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April 27, 2006

VIA E-FILING & FEDERAL EXPRESS
Lester A. Heltzer
Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0071

Re: Dana Corporation, et. al., Case Nos. 7-CA-46965, 7-CB-14803, 7-CA-47078, 7-CA-14119, 7-CA-47079, 7-CA-14120

Dear Mr. Heltzer:

I am writing on behalf of General Motors Corporation ("GM"), DaimlerChrysler Corporation ("DaimlerChrysler"), and The Ford Motor Company ("Ford") (collectively, "*Amici*") to request to submit the enclosed brief *amici curaie*, pursuant to the Board's March 30, 2006 invitation to file such briefs in the above-captioned cases.

Amici are large manufacturers of automotive products with domestic workforces, both represented and unrepresented, numbering in the many thousands. Each has had comprehensive and long-standing collective bargaining experiences, and has had to undergo the interruptions and unrest which can occur during the course of contentious organizing campaigns. *Amici* have experienced first-hand how such distractions can complicate the effective management of their workforces, and write in this case to urge the Board to be receptive to allowing the parties early in the process to develop appropriate ground-rules governing organizing campaigns provided, of course, the affected employees retain the ability to decide whether they desire union representation or not.

Thank you for your consideration.

Very truly yours,

Andrew M. Kramer

Andrew M. Kramer

Enclosure
cc: All Parties on the Service List

NYI-2258450v1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DANA CORPORATION,	)	
	)	
Employer,	)	
	)	
	)	
and	)	
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Union.,	)	Case Nos. 7-CA-46965
	)	7-CB-14803
	)	7-CA-47078
	)	7-CA-14119
	)	7-CA-47079
	)	7-CA-14120
and	)	
	)	
GARY SMELTZER, JOSEPH MONTAGE & KENNETH GRAY,	)	
	)	
Charging Parties.	)	

BRIEF OF *AMICI CURIAE* GENERAL MOTORS CORPORATION, DAIMLERCHRYSLER CORPORATION, AND THE FORD MOTOR COMPANY

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BRIEF OF *AMICI CURIAE* GENERAL MOTORS CORPORATION, DAIMLERCHRYSLER CORPORATION, AND THE FORD MOTOR COMPANY

Amici curiae General Motors Corporation ("GM"), DaimlerChrysler Corporation ("DaimlerChrysler"), and The Ford Motor Company ("Ford") (collectively, "*Amici*") respectfully submit this brief in support of the right of employers and unions to explore the possibility of a mature relationship in an ever-competitive world by negotiating the process by which unions representing their employees at some facilities will seek to organize their employees at other facilities and some of the general principles that would guide collective bargaining in the event bargaining authority is obtained from an uncoerced majority of those employees. This measure of flexibility, we believe, is available under the National Labor Relations Act, 29 U.S.C. § 151, et seq. ("NLRA" or "the Act"), and we respectfully urge the National Labor Relations Board ("the Board") to sustain the determination of the Administrative Law Judge ("ALJ") that the General Counsel has not established a violation of the Act respecting the entering into and maintenance of the Letter of Agreement of August 6, 2003 ("Letter of Agreement") between Dana Corporation ("Dana") and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (the "UAW" or "Union").

I. Preliminary Statement

A. Interests of the *Amici*

Amici GM, DaimlerChrysler and Ford are large manufacturers of, *inter alia*, automotive products. Their domestic workforces, comprised of both represented and unrepresented employees, number in the many thousands.

Amici have had an extensive and long-standing collective bargaining experience, with some of their bargaining relationships spanning many decades. Each has experienced, in varying

