UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DANA CORPORATION

Respondent Employer,

and

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

Respondent Union,

and

GARY L. SMELTZER, JR. — Cases 7-CA-46965, 7-CB-14083

and

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

and

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

BRIEF AMICUS CURIAE OF THE WACKENHUT CORPORATION

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BRIEF OF AMICUS CURIAE

THE WACKENHUT CORPORATION

I. INTRODUCTION

The Wackenhut Corporation respectfully submits this Brief Amicus Curiae in response to the National Labor Relations Board's March 30, 2006 Notice and Invitation to File Briefs.

II. STATEMENT OF INTEREST

With over 38,000 employees, Wackenhut is a leading provider of security services to major United States corporations as well as government agencies. Wackenhut is now a subsidiary of Group 4 Securicor, the largest security corporation in the world. Wackenhut provides uniformed security officers and conducts investigations, background checks and security audits and assessments, as well as other security related services. Wackenhut employs both Unionized and non-Unionized employees and has collective bargaining agreements with more than a dozen different Unions. Wackenhut has experienced growing pressure from Unions to consent to neutrality/card check agreements and to pre-recognition bargaining. The Service Employees International Union ("SEIU") is currently engaged in an aggressive "corporate campaign" against Wackenhut. At the heart of the campaign is the SEIU's demand that Wackenhut agree to a broad neutrality/card check agreement, which would apply to unrepresented units prior to a majority showing and without the opportunity for secret ballot vote by employees.

Amicus status and participation were previously granted to The Wackenhut Corporation in *Dana Corporation* 8-RD-1976 and *Metaldyne Corporation*, 6-RD-1518, et al.

III. STATEMENT OF THE CASE

The statement of the cases and facts are set forth in the parties' brief and in the ALJ's Initial Decision and Order.

IV. SUMMARY OF THE ARGUMENT

It is the position of The Wackenhut Corporation, as amicus, that pre-recognition bargaining prior to a showing of majority support violates the National Labor Relations Act ("Act"), 29 U.S.C. §151, et. seq., interferes with the core federal labor policy of employee free choice, and is incompatible with the statutory right of employees to exercise their preference to be represented by a Union or not to be represented in an uncoerced and informed manner. If the Board were to affirm ALJ Kocol's April 8, 2005 Initial Decision and Order, it would have a particularly pernicious effect on guard employees governed by Section 9(b)(3) of the Act. The Board and the courts have long recognized that any recognition of a mixed-guard Union as representative of an employer's guard employees must be purely voluntary on the part of the employer. *See Wackenhut Corp.*, 287 NLRB 374, 376 (1987).

Congress explicitly recognized the inherent conflict that exists when guards, who serve to protect an employer's property, are represented by the same Union that represents non-guard employees. Congress enacted Section 9(b)(3) "to shield employers of guards from the potential conflict of loyalties arising from the guard union's

representation of nonguard employees or its affiliation with other unions who represent nonguard employees." *Wells Fargo Corp.*, 270 NLRB 787 (1984).

Pre-recognition bargaining in the 9(b)(3) context would directly contravene the Act since any procedure that fosters representation of guards by a mixed Union inherently interferes with employee Section 7 rights. Guards represented by a mixed Union start off with diminished rights because of the application of Section 9(b)(3). *See Truck Drivers Local Union No. 807 v. Wells Fargo Armored Serv. Corp.*, 755 F.2d 5, 10 (2d Cir. 1985) (quoting *NLRB v. White Superior Div., White Motor Corp.*, 404 F.2d 1100, 1004 (6th Cir. 1968).

The 7th Circuit's exhortation that "[C]ollective bargaining is a sham where the employer sits on both sides of the bargaining table" is especially apt in the guard arena. *Valley Mould & Iron Corp. v. NLRB*, 116 F.2d 760, 764 (7th Cir. 1940).

V. PRE-RECOGNITION BARGAINING UNDER CURRENT LAW

A. The Act's Guarantee and Protection of Employees' Right of Free Choice

The much quoted words of Section 7 of the Act declare our national policy on the right of employees to self organization:

> Employees shall have the right to self organization, to form, join or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any and all such activities... .

