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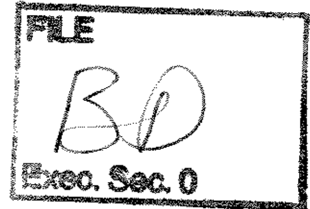

THE UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

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

Charging Party

and

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

Charging Party

and

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

Charging Party

______________________________________/

RESPONDENT UNION, UAW AND THE AMICUS CURIAE AMERICAN FEDERAL OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO) JOINT BRIEF IN OPPOSITION TO EXCEPTIONS

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The Respondent International Union, United Automobile, Aerospace & Agricultural Implement Workers of America ("UAW" or "Union") and the Amicus Curiae American Federal of Labor and Congress of Industrial Organizations ("AFL-CIO") jointly submit this brief in opposition to the General Counsel's and Charging Parties' exceptions.

INTRODUCTION

This case involves an ordinary recognition agreement providing that the Employer will recognize the Union upon a showing of majority support. The General Counsel and Charging Parties attempt to remove this case from the well-established line of precedent upholding and enforcing such agreements under a wholly novel theory. Citing provisions of the recognition agreement through which the parties state their common aspirations concerning a small number of subjects to be addressed in possible, future collective bargaining, the General Counsel and Charging Parties both misconstrue and seek an unjustified extension of the Board's holding in Majestic Weaving, 147 NLRB 859 (1964). But the agreement at issue here clearly, expressly, and effectively preserved and protected employee free choice, as conclusively demonstrated by the fact that employees have not chosen to be represented by the Union and remain unrepresented by the Union. For the reasons fully explained below, the Administrative Law Judge ("ALJ") correctly recommended that the Complaint be dismissed.

PROCEDURAL HISTORY

The Complaint in this case charges a violation of sections 8(a)(2) and 8(b)(1)(A) of the Act.[1] The relevant allegations in the Complaint are the following:

---

[1] Neither the General Counsel nor the Charging Parties have articulated any basis for the 8(b)(1)(A) charge. In the premature recognition cases such as ILGWU v. NLRB (Bernhard Altmann), 366 U.S. 731 (1961), and Majestic Weaving, 147 NLRB 859 (1964), the 8(b) violation was premised on the recognition and execution of a collective bargaining agreement absent majority support or when majority support was tainted by the premature recognition. See Bernhard-Altman Texas Corp., 122 NLRB 1289, 1293 (1959) ("just as an employer violates Section 8(a)(1) (as well as 8(a)(2)) by recognizing and contracting with a minority union, so, too, does a minority union violate Section 8(b)(1)(A) by executing and maintaining a collective-bargaining agreement in which it is recognized as the exclusive representative"). Here, the Union was never recognized and never reached a collective bargaining agreement. Thus, there was no 8(b)(1)(A) violation.

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.

A hearing was held on February 8, 2005, in Detroit Michigan. On April 11, 2005, Administrative Law Judge William G. Kocol recommended that the Complaint be dismissed.

FACTS

The relevant facts in this case are few and are not in dispute. The Employer, Dana Corp., makes automotive parts and light and heavy duty components for industrial and off-highway vehicles. Tr. at 61. The charge arises out of the Employer's St. Johns plant where it manufactures engine parts and employs approximately 305 employees. Tr. at 63.

The specific facts relevant to the charge are the following:

1. The Union is not and has never been the certified or recognized representative of employees at the St. Johns facility and no collective bargaining agreement exists at the facility. Tr. at 64.
2. The Union and the Employer entered into a Letter of Agreement ("agreement") on August 8, 2003. J-1.
   A. The Employer did not recognize the Union as the representative of the employees in the agreement. J-1.
   B. The agreement expressly provides that the Employer will <u>not</u> recognize the Union as the representative of the employees until the Union presents evidence of majority support. J-1 at 5-7. The agreement expressly provides:

i. On it's first page: "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 committed to an expeditious procedure for determining majority status. If a Dana employee chooses to be or not to be represented by the UAW, there will be no reprisals by the UAW or the Company due to their choice." J-1 at 1 (Purpose).

ii. "The Company and/or Union will not threaten, intimidate, discriminate against, retaliate against or otherwise take adverse action against any employee, based on his or her decision to support or not support representation by the Union. Nor will the Company or the Union take any adverse actions against each other because a facility's employees decide to be or not to be represented by the Union." J-1 at 4 (art. 2.1.3.3).

iii. "The 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." J-1 at 5 (art. 3.1).

iv. for procedures through which the Union could in the future demonstrate majority status and provides for verification by a neutral third party. J-1 at 5-7 (art. 3).

v. that the Employer will recognize the Union only "[i]n the event that the Union is found to have achieved majority status" pursuant to the agreement's procedures. J-1 at 7 (art. 4.1).

3. The parties did not agree to a collective bargaining agreement that would apply once the Union had demonstrated majority support and the Employer had recognized the Union.

A. The agreement is wholly silent on almost all terms and conditions of employment. J-1.

B. Only nine terms and conditions of employment are even mentioned in the agreement, but no specific contract language is agreed upon as to any of them. The entirety of the language in the agreement in any way relating to terms and conditions appears below:

i. Health care: "The parties agree that in labor agreements bargained pursuant to this Letter, the following conditions must be included for the facility to have a reasonable opportunity to succeed and grow. Healthcare costs that reflect the competitive

reality of the supplier industry and product(s) involved." J-1 at 9 (art. 4.2.4). "[I]n no event will bargaining between the parties erode current solutions and concepts already in place or scheduled to be implemented January 1, 2004 at Dana's operations which include premium sharing, deductibles, and out of pocket maximums." J-1 at 8 (art. 4.2.1).

ii. Classifications: "The parties agree that in labor agreements bargained pursuant to this Letter, the following conditions must be included for the facility to have a reasonable opportunity to succeed and grow. . . Minimum classifications." J-1 at 9 (art. 4.2.4).

iii. Work organization: "The parties agree that in labor agreements bargained pursuant to this Letter, the following conditions must be included for the facility to have a reasonable opportunity to succeed and grow. . . Team-based approaches." J-1 at 9 (art. 4.2.4).

iv. Attendance: "The parties agree that in labor agreements bargained pursuant to this Letter, the following conditions must be included for the facility to have a reasonable opportunity to succeed and grow. . . The importance of attendance to productivity and quality." J-1 at 9 (art. 4.2.4).

v. Feedback: "The parties agree that in labor agreements bargained pursuant to this Letter, the following conditions must be included for the facility to have a reasonable opportunity to succeed and grow. . . Dana's idea program (two ideas per person per month and 80% implementation." J-1 at 9 (art. 4.2.4).

vi. Improvement: Work organization: "The parties agree that in labor agreements bargained pursuant to this Letter, the following conditions must be included for the facility to have a reasonable opportunity to succeed and grow. . . . Continuous improvement." J-1 at 9 (art. 4.2.4).

vii. Compensation: "The parties agree that in labor agreements bargained pursuant to this Letter, the following conditions must be included for the facility to have a reasonable opportunity to succeed and grow. . . Flexible Compensation." J-1 at 9 (art. 4.2.4).

viii. Overtime: "The parties agree that in labor agreements bargained pursuant to this Letter, the following conditions must be included for the facility to have a reasonable opportunity to succeed and grow. . . Mandatory overtime when necessary (after qualified volunteers) to support the customer." J-1 at 9 (art. 4.2.4).

ix. Duration: minimum duration of four (4) years. J-1 at 8 (art. 4.4.2).

C. The agreement establishes a process for collective bargaining should the Union

demonstrate majority support and be recognized by the Employer. The provisions of the agreement relating to process are as follows:

i. The Employer agrees to bargain "promptly" after the demonstration of majority support. J-1 at 7 (art. 4.2).

ii. The parties agree that the "UAW's IPS Competitive Shops Department will actively participate in the negotiations." J-1 at 7 (art. 4.2).

iii. The parties agree to "bargain on an expedited basis" and "make every effort to arrive at a first contract within six (6) months." J-1 at 7-8 (art. 4.2).

iv. The parties agree that if a contract has not been agreed upon within five months, they will submit unresolved issues to the "UAW Dana Contract Competitiveness Committee" consisting of three members representing each party. J-1 at 8 (art. 4.2.3).

v. Finally, the parties agree that if a contract has not been agreed upon within six months, they will submit unresolved issues to a neutral third party for interest arbitration. J-1 at 9 (art. 4.2.5). The Union agrees not to strike and the Employer agrees not to lockout based on the agreement to arbitrate all unresolved disputes. J-1 at 12 (art. 6.1). The parties further agree to a procedure for the arbitration and that, with respect to economic issues, the neutral shall:

> approach the issue based on a competitive analysis of total wages and total benefits provided by those competitors who compete with the facility in question for the customer's contracts and the total wages and benefits at the Company's facilities making similar products. OEM's are not to be considered competitors nor shall this process include comparisons to suppliers who are operating under collective bargaining agreements that had previously been OEM collective bargaining agreements. The Neutral shall also 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. J-1 at 10 (art. 4.2.6).

4. The Union has never obtained majority support in the St. Johns unit and has never requested recognition. Tr. at 63-64. The Employer has never extended recognition. Tr. at 64.

5. The Union is the representative of the employees of the Employer in nine other units, with seven collective bargaining agreements covering 2,200-2,300 employees. Tr. at 62-63.

ARGUMENT

I. The ALJ Correctly Recommended that the Complaint be Dismissed on Procedural Grounds

The General Counsel misstates and thus fails to address the ALJ's procedural holding. The ALJ did not hold that the Complaint fails to allege that an agreement on substantive terms prior to a showing of majority support violates § 8(a)(2). Rather, the ALJ held that the theory of the case presented by the General Counsel at trial was that the parties' conduct here amounted to actual recognition. "[T]he General Counsel . . . argues that Dana's actions amounted to recognition of the UAW." ALJD at 6. This is clear from the General Counsel's Brief to the ALJ. The argument presented in the brief is that "Dana unlawfully recognized the UAW, and the UAW unlawfully accepted such recognition, by entering into the Letter of Agreement when the UAW did not represent a majority of the employees at the St. Johns plant." GC Brief to ALJ at i. It is this theory that the ALJ correctly held was not pleaded.

