UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RITE AID STORE #6473,
Employer,

and Case 31-RD-1578

MATTHEW SILCOX,
Petitioner,

and

LAMONS GASKET COMPANY, A DIVISION OF TRIMAS CORPORATION,
Employer,

and

MICHAEL E. LOPEZ, Case 16-RD-1597
Petitioner,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION,
Union.

BRIEF TO THE NATIONAL LABOR RELATIONS BOARD ON BEHALF OF AMICUS CURIAE CENTER ON NATIONAL LABOR POLICY, INC.

Respectfully submitted by:

Michael E. Avakian, Esq.
THE CENTER ON NATIONAL LABOR POLICY, INC.
5211 Port Royal Road, Suite 103
No. Springfield, Virginia 22151-2100
(703) 321-9180

Attorney for Amicus Curiae

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STATEMENT OF THE CASE AND AMICUS CURIAE POSITION

The above-captioned proceeding is before the National Labor Relations Board ("the Board") on Request for Review. On August 27, 2010, a majority of the Board granted the Requests for Review. On August 31, 2010, the Board issued an Order inviting "the parties and additional interested amici" to file briefs, including whether to "modify or overrule *Dana*." *Dana Corp, et al*., 341 N.L.R.B. 434 (2007).

The Center on National Labor Policy, Inc. is a national non-profit legal foundation concerned with protecting the individual rights of employers, employees, and consumers. Founded in 1975, the Center has a long and significant history of experience under the National Labor Relations Act, from defending employees in litigation, upholding employee Section 7 rights, enforcing Section 7 rights, protecting employer rights, and presenting the public interest. *E.g., Tradesmen International, Inc. v. NLRB*, 275 F.3d 1137 (7th Cir. 2002); *Colorado-Ute Electric Assn. v. NLRB*, 939 F.2d 1392 (10th Cir. 1991); *NLRB v. Ensign Elec. Div. of Harvey Hubble, Inc.*, 767 F.2d 1100 (4th Cir. 1985); *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983); *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983).

The Board has recognized the unique status of the Center in formulating policy under the Act and has always consented to the Center's participation as *amicus curiae* in the public interest in federal cases. *See e.g.*, *Sparkling Springs Water, Inc.*, 13-RC-20559 (Aug. 2, 2001).

It is the Center's position in this case that the statutory provisions providing for employee fee choice and access to the Board's electoral machinery should be the preferred mechanisms for resolving questions concerning employee support for labor organizations. Resort to the rhetorical beneficent and paternal purposes of the Labor Act cannot substitute for Congress' express statutory authorizations for registering levels of employee support for collective action.

This brief will be confined to the more difficult and theoretical questions of law and

public policy regarding the need to ensure employee access to the Board's processes to register their sentiments on unionization, the underpinnings for Section 7 of the Act and the Board's explicit directive to make its election machinery available to employees.

PROCEDURAL BACKGROUND

On August 27, 2010, the Board issued an order granting requests for review by Rite Aid Store #6473 and United Steel union of the Regional Directors' administrative dismissal of the decertification petitions filed in these cases. 355 N.L.R.B. No. 157 (2010). The Board then decided to consolidate the cases for review. *Id.*

Inherent in the Order is the applicability of the four factors prompting its decision to grant review in *Dana*, itself on June 7, 2004, 341 N.L.R.B. 1283 (2004): "[1] the increased usage of recognition agreements, [2] the varying contexts in which a recognition agreement can be reached, [3] the superiority of Board supervised secret-ballot elections, and [4] the importance of Section 7 rights of employees." *Id.*

The Center's amicus brief will address primarily factors 3 and 4.

STATEMENT OF THE ISSUE

The issue is whether the Board should abandon its existing doctrine granting employees forty-five-days after a voluntary union agreement is reached with an employer to file a petition for election under Section 9(a) of the Act to confirm or deny the union's status, or follow *Keller Plastics Eastern, Inc*., 157 N.L.R.B. 583 (1966).