To guard against employer overreaching, Congress included Sections 8(a)(1) and 8(a)(2) of the Act: "It shall be an unfair labor practice for an employer - to interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section

7....[and] to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

In 1947 Congress added Section 8(b)(1)(A), declaring: "It shall be an unfair labor practice for a labor organization or its agents - to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7." The language of Section 7 indisputably propounds an *employee's* right. It is the fundamental right of *employees* to choose or not to choose a collective bargaining representative, a right underscored by the prohibitory language of Section 8(a)(1) and 8(b)(1)(A) recognizing unlawful overreaching by employers and Unions.

The United States Supreme Court has explicitly recognized the rights of employees protected by Section 7. The Court has also distinguished between employee and non-employee rights (including Union agents). While recognizing that employers could not generally prohibit employees from distributing literature on company property, the Supreme Court rebuffed the NLRB's attempt to grant to non-employees, an employee's Section 7 rights. *NLRB v. Babcock & Wilcox Company*, 351 U.S. 105 (1956), (holding that the employee/non-employee distinction "is one of substance"). When the Board again allowed non-employee organizers similar access rights as employees to company property in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992), the Court reaffirmed and extended its *Babcock* holding: "[B]y its plain terms, thus, the NLRA confers rights only on *employees*, not on unions or their non-employees organizers." (Italics in original).

Under the Act, only employees - not employers or labor organizations - enjoy statutory rights and privileges. The core value of the Act is the protected right to choose

whether to be represented exclusively by a labor organization for purposes of collective bargaining regarding wages, hours of work, or other conditions of employment. Representation is exclusive covering all employees in the unit, provided a majority of employees in that unit designate, select or elect a labor organization as their representative. Once a majority of employees in an appropriate unit designate, select or elect an exclusive representative, it is an unfair labor practice under the Act for an employer or a labor organization to refuse to bargain collectively upon request.

B. Pre-Recognition Bargaining Compromises Employees' Rights and Directly Contravenes the Congressional Policy Incorporated into Section 9(b)3

The Act, Section 1, sets forth national labor policy - (1) the reasons for the policy, (2) the goals to be achieved, and (3) the process:

> (1). Reasons "The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening or obstructing commerce...."
>
> (2). Goals "[T]o eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred...."
>
> (3). Process "[B]y encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

The Act, Section 1, specifically defines "bargaining power," or the absence thereof, as a composite of "freedom of association" and "actual liberty of contract." Rather than mandating employee associations and/or Union representation despite Section 1's assertion that organization and bargaining safeguard commerce, the Act, Section 7, leaves the matter of collective representation to individual, employee free

choice. The Act encourages the salutary process of collective bargaining as a means, not an end, to the "friendly adjustment of industrial disputes" *provided* "the majority of the employees in a unit appropriate"..."designated or selected"..."[r]epresentatives"...to be the "exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment....". Once chosen, the legal obligation to bargain attaches to *both* the exclusive representative and to the employer.

The Act does not address bargaining by a Union and an employer *prior* to designation, selection or election by an employee majority in an appropriate unit because the bargaining *process*, as a means to a desired policy end, necessarily is *contingent* on a proclaimed and proven appropriate employee majority. Bargaining - whether to agreement, tentative agreement or "wink and nod" - in advance of and/or in anticipation of a future declaration of an appropriate employee majority is unlawful under the Act, regardless of whether pre-recognition bargaining in all cases, some cases, or in theory might be salutary. Section 7 is clear - employees have the right to bargain collectively *through* representatives of *their own choosing.* There is no Section 1 "liberty of contract" by inverting the process - placing the negotiated deal before the legitimizing of the representative, to bargain for a result which may or may not be in the third-party beneficiaries'/employees' best interests.

The Supreme Court has repeatedly referred to the "Act's goal of protecting employee choice." While the Act seeks to ensure "industrial stability," the Court has made clear that industrial stability may not be achieved at the expense of employee rights. "Individual and collective employee rights may not be trampled upon merely

because it is inconvenient to avoid doing so." *International Ladies' Garment Workers' Union AFL-CIO (Bernhard-Altmann Texas Corporation) v. NLRB*, 366 U.S. 731, 740 (1961); *Majestic Weaving Co.*, 147 NLRB 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2nd Cir. 1966).

C. The Exclusive Representative's Duty of Care and Loyalty is Particularly Important Under Section 9(b)(3)

The Supreme Court recognized that a duty of "fair representation" was a necessary corollary to a representative's status as exclusive representative. "[U]nder this doctrine, the Union's statutory authority to represent all members of a designated unit includes an obligation to serve the interests of all...to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes,* 386 U.S. 171, 177(1967).