II. The ALJ Correctly Recommended that the Complaint be Dismissed on Substantive Grounds

This case involves an ordinary recognition agreement in which the Employer agrees to recognize the Union if it can demonstrate majority support in a unit. Congress clearly and expressly endorsed voluntary recognition when it provided in § 9 of the Act that employees could petition for an election only if "their employer declines to recognize their representative." 29 U.S.C. § 159(c)(1)(A)(I). The Board has frequently stated that "national labor policy favors the honoring of voluntary agreements reached between employers and labor organizations" and proclaimed that it "will enforce such agreements, including agreements that explicitly address matters involving union representation." Verizon Information Systems, 335 NLRB 558, 559 (2001) (quotation marks and citation omitted). The Board and the Courts of Appeal have uniformly upheld and enforced recognition agreements. See, e.g., Raley's, 336 NLRB 374 (2001); Central Parking System, Inc., 335 NLRB 390 (2001); Goodless Electric Co., 332 NLRB 1035 (2000), enf.

denied on other grounds, 285 F.3d 102 (1st Cir. 2002); MJS Garage Management Corp., 314 NLRB 172 (1994); Goldsmith-Louison Cadillac Corp., 299 NLRB 520 (1990); Alpha Beta Co., 294 NLRB 228 (1989); Jerry's United Super, 289 NLRB 125, 138 (1988); L&B Cooling, Inc., 267 NLRB 1, 1-2 (1983), enf'd, 757 F.2d 236 (10th Cir. 1985); CAM Industries, 251 NLRB 11 (1980), enf'd, 666 F.2d 411, 412-14 (9th Cir. 1982); S.B. Rest of Framingham, Inc., 221 NLRB 506 (1975); Houston Division, Kroger Co., 219 NLRB 388 (1975); Redmond Plastics, Inc., 187 NLRB 487 (1970); UAW v. Dana Corp., 278 F.3d 548 (6th Cir. 2002); United Steelworkers of America v. AK Steel Corp., 163 F.3d 403 (6th Cir. 1998); Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561 (2d Cir. 1993); Hotel Employees, Restaurant Employees, Local 2 v. Marriott Corp., 961 F.2d 1464 (9th Cir. 1992); Georgetown Hotel v. NLRB, 835 F.2d 1467, 1470-71 (D.C.Cir. 1987); Mo-Can Teamsters Pension Fund v. Creason, 716 F.2d 772, 775 (10th Cir. 1983), cert. denied, 464 U.S. 1045 (1984).[2] No party argues that the provisions of the agreement governing recognition are unlawful.

The agreement also contains bilateral limitations on the conduct of the parties during any organizing drives. Such provisions have also been universally sustained and enforced. See, e.g., Hotel Employees & Restaurant Employees v. Sage Hospitality Resources, 390 F.3d 206 (3rd Cir. 2004), cert. denied, 125 S. Ct. 1944 (2005); UAW v. Dana Corp., 278 F.3d 548 (6th Cir. 2002); Hotel Employees & Restaurant Employees, Local 2 v. Marriott Corp., 961 F.2d 1464 (9th Cir. 1992); UAW v. Dana Corp., 679 F.2d 634 (6th Cir. 1982), vacated as moot, 697 F.2d 718 (6th Cir. 1983). See also AK Steel Corp. v. United Steelworkers, 163 F.3d 403, 406-08 (6th Cir. 1998) (requiring District Court to enforce award that

[2] In Linden Lumber Division, Summer & Co. v. NLRB, 419 U.S. 301 (1974), the Supreme Court distinguished the facts in that case, where the Court upheld an employer's refusal to recognize a union that claimed majority support based on cards, from one in which "the employer breaches his agreement to permit majority status to be determined by means other than a Board election." 419 U.S. at 310 n. 10. In the same case, the Board also pointed out that the parties "never voluntarily agreed upon any mutually acceptable and legally permissible means, other than a Board-conducted election, for resolving the issue of union majority status." Id. quoting 190 NLRB 718, 721 (1971). In making both these points, the Court recognized that an employer's agreement to recognize a union upon proof of majority support is "legally permissible."

"ordered that . . . AK Steel stop issuing communications to employees and engaging in any conduct in violation of the Neutrality Agreement"). Again, the Complaint does not allege that the provisions of the agreement governing the parties' conduct during an organizing campaign are unlawful.

The General Counsel and Charging Parties attempt to remove the recognition agreement at issue here from the above-cited, well-established lines of precedent based on two features of the agreement: (1) its statement of broad principles concerning "conditions [that] must be included" "in labor agreements bargained pursuant to" the agreement, J-1 at 9 (art. 4.2.4), and (2) its creation of procedural ground rules for future bargaining that may take place if the Union demonstrates majority support and is recognized in any unit.[3] But these provisions clearly do not constitute recognition and do not constitute an enforceable agreement on substantive terms, much less a complete collective bargaining agreement. No case has ever held that such provisions render a recognition agreement unlawful.

The ALJ recommended that the Complaint be dismissed on substantive grounds for two reasons. First, he concluded that the Board's decision in Majestic Weaving is inapposite. Second, he concluded that the Board's decision in Houston Division of the Kroger Co., 219 NLRB 388 (1975), applies. The ALJ was correct in both respects.

A. Majestic Weaving is Inapposite

The General Counsel's and Charging Parties' exceptions rely almost exclusively on one case. The General Counsel argues that "Respondents' conduct constituted unlawful assistance even in the absence of unlawful recognition under Majestic Weaving." GC Brief in Support of Exceptions at 11. But the ALJ correctly rejected this argument because Majestic Weaving is distinguishable for two separate reasons:[4]

[3] As we explain infra at pg. 24, the latter argument is outside the scope of the allegations in the Complaint.

[4] In fact, Majestic Weaving is distinguishable for two additional reasons as discussed infra at n.11 and n.17.

(1) there was no recognition of the Union in this case and (2) there was no prenegotiation of a complete collective bargaining agreement or anything close to a complete agreement in this case.

1. There Was No Actual Recognition in This Case

a. Majestic Weaving involved the actual recognition of a union that lacked majority support. While the parties in Majestic Weaving deferred the formal act of execution of the fully negotiated collective bargaining agreement until after the acquisition of majority support, they did not so condition recognition. The Board makes this clear when it states:

> The [Bernhard-Altmann] Court also observed that there 'could be no clearer abridgment' of the Section 7 rights of employees than impressing upon a non-consenting majority an agent granted exclusive bargaining status. That is precisely what the Respondent did here, and the fact that it conditioned the actual signing of a contract with Local 815 on the latter achieving a majority at the 'conclusion' of negotiations is immaterial. In the *Bernhard-Altmann* case an interim agreement without union-security provisions was the vehicle for prematurely granting a union exclusive bargaining status which was found objectionable by the Board and the courts; in this case contract negotiation following an oral recognition agreement was the method. We see no difference between the two in the effect upon employee rights.

147 NLRB at 860 (emphasis added). In other words, in Majestic Weaving, the Board found that the employer had granted recognition to the union in "an oral recognition agreement" and that while the "actual signing of a contract" was conditioned on proof of majority support, the grant of recognition was not.[5] In this case, no such "premature recognition" was granted either expressly or implicitly. To the contrary, recognition was expressly conditioned on proof of majority support.

Moreover, the decision in Majestic Weaving rested solely on the Supreme Court's decision in ILGWU v. NLRB (Bernhard Altmann), 366 U.S. 731 (1961). Both cases concern "premature recognition." Yet in this case it is undisputed that recognition was not and still has not been extended to the Union. In

[5] This explains why the majority of cases that cite Majestic Weaving do so for the proposition that it is unlawful for an employer to recognize a union absent majority support and cite Majestic Weaving and Bernhard-Altmann for the same proposition. See infra at n.6.

Bernard Altmann, the employer granted the union the status of exclusive representative before it obtained majority support. The illegality of the action resulted from the fact that it presented the employees with "a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative." 366 U.S. at 766. This action had the effect of "impressing that agent upon the nonconsenting majority." Id. at 737. The Court found that "the violation which the Board found was the grant by the employer of exclusive representation status to a minority union." 366 U.S. at 736.

Similarly, in Majestic Weaving, the Board found that the employer "negotiated with Local 815, despite its minority status, as the exclusive representative of its employees." 147 NLRB at 860 (emphasis added). The Board held "that there 'could be no clearer abridgment' of Section 7 rights of employees than impressing upon a non-consenting majority an agent granted exclusive bargaining status. That is precisely what the Respondent did here." Id. at 860 (emphasis added). In Majestic Weaving, as in Bernhard Altmann, the unlawful assistance was the recognition of the union as the exclusive bargaining agent.

No case following Majestic Weaving has found a violation of the Act when the employer did not, in fact, recognize the union.[6]

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[6] In fact, very few cases follow or even cite Majestic Weaving. A LEXIS search produces 23 Board decisions that cite Majestic Weaving in the 41 years since it was decided. Thirteen of these cases cite Majestic Weaving for reasons wholly unrelated to this case: three cite it in relation to its holding concerning a discriminatory discharge, Norfolk Tallow Co., 154 NLRB 1052, 1059 (1965) Shakespeare Co., 152 NLRB 609, 616, 616 (1965); R. & R. Screen Engraving, Inc., 151 NLRB 1579, 1603 (1965); six cite it in relation to its holding concerning remedies, Sinko Manufacturing and Tool Co., 154 NLRB 1474, 1476 (1965); Combustion Engineering, Inc., 181 NLRB 602, 609 (1970); IUE (Westinghouse Electric Corp.), 180 NLRB 1062, 1063 (1970); Lianco Container Corp., 173 NLRB 1444, 1449 (1969); Clement Brothers Co., 165 NLRB 698, 713 (1967); W.J. Graham, 164 NLRB 679, 697 (1967); one cites it concerning supervisory taint in the collection of cards, Department Store Food Corp. of Pa., 172 NLRB 1203, 1209 (1968); two cite only the Second Circuit's decision concerning changing rules by adjudication, Our Way, Inc., 268 NLRB 394, 413 (1983); New York Lithographers (Publishers Association of New York City), 258 NLRB 1043, 1049 (1981); one cites only the Second Circuit's decision concerning agency, Milgo Industrial, Inc., 203 NLRB 1196, 1203 (1973). Six cases cite Majestic Weaving simply for the proposition that an employer cannot recognize a union that lacks majority support – in other words, simply as following Bernhard-Altmann: American Bakeries Co., 280 NLRB 1373, 1374 (1986); EG & G Florida, Inc., 279 NLRB 444, 453 (1986); Nitro Super Market, Inc., 161 NLRB 505 (1966); Pittsburgh Metal Lithographing Co., 158 NLRB 1126, 1133 (1966); Hampton Merchants Ass'n, 151 NLRB 1307, 1309-10, 1326 (1965) (supervisory assistance in collection of cards tainted majority); Cowles Communications, Inc., 170 NLRB 1596, 1607 (1968) (and also concerning remedies at 1613). In one case, Sturgeon Electric Co., 166 NLRB 210, 210 (1967), the Board held that the employer had unlawfully refused to bargain with one union and that its subsequent entry into an agreement with a rival union at a time when it lacked majority support was no defense. Finally, in three cases, Majestic Weaving is discussed in relation to issues that are not reached either by the ALJ or the Board. In SMI of Worcester, Inc., 271 NLRB 1508, 1518-20 (1984), the ALJ

In this case, in clear contrast to Bernhard Altmann, Majestic Weaving, and their progeny, the Employer never recognized the Union. Nor did the Employer refuse to enter into the same preliminary discussions it engaged in with the UAW with other unions. Thus, here there was no "premature recognition," there was no exclusive recognition, in fact, there was and remains no recognition.