degrees, disruptions and distractions during the course of contentious organizing campaigns. Each of the *Amici* can report occasions where the negative effects of a bitterly fought organizing campaign has spilled over to affect adversely, for a time, the quality of the ongoing relationship between the employer and the collective bargaining representative. Such negative spillover effects have complicated the ability of *Amici* to manage their workforces efficiently and be able to elicit the degree of employee commitment to enterprise goals necessary to maintain positions in the marketplace. Fortunately, over time, relationships mature and tend to improve. Nevertheless, the costs of this initial period of adjustment are avoidable when the employer and the bargaining agent can begin early in the process to foster mutual trust and respect by developing appropriate ground-rules for organizing campaigns (what might be called "framework agreements") -- subject to the critical proviso that the employees sought to be organized are free to decide whether they want union representation or not. Employees have a strong interest in being able to consider, on the basis of credible information – rather than mere promises – the union's likely objectives in deciding whether or not collective representation is in their interest. Employers, too, benefit from being able to evaluate, early in the process, union objectives and the basic parameters of a possible agreement should the union obtain majority support. It is to further such goals, which we believe are fully consonant with the Act's commitment to the principles of freedom of contract and employee free choice, that we write in support of the position of Dana and the UAW in this proceeding.

B. Scope of the Issue Presented

The issue before the Board is whether it is permissible under the Act for employers and unions representing their employees at some facilities to negotiate ground-rules for how those unions will go about attempting to organize unrepresented employees at other facilities. Some aspects of the Letter of Agreement in question – for example, the "neutrality" and "card check"

provisions -- are commonplace and not challenged here. Rather, the General Counsel's theory is that Sections 8(a)(1) and (2) of the Act have been violated simply because Article 4 of the Letter of Agreement, expressly dealing only with the situation "Following Proof of Majority" (Joint Exh.1, Art. 4), describes in general language the principles that would inform future bargaining on particular substantive topics, such as the union's willingness to support the idea of co-payments for health care, that are of critical importance to the survival of organized firms in this country.[1] In the language of the Complaint, the General Counsel alleges "unlawful assistance to a labor organization" was rendered because the Letter of Agreement --

> "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." (Complaint ¶¶ 9-11)

The General Counsel's attempt to outlaw pre-recognition "framework" agreements with non-stranger, incumbent unions is breathtakingly unprecedented. The General Counsel is not complaining about a completed agreement, or the actual conferral of an exclusive bargaining agency, or even that there is a binding agreement of any kind on the general principles stated in Article 4. Rather, his complaint is that the Letter of Agreement "sets forth terms and conditions"

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[1] There is apparently also objection to the provision for final-offer interest arbitration of contract terms, with a related no-strike pledge, in the event (1) the Union provides proof of majority status under Article 3 of the Agreement, and only upon such lawful recognition, (2) and after six months of negotiations, the parties are unable to reach an agreement. (Joint Exh.1, Art. 4.2.5.). On this point, it is well to remember the Supreme Court's flat-out rejection (per Chief Justice Hughes) of similar qualms over interest arbitration clauses in a "members-only" collective agreement: "[T]he fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. [By] precluding strikes and providing for arbitration of disputes, these agreements are highly protective of interstate and foreign commerce. They contain no terms which can be said to 'affect commerce' in the sense of the Act so as to justify their abrogation by the Board. The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 237 (1938).

on matters "to be negotiated" in a later agreement upon proof of an uncoerced majority for union representation. The General Counsel's position is, we submit, inimical to national labor policy. It disserves not only the interests of employers and unions in developing a constructive, problem-solving, rather than problem-engendering, framework for representation issues, but also the interests of employees in making an informed decision over whether to authorize a collective bargaining agency – one based not on bald union promises of "pie in the sky" improvements that do not take costs into account, but on the union's embrace of principles, stated at a very general level, signaling that this bargaining agent will contribute to, rather than detract from, the growth and competitive health of their employer.

In framing the issue, *Amici* believe it is equally important to state what is ***not*** at issue in these consolidated cases.

First, the issue in this case is not one of premature recognition of the UAW as the bargaining representative for Dana's St. John, Michigan (or any other) facility at a point when the Union lacked a majority. No such allegation is made in the General Counsel's Complaint, and for good reason. The Letter of Agreement expressly states that "[t]he parties understand that the Company may not recognize the Union as the exclusive bargaining representative of employees in the absence of a showing that the 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). To date, the UAW has not been recognized as the exclusive bargaining agent of the employees at Dana's St. John facility. Conferral of exclusive bargaining status on a minority union indeed lies at the core of the Section 8(a)(2) prohibition. But there has been no such conferral here. As the Charging Parties themselves acknowledge: "But, the issue is not premature recognition, but rather pre-recognition bargaining." (Charging Parties' Br. 2 n.2).