Importantly, the Supreme Court acknowledges that "federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining...[which] of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Id.* at 182.

The Supreme Court again addressed a Union's duty of fair representation in *Teamsters v. Terry*, 494 U.S. 558 (1990). The Court, citing its decision in *Vaca* noted that "[a] union must discharge its duty [of fair representation] both in bargaining with the employer and in its enforcement of the resulting collective-bargaining agreement." *Id.* at 563. Moreover, "[j]ust as a trustee must act in the best interests of the beneficiaries,...a union, as the exclusive representative of the workers, must exercise its power to act on behalf of the employees in good faith." *Id.* at 567.

A labor organization's representational exclusivity and correlative duty of fair representation as a result of designation, selection or election by an employee majority in an appropriate unit "is thus akin to the duty owed by other fiduciaries to their beneficiaries...the duty a trustee owes to other trust beneficiaries...[or] the relationship between union and employee [is like] that between attorney and client. The fair representation duty also parallels the responsibilities of corporate officers and directors toward shareholders." *Airline Pilots v. O'Neill*, 499 U.S. 65, 74-75 (1991).

D. Necessarily Included in the Exclusive Representative's Duty of Good Faith and Honesty in Negotiating and Administering the Collective Bargaining Agreement is an Obligation to Avoid Pre-Recognition Entanglements

As the Board and courts explored implications of the duty of fair representation, it became apparent that the imposition of the duty was not sufficient, that the fiduciary obligation must be re-enforced by the removal and disclosure of compromising situations. Section 302 of the Taft Hartley Act makes it a crime "for any employer to...deliver...or agree to...deliver, any...thing of value to any labor organization...which represents or *seeks to represent*...any of the employees of such employer..." (Emphasis added). 29 U.S.C. §196(a).

Congress also recognized that "[t]he officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." 29 U.S.C. §501(a). It imposed on these agents, labor organizations, and employers detailed disclosure and reporting requirements of financial arrangements which might tend to compromise that trust. 29 U.S.C. §431 et. seq.

The Board and courts similarly recognize the impact of premature recognition, that is, an employer's extending recognition to a labor organization which has not established majority support. The Board has recognized that such an act would enhance the stature of the organization and is so likely to induce employees to accept it that it voids the legitimacy of subsequently obtained majority support. *International Ladies' Garment Workers' Union, AFL-CIO (Bernhard-Altmann Texas Corporation) v. NLRB*, *supra*.

VI. THE BOARD SHOULD REVERSE THE ALJ'S INITIAL DECISION AND ORDER

A. Dana Corporation and the UAW Unlawfully Agreed on Terms and Conditions of Employment Contingent on a Future Employee Majority

As outlined by the Administrative Law Judge, the Letter of Agreement negotiated by Dana Corporation ("Dana") and the International Union ("UAW") provided access to the employer's premises to enable the UAW to meet with Dana's employees, spelled out a procedure for determining majority status, obtained Dana's agreement to reorganize the UAW provided majority status was achieved, and committed Dana to not say or do anything implying opposition to unionization. *Dana Corporation,* ALJD-24-05.

In addition, however, the Letter of Agreement provided for, among other things:

- maintaining healthcare benefits and premium sharing, deductibles, and out-of-pocket maximums;
- any collective bargaining agreement would last at least four (4) years;
- interest arbitration;
- minimum classifications;
- flexible compensation;
- mandatory overtime;

- dispute resolution; and
- no-strike, no-lockout commitments.

Because the Letter of Agreement set terms and conditions of employment prior to and/or without proof of majority status by Dana's employees in an appropriate unit, the Letter of Agreement is void and the actions by both Dana and the UAW are unlawful. Bargaining with a minority Union - with or without recognizing the Union and/or making the negotiated terms contingent on the Union achieving majority status - renders unlawful support and interferes with employees' Section 7 rights. *Majestic Weaving Co., supra.*, enforcement denied on other grounds, citing *International Ladies' Garment Workers' Union, AFL-CIO (Bernhard-Altmann Texas Corporation) v. NLRB*, *supra.*, and overruling *Julius Resnick, Inc.*, 86 NLRB 38 (1949). Dana's pre-recognition bargaining renders support to the UAW in violation of Section 8(a)(2). Dana's pre-recognition negotiating and resulting agreement with the UAW interfere with employees' Section 7 rights to choose, thereby violating Sections 8(a)(1) and 8(b)(1)(A) of the Act.