In order to sustain the charge in this case, the General Counsel and the Charging Parties argue that any agreements concerning terms and conditions of employment, no matter how limited and partial, even if they are expressly conditional upon a showing of majority support and subsequent recognition, violate section 8(a)(2). But this position was rejected by the Supreme Court in Retail Clerks v. Lion Dry Goods, 369 U.S. 17 (1962). In that case, a union that was no longer the representative of employees negotiated a strike settlement agreement with an employer. The agreement set some terms and conditions of employment, providing, for example, for reinstatement of strikers, continuation of seniority rights, and no reduction of pay or benefits. Id. at 20 n. 4. Like the agreement here, the agreement in Lion Dry Goods expressly provided that the union was not the representative of employees and that it would not be recognized as such until it demonstrated majority support (in Lion Dry Goods, the agreement specified that the demonstration had to be through a Board election). The agreement further provided for arbitration of disputes arising under it and, when the employer later failed to comply with the agreement, the union demanded arbitration, the company participated, and an award was issued in favor of the union which the union sought to enforce in court. The Supreme Court held that the agreement was enforceable under section 301 despite the employer's specific objection that the union was not the properly recognized representative of the employees. Id. at 28-29. If the General Counsel and Charging Parties

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discussed the issue but decided that it could not be reached because it had not been alleged in the complaint. In American Standard Cargo Container Co., 151 NLRB 1399 (1965), the ALJ cited testimony that the union entered into negotiations with the employer prior to contacting any employees, but the Board expressly rejected any finding that the employer recognized the union before it obtained majority support. Id. at 1408, 1400 n. 1. Finally, Eltra Corp., 205 NLRB 1035 (1973), in which the ALJ distinguished Majestic Weaving, but then decided he need not reach the issue, is discussed in the text. Majestic Weaving has thus never been understood by the Board to stand for the proposition

were correct that any agreement between a union not yet enjoying majority support and an employer concerning substantive terms of employment constitutes unlawful employer assistance, even when the agreement expressly provides that the union is not the representative and will not be until it obtains majority support, Lion Dry Goods could not have been decided in favor of the union. Majestic Weaving thus cannot stand for the proposition advanced by the General Counsel and Charging Parties.

This is exactly how the ALJ construed and distinguished Majestic Weaving in Eltra Corp., 205 NLRB 1035 (1973). In that case, the union and employer were party to a national agreement that the union contended applied to any newly organized unit. When the employer refused to apply the agreement after the union was certified as the representative of employees in a new unit, the union filed a charge and the employer argued the agreement was unenforceable because it violated section 8(a)(2), citing Majestic Weaving. 205 NLRB at 1038-39. The ALJ rejected this defense, reasoning:

> the Majestic Weaving case is clearly distinguishable from the instant situation. There, the employer granted recognition to a minority union. Here, the [Employer] recognized the International Union as the representative of the Visalia employees only after the Union had demonstrated its majority status in a Board-conducted election. . . . In short, I am of the opinion that Majestic Weaving is not helpful in deciding the issue posed by the instant dispute.

Id. at 1039-40. The ALJ held that the agreement was valid, reasoning:

> Is it unlawful under the Act for an employer to agree that a collective-bargaining agreement covering employees of the employer who are already represented by a union shall be applied in a different unit, to other employees not represented by this union, provided those employees designate the union as their bargaining representative . . . ? The Board's previous decisions involving such agreements seem to implicitly sanction their validity. . . . The more recent Majestic Weaving case does not, for the reasons previously discussed, detract from the validity of [these cases].

Id. at 1040.[7] This case is analogous to Eltra and not to Majestic Weaving because both recognition and

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advanced by the General Counsel in this case.

[7] The Board did not review the ALJ's conclusion on this question because it agreed with his primary holding that the national agreement did not apply to the unit in question. Eltra Corp., 205 NLRB at 1035 n. 1.

application of the agreement were expressly conditioned on a prior showing of majority support.

b. The distinction we are making here is a distinction of substance. The agreement here expressly preserved employees' choice while the agreement in Majestic Weaving did not.[8] In several reported cases arising out of agreements parallel to that at issue here, employees have exercised their freedom to choose by rejecting representation by a union that had negotiated some or all of the terms of a collective bargaining agreement that would have applied had a majority of employees chosen to be represented. In these cases, unions unsuccessfully alleged that it was an unlawful threat for employers to state that various unfavorable terms of an agreement would apply if the union won an election. It appears that the employees in these cases rejected representation based on their evaluation of the terms of the agreement that would have applied had they opted for recognition. The chance to make such an evaluation enhances rather than diminishes the rights of employees to freely choose whether to be represented.

For example, in Crown Cork & Seal Co. v. NLRB, 36 F.3d 1130 (D.C.Cir. 1994), after the union lost an election, it filed unfair labor practice charges based, in part, on the employer's preelection statement that employees would lose their existing retirement plan and get something worse if the union won the election. Id at 1140. The Court rejected the charge on the grounds that the prediction was supported by the terms of a master contract (which the parties had agreed to apply if the union won the election). Id at 1140-41. See also id. at 1136-40 (also rejecting charge based on alleged threat of layoffs based on "prospective changes in cost at the . . . plant – changes that the record showed would inevitably result from the Master Agreement"). Similarly, in General Electric Co. v. NLRB, 117 F.3d 627 (D.C.Cir. 1997),

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[8] While the parties in Majestic Weaving "conditioned the actual signing of a contract . . . on the [union] achieving a majority at the 'conclusion' of negotiations," 147 NLRB at 861, the initial recognition was not conditional and the agreement did not state that its application was conditional. In other words, deferral of the signing was a mere formality.

the union lost an election and filed an unfair labor practice charge based, in part, on the employer's prediction of a loss of holidays due to "differences between the National Agreement and practices at the [unrepresented] plant." Id. at 632. The Court rejected the charge because the "predictions that employees would lose their eleventh holiday and two percent vacation pay if they came under the National Agreement were . . . grounded in objective fact." Id. These cases demonstrate that employee free choice is preserved, in fact, enhanced, when both recognition and the application of contract terms is expressly conditioned on a showing of majority support.

c. There are strong policy reasons for not extending the holding in Majestic Weaving as sought by the General Counsel and Charging Parties. For employees, knowledge about what representation will mean promotes free and informed choice. If the law allows employers to make dire predictions of what will happen if employees choose unionization[9] and allows unions to make extravagant promises,[10] surely it permits the parties to reach an agreement about what unionization will actually mean and so inform the employees so that the employees will actually know what will happen if they unionize. As Professor Samuel Estreicher has observed, all too often,

> Workers . . . must decide on union representation against a backdrop of uncertainty. All too often they are voting without an understanding of the union's bargaining objectives and acumen.

Estreicher, "Freedom of Contract and Labor Law Reform: Opening Up the Possibility for Value-Added Unionism," 71 *NYU Law Rev.* 827, 835 (1996). Free choice is not promoted, he points out, when "workers [are] casting lots with limited information." Id. at 838.

Employers, too, would be forced to make decisions about what position to take on the union

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[9]See, e.g., Savers, 337 NLRB 1039 (2002), in which the Board held that a supervisor's statement that "if the union ever did come in, the store wasn't making enough money to . . . pay off higher wages, and it would be a possibility that everybody would lose their job" was held to be a permissible prediction of future events.

question from behind a legally imposed veil of ignorance if the General Counsel's and Charging Parties' position is accepted. In a 1987 report published by the Department of Labor, two respected management lawyers explained:

> [A] relationship with the union is one of the most significant business transactions in which an employer can engage. If that relationship is not successful, the results can [be] disastrous. As in any other potential business relationship, the employer should be able to talk to the other side and perhaps even reach some preliminary understandings before it determines whether it wants to avoid such a relationship or not. . . .
>
> . . . . [B]efore embarking on a course of action – whether pro-union, anti-union or neutrality, employers should have enough information to allow for an intelligent decision. . . .
>
> [T]he value of engaging in preliminary discussions with unions should not be overlooked. Meeting with a union early on to ascertain its goals and representation philosophy enables the employer to more realistically assess (1) the potential impact of the union on the employer's operations; and (2) the wisdom of expending company resources to campaign against the union.

Stanley J. Brown and Henry Morris, Jr., "Pre-recognition Discussions with Unions," in *U.S. Labor Law and the Future of Labor-Management Cooperation, Second Interim Report* 98, 99 (U.S. Department of Labor, Bureau of Labor-Management and Cooperative Programs Oct. 1987). Thus, these employer representatives recommend the following sensible steps whose legality the General Counsel and Charging Parties attempt to cast into question.

> First, employers should establish at the outset that they only intend to engage in exploratory discussions, not in collective bargaining. Second, they should make clear that they will not extend recognition to the union unless and until it demonstrates majority support. Third, any understandings reached with the union during preliminary discussions should expressly be contingent on the union's demonstration of majority support. Fourth, all such agreements should unequivocally reaffirm the employees' right freely to select the representative of their choice.

Id. at 103. These are exactly the steps followed in this case.

In a related context, the Board itself has recognized that preliminary discussions between

employers and unions further the policies of the Act and that it would be inconsistent with those policies if employers were "compelled to simply deny the union the opportunity to express its objectives, or further still, to avoid altogether any contact with the union." Terracon, Inc., 339 NLRB 221, 225 (2003), aff'd sub nom. International Union of Operating Engineers, Local 150 v. NLRB, 361 F.3d 395 (7th Cir. 2004). From the perspective of both employees and employers, then, it is advantageous to know as much as possible about what representation will mean before deciding whether to support or oppose such representation. Extending Majestic Weaving to bar employers and unions from reaching any agreements on substantive terms, even if recognition and application of any such agreements are expressly conditional on a showing of majority support, would prevent both employees and employers from realizing these advantages.

Put simply, the General Counsel and Charging Parties have proposed a rule that has the potential to make all parties worse off. In many situations, a majority of employees may want union representation for specific reasons and may be willing to sacrifice other gains in order to obtain representation and specific elements in a subsequent collective bargaining agreement. For example, employees may want the job security arising from a just cause provision and a wage increase and be willing to sacrifice a larger contribution by their employer toward their health insurance. Their employer, on the other hand, may not want to expend the time and money necessary to conduct an anti-union campaign so long as it can be certain that the union will not seek a larger contribution toward employees' health insurance. In this situation, all parties gain if they can have preliminary discussions and enter into agreements conditional on a showing of majority support. The fact that all parties benefit is objectively demonstrated by (1) the agreement of the employer, (2) the agreement of the union, and (3) the subsequent showing of majority support among employees. If the General Counsel's and Charging Parties' position is adopted, such win-win opportunities will be categorically precluded.

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[10]See, e.g., Smith Co., 192 NLRB 1098, 1101 (1971).

d. Under the case law and the policies underlying the Act, an agreement on substantive terms of employment that is expressly conditional on a showing of majority support and subsequent recognition is far different than an agreement to recognize that delays only the actual signing of a collective bargaining agreement until after a showing of majority support. Majestic Weaving is thus inapposite.[11]

The General Counsel and Charging Parties will, no doubt, reply that here the agreement did not enhance employee free choice because the terms of the agreement were not disclosed to the employees. However, if the General Counsel and Charging Parties are correct that the application of Majestic Weaving turns on the extent of disclosure of any agreed upon terms, they are also correct that the case must be remanded for further development of the record on this question.

The only evidence in the record concerning disclosure of the agreement is a press release from the Employer. CP Exhibit 4. But there is actually no evidence in the record that the press release was issued. Tr. at 74-75. Moreover, nothing in the release suggests that the agreement applies to unrepresented plants. Even if this was not so, nothing in the release suggests the parties have reached agreement on any substantive terms that would apply in unrepresented plants. The release says only, "The partnership agreement establishes collective bargaining and representation principles . . . . The

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[11] In addition, in Majestic Weaving, the Board found that the employer had recognized the union that lacked majority support as the exclusive representative of its employees. The Board expressly stated that, "despite its minority status," the employer negotiated with the union "as the exclusive representative of its employees." Id. at 860 (emphasis added). This finding is well supported by the evidence in the case that showed that a rival union had both presented evidence of majority support and made a request to bargain which was refused by the employer. Id. at 861.