Second, this case does not involve the problem of an employer presenting an unorganized workforce with a fait accompli of a completed collective bargaining agreement and thus endowing the minority union with "a deceptive cloak of authority with which to persuasively elicit additional employee support." ILGWU, AFL-CIO (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731, 736 (1961). Thus, this case does not raise the problem involved in Majestic Weaving Co. of New York, 147 N.L.R.B. 859 (1964). There, recognition preceded majority support and the fait accompli of a completed agreement was then executed as a manipulative device to secure the appearance of majority support from the affected employees. As the Board observed in *Majestic Weaving Co.,* the case involved the "impressing upon a nonconsenting majority an agent granted exclusive bargaining status"; the fact that the employer "conditioned the actual signing of a contract with Local 815 on the latter achieving a majority at the 'conclusion' of negotiations is immaterial." Id. at 860. It was "immaterial" because "negotiation follow[ed] an oral recognition agreement"; thus, as in *Bernhard-Altmann*, a "deceptive cloak of authority" tainted any demonstration of post-recognition support by the affected employees.[2]

Here, there is no fait accompli, no consummated collective bargaining agreement, no collective bargaining agreement whatsoever. Nor is there any danger of "a deceptive cloak of authority" inherent in premature recognition or the presentation of a completed agreement to induce ostensible employee support for a minority union. There is in fact neither any

[2] We note also that the Board in *Majestic Weaving* articulated or had available to it other independent grounds for finding a violation in that case: (1) Felter, who had "acted in a lead capacity for the general laborers," had actively solicited card authorizations for Local 815 after target employees were identified to him by the plan personnel manager in a manner indicating employer interference with card solicitations; and (2) there was a rival union on the scene even though it did not formally request recognition and bargaining until a month after the signing of the contract with Local 815. See 147 N.L.R.B. at 860-61.

"decepti[on]" nor any "cloak of authority." Dana issued a press release publicizing the existence of the Letter of Agreement; employees at the St. John facility were sufficiently alerted to the Agreement's existence and its general terms that at least three of them filed charges triggering this proceeding; and all of the St. John employees by now have had an opportunity to examine the text of the Agreement and evaluate whether collective representation by the UAW in these circumstances is in their interest. To date, they have decided to continue their unrepresented status.

Third, this case does not involve a stranger union. Dana's Letter of Agreement is with a union with whom it has had a longstanding bargaining relationship: Dana and the UAW are presently parties to a Master Agreement covering three units in two locations, as well as six other collective bargaining agreements patterned on the Master Agreement and covering around 2,300 employees. (Dana Br. 4). Certainly, as the ALJ in this case reasoned, Dana and the UAW could have negotiated what is called a "Kroger" or "additional locations" clause that would have provided for extension of the Master Agreement to St. John or other of its facilities, subject only to the condition that the UAW ultimately presented proof of majority support before the agreement could be applied to the affected employees. See, e.g., Houston Division, Kroger Co., 219 N.L.R.B. 388 (1975). The Board has been clear that such agreements are valid and do not reflect any unlawful assistance to a labor organization, and indeed that they affirmatively advance labor policy. From the standpoint of the affected unrepresented employees, whether at St. John or elsewhere, it would seem exceedingly difficult to argue that they have less self-determination when the Letter of Agreement leaves virtually all of the substantive terms to be negotiated (negotiation to occur only if they choose to be represented by the Union), rather than applying a Master Agreement that is already completed.

A fourth issue not present here is whether employees must be informed not only of the existence and general terms of the framework agreement but given an opportunity to review its text as a condition of lawful voluntary recognition of a union that is party to such an agreement. While *Amici* believe that such an opportunity should be provided as a policy matter, this issue should not be decided in the abstract but in the context of a concrete case involving a union which has been recognized in the absence of such a disclosure, or where cards are used to obtain an NLRB election or secure a *Gissel* bargaining order and it is argued that the cards are tainted because such a disclosure has not been made.