Quite apart from agreeing to a non-Board process to legitimize an alleged employee majority (card-check) and/or to waive an institutional right of speech to assist informed choice regarding a party's perspective to a particular, potential representative (neutrality agreement), the negotiation of substantive contract terms prior to achieving majority status is directly pernicious to the employees' rights under Section 7. Since the duty of fair representation attaches only upon achieving majority status, there is no regulatory limit on pre-recognition deal-making even assuming the terms are publicized. *Teamsters v. Terry, supra.* What terms might be made public to assist in obtaining an employee majority would be, rationally, only those that induce subscription, necessarily

interfering with employee choice. *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964). This is a particularly egregious danger with respect to mixed guard Unions under Section 9(b)3.

With an employee designated majority comes the labor organization's fiduciary duty of loyalty/fair representation which leads to recognition by the employer and then, and only then, to the joint obligation of labor and management to bargain. If the order is reversed, not only is federal labor policy violated, but the economic valuation of collective bargaining for all interested parties becomes compromised:

- There is the danger of up front favorable terms to one or both institutional parties without insuring the interests of the yet to be identified employee majority;
- There is economic uncertainty because the negotiated terms may become less valuable with the passage of time until majority status if achieved;
- There is the very real possibility of creating unforeseen limitations/rigidities regarding other terms or conditions not yet negotiated during future contract negotiations once exclusive majority status is demonstrated.

Agreement by an employer and a labor organization on terms or conditions of employment to be applied (or effectively denied) to a group of employees not yet identified or who have not designated, selected or elected the labor organization as their exclusive majority representative violates Sections 8(a)(1), 8(b)(1)(A), and 8(a)(2) of the Act.

B. Concern for the Fiduciary Duties Owed by a Labor Organization to All Employee Members of the Unit Requires Outlawing Any Agreements or "Understandings" Between a Target Employer and a Labor Organization Prior to the Establishment of Exclusive Majority Status

For centuries our jurisprudence has recognized that a person occupying a position of trust and responsibility to another must generally favor the interest of the beneficiary over its own and avoid compromising situations.

A trust holder clearly must not compromise its duty of loyalty to the principal by accepting a gift from a person with whom it is transacting business on behalf of the principal, but the same concerns would extend to the arrangement between a would-be trust holder and a party with whom he or she *will* negotiate on behalf of a prospective principal. When the third party becomes instrumental in assisting the agent's obtaining a coveted agency arrangement, the same temptations appear. Thus, an undisclosed prior relationship between an agent and a person with whom that agent will later deal adversely on behalf of the principal should be grounds for dissolving the fiduciary relationship and returning all proceeds and benefits to the principal.

In light of a Union's obligation to "exercise" its discretion in complete "good faith and honesty" and to "serve the interests of all" of the beneficiaries, it must avoid any pre-recognition agreements or understandings regarding the substantive terms of the prospective collective bargaining agreement. *Vaca v. Sipes*, *supra.*, at 177.

Under the Act, representative status can be conferred only by the employees, either directly through a secret ballot election or indirectly by the employer voluntarily recognizing the majority representative. The choice by an employer to exercise its right to oppose the Union or to remain neutral is a significant factor in the success of Unions in obtaining employee support. It is obvious that an employer's outright support for

Union representation is even better than neutrality. In pre-recognition settings, a Union has a strong self-interest in seeking favor of the employer of the employees it hopes to represent.

In the collective bargaining process, there is an inherent tension between the interests of the employer and the interests of the Union as the employees' representative. Our process assumes that this natural tension drives the dynamics and lessens the concern of disloyalty of the Union representative to its employee unit members. *NLRB v. Katz*, 369 U.S. 736 (1962) (wide discretion given the collective bargaining agent in resolving intra-membership conflicts during the bargaining process).

In a pre-recognition setting, however, the interests of the Union and those of the employees are not necessarily parallel, much less known. The employer holds valuable incentives to enhance the Union's chances of obtaining majority status - access to employees, neutrality, and even the willingness to agree to voluntary recognition. At this point, the Union does not yet have an explicit relationship with the employees and, absent majority status, no fiduciary duty of care and loyalty. Thus, there will be a strong temptation on the parts of the Union and of the employer to seek an understanding or agreement favorable to their mutual interests. The employer's interest is obtaining favorable terms for a prospective contract. The Union's interest is reducing or eliminating employer opposition in order to gain or ensure representative majority status. The immediate welfare of yet to be solicited employees becomes secondary to the mutual interests of the parties - reaching understandings serving their self-interests, namely, contractual terms or conditions and recognition.