In this case, not only was recognition not granted, exclusive recognition was not granted. There is no evidence that any rival union was on the scene or that the Employer would not have entered into a parallel, nonexclusive agreement with any other union upon request. In Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938), the Supreme Court upheld an agreement between a union and an employer on exactly this grounds. In that case, the employers and union were parties to agreements that set terms only for members of the union. The Court recognized the employees' statutory right to select an exclusive representative, but held that "[n]othing that the employers had done deprived them of that right." Id. at 236. The Court reasoned, "Nor did the contracts make the Brotherhood and its locals exclusive representative for collective bargaining. On this point the contracts speak for themselves." Id. at 236-37. The same is true here.

Just as in the cases involving employer grants of access to unions seeking to organize their employees, there is no violation of § 8(a)(2) unless a rival union requests to enter into a parallel, conditional agreement and the request is denied. See, e.g., Detroit Medical Center Corp., 331 NLRB 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. . . . There is no contention that the Employer would not have granted a similar request for access from the Intervenor."). Here, there was no such demand or denial. For this reason as well, Majestic Weaving is inapposite.

agreement also establishes a cooperative approach with the goal of ensuring that labor agreements negotiated by the parties are competitive for Dana and its people."[12] Nothing in this language suggests that the parties had reached agreement on any substantive terms.

On this record, the General Counsel's entire section 8(a)(2) theory that the execution of the agreement unlawfully assisted the Union by granting it "privileged status in the eyes of employees" loses its foundation. If the unrepresented employees were unaware of any agreements on substantive terms or did not know that such agreements applied to them, then the agreement could not have influenced them in any way. The evidence the General Counsel and Charging Parties attempted to introduce would actually have undermined their allegations. A secret agreement might violate some other provisions of the Act, but it cannot possible constitute unlawful "assistance" under section 8(a)(2).[13]

Finally, if the General Counsel and Charging Parties are correct that the application of Majestic Weaving turns on the extent of disclosure of any agreed upon terms, they are also correct that the case must be remanded for further development of the record on this question. The Second Circuit suggested exactly this approach to Majestic Weaving in its decision refusing to enforce the decision on procedural grounds. The Second Circuit suggested that the Board's decision could be read to permit pre-recognition bargaining so long as employees are informed of any resulting agreement and the application of the agreement is conditional on majority support of union representation. "We cannot tell, for example, how far the new rule depends on knowledge of the negotiation by the employees, or whether a full disclosure

[12] It should also be noted that the release states, "This new partnership agreement . . . supports the freedom our people have always enjoyed to choose whether or not they wish to be represented by a union." CP Exhibit 4.

[13] Moreover, even if the reference to "collective bargaining principles" could be understood to suggest the parties had reached agreement on some substantive terms, if only the fact and not the terms of such agreements was disclosed, employees were free to decide for themselves whether they desired to be represented by a union that had agreed not to disclose to them terms it had already agreed upon. The General Counsel argues that such limited disclosure would lead employees to believe the Union is somehow in a privileged position in relation to the Employer. But it is just as likely that it would lead employees to distrust the Union or consider it weak in relation to the Employer. In either case, employees were able to make a free choice based on what the Union was able to or chose to disclose to them.

of the condition to them would save the situation." NLRB v. Majestic Weaving Co., 355 F.2d 854, 862 n. 4 (2d Cir. 1966)

The General Counsel and Charging Parties point out that the ALJ rejected testimony offered by them on this issue. But the Union also attempted to introduce evidence at the hearing demonstrating that the terms of the agreement were communicated to employees and the Union's offer was similarly rejected. Tr. at 79-80.[14] Thus, if it is determined that the holding in Majestic Weaving does not apply when employees know the contents of any agreements regarding substantive terms at the time they make the choice to be represented (which has not yet happened in this case), the record should be reopened or the case remanded so that the Union can introduce the proffered evidence. In other words, if Majestic Weaving is construed in this way, the exclusion of evidence offered by both sides was error.

2. There Was No Enforceable Agreement on Substantive Terms or Complete Collective Bargaining Agreement in This Case

In Majestic Weaving, the Board found that the employer and union had negotiated and drafted a complete collective bargaining agreement, leaving only the formal act of signing until after the acquisition of majority support. The Trial Examiner found that the parties met three times before any showing of majority support and that, at the third meeting, "they finally agreed upon terms, which [the employer's labor relations consultant] was to draft into an agreement." Id. at 867. At the next meeting of the parties, the contract was executed. At the same meeting, "[i]mmediately before the signing of the contract," authorization cards were given to the employer. Id.

In this case, in contrast, no enforceable agreement on terms was reached, much less a complete agreement or anything close to a complete agreement. Indeed, the General Counsel does not allege in the Complaint that the parties reached a collective bargaining agreement, but only that the Letter of

[14] In fact, the General Counsel's offer of proof stated that his witness would testify that a notice was posted informing employees that they

Agreement "set forth terms and conditions of employment to be negotiated in a collective bargaining agreement should Respondent Union obtain majority status." Complaint ¶ 9. While the General Counsel's and the Charging Parties' exceptions are full of characterizations of the agreement's terms, they do not point to any specific language that could simply be incorporated into a collective bargaining agreement as a final, complete provision. The closest the agreement comes to suggesting what terms of employment might be established in a first contract (should the Union be recognized at some future time after a showing of majority support) is the identification of eight "conditions" deemed necessary for a covered "facility to have a reasonable opportunity to succeed and grow." J-1 at 9 (art. 4.2.4).[15] Seven of the stated conditions are little more than vague, aspirational goals, such as, "Continuous improvement" and "Healthcare costs that reflect the competitive reality of the supplier industry and the product(s) involved," which say almost nothing about the actual terms of any future agreement. "Indefinite and aspirational language" of this sort "does not constitute an enforceable promise." Ullmo ex rel. Ullmo v. Gilmour Academy, 273 F.3d 671, 677 (6th Cir. 2001).

The only condition that has any substance is the one providing for "[m]andatory overtime when necessary (after qualified volunteers) to support the customer." J-1 at 9 (art. 4.2.4). But even as to this issue, "the requisite meeting of the minds as to all substantive matters did not occur." Luther Manor Nursing Home, 270 NLRB 949, 949 n. 1 (1984), aff'd sub nom. United Food and Commercial Workers Union, Local No. 304A v. NLRB, 772 F.2d 421 (8th Cir. 1985). The parties have not attempted to define when such overtime will be deemed "necessary," who are "qualified volunteers," or how the overtime will be assigned. Nor is any specific contract language agreed upon. And, of course, one contract clause does not a collective bargaining agreement make.

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could read the agreement at a specific location in the plant and that employees did so. Tr. at 50.

[15] Tellingly, these "conditions" are set forth in a section of the agreement headed, "Following Proof of Majority Status." J-1 at 7 (art. 4).

Even if any of these "conditions" are considered enforceable, none of them sets forth a complete agreement, even on the narrow subject it addresses. Thus, for example, even if the agreement binds the parties to some "premium sharing" for health insurance, J-1 at 8 (art. 4.2.1), it does not provide how premiums must be shared, that the Employer could not demand lower benefits if the Union insisted on a lower share of the premiums being born by employees, or that the Union could not demand better benefits if the Employer insisted on a higher share of the premiums being born by employees.[16] Therefore, even if the Union had demonstrated majority support and been recognized, substantial bargaining on this subject and on every subject would have been required in order to reach a collective bargaining agreement.

This distinction is again one of substance. It belies the Charging Parties' unfounded assertion that the preliminary discussions and aspirational commitments of the Union and Employer somehow bound the employees to terms and conditions of employment they would have rejected after a showing of majority support and subsequent recognition – i.e., to substandard terms. The employees would not have effectively been bound to anything had these events occurred (which, as demonstrated supra, is highly unlikely as employees will reject representation if it will lead to inferior terms of employment) because a complete agreement had not been reached. The Union could have effectively redressed any perceived deficiencies in any prior, binding commitments through the negotiation of both the other terms of a complete contract and the actual terms governing subjects addressed only in broad strokes in the agreement.

Even if any of the "conditions" in the agreement were enforceable and even if they set forth a complete and final agreement on the small number of subjects addressed, this case would still be far

[16] Even the agreement's commitment on the duration of a contract, J-1 at 8 (art. 4.2.2), is, in effect, subject to modification during future bargaining, for example, through provisions for reopening of specific subjects or upon the occurrence of specific conditions.

different from Majestic Weaving where a complete collective bargaining agreement was reached and fully drafted and only execution was deferred. In a case like Majestic Weaving, where a complete collective bargaining agreement was negotiated, employees might well understand recognition to be a *"fait accompli"* as the Court found it to be in Bernhard-Altmann, 366 U.S. at 736. They might believe that the deal has already been fully consummated and their contrary choice would not be registered or respected. This sense of inevitability produced by the negotiation of a complete collective bargaining agreement is thus what produces the "deceptive cloak of authority" described in Bernhard-Altmann. Id. Here, in contrast, even if the agreement contained binding commitments relating to substantive terms of employment, no reasonable employee would understand the parties' agreement on a mere handful of terms as such a *fait accompli.* Construed in a manner most favorable to the General Counsel's and the Charging Parties' theory, the agreement said absolutely nothing about the vast majority of terms and conditions of employment, including but not limited to, hours, holidays, pensions, promotion, discipline, and discharge. Thus, the Board need not decide in this case whether something closer to the complete agreement at issue in Majestic Weaving might violate section 8(a)(2) despite the fact that it left some terms for negotiation. Here, any agreements that were reached were on such a small number of subjects and were so limited in scope that no employee could reasonably have understood them to make recognition a *fait accompli.*

Finally, the agreement also describes the procedures the parties intend to follow should collective bargaining begin. These provisions commit the parties to "bargain on an expedited basis for the first contract" and to "make every effort to arrive at a first contract within six (6) months following proof of majority status." J-1 at 7-8 (art. 4.2). In order to achieve the goal of "arriv[ing] at a first contract within six (6) months following proof of majority status," the agreement provides that "[i]n the event the Company

and the Union are not able to reach an agreement within five (5) months following certification, the parties agree to submit the unresolved issues to a joint UAW Dana Contract Competitiveness Committee comprised of three (3) Company and three (3) Union members." J-1 at 8 (para. 4.2.3). This committee is charged with the task of "seek[ing] a satisfactory resolution that does not materially harm the financial performance of the facility and/or inhibit the facility's opportunities for growth, giving due consideration to the needs of the employees." J-1 at 8-9 (art. 4.2.3).