STATEMENT OF THE CASE

A. Background Facts

Since there are no published decisions by the Regional Directors in these cases, a review of what occurred in the *Dana/Metaldyne* cases is appropriate.

In the *Metaldyne* case, the Employer and Union entered into a voluntary recognition and

card check agreement in September 2002. 341 N.L.R.B. No. 150, *supra*, slip op at 3. (dissenting opinion). Following an organizing drive during which the union acquired authorization cards from a majority of the employees in the agreed upon production and maintenance unit, the Employer recognized the Union as the collective bargaining representative of the employees on December 1, 2003, based upon a card check by a neutral third party. *Id.* On December 23, two decertification petitions were filed by unit employees supported by the requisite 30% showing of interest. *Id.* Thereafter, on January 21, 2004, the Regional Director dismissed the petitions on the ground that, under prevailing Board precedent, a reasonable period of time for collective bargaining negotiations had not elapsed, citing, inter alia, *Keller Plastics Eastern*, supra; *Rockwell International Corp.*, 220 N.L.R.B. 1262, 1263 (1975) (decertification petition with more than 50% showing of interest filed 14 days after card majority recognition barred); *Seattle Mariners*, 335 N.L.R.B. 563 (2001) (decertification petition with 30% showing of interest filed 32 days after card majority recognition barred) (Regional Director's decision, pp. 1-3).

In the *Dana* case, the Employer and the Union entered into a voluntary recognition and card check agreement on August 6, 2003. 341 N.L.R.B. No. 150, slip op. at 3 (dissenting opinion). The Employer recognized the Union as the collective bargaining representative of employees in the agreed-upon unit on December 4, 2003, after examination of the authorization cards by a neutral third party. *Id.* On January 7, 2004, a decertification petition with the requisite showing of interest was filed. *Id.* Subsequently, as in the Metaldyne case, the Regional Director, on January 21, 2004, dismissed the petition on the ground that a reasonable period of time for negotiations had not elapsed between the voluntary recognition and the time of the petition filing, citing *Keller Plastics Eastern*, *supra*; *MGM Grand Hotel*, Inc., 329 N.L.R.B. No. 99 (1999), and *Seattle Mariners*, *supra*. (Regional Director's decision, p. 1).

ARGUMENT

THE BOARD'S *DANA CORPORATION* DOCTRINE SHOULD NOT BE ABANDONED OR MODIFIED BECAUSE SECRET BALLOT ELECTIONS BEST SAFEGUARDS EMPLOYEE SECTION 7 RIGHTS

The centerpiece of the National Labor Relations Act is Section 7, which confers upon employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection," as well as "the right to refrain from any or all such activities." 29 U.S.C. § 157. By its very terms, the Statute makes representational rights derivative from the exercise of employee rights.

At the same time, under Section 9(a) of the Act, 29 U.S.C. § 159(a), where a majority of employees in an appropriate unit have "designated or selected" a collective-bargaining representative, the rights of both consenting and nonconsenting employees are sharply curtailed because that representative becomes "the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

The Supreme Court has declared that the "Act guarantees employees freedom of choice and majority rule." *International Ladies' Garment Wkrs. Union v. NLRB (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731, 738 (1944). The D.C. Circuit has also recognized that, "[F]reedom of choice and majority rule in employee selection of representatives" are indeed "[t]he Act's twin pillars." *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (1983), *cert. denie*d *sub. nom*, *Local 22*, *Intern Ladies' Garment Workers' Union*, 467 U.S. 1241 (1984). Because employee selection of a collective-bargaining representative means surrendering the individual ability to affect the terms and conditions of working life, it is vitally necessary that employee freedom of choice in making that decision be scrupulously protected by the Board.