Finally, another issue that need not, and should not, be reached in this case, is whether an employer violates Sections 8(a)(1) and (2) of the Act if, say, the access provisions of the Letter of Agreement are not extended to rival labor organizations. No rival organization has appeared on the scene. The Board would be wise to follow its usual practice of not only waiting for a rival organization to appear but also for that organization to in fact make a demand for comparable access and be turned down by the employer. See, e.g., Detroit Medical Center, 331 N.L.R.B. 878, 878 (2000) ("The Employer simply considered the only access request made to it and did not affirmatively seek out the Intervenor to make the same offer to it. We find that the Employer was not obligated to offer the Intervenor something it had not requested.").

C. *Amici*'s Position

It is *Amici*'s position that on the limited issue before the Board, the ALJ properly determined that the mere entering into and maintenance of the Letter of Agreement did not violate Sections 8(a)(1) and (2) of the Act. Two fundamental principles inform this conclusion:

- The Act seeks to further agreements between employers and unions as a means of reducing the conditions for labor strife and social instability, and except where the Act specifically provides otherwise, the freedom of contract of the parties is unimpaired even in the absence of a traditional collective bargaining agency. Where no recognition of the union as the exclusive bargaining agent has occurred,

the Act simply does not bar an employer from negotiating with a union representing employees at some of its facilities the ground-rules under which that union will attempt to organize employees at its other facilities.

- The second principle is that the Board needs to be vigilant about protecting the rights of employees not represented by the union. Those rights are fully vindicated, we respectfully submit, where an exclusive bargaining agency has not been conferred and the employees will have an opportunity to make an informed, voluntary decision on whether they wish to be represented by that union, some other union (if any appears), or no union at all.

II. Legal Analysis

This case involves the interplay between (1) the freedom of contract of employers and unions except where expressly barred by the Act or other applicable laws, and (2) the freedom of choice of employees to decide whether they wish to be represented by a union or not. Both values are of equal importance and should be read consistent with each other, and both point in this case to sustaining the determination of the ALJ that the entering into and maintenance of the Letter of Agreement between Dana and the UAW is not unlawful assistance to a labor organization in violation of Sections 8(a)(1) and (2).

A. Absent Premature Recognition of the Union as an Exclusive Bargaining Agent, the Act does not bar Framework Agreements Setting Forth the Ground-Rules under which a Union Representing Employees of the Employer will Attempt to Organize Employees at the Employer's Other Facilities.

The Act, in its opening section, makes clear that a major purpose of the legislation was to promote the flow of commerce "by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151. Mindful of this overarching Congressional objective, as further confirmed by the addition in the Taft-Hartley amendments of Section 8(d) of the Act -- inserted to remind the Board that the duty to bargain "does not compel either party to agree to a proposal or require the making of a

concession," id. § 158(d) -- the Supreme Court has in a number of rulings emphasized the statutory commitment to allowing employers and unions to craft solutions to the issues confronting them. Thus, for example, in NLRB v. Insurance Agents, 361 U.S. 477 (1960), the Court held that the Board lacks authority under the duty-to-bargain provisions to regulate the bargaining tactics of the parties because the agency's assertion of such authority would necessarily intrude into the substance of the bargaining between the parties. As the Court emphasized: "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." Id. at 488.[3]

Freedom of contract is, of course, not absolute. But the Board has not been given a roving commission to strike down contracts between employers and unions that do not conform to some idealized conception (that the Charging Parties seem to be harboring) of collective bargaining as a necessarily adversarial, zero-sum game. Rather, the agency must allow these private parties to craft their own solutions -- unless it can ground its intervention in some express prohibition of the Act, such as, for example, the ban on "hot cargo" clauses in Section 8(e).