The Board should continue to insist that a current, exclusive representative owes a duty of care and loyalty and fair representation to current unit members. But the Board should prohibit any understandings regarding prospective contract terms prior to majority representation when no duty of care is present.

C. Negotiation and/or Application of an After-Acquired Clause to Extend an Existing Contract to a New Facility Contingent on Proof of Majority Status is Unlawful Pre-Recognition Bargaining

In *Kroger Co.*, 219 NLRB 388 (1975), the Board held lawful a negotiated provision in a collective bargaining agreement that would extend the terms of the entire agreement to a new facility, provided majority status at the new unit is achieved. The Board was concerned only with evidence of the Union's majority at the new location.

Recently, in *Shaw's Supermarkets*, 343 NLRB No. 105 (2004), the Board remanded for hearing with respect to employer waiver of the right to a Board election in a case involving a contractual "after-acquired" clause mandating that the employer recognize the Union and apply the existing contract to each additional facility when an employee majority authorizes Union representation. While acknowledging *Kroger Co.*, the Board expressed interest in the clause's effect on unit appropriateness and whether the employer had clearly waived its right to a Board election.

Quite apart from whether voluntary recognition, card-check, and neutrality agreements are legal or wise, the issue of pre-recognition bargaining - the imposition of an existing contract or contract terms on a future, separate unit is obvious - it violates employees' Section 7 rights. Extending an extant contract on a yet to be validated employee majority in a separate unit undercuts the very purpose of the Act - to facilitate a process to *initiate* collective bargaining *only after* majority status has been

demonstrated. It ignores that the freedom of employees to choose a collective bargaining representative is for the purpose of having the chosen representative negotiate a contract according to the employees' interests.

Kroger confuses selecting a bargaining representative with the purpose of such selection - enabling employees "to bargain collectively through representatives of their own choosing." It is the bargaining, not the selection of a representative, that is the end. *Kroger* is inconsistent with the rationale of *Majestic Weaving* and should be overruled.

D. If an Employer's Delivery or Agreement to Deliver "Things of Value" to a Union, and if the Receipt or Acceptance of Same are Each Misdemeanors Subject to Fines or Imprisonment, Pre-Recognition Bargaining Should Be Considered an Unfair Labor Practice

Sections 302(a), (b) and (d) of the Labor Management Relations Act make it a misdemeanor subject to fine or imprisonment for any person to willfully deliver or receive or accept "money or other thing of value...[except as specifically excepted in subparagraph (c), e.g., wages paid for services rendered, satisfaction of a court judgment or arbitration settlement/decision, purchase/sale of an article/commodity at market price, dues check-off, payments to trust funds pursuant to collective agreement]". 29 U.S.C. §186(a), (b), (c) and (d); *Butchers Union, Local No. 498 v. Mercy-Memorial*, 862 F.2d 606, 608 (6th Cir. 1988).

The negotiation and agreement by an employer and a labor organization regarding wages, hours of work, and/or terms and conditions of employment reflect direct and indirect economic costs and/or benefits - necessarily "things of value" or presumed benefit to the person/party receiving or accepting the economic "value" and a presumed cost to the person/party delivering or parting with the "value in exchange." Pre-negotiation of terms might be undertaken for a variety of reasons - avoiding an

expensive corporate campaign, fending off competing Unions, determining labor costs in advance, obtaining favorable terms for the prospective unit or elsewhere.

While Congress intended to provide independent remedies for like or similar conduct, surely it contravenes national labor policy if the Board were to ignore that which is singled-out for harsh punishment. Although the Board's decision in *Kroger Co.* is wrong, as previously discussed, the Board did understand what was really going on, i.e., the trading of things of value for concessions in other areas. *Kroger Co.*, *supra.*, at 389.

VII. CONCLUSION

For the reasons set forth above, the Board should hold that pre-recognition bargaining and agreement on wages, hours and/or terms and conditions of employment *before* a majority of employees in an appropriate unit have designated, selected or elected their exclusive bargaining representative is unlawful. Similarly, after-acquired clauses should be held unlawful.

Respectfully submitted,

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