If the expedited bargaining and Competitiveness Committee review process set forth in the agreement do not produce a collective bargaining agreement within six months, the parties agree to "submit the unresolved issues to [a] Neutral for interest arbitration." J-1 at 9 (art. 4.2.5). The interest arbitration procedure defined in the agreement calls for the parties to "present a list of unresolved issues as reflected in the final offers made at the bargaining table." J-1 at 9 (art. 4.2.6). The Neutral may only "select between the final offer made by the Company and the final offer made by the Union" and has "no authority to add to, subtract from, or modify the final offers submitted by the parties or to engage in mediation of the dispute." Id. The Neutral must "select the final offer package found to be more reasonable in view of the information presented at the hearing." Id. Consistent with the parties' agreement to follow defined processes in establishing a collective bargaining agreement, both the Union and the Company agree not to engage in any work stoppages "during the period beginning on the date the Union [initiates the agreed-upon representation process] through the resolution of the first contract." J-1 at 12 (art. 6.1).

The General Counsel has not alleged that any of the provisions related to the procedures to be used in any future collective bargaining are unlawful. The Complaint alleges that the 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. The Complaint does not allege that the purely procedural terms of the agreement which do not "set[] forth terms and conditions of employment" are unlawful.[17]

There would be no legal basis for alleging that the procedural aspects of the agreement are illegal, as neither Majestic Weaving nor any other case supports that proposition. Most obviously, the Union's agreement not to strike cannot violate §§ 8(a)(2) or 8(b)(1)(A).[18] None of the provisions that simply describe how the parties will bargain should bargaining commence are "terms and conditions of employment." In fact, the Board has repeatedly held that "an interest arbitration clause...relates to the relationship between the parties rather than to wages, hours, or other terms and conditions of employment." Laidlaw Transit, Inc., 323 NLRB 867, 869 (1997) (and cases cited therein). The Board has found that such clauses do not "relate to wages, hours, and terms and conditions of employment, but instead appl[y] only to the processes available to the parties in the event they c[an] not reach agreement." Sheet Metal Worker Local 59 (Employers Ass'n), 227 NLRB 520, 520 (1976).

An employer can inform employees that it will reach agreement with a particular union should the employees choose to be represented by that union. Thus, in Coamo Knitting Mills, Inc., 150 NLRB 579, 585, 595 (1964), the Vice President of the company told the assembled employees, "The Company will

[17] Moreover, the Complaint alleges that the violation was the agreement on "terms and conditions of employment to be negotiated in a collective bargaining agreement should Respondent Union obtain majority status." Complaint ¶ 9. Not only are the procedural provisions of the agreement not "terms and conditions of employment," they are not "to be negotiated in a collective bargaining agreement." The agreements concerning the process for negotiating should the Union obtain majority support, including the no strike pledge and interest arbitration provision, would apply only during the period between a showing of majority support and execution of a collective bargaining agreement. The agreement does not provide that these provisions must be integrated into any such collective bargaining agreement. Indeed, the no strike provision expressly expires upon "resolution of the first contract." J-1 at 12 (art. 6.1). Thus, for this reason as well, the procedural provisions are outside the scope of the Complaint.

[18] Moreover, as the ALJ concluded, the Union cannot effectively waive employees' right to strike until it is recognized after a showing of majority support. ALJD at 7. Indeed, the agreement did not purport to waive employees' right to strike at all, providing only, "The Union agrees that it will not engage in any strike or work stoppage." J-1 at 12 (art. 6.1).

negotiate a contract with the Union, which we believe will be mutually beneficial." The Board held that this and other conduct did not violate section 8(a)(2). Id. at 582. The procedural provisions of the agreement in this case, including the interest arbitration provision, gave no more assistance to the Union than did the employer's statement in Coamo.

Because there were no binding commitments on "terms and conditions of employment" and no complete agreement or anything close to one in this case, the ALJ correctly concluded that Majestic Weaving is inapposite.[19]

B. The ALJ's Factual Finding that There Was No Tacit Recognition is Supported by Substantial Evidence

Recognizing that the application of Majestic Weaving depends on a finding that the Employer has recognized the Union, as demonstrated above, the General Counsel argues, in the alternative, that the bargaining between the parties amounted to "tacit recognition of the Respondent Union." GC Brief at 19. The Board has clearly held, however, that such negotiations do not constitute recognition and thus impose a duty to bargain on an employer unless they are accompanied by a "clear, express, unequivocal statement of recognition." Nantucket Fish Co., 309 NLRB 794, 795 (1992). The Board must apply the same standard for determining if there has been tacit recognition when the union is arguing that recognition was bestowed as when the union is arguing that recognition has not been bestowed. In this case, there was no "clear, express, unequivocal statement of recognition." In fact, there was a clear, express, unequivocal statement of nonrecognition. Thus, any implication that could have been drawn

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[19] Finally, in Majestic Weaving, the Board found other forms of unlawful support for the union. 147 NLRB at 859. In fact, the primary holding in the case was that the employer gave unlawful assistance when its personnel manager accompanied a union representative throughout the plant while the latter solicited authorization cards. Id. at 860. Under Bernhard-Altmann, the question is whether the employer's actions, viewed as a whole, afforded the union "a deceptive cloak of authority with which to persuasively elicit additional employee support." 366 U.S. at 736. In Majestic Weaving, this improper authority was granted through both actual recognition and unlawful supervisory assistance in the solicitation of cards. Here, the only allegation in the Complaint relates to the agreement between the Union and the Employer. The agreement alone, expressly conditional on an uncoerced showing of majority support, did not give the Union any "deceptive cloak of authority."

If the Board disagrees that Majestic Weaving is inapplicable here for the above-stated reasons, it should overrule Majestic Weaving.

from the facts that the Employer met, negotiated with, and reached an agreement with the Union are contradicted by the express terms of the agreement and the undisputed fact that the Employer did not recognize the Union and still has not done so.

The cases cited by the General Counsel are inapposite. In Lyon & Ryan Ford, Inc., 246 NLRB 1 (1979), enf'd, 647 F.2d 745 (7th Cir. 1981), cert. denied, 454 U.S. 894 (1981), the union demanded recognition and the employer asked to see and reviewed the evidence of majority support. Id. at 3-4. The Board found that the employer "recognized the Union . . . upon [its agent's] checking the employees' authorization and application for membership cards." Id. at 4. Here, the Union made no demand, the Union submitted no cards, the Employer checked no cards, and the Employer did not recognize the Union. The other two cases cited by the General Counsel Terracon, Inc., 339 NLRB 221 (2003), and Ednor Home Care, Inc., 276 NLRB 392 (1985), both find no recognition despite the fact that the Union demanded recognition and the employer reviewed authorization cards in both cases. See 339 NLRB at 221; 276 NLRB at 393. The dicta the General Counsel cites from Ednor is inapposite because no form of bargaining can evidence recognition when the union has made no demand for recognition, the union has presented no evidence of majority support, the employer has not reviewed any evidence of majority support, and the parties have expressly agreed that recognition is not being extended.

The Court of Appeals in Terracon affirmed that there must be "clear and unequivocal evidence that [the employer] was recognizing the Union." 361 F.3d 395, 401 (7th Cir. 2004). In this case, there was clear and unequivocal evidence that the employer was not doing so. The General Counsel's alternative theory must be rejected.

C. Kroger Applies

The ALJ recommended, in the alternative, that the Complaint be dismissed because this case is

governed by Houston Division of the Kroger Co., 219 NLRB 388 (1975). In Kroger, the Board enforced an employer's agreement to recognize a union in a new unit and apply the terms of an existing collective bargaining agreement in that unit after recognition so long as recognition was conditioned on a demonstration of majority support.[20] In fact, there is a long line of cases both before and after Kroger upholding and enforcing such clauses. See Raley's, 336 NLRB 374 (2001) (holding clause enforceable and remanding for review of proof of majority support); Central Parking System, Inc., 335 NLRB 390 (2001) (invocation of clause not grounds for RM petition); MJS Garage Management Corp., 314 NLRB 172 (1994) (finding 8(a)(5) violation when employer refused to recognize union under clause); Goldsmith-Louison Cadillac Corp., 299 NLRB 520 (1990) (finding 8(a)(5) violation when employer refused to recognize union under clause); Jerry's United Super, 289 NLRB 125 (1988) (same); Joseph Magnin Co., 257 NLRB 656 (1981), enf'd, 704 F.2d 1457 (9th Cir. 1983), cert. denied, 465 U.S. 1012 (1984) (employer violates 8(a)(3) by discriminating against union members in hiring in order to avoid application of clause); S.B. Rest of Framingham, Inc., 221 NLRB 506 (1975) (addition of store to national unit under clause bars deauthorization petition in single store unit); Eltra Corp., 205 NLRB 1035 (1973) (ALJ conclusion that clause lawful and union could use contract terms in campaign); White Front Stores, Inc., 192 NLRB 240 (1971) (clause is defense to 8(b)(2) charge); Radio Corp. of America, 107 NLRB 993 (1954) (application of clause bars petition); Emery Air Freight Corp., 2000 NLRB LEXIS 54 (ALJ Feb. 2, 2000) (clause is defense for employer who refused to bargain over terms settled thereby). See also General Electric, 117 F.3d 627, Crown Cork, 36 F.3d at 1130. Although such clauses are often called "after acquired" clauses, the Board has held that such clauses can lawfully be applied to existing facilities and pointed out that in Kroger itself the term "additional store clause" was used and, indeed, the stores at issue existed at the

[20] The Board not only held that such agreements are enforceable, it held that "national labor policy favors enforcing their validity." 219 NLRB at 389.

time the contract was executed. Raley's, 336 NLRB at 376. In addition, such clauses are obviously not only valid in the retail industry. See, e.g., Central Parking; MJS; Goldsmith; Eltra; Radio Corporation; Emery; General Electric; Crown Cork.

Two factors distinguish Kroger and its progeny from Majestic Weaving, both of which are present in this case. First, in Kroger, the Board implied into the agreement a condition precedent of a showing of majority support.[21] The Board stated that it had "held that 'additional store clauses' are valid in situations where the Board is satisfied that the employees affected are not denied their right to have a say in the selection of their bargaining representative." 219 NLRB at 388. Thus, in Jerry's United, the Board adopted the ALJ's reasoning that the enforcement of such clauses "allows the parties as much freedom as possible to structure their bargaining relationship through negotiations without permitting them to deny to affected employees the statutory right to select or reject a bargaining representative." 289 NLRB at 139. In short, "The Board has held that such clauses are valid and will be given effect where . . . the Board is satisfied that the employees affected are not denied their right to have a say in the selection of their bargaining representative." S.B. Rest, 221 NLRB at 507. In this case, the agreement expressly conditions recognition on a showing of majority support. Thus, as in Kroger, the Board would be "satisfied that the employees affected are not denied their right to have a say in the selection of their bargaining representative." 219 NLRB at 388.

Second, in Kroger, the union represented some employees of the employer before it entered into the agreement concerning unrepresented units. This was also true in each of the cases following Kroger cited supra at 27. This factor is also present here. As set forth above, the Union is the representative of the employees of the Employer in nine units, under seven collective bargaining agreements covering

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[21] Even before Kroger, the Board held that so long as such agreements require a showing of majority support, "the rights of the third parties, i.e., the employees . . ., have not been jeopardized." White Front Stores, 192 NLRB at 242.

2,200-2,300 employees. Tr. at 62-63.