The significance of this right in the instant case cannot be minimized. Under the national

principle of exclusive representation, bargaining and grievance representation by a certified or "temporarily protected" union is mandatory. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). Bargaining by individual employees is strictly prohibited and dissatisfied employees who circumvent their exclusive representative are not only subject to legal action, but are unprotected as to their concerted activities and may be fired without recourse. *Emporium Capwell Co. v. Western Addition Comm. Org.*, 420 U.S. 50, 72; *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 192 (1967).[1] The statute empowers the Board to conduct elections to determine employee sentiment regarding unionization under Section 9 of the Act. Elections may be sought by employees or labor organizations acting on their behalf, Section 9(c)(1)(A), 29 U.S.C. § 159(c)(1)(A), either for certification or decertification, as well as by employers for decertification under proper circumstances, Section 9(c)(1)(B), 29 U.S.C. §159(c)(1)(B).

Early on, the Supreme Court observed that, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 328 (1944). In the exercise of this discretion, the Board created the "laboratory conditions" doctrine to evaluate the conduct of parties to a Board conducted election. *General Shoe Corp.*, 77 N.L.R.B. 124 (1948). The Board reasoned that, "An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative." *Id.* at 126. Amplifying the point, the Board said, "[I]t is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of

[1] In addition, it is almost certain that all employees will incur a heavy mandatory financial obligation as a result of dues payments required under a union security clause pursuant to Section 8(a)(3) of the Act, 29 U.S.C. § 8(a)(3).

the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled." *Id*. at 127.

Under the "laboratory conditions" doctrine, "Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." *Id*. at 126. The Board has underlined this point: "[I]t is also important to again emphasize what we have done before—that the test of conduct which may interfere with the 'laboratory conditions' for an election is *considerably more restrictive* than the test of conduct amounting to interference, restraint, or coercion which violates Section 8(a)(1)." An Outline of Law and Procedure in Representation Cases § 24-320 (Washington, D.C. 2002) (emphasis supplied). As a result, any party to a Board representation election may file with the Regional Director "objections to the conduct of the election or objections to conduct affecting the results of the election." Section 102.69(a), N.L.R.B. Rules and Regulations (Washington, D.C. 2002).

To illustrate the stringency of the "laboratory conditions" doctrine, it is useful to recapitulate some of the conduct that the Board has found objectionable in representation proceedings: (a) forged documents that employees cannot recognize as such, *Mt. Carmel Medical Center*, 306 N.L.R.B. 1060 (1992); (b) alteration of Board documents to imply a Board endorsement of a party, *Allied Electric Products*, 109 N.L.R.B. 1270 (1954); appeals to racial prejudice, *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962); (c) "captive audience" speeches by either party to massed assemblies of employees within 24 hours of an election, *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1954); (d) waiver of union initiation fees if limited to employees who sign cards before an election, *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973); (e) coercive conduct by supervisors on behalf of a union, *Sutter Roseville Medical Center*, 324 N.L.R.B. 218 (1997); (f) electioneering at or near the polls, *Alliance Ware, Inc.*, 92 N.L.R.B. 55 (1950); (g) prolonged

conversation regardless of content between parties and voters waiting in line to vote. *Milchem, Inc.*, 170 N.L.R.B. 362 (1968); and (h) keeping an unofficial list of employees who have voted, *International Stamping Co.*, 97 N.L.R.B. 921 (1951).

Thus, the Board has maintained the sanctity of its election process by hedging it with the most careful safeguards.

In addition, the Board takes certain prophylactic measures to ensure a fair and free ballot, including requiring the posting of election notices at least three days beforehand, furnishing a Board Agent to conduct the election, count the ballots, accept challenges to ballots, and issue a tally, and permitting observers from both parties to participate in the process. *See generally* §§ 11300-11350, *N.L.R.B. Casehandling Manual, Part Two—Representation Proceedings* (Washington, D.C.).

As noted by the Supreme Court, "The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969); accord: *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 304 (1974). (*Gissel* recognized "acknowledged superiority" of elections "in ascertaining whether a union has majority support"). The Board recently reaffirmed this principle, stating, "[E]lections are the preferred means of testing employees' support." *Levitz Furniture Co. of the Pacific, Inc.*, 333 N.L.R.B. 717, 725-26 (2001).