Under Section 8(a)(2), Congress has expressly prohibited "domination or interference with the formation or administration of any labor organization or [the] contribut[ion] of financial or other support to it." 29 U.S.C. § 158(a)(2). Despite the rhetoric employed in the brief filed on

[3] Similarly, in H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99 (1970), the Court emphasized that, despite the apparent breadth of the Board's remedial authority under Section 10(c) of the Act, that authority does not include imposing terms on the parties as a remedy for an unlawful refusal to bargain in good faith. The Board's remedial authority was limited by the overarching policies of the Act: "One of these fundamental policies is freedom of contract. ... [T]he fundamental premise on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the terms of the contract." Id. at 108.

behalf of the Charging Parties, the General Counsel makes no claim of employer "domination or interference" with the UAW's formation or internal administration. As previously discussed, the General Counsel's theory is one of unlawful non-financial "support" of the UAW's organizing objectives inhering in the provisions principally in Article 4 ("Following Proof of Majority Status") of the Letter of Agreement setting forth some general substantive principles that should guide bargaining between the parties, to take effect only after the Union proves its majority status in an appropriate unit.

The General Counsel's approach is unprecedented. The prohibition of "other support" by the employer in Section 8(a)(2) takes its meaning from the context in which the term appears (which speaks of "domination" of unions, "interference" with their "formation or administration" of unions, or financial contributions to unions), and cannot be read as a hard-edged barrier to employers and unions trying to develop positive, non-adversarial solutions to common problems. Not all employer conduct that might enhance the prestige of a union constitutes proscribed "other support" violative of Section 8(a)(2). Indeed, if that were the law, there would be no collective bargaining, for virtually every aspect of a collective agreement imparts to the union, to borrow a phrase from the General Counsel, a "privileged insider" status. (General Counsel Br.16). Rather, the "other support" that violates Section 8(a)(2) has to be support that either (a) compromises the organizational independence of the union or (b) confers the status of an exclusive bargaining agency on a minority union. Neither of these circumstances is present here: The UAW remains the vigorous defender of employee interests it has always been; and nothing in the Letter of Agreement confers exclusive bargaining authority on the UAW for any group of employees.

As an example of the limited reach of the prohibition on "other support" in Section 8(a)(2), it is well-established that unions can lawfully negotiate "members-only" agreements

with employers willing to enter into such agreements. This is true even if such agreements may make the union look more attractive in the eyes of unrepresented employees, and even if the union gives up its right to strike in favor of interest arbitration. See Consolidated Edison Co. v. NLRB, 305 U.S. 197, 237-39 (1938). If the Letter of Agreement had been confined to UAW members, there would be no challenge in this case; and yet the General Counsel is prepared to level a challenge here because the Agreement envisions the possibility of an exclusive bargaining agency if the Union produces proof of uncoerced majority support. But the language of Section 8(a)(2) cannot be finessed in this way: If there is no employer "support" in the case of a members-only agreement that will have immediate operational effects in a plant and may well influence employee attitudes towards the union, how can there be unlawful "support" in a framework agreement which will have no operational consequences whatsoever in any Dana facility until the employees themselves decide to confer bargaining authority on the Union?

The scope of the "other support" prohibition can have only the most limited reach when dealing with incumbent unions. Where the union is the exclusive bargaining agency for a group of employees, it is commonplace for the parties to negotiate rules of special access for the union, such as bulletin boards, in-plant union offices, time-off to conduct union business, and the like. The Board has never held that such practices in the large, absent a showing of clear abuse, constitute "other support" to the union in violation of Section 8(a)(2).

Nor does any question of unlawful "other support" arise when the incumbent union has lost its bargaining agency because the previous employer has sold its business to a buyer who is uncertain whether it wishes to retain the previous workforce or exercise its unconditional right to hire an independent workforce. The Supreme Court has suggested that even in these circumstances, it is appropriate, lawful, and often desirable from the standpoint of national labor

policy for the previously incumbent union to explore new substantive terms that might induce the buyer to hire the previous workforce. See NLRB v. Burns Intl. Security Services, Inc., 406 U.S. 272 (1972). In St. Louis Post Dispatch, 1981 NLRB GCM LEXIS 70 (May 19, 1981), the General Counsel (per Harold J. Datz), relying on Burns, declined to issue a complaint in similar circumstances as long as the employer negotiated only substantive terms and did not recognize an exclusive bargaining agency.