The fact that the Union already represents some employees of the Employer distinguishes Kroger and this case from Majestic Weaving for two reasons. First, because the existence of non-union facilities operated by their employer can undermine the bargaining strength of employees at unionized facilities, employees have a strong § 7 interest in organizing and improving the terms of employment of other employees who work for the same employer at other locations. In other words, all employees of a single employer have common interests. Congress recognized this when it provided for employer-wide bargaining units. 29 U.S.C. § 159(b). The Board has also recognized, "Precisely because they work for the same employer, even at different workplaces, employees will often have common interests and concerns related to wages, benefits, and other workplace issues that may be addressed by concerted action." Hillhaven Highland House, 336 NLRB 646, 649 (2001), enf'd sub nom. First Healthcare Corp. v. NLRB, 344 F.3d 523 (6th Cir. 2003). Thus, the Board has consistently held that employees of a single employer have a right to engage in solicitation and distribution in exterior, nonwork areas of the facilities of their employer, even if the employees at issue do not work at those facilities and even if the employees that do are in a different bargaining unit or are currently unrepresented. See, e.g. id. (and cases cited at 648). This line of precedent was recently affirmed by the D.C.Circuit in ITT Industries, Inc. v. NLRB, 2005 U.S.App.LEXIS 12756 (D.C.Cir. June 28, 2005). The Court found that "employees who seek to make common cause with similarly situated employees of the same employer [even if they do not work in the same location and are in different bargaining units] are seeking to advance their own interests." Id. at 17-18. Represented employees of an employer thus have an interest in whether other employees of their employer are represented and in their terms and conditions of employment. A union that represents the represented employees of the employer has the same interests.

Kroger recognized that in some situations the interest of represented employees in the terms and conditions of unrepresented employees of the same employer is so strong that the employer has a duty to bargain with the represented employees about the subject. But the interest of already represented employees in the terms and conditions of other employees or their employer does not wholly disappear at the point where it can no longer be found that those terms and conditions "vitally effect" the represented employees under the standard established in Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 (1971). In other words, the subject does not move from a mandatory subject to an illegal subject. Rather, so long as the Union represents some employees of the employer, it moves from a mandatory subject to a permissive subject.

Second, a union that already represents some employees of the employer has already been recognized and reached agreements with the employer. Such a union is already not "merely an outsider seeking entrance" as the General Counsel contends a nonincumbent union must be. GC Brief at 16 (citing NLRB v. Golden Age Beverage, 415 F.2d 26, 30 (5th Cir. 1969)). Such a union is obviously free to point out these facts when it campaigns among unrepresented employees of the employer. Such a union thus gains no "deceptive cloak of authority" if it negotiates terms of employment with the employer that will apply to unrepresented employees should they also decide to be represented by the union.

The General Counsel and Charging Parties attempt to distinguish Kroger in two respects. First, they argue that Kroger is limited to situations where the bargaining between the union and employer takes place within the context of negotiations for a contract in an existing unit. But this is a wholly formalistic distinction as the parties here, and in any future case, could easily have inserted the terms of the agreement into one of their existing collective bargaining agreements. Moreover, such a limiting construction of Kroger and its progeny makes no sense. If the question here was does the Employer

have a duty to bargain with the Union about recognition and the subsequent terms and conditions of employment of employees in a separate, unrepresented unit, then, obviously, it would matter whether the negotiations occurred during bargaining for a contract in an existing unit. But this is not the question here. The question here arises under section 8(a)(2) and relates to the rights of employees in the unrepresented unit not the rights of the employees in the represented unit. From the perspective of employees in the unrepresented unit, it does not matter in what context the parties negotiated terms that will apply to them if they choose to be represented.

Second, the General Counsel and Charging Parties argue that Kroger only applies to situations where the entire existing collective bargaining agreement is applied to the newly organized unit(s). But the legitimate interests which underlie a union's attempt to negotiate a Kroger clause remain whether or not the union has sufficient bargaining power to obtain a full application of contract clause. That is why the Board has held that a union's efforts to bargain about terms and conditions of employees at unorganized facilities can be a mandatory subject of bargaining even if the union obtains less than a full Kroger clause. See Pall Biomedical, 331 NLRB 1674 (2000), enf. denied, 275 F.3d 116 (D.C. Cir. 2002).[22]

Even if the Union here was unable to obtain a full application of contracts clause, its objective – to protect represented employees by raising the standards of unrepresented employees -- remains the same. In Pall Biomedical, the Board reasoned that the union sought the same objective at issue in Kroger: "If the [Employer] began performing bargaining unit work at [the nonunion location], the Union would be in a position to protect the interests of the existing unit employees by achieving recognition as the bargaining representative of the [nonunion] employees and negotiating terms and conditions of

[22] While the Court denied enforcement in Pall, its decision in no way suggested that this form of agreement is suspect or unenforceable. Rather, the Court merely held that, under the particular facts of that case, the interest of employees in an existing unit in obtaining such an agreement, applicable in another unit, was not sufficiently direct to be the basis of a duty to bargain concerning the subject.

employment for them similar to those enjoyed by the [represented] employees." 331 NLRB at 1677.

To argue that an agreement that makes it more likely that employees at nonunion facilities will be represented does not lessen the Employer's incentive to divert work to the nonunion facility is to deny reality. It is an unfortunate fact that employers generally prefer to produce in nonunion plants. If employers did not generally prefer to produce in nonunion plants, there would be no need for the NLRA and the NLRB's volumes would be considerably thinner. Indeed, Congress' findings of a "denial by some employers of the right of employees to organize and a refusal by some employers to accept the procedures of collective bargaining" were the foundation of the Act. 29 U.S.C. §151. Courts of Appeals have heard innumerable cases in which "an employer . . . diverted work from bargaining unit employees to non-bargaining unit employees." Road Sprinkler Fitters Local Union v. NLRB, 676 F.2d 826, 831 (D.C.Cir. 1982). In Road Sprinkler Fitters, the Court considered a situation where the company's nonunion side's work "increased dramatically" while "during the same period" the union side's work "dropped abruptly." Sprinkler Fitters III, 789 F.2d 9, 14 (D.C.Cir. 1986). Geiger Ready-Mix Co. of Kansas City v. NLRB, 87 F.3d 1363 (D.C.Cir. 1996), is another example of a case in which an employer "closed its only unionized cement mixing facility, laid off the employees who worked there, increased production at its nonunion plants and, after several weeks, reopened the former unionized facility with nonunion workers." Id. at 1365.

It is a fact that unionization is directly correlated with higher wages and benefits. "Unions raise wages of unionized workers by roughly 20%." Lawrence Mishel with Matthew Walters, "How Unions Help All Workers," *Economic Policy Institute Briefing Paper* #143 (August 2003) (available at www.epinet.org/content.cfm/briefingpapers_bp143.) Another recent study found that "the average union premium could be as high as 24%." Barry T. Hirsch, "Reconsidering Wage Effects: Surveying New

Evidence on an Old Topic." 25 *J. of Labor Research* 233-66 (2004). According to the Employee Benefits Research Institute, "in September 2003, 86 percent of union workers were covered by health benefits through their own job, compared with 59.5 percent of nonunion workers." In other words, union members were 45% more likely to have jobs that provided health insurance. "Union Status and Employment-Based Health Benefits," 26 *EBRI Notes* 1 (2005) (available at http:///www.araw.org/docUploads/0505notes%20take2%2Epdf). In the area of retirement, the union advantage is even greater. Seventy-two percent of union members are covered by guaranteed defined benefit pensions, as against only 15 percent of non-union workers. Bureau of Labor Statistics, "National Compensation Survey: Employee Benefits in Private Industry, 2002-2003," at 12, Table 1 (January 2005) (available at http://www.bls.gov/ncs/ebs/sp/ebbl0020.pdf .) Union members also enjoy a substantial advantage in paid time off. They have an average of three weeks of paid vacation per year, compared with 2.35 weeks for non-union workers--a union advantage of 27 percent. Mishel & Walters, "How Unions Help All Workers," at 7. Generally, among employers having "the same measured characteristics," employee fringe benefits were 68% greater among unionized employees." Freeman and Medoff, *What Do Unions Do* 64 (1984). Indeed, Congress expressly recognized the fact that unions raise wages and improve benefits in the Preamble of the Act:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and working conditions. [29 U.S.C. §151.]

Thus, the General Counsel's and Charging Parties' contention that the agreement here did not further the interests of the represented employees simply by making it more likely that other employees of the employer would gain representation is simply wrong.

Finally, it is also in the interest of organized employees to increase their bargaining power with their employer by making it more likely that other employees of the employer will gain the right to be represented by the union. A union that represents employees at 75% of an employer's plants has far greater bargaining power than a union that represents employees at only 10% of the plants and is thus more able to improve all represented employees' term of employment.

The Charging Parties argue that it is less likely that a union will sacrifice the interests of employees in the unrepresented unit by negotiating a weak contract if the same contract will apply in the represented unit. But the question here is whether the Employer provided unlawful assistance to the Union. The charge is that the existence of the agreement provided an illicit boost to the Union. Negotiation of a substandard contract will not provide any such boost to a union. Thus, the Charging Party's argument, even if its factual predicate were correct, actually proves the opposite.

Moreover, the factual predicate of the argument is not correct. First, a union that represents employees in one or more units is not likely to negotiate a substandard contract for employees in a new unit because of the detrimental impact it would have on already represented employees. The employer may, for example, shift work to the unit with substandard terms or cite the lower terms as evidence of the need for concessions in the next round of negotiations in the original units. Second, a union is not likely to negotiate a weak contract governing a unit in which the employees have not yet selected the union as their representative. If it does, the union is likely to be defeated as demonstrated by General Electric and Crown Cork. The union must still convince the employees to choose to be represented and thus it will make every effort to demonstrate that representation will be beneficial to the employees by negotiating a strong contract. Finally, the legality of agreements reached between unions and employers cannot depend on the strength of their terms because innumerable factors ranging from competition in the

industry to the degree of union density to the skills of the parties' negotiators, may influence the substantive terms.

The ALJ concluded, "if Dana and the UAW are free to extend their existing agreements to cover the St. John's employees they should be free to bargain for less than a full extension so as to allow greater employee participation in [establishing] the terms and conditions of employment at the new facilities." ALJD at 9. As explained above, he was correct.

Thus, Kroger makes plain that Majestic Weaving does not apply when (1) recognition and the application of negotiated terms of employment are conditional on a showing of majority support and (2) the union represents some employees of the employer at the time it executes the agreement concerning the unrepresented employees of the employer. Majestic Weaving, therefore, does not apply to this case.

D. The Charging Parties' Other Theories Are Not Before the Board and Are Invalid

The Charging Parties present three other theories of the case in their exceptions that were not pleaded in the Complaint and are not advanced by the General Counsel. Each of them is not properly before the Board and each is invalid.

1. The Charging Parties' Interference Theory is Not Before the Board and is Invalid

The Charging Parties argue that the arms-length agreement between the Employer and the Union constitutes unlawful employer interference because the Union agreed not to seek certain terms in possible, future collective bargaining.

This theory is not properly before the Board. The Complaint alleges only that by entering into the agreement the "Employer has been rendering unlawful assistance to a labor organization." Complaint ¶ 11. It does not allege interference.

Moreover, the theory is obviously invalid as it would prevent unions from ever making any binding

concessions to an employer. The Charging Parties argue, "The Letter of Agreement is unlawful under § 8(a)(2) because it grants Dana contractual authority over how the UAW can conduct itself when acting as the exclusive bargaining representative of employees vis-a-vis Dana." CP Brief at 15. But the same thing could be said, for example, about a contractual no strike clause. In other words, the Charging Parties' theory would render collective bargaining itself unlawful.

