexus between the requested information and the issue before the ALJ). In this case, the bargaining history documents have no relation to whether or not the Letter of Agreement is unlawful on its face, and documents relating to *other* Dana facilities plainly have no bearing on whether an unfair labor practice has been committed at St. Johns. Accordingly, the Board should affirm the ALJ's revocation of both the Charging Parties and the General Counsel's subpoenas.

B. The ALJ Properly Excluded Irrelevant Testimony.

For the same reasons described above, the objections raised by the General Counsel and the Charging Parties with respect to the exclusion of testimony by the ALJ at the February 8, 2005 hearing should be rejected. They sought to introduce testimony about how an employee became aware of

the Letter of Agreement (Tr. 41-42; 49-50; 53-57), an employee's subjective reaction to the Letter of Agreement (Tr. 44), and an anti-union petition circulated at St. Johns in the fall of 2003 (Tr. 46). None of this testimony would assist the ALJ or the Board in determining whether the Respondents' conduct of entering into and maintaining the Letter of Agreement is unlawful, which is the single issue presented in the complaint. Although the General Counsel suggests that this testimony could "shed light on the motive for other conduct that is alleged to be unlawful," the argument is misplaced since, as described above, the Complaint alleges *no* conduct other than the entering into the Letter of Agreement itself. (GCE p. 26) (citations omitted). Because the testimony offered was not relevant to any issue before the ALJ, the Board should affirm the ALJ's decision on this issue as well.

VI. REMEDIES

For the reasons set forth above, the Board should affirm the ALJ's dismissal of the Complaint in its entirety. However, should the Board disagree, fundamental fairness requires that any remedy in this case be limited to Dana's St. Johns facility, as sought in the Complaint, at the hearing, and in the General Counsel's post-hearing brief. The General Counsel's attempt to vastly expand the reach of this case to all of Dana facilities covered by the Letter of Agreement should be rejected out of hand. (GCE p. 32).

There can be no doubt that, until filing his exceptions, the General Counsel's consistent position was that this case and the remedy sought

therein was limited expressly to Dana's facility in St. Johns, Michigan. The Complaint is limited both in its substantive allegations to the facility in St. Johns and to the remedy of "void[ing] the Letter of Agreement *as it applies to the St. Johns facility*." (General Counsel Exh. 1(N) ¶ 10, p. 4). At the hearing, Counsel for the General Counsel explicitly limited her arguments to the St. Johns facility. (Tr. 8) ("The General Counsel will show in this case that Dana Corporation gave unlawful assistance to the UAW by negotiating terms and conditions *at the St. Johns plant* with the UAW before the UAW obtained cards from the majority of employees *at that plant*.") (emphasis added). And, in fact, the General Counsel confirmed this position in his post-hearing brief to the ALJ, asking that the Letter of Agreement be "voided *as it applies to the St. Johns plant*." (GCALJ p. 24) (emphasis added).

To entertain consideration of such a vastly expanded remedy at this late date would substantially prejudice Respondents, that prepared for the hearing and the briefing of this matter relying on the General Counsel's representation that the remedy sought was limited to the St. Johns facility. Had counsel been aware of the potential for an expanded remedy, Respondents may well have presented additional evidence at the hearing, including evidence that, under the Letter of Agreement, other Dana facilities *have* chosen to be represented by the UAW and, in fact, the Respondents have entered into collective bargaining agreements at other Dana facilities after they were organized pursuant to the Letter of Agreement. If the General

Counsel intended to request that the Letter of Agreement be expunged at all facilities listed therein, he should have either included such a broad remedy in the Complaint or amended the Complaint to reflect his intentions. Taurus Waste Disposal, Inc., 263 N.L.R.B. 309 n. 40 (1982) (refusing to entertain a remedy different than that originally requested by the General Counsel where Respondent did not have the opportunity to fully litigate the issue); see also Boyle's, 400 F.2d at 164 (the General Counsel "exercises exclusive control over the issues contained in any complaint that he files.")12

Although simple fairness requires that any remedy be limited to that litigated by the parties, that is not the only reason to preclude the General Counsel's last minute efforts to broaden the scope of this case. As mentioned above, Dana and the UAW have entered into collective bargaining agreements pursuant to the Letter of Agreement and adopting the General Counsel's new proposed remedy would create labor instability, particularly at those facilities.

CONCLUSION

Nothing in the language of the Act or the case law prohibits employers and unions from reaching agreements such as the Letter of Agreement. Indeed, established Board precedent, including Kroger, confirms the legality and desirability of such arrangements that promote free choice while fostering industrial peace. Here, Dana employees remain completely free to

12 Moreover, because the violations alleged are in no way "egregious," a broad remedy is also inappropriate here.

choose union representation and to select the bargaining representative of their choosing. Nothing in the Letter of Agreement impedes these rights. As the Board has long recognized, voluntary recognition and neutrality agreements, like the Letter of Agreement, foster industrial stability by permitting employers to make informed decisions as to whether to oppose unionization of their facilities and by encouraging cooperative labor relationships. As the ALJ noted, the Letter of Agreement, characterized by Charging Parties as a "concessionary" contract, might be viewed instead as a "mature recognition" of the reality of the industry. (ALJD p. 10). Employers ought to be entitled to discover whether a union has such a "mature recognition" and to learn a union's position on issues of vital importance to the employer, such as how to maintain competitiveness in a global environment, before deciding whether to oppose unionization or to agree to maintain neutrality and/or a voluntary procedure for recognition should the employees so choose. Affirming the ALJ's decision will thus encourage better informed and less contentious behavior by employers facing organization efforts. By contrast, if the Letter of Agreement is found unlawful, it will encourage employers to resist unionization and thereby create labor strife and disruption.

As Kroger recognizes, the ability for unions and employers to reach voluntary agreements like the Letter of Agreement is even more important where, as here, an employer's workforce is already partially represented. The

thousands of Dana employees currently represented by the UAW have a vital interest in maintaining harmonious labor management relations. By establishing a level of security and stability in the collective bargaining relationship between Dana and the UAW, the Letter of Agreement furthers their mutual interest (and the interest of Dana employees) in keeping Dana competitive in the ever-challenging global market. It does so without sacrificing the rights of Dana employees and preserves their freedom to choose representation or, as the employees at St. Johns have done, to choose no representation at all.

For all of the foregoing reasons, Dana respectfully requests that the National Labor Relations Board affirm the ALJ's decision in its entirety and find that Dana's conduct in entering into or implementing the Letter of Agreement does not constitute a violation of Sections 8(a)(1) or (2) of the National Labor Relations Act.

Respectfully submitted,

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July 28, 2005

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent Employer's Answering Brief to Charging Parties and General Counsel's Exceptions to the ALJ's Decision was served by Federal Express on July 28, 2005 on:

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