The "other support" prohibition is also largely inapplicable to Kroger-type agreements between employers and incumbent unions. The Board consistently has ruled that not only are such clauses lawful but that they are mandatory subjects of bargaining both because represented employees have a legitimate interest in extending collectively negotiated standards to additional locations of the same employer but also because it advances national labor policy to allow the parties to resolve amicably potential areas of disagreement between them. It is a premise of these rulings that the union lacks bargaining authority to bind the employees at the additional location, and indeed that is why the Board properly has insisted on an implied condition-subsequent for such agreements – that the union demonstrate an uncoerced majority at the additional location. At some abstract level, such clauses "support" the incumbent union by making the union appear as a viable, perhaps attractive, option for the latter employees, but there is no unlawful "other support" in violation of Section 8(a))(2) because an exclusive bargaining agency has not been imposed on them.

Implicitly acknowledging that the Letter of Agreement in this case, because it imposes no terms on third parties, may be far more conducive to meaningful collective bargaining than the type of provision at issue in Kroger itself, the General Counsel and the Charging Parties now attempt to re-conceptualize the reasoning in Kroger and its progeny, arguing counter-intuitively

that these clauses are allowed precisely because of their inflexibility. This rationalization does not reflect what Kroger is about, which is to allow employers and incumbent unions to chart a constructive course for their future dealings. Thus, for example, in Eltra Corporation, 205 N.L.R.B. 1035 (1973), the Board held that Kroger privileges a formal extension of a collective agreement to additional, unorganized facilities even when the parties anticipate continued adherence to a well-established practice of significantly varying its terms to fit local conditions. [4]

The General Counsel and Charging Parties' reading of Kroger indeed turns national labor policy on its head: Insistence by labor unions of the terms of master agreements across the broad range of an employer's facilities is lawful. On the other hand, unlawful "other support" is rendered to unions who are willing in framework agreements with employers to signal flexibility and economic maturity in their industrial philosophy to unrepresented employees, as well as the employer, by endorsing, in principle, guideposts for future bargaining such as "Health care costs that reflect the competitive reality of the supplier industry," "Minimum Classifications," and "The importance of attendance to productivity and quality." (Joint. Exh. 1, Art. 4.2.4).

To accept the position advanced by the General Counsel and the Charging Parties, an inexplicable line would have to be drawn that, we respectfully submit, cannot be located in the "other support" language of Section 8(a)(2).

B. The Framework Agreement in this Case Leaves Unimpaired the Rights of Unrepresented Employees Because They Retain the Opportunity to Make an Informed, Voluntary Decision Whether They Wish to be Represented by the Union, Some Other Union or No Union at All.

The General Counsel and the Charging Parties would have the Board believe that the Letter of Agreement here somehow contravenes the trip-wire in Majestic Weaving Co. of New

[4] We note also the General Counsel's decision (per Harold J. Datz) to decline to issue a complaint in Saturn Corp., 1986 NLRB GCM LEXIS 112 (June 2, 1986), which made possible an important experiment in U.S. labor-management relations.

York, 147 N.L.R.B. 859 (1964). This is an unfounded assertion. Aside from the fact that Majestic Weaving can be explained by its express and available alternative grounds, see note 2, supra, and the Second Circuit denied enforcement in part because the Board erroneously reasoned that its ruling was compelled by the Supreme Court's decision in Bernhard-Altmann, see NLRB v. Majestic Weaving Co., Inc., 355 F.2d 854, 859 (2d Cir. 1966) (per Judge Henry Friendly), the decision stands only for the proposition that "'the premature grant of exclusive bargaining status to a union,' even if conditioned on attainment of a majority before execution of a contract, is similar to formal recognition 'with respect to the deleterious effect upon employee rights.'" Ibid., quoting 29 N.L.R.B. Ann. Rep. 69 (1964) (emphasis supplied).