The Charging Parties' theory cannot be adopted as it would prevent unions from ever making any binding agreements with employers limiting their latitude at the bargaining table. Unions and employers routinely enter into agreements that restrict how the union will conduct itself in bargaining. See, e.g., Safway Steel Products, Inc., 333 NLRB 394 (2001) (agreement that contract will be reopened during term to discuss health care cost increases and union will not strike); Associated General Contractors, Georgia Branch, 138 NLRB 1432, n.6 (1962) (agreement by unions not to seek wage increase unless increase was granted to other unions); Harowe Servo Controls, Inc., 250 NLRB 958 (1980) (agreement prohibiting bargaining over economic issues until all non-economic issues are resolved); Southwestern Portland Cement, 303 NLRB 473 (1991) (agreement that union will submit any agreement negotiated with employer to employees for ratification). Under the Charging Parties' theory, all of these agreements would be unlawful.

Employers and unions enter into many types of agreements, in addition to collective bargaining agreements, that place limits on union action. For example, the Board has held that an employer and union can enter into a binding agreement that the union will not attempt to organize certain employees. See Briggs Indiana, 63 NLRB 1270 (1945). If an employer does not interfere with a union by obtaining an agreement that a union will entirely refrain from representing specified employees, it does not interfere with a union by obtaining an agreement that places a limited number of restrictions on the union if it

becomes the representative of employees. The Board has also enforced an agreement barring a union from filing a petition for an election. See Verizon Information Systems, 335 NLRB 558 (2001). In Lexington House, 328 NLRB 894 (1999), the Board reaffirmed Briggs Indiana, holding, "the public policy supporting labor-management contracts extends beyond traditional collective-bargaining agreements. . . .[W]e believe that each of the parties to a collective-bargaining relationship must honor its promises, irrespective of whether those promises are in the collective-bargaining agreement." Id. at 897. Under the Charging Parties' theory, all such agreement would be unlawful interference. The theory must, therefore, be rejected.

Finally, the Charging Parties' theory misconstrues the nature of the prohibition against employer interference in section 8(a)(2), as consistently interpreted by the Board and the courts. As the cases cited by the Charging Parties reflect, the Board has found unlawful interference by an employer in the formation or administration of a union only where the employer has injected itself into the actual operation of the union by, for example, placing its agents or allowing its agents to be placed in positions where the agent is responsible for performing the functions of the union vis-a-vis the employer - positions such as shop steward or negotiating committee member. See Vanguard Tours, 300 NLRB 250 (1990), enf'd in part, 981 F.2d 62 (2nd Cir. 1992); General Steel Erectors, 297 NLRB 723 (1990), enf'd, 933 F.2d 568 (7th Cir. 1991); Nassau & Suffolk Contractors Ass'n, 118 NLRB 174, 187 (1957). There is no allegation, and obviously no evidence, that the persons who negotiated the Letter of Agreement with the Employer on behalf of the Union had any connection with the Employer, let alone that they were the Employer's agents. Nor does the agreement extend to the Employer any right, in the event that the employees select the Union as their bargaining representative, to have its agents participate in collective bargaining negotiations on behalf of the

Union. Thus, the notion advanced by the Charging Parties that the Employer either was or will be "sitting on both sides of the bargaining table" in its dealings with the Union is completely specious. The Employer here, through arms' length bargaining, has obtained an agreement from the Union in which the Union has agreed to parameters governing the scope of future bargaining in return for concessions that the Union reasonably believed would benefit all employees of the Employer. There is no support in the law for the theory that by doing so, the Employer has unlawfully interfered in the formation or administration of the Union within the meaning of section 8(a)(2).

2. The Charging Parties' Promise of Benefit Theory is Not Before the Board and is Invalid

The Charging Parties argue that any agreement as to terms to be included in a possible, future collective bargaining agreement constitute an unlawful promise of benefit.

This theory is not properly before the Board as the ALJ held. ALJD at 10. The Complaint alleges only that by entering into the agreement the Employer rendered unlawful assistance to the Union. Complaint ¶ 11. The Complaint does not allege any promise of benefit.

Moreover, the theory is invalid for three reasons. First, the Charging Parties do not identify any specific benefit that was promised in the agreement. In fact, they argue that the Union agreed "to bargain concessions." CP Brief at 1. In addition, they argue that the terms of the agreement were not disclosed to employees. CP Brief at 11-12. For both of these reasons, the Charging Parties' own positions remove the foundations of their promise of benefit theory.

Second, the courts have already rejected the precise theory advanced by the Charging Parties. In the decisions cited supra at 14, the D.C. Circuit held that it was not an unlawful threat for an employer to inform employees what would happen under its agreements with a union if the employees selected the union as their representative. General Electric, 117 F.3d at 632; Crown Cork, 36 F.3d at 1140-41. Just

as an employer can point out adverse consequences that will flow from the application of its contract with a union, an employer or union can point out favorable consequences. The former is not an unlawful threat and the later is not an unlawful promise because both are simply "predictions . . . grounded in objective fact" – i.e., on the terms of the agreement between the employer and union. Id.

Third, the prohibition of promises of benefits has never been applied to the fruits of bargaining between a union and an employer. The logic of the promise of benefit cases does not apply to benefits that result from such bargaining. In NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964), the Supreme Court explained that an employer's promise or grant of benefits is problematic because "the employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." The Court concluded, "The beneficence of an employer is likely to be ephemeral if prompted by a threat of unionization which is subsequently removed. Insulating the right of collective organization from calculated good will of this sort deprives employees of little that has lasting value." Id. at 410. This reasoning does not apply to a case where the benefits flow from selecting a collective bargaining representative and the benefits will be embodied in a collective bargaining agreement.

3. The Charging Parties' DFR Theory is Not Before the Board and is Invalid

The Charging Party argues that the Union breached its duty of fair representation by entering into the agreement.

This theory is not properly before the Board as the ALJ held. ALJD at 10. The Complaint alleges no breach of the duty of fair representation. See Complaint ¶ 12.

Moreover, the duty of fair representation theory is invalid. Most obviously, the Union had no duty

of fair representation at the time it entered into the agreement because it was not the exclusive representative of the employees and it still has no such duty because it is still not the exclusive representative of the employees. See Allied Chemical & Akali Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 181 n. 20 (1971). Thus, the theory is, at best, premature.

In addition, unions are accorded a large amount of discretion in developing a bargaining strategy that will advance the long-term interests of employees.[23] "A wide range of reasonableness must be allowed a statutory bargaining representative." Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). "Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of the bargaining responsibilities." Air Line Pilots v. O'Neill, 499 U.S. 65, 78 (1991). Surely, the good faith of the Union's strategy cannot be judged until it becomes the representative of the employees and negotiates an agreement. The theory is thus doubly premature.

Even if the theory were not premature, the Charging Party's premises, that the Union somehow traded off employees' interests in order to advance its institutional interests, is misplaced. The Union obtained no institutional benefit in the agreement. The Union bargained for an expedited and noncontentious procedure through which employees could choose whether they wished to be represented. The Union reasonably concluded that this would benefit employees in the long run. The Union gained nothing as an institution under the agreement. The suggestion that a union violates the law by seeking to facilitate the representation of employees when the law expressly states that it is "the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining" is baseless. 29 U.S.C. § 151.

[23] It is thus notable that the primary case cited by the Charging Parties, Aguinaga v. United Food & Commercial Workers, 993 F.2d 1463 (10th Cir. 1993), cert. denied, 510 U.S. 1072 (1994), is a contract enforcement case not a bargaining case.

Finally, the Union' strategy was entirely proper, even accepting the Charging Parties' erroneous characterization. A union can make short-term concessions in order to make long-term gains. See, e.g., Sutton v. Weirton Steel Division, 724 F.2d 406, 412 (4th Cir. 1983), cert. denied, 467 U.S. 1205 (1984) ("a union may compromise to achieve long-term advantages"). The Union here reasonably concluded that if it could secure representation for the employees, it would lead to improvements in their terms and conditions of employment. Empirical evidence supports this conclusion. See supra at 33-34. Moreover, a union can seek to advance its over-all bargaining power with an employer. For example, a union can negotiate for common expiration dates for contracts in multiple units of employees of a single employer. See Standard Oil Co., 137 NLRB 690, 691 (1962), enf'd, 322 F.2d 40 (6th Cir. 1963) (citing United States Pipe and Foundry Co. v. NLRB, 298 F.2d 873 (5th Cir. 1962), cert. denied, 370 U.S. 919 (1962)). Here, the Union was attempting to increase the number of employees of the Employer who were represented which would obviously increase all the employees' bargaining power with their employer. The Union reasonably concluded that this would improve the employees' terms and conditions in the long run. Similarly, a union can protect its ability to bargain effectively for the employees. Thus, a union can negotiate a dues checkoff clause or an agency fee provision in order to insure that it has the financial means to effectively represent the employees. See United States Gypsum Co., 94 NLRB 112, 113 n. 7, amended on other grounds, 97 NLRB 889 (1951) (checkoff is mandatory subject of bargaining); NLRB v. General Motors Corp., 373 U.S. 734, 744-45 (1963) (agency shop is mandatory subject of bargaining). The Union's strategic decisions aimed at improving employees' terms and conditions of employment in future bargaining and beyond as the Union gained the ability to represent additional employees of the Employer were well within the "wide latitude" accorded unions once they acquire a duty of fair representation.

III. The Procedural Exceptions Have No Merit

A. The Bargaining History is Irrelevant

The General Counsel and Charging Parties argue it was error for the ALJ to quash a subpoena that sought production of evidence relating to the negotiation of the agreement at issue. However, while the General Counsel argues that the scope of this form of discovery is broad, he presents no specific argument about how the evidence that might have been obtained would have been relevant to the issues before the ALJ. The Charging Parties present only a conclusory argument: "evidence regarding the negotiation of the Agreement would be probative as to the extent of Respondents' bargaining over employee terms and conditions of employment, the intent of the Respondents under the Letter of Agreement, and the meaning of certain [of] its terms." CP Brief at 10. However, the violation alleged here is the entry into the agreement. The extent of bargaining is irrelevant. The Charging Parties do not point to any specific terms of the agreement that are ambiguous nor do they make any argument about how evidence of the parties' intent or bargaining history might be relevant to the meaning of any specific term. Both the General Counsel and the Charging Parties fail to point to any specific portion of the subpoena or any specific request for documents that they believe it was error for the ALJ to quash.

Moreover, the Union's and Employer's petitions to revoke cited numerous procedural and substantive deficiencies in the subpoena and the specific requests for documents. U Exhibit 2; Er. Exhibit 2. The General Counsel and Charging Parties fail to address any of these arguments.

The ALJ did not err by quashing the subpoena.

B. The Extent of Disclosure of the Terms of the Agreement is Irrelevant

The General Counsel and the Charging Parties also argue it was error for the ALJ to preclude testimony concerning the extent of disclosure of the terms of the agreement. This argument is addressed

supra at 17-19.

IV. The Remedies Requested by the General Counsel and Charging Parties are Not Merited

A. The Only Appropriate Remedy is to Sever and Declare Void the Alleged Unlawful Provisions of the Agreement

As discussed supra at 6, the ALJ correctly held that the only issue before the Board is whether the August 6 letter of agreement unlawfully settled terms and conditions of employment prior to a showing of majority support. Moreover, the only terms of the agreement that the Complaint alleges are unlawful are those "that set forth terms and conditions of employment to be negotiated in a collective bargaining agreement should Respondent Union obtain majority status." Complaint ¶ 9. The Complaint does not allege and no party argues that any of the other provisions of the agreement, providing for a procedure for recognition and regulating the parties campaign conduct, are unlawful. Therefore, in the event the Board finds that Dana and the Union negotiated substantive terms and conditions of employment in violation of the Act, the proper remedy would be to sever and declare void and unenforceable any illegal terms, not to condemn the entire agreement. "[N]o more of the contract should be invalidated than is unlawful, 'where the excess may be severed and separately condemned.'" Wagner Equipment Co., 253 N.L.R.B. 171, 174 (1980) (citing NLRB v. Rockaway News Co., 345 U.S. 71, 79 (1953).

The letter of agreement is structured so that the allegedly unlawful terms are easily severed. The allegedly unlawful terms are each discrete provisions. They are all contained in a discrete Article of the agreement headed "Following Proof of Majority Status." J-1 at 7-10 (art. 4). They are in no way wholly integrated into the agreement. As in Rockaway News, "The feature to which the Board rightly objects not only may be severed but are separated in the contract." 345 U.S. at 78. The agreement contains other consideration offered by both sides. The Employer agrees to a recognition procedure and to limit its conduct during any campaign and the Union also agrees to limit its campaign conduct and not to engage

in any strike. J-1 at 4-5 (art. 2.1.3.2, .3, .4, .6, .9), 12 (art. 6). Thus, wholly apart from the allegedly unlawful provisions, the agreement embodies a bargain between the parties for a peaceful and noncontentious process for determining whether employees will be represented by the Union. "The whole contract shows respect for the law and not defiance of it." Id. The General Counsel's suggestions that the extremely limited provisions addressing only a few terms of employment and only in the broadest strokes are "so basic to the whole scheme of a contract . . . that it must stand or fall as an entirety" and "form[] the very foundation on which the agreement rests," GC Brief at 31 (quoting dicta in Rockaway News, 345 U.S. at 78; NLRB v. Custom Sheet Metal & Service Co., 666 F.2d 454, 460-61 (10th Cir. 1981)), are clearly wrong. "The total obliteration of this contract is not in obedience to any command of the statute. It is contrary to common-law contract doctrine." Rockaway News, 345 U.S. at 79.

The Board has often severed clauses that violate the Act from written documents and agreements. For example, in Flying Dutchman Park, Inc., 329 NLRB 414 (1999), the Board found that an illegal union security clause was "'not basic to the whole scheme of the contract, and there is no provision that the contract is integrated or that its respective sections are interdependent.'" Id. at 416 (quoting NLRB v. Tulsa Sheet Metal Works, 367 F.2d 55, 59 (10th Cir. 1966)). The Board ordered the illegal union security provision deleted from the contract. Similarly here, the terms and conditions are "not basic" to the recognition procedures and campaign conduct portions of the agreement and can easily be severed. See also Central Pa. Regional Council of Carpenters (Novinger's), 337 NLRB 1030, 1031 (2002), enf'd, 352 F.3d 831 (3d Cir. 2003) (Board remedy was to "[c]ease and desist from entering into, giving effect to, or enforcing the anti-dual shop provisions . . . ."); UAW, Local 148 (Douglas Aircraft Co.), 296 NLRB 970 (1989) (Board ordered expungement of provision of UAW Constitution restricting resignation from union); Local 1367, International Longshoremen Ass'n (Galveston Maritime Ass'n), 148 NLRB 897 (1964), enf'd,

368 F.2d 1010 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967) (Board ordered cease giving effect to discrimination clauses).

At most, the Board should order that Article 4 of the agreement be severed and declared void and unenforceable.

B. The Only Appropriate Remedy is Limited to the St. Johns Facility

The General Counsel and Charging Parties request that the Board order Respondents to cease and desist from applying the agreement at any Dana facility. The General Counsel provides no support for this request. GC Brief at 32. Moreover, the instant Complaint alleges a violation concerning only the St. Johns facility. Accordingly, the record in this case was limited to circumstances at the St. Johns facility. Thus, for example, there is no evidence of majority support or lack thereof at any other facility or of disclosure of the terms of the agreement or lack thereof at any other facility. Thus, even if a violation is found, it would be found only at the St. Johns facility. A narrow cease and desist order prohibiting enforcement of the unlawful terms of the letter of agreement at St. Johns would be the only appropriate remedy.

A remedial order can apply only to the single facility where a violation is found. "It would seem . . . clear that the authority conferred on the Board to restrain the practice which it has found . . . to have [been] committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct." Communication Workers of Am. v. NLRB, 362 U.S. 479, 480-81 (1960) (internal citations and quotation marks omitted).

A case relied on by the Charging Parties illustrates the factual and procedural differences between a case requiring a broad order and the current case. In Duane Reade, Inc., 338 NLRB No. 943 (2003),

enf'd, 99 Fed. Appx. 240 (D.C. Cir. June 4, 2004), the Board issued a broad order that corresponded to exact locations specified by the General Counsel in its conformed complaint. Duane Reade employees were represented by two rival unions, Allied Trades Council and UNITE. Based on the specific complaint allegations involving eight different employer locations, the Board found that the employer actively assisted UNITE and unlawfully recognized UNITE at all locations. As a result, the Board ordered a broad remedy applying to all eight stores covered in the complaint. In contrast, the Complaint in this case designated only the St. Johns facility (a location where there are no allegations of conduct comparable to that in Duane Reade).

A broad order is "'warranted only when a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.'" Windsor Castle Health Care Facilities, Inc., 13 F.3d 619, 624 (2nd Cir. 1994) (quoting Coil-A.C.C., Inc. v. NLRB, 712 F.2d 1074, 1076 (6th Cir. 1983) (citations omitted)). The record evidence here does not support a broad cease and desist order. There is no record evidence involving any other Dana facility. The General Counsel has alleged a single violation of the Act. This is the first time this letter of agreement has been challenged. There is no prior history of unfair labor practices involving this facility. The record does not demonstrate any tendency on the part of the Respondents to violate the Act in this manner or in any other manner.[24]

Finally, the Charging Parties' reliance on Truck Drivers, Local 705, 210 NLRB 210 (1974), is misplaced as the case is easily distinguishable. In Truck Drivers, the Board affirmed the Administrative Law Judge's finding that IBT Local 705 engaged in a "widespread pattern of unlawful activities affecting the gasoline service station industry throughout the Metropolitan Chicago area." Id. at 213. Indeed, the

[24] The fact that the only evidence the Charging Parties can cite to support their argument that the Board can find that the Union has a proclivity to violate the Act is a Complaint in another case in which no finding of unlawful conduct has been made, CP Brief at 43, is telling.

Administrative Law Judge characterized Respondent as engaging in "a consistent and well-defined and organized pattern of unlawful conduct . . . so flagrant, egregious, widespread, and long-continued as to arouse wonderment whether paralleled in Board's annals . . . ." Id. at 273. The record reflects over 82 separate instances where IBT Local 705 induced station dealers to sign contracts covering over 10,000 employees that IBT Local 705 did not represent, required those dealers to pay initiation and dues, did not collectively bargain about any of the 10,000 employees terms and conditions and told dealers they did not have to pay the wages in the contract. Record evidence shows this practice went on as long as 15 years. These widespread and egregious violations bear no similarity to the challenge here to the application of discrete provisions of an agreement at a single facility of the Employer.

C. The Remedy Should Not Bar Lawful Voluntary Recognition

Finally, the Charging Parties go further than the General Counsel and argue that the Board should bar Dana from recognizing the UAW at any facility absent a Board supervised election. This remedy has been applied only when an employer has unlawfully recognized a union absent majority support. Indeed, the Charging Parties state exactly that: "The remedy for an employer's recognition of a union that lacks the uncoerced support of a majority of employees due to the employer's violation of § 8(a)(2) is for the employer to not recognize the union unless and until it is certify by the NLRB." CP Brief at 40-41. In this case, however, the Employer did not and has not recognized the Union. Where the Board has found an employer to have given unlawful assistance to a union during an organizing campaign, but there has been no unlawful recognition of the union, the Board has limited the remedy to a cease and desist order. See, e.g., Kosher Plaza Supermarket, 313 NLRB 74 (1993); Riker Video Industries, 171 NLRB 3 (1968). There are important policy reasons for imposing a remedy that prohibits voluntary recognition only in the extreme circumstances where there has been unlawful recognition, since national labor policy

encourages voluntary agreements between parties and Congress has specifically endorsed voluntary recognition in section 9(c)(1)(A)(i) of the Act. Thus, any remedial order in this case should extend no further than to order the parties to cease and desist enforcing the alleged unlawful provisions of the agreement at the St. Johns facility.

CONCLUSION

For the above-stated reasons, the Board should reject the exceptions and adopt the decision of the ALJ.

Respectfully submitted,

Blair Kathleen Simmons

Daniel W. Sherrick
General Counsel
Betsey A. Engel
Blair Simmons
Associate General Counsel
International Union, United
Automobile, Aerospace and
Agricultural Implement Workers
of America, AFL-CIO (UAW)
8000 East Jefferson Avenue
Detroit, Michigan 48214-2699
(313)926-5216

Counsel for Respondent Union

Jonathan P. Hiatt
General Counsel
AFL-CIO
815 16th St., N.W. Suite 807
Washington, D.C. 20006
(202)637-5053

Craig Becker
Associate General Counsel
AFL-CIO
25 E. Washington, Suite 1400
Chicago, IL 60602
(312) 236-4584

Counsel for Amicus AFL-CIO

THE 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., An Individual — CASES 7-CA-46965, 7-CB-14083

Charging Party

and

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

Charging Party

and

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

Charging Party

_______________________________________/

CERTIFICATE OF SERVICE

The undersigned hereby certifies and declares that one (1) copy of the document referenced below was served as follows:

1. Documents served: Respondent Union, UAW and the Amicus Curiae American Federal of Labor and Congress of Industrial Organizations (AFL-CIO) Joint Brief in Opposition to Exceptions

Certificate of Service

2. Served upon: Service List below

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4. Date served: July 28, 2005

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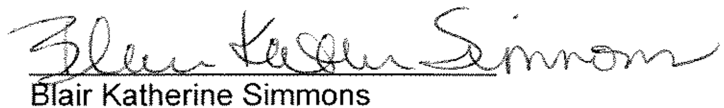

Blair Katherine Simmons

Service List:

Stanley Brown
Hogan & Hartson
Suite 1100
8300 Greensboro Drive
McLean VA 22102
Phone No. 703-847-2446
Via Overnight Mail

Sarah Karpinen
Counsel for General Counsel
NLRB Region 7
477 Michigan Avenue, Room 300
Detroit, MI 48226
Phone No. 313-226-3200
Via Hand Delivery

William Messenger
National Right to Work Legal
Defense Foundation
Suite 600
8001 Braddock Road
Springfield, VA 22160
Phone No. 703-321-7143
Via Hand Delivery