As the Board's 1964 Annual Report makes clear, Majestic Weaving was a limited extension of Bernhard-Altmann to capture not only formal execution of exclusive bargaining agreements with minority unions, but also the "premature grant of exclusive bargaining status" to such unions. In that case, recognition preceded bargaining ("negotiation follow[ed] an oral recognition agreement," 147 N.L.R.B. 859, 860 (1964)) and the fait accompli of a completed agreement was then executed as a device to create the appearance of majority support for an earlier recognition agreement. Here, by contrast, neither the General Counsel nor the Charging Parties argue there has been premature recognition, only that there has been "pre-recognition bargaining." (Charging Parties Br. 2 n.2). Their concession is no accident, for the Letter of Agreement at issue in this case could not be clearer:

- "Employee's freedom to choose is a paramount concern of Dana as well as the UAW. We both believe that membership in a union is a matter of personal choice and acknowledge that if a majority of employees wish to be represented by a union, Dana will recognize that choice. The Union and the Company will not allow anyone to be intimidated or coerced into a decision on this important matter. The parties are also committed to an expeditious procedure for determining majority status." (Joint Exh.1, "Purpose")).

- "The parties understand that the Company may not recognize the Union as the exclusive bargaining representative of employees in the absence of a showing that the majority of the employees in an appropriate bargaining unit have expressed their desire to be represented by the Union." (Id., Art. 3.1).

- "In the event that the Union is found to have achieved majority status by the procedures described in Article 3, the Company agrees to recognize the Union as the exclusive bargaining representative of employees in the Bargaining Unit." (Id., Art. 4.1).

From a broader perspective, the Letter of Agreement provides an important means of implementing the principle of employee free choice – one that should not be taken off the table of lawful options available to the parties. Conventionally, when a union attempts to organize new groups, it is principally engaged in the business of making promises – promises that may be no more than a wish list of hopes for future gains or promises that may some basis in what it has achieved in other agreements with that employer or other firms, although without pointing out relevant differences in local conditions and economic realities. Employees are often in the position of having to decide, without reliable information, whether to believe the union's promises or, rather, to believe the employer's recitation of economic circumstances that seemingly render hollow the union's promises. By contrast, framework agreements of the type at issue in this case can significantly improve the flow of useful information to employees because they provide a mechanism for the union to credibly signal that, while it intends to be a vigorous bargaining agent for employees, it is prepared to take into account economic realities in formulating its demands, without waiting for the employer to be at death's door of a Chapter 11 reorganization process before these realities are absorbed. Employees should have this information in making the decision whether to grant exclusive bargaining status to a union or not.

Framework agreements of the type in this case also enable unions to re-brand themselves in the market for the hearts and minds of employees. The framework agreement here provides a

way for the Union to make a credible proffer to the employees, informing them how it will go about its roles as a bargaining agent and contract enforcer. One would be hard pressed to argue that permitting credible commitments of this type to be communicated to employees does not further the overarching Congressional commitment to fostering an informed, uncoerced employee choice on collective representation.

The essential caveat, and one fully recognized by Dana and the Union, is that at all times the affected employees will make the ultimate decision whether they want the approach to collective bargaining indicated in the Letter of Agreement, a more conventional, militant style of representation from another union, or no union representation at all. There is nothing in the record of this case to suggest that employees at Dana's St. John facility or any location covered by the Letter of Agreement do not fully retain this decision-making authority.

III. Conclusion

As set forth above, on the narrow issue before the Board, the ALJ's determination was plainly correct that the Letter of Agreement between the parties does not constitute a form of unlawful "other support" in violation of Sections 8(a)(1) and (2) of the Act. In fact, we believe agreements of the type in this case, while they should not be mandated, provide an important option that employers and unions seeking to develop and deepen a mature, constructive relationship should have available to them. Not only would this further the statutory commitment to freedom of contract between employers and unions but also would advance, by providing better information to employees about likely union policies, the equally central statutory goal of promoting an informed, uncoerced employee choice over whether to authorize a collective bargaining representative or not.

Dated: April 27, 2006.

Respectfully submitted,

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Motor Company

CERTIFICATE OF SERVICE

I certify that on April 27, 2006, the foregoing true and correct copy of BRIEF OF *AMICI CURIAE* GENERAL MOTORS CORPORATION, DAIMLERCHRYSLER CORPORATION, AND THE FORD MOTOR COMPANY was electronically filed with, as well as served via Federal Express on, the Office of the Executive Secretary in accordance with the National Labor Relations Board Rules & Regulations and Electronic Filing procedures, and served via Federal Express on the addressed as follows:

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