Gissel and the cases it has spawned require some discussion antecedent to consideration of the voluntary recognition bar doctrine. In *Gissel*, the Court observed that, notwithstanding the superiority of an election, a union could achieve representation by acquiring authorization cards from a majority of the employees in the appropriate unit, inasmuch as Section 9(a) of the Act, 29 U.S.C. § 159(a), refers to representatives "'designated or selected' by a majority of the

employees without specifying precisely how that representative is to be chosen." *Id.* at 596. However, the central question in *Gissel* was whether such cards "though admittedly inferior to the election process, can adequately reflect employee sentiment when that process *has been impeded* [by the employer]. *Id.* at 603 (emphasis supplied). The Court ruled that the Board could issue an order requiring an employer to bargain without an election only in two limited circumstances: (1) "'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices," *id*. at 613, and in (2) "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes,"[2] *id* at 614. In other words, only where an employer has engaged in serious misconduct tainting the election process, and where a card majority has been obtained without misrepresentation or coercion, *id.* at 591, can the Board deprive employees of the right to vote by secret ballot on unionization.

The courts of appeal have emphasized how rarely employer misconduct may justify the remedy of bargaining without an election and reliance on admittedly less reliable authorization cards to establish a unit majority. The D.C. Circuit has referred to a bargaining order as an "extreme" or "extraordinary" remedy. *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1065 (2001); *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1170 (1996); *Charlotte*

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[2]In such cases,

> "[T]he Board can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment, once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue."

Gissel, 395 U.S. at 614-15.

Amphitheater v. NLRB, 82 F.3d 1074, 1077 (1996). Other circuits concur.[3]

Nevertheless, the Board and the courts have permitted employers voluntarily to recognize labor organizations based upon evidence of an uncoerced card majority in an appropriate unit. See, for example, *NLRB v. Lyon & Ryan Ford*, 647 F.2d 745, 750-51 (7th Cir. 1981), *cert. denied*,

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[3] A bargaining order is an "extreme remedy." *NLRB v. Matouk Industries, Inc.*, 582 F.2d 125, 130 (lst Cir. 1978) "[T]he Supreme Court in [Gissel] made it clear that an election remains the preferred method to determine a bargaining unit's representative and that a bargaining order should be enforced only when an election is not feasible." *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110, 120 (lst Cir. 1978); *NLRB v. Cott Corp.*, 578 F.2d 892, 894-95 (1st Cir. 1978) (same). "[A] bargaining order is an extraordinary and drastic remedy, is not favored, and should only be applied in unusual cases." *NLRB v. J. Coty Messenger Service, Inc.*, 763 F.2d 92, 99 (2nd Cir.1985); *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1331 (2nd Cir. 1996) (quoting same and stating bargaining order "warranted only when it is clearly established that traditional remedies cannot eliminate the effects of the employer's past unfair labor practices"); *J.L.M, Inc. v. NLRB*, 31 F.3d 79, 83 (2nd Cir. 1994) (quoting same). "A new election, not a bargaining order, is the preferred remedy for employer misconduct which taints a union election." *Harper Collins San Francisco,* 79 F.3d at 1331; accord: *J. Coty Messenger Service*, 763 F.2d at 99; *NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108, 110 (2nd Cir. 1984) (*Pace II*); *NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 230 (2nd Cir. 1983); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212 (2nd Cir. 1980). "The bargaining order is an extraordinary remedy and, because it operates to disenfranchise the workers in the choice of their representative, it is appropriate only when the harmful effects of that disenfranchisement are outweighed by the positive advancement of the policies underlying federal labor law." *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460, 470 (3d Cir. 1981). Elections are the "superior and preferred means of determining employee sentiment." *Rapid Mfg. Co. v. NLRB*, 612 F.2d 144, 151 (3d Cir. 1979); accord: *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239, 246 (3d Cir. 1976), *on appeal after remand*, 585 F.2d 821 (1978) (table). A bargaining order is an "extraordinary and drastic remedy," appropriate only in the most "unusual cases." *Be-Lo Stores v. NLRB*, 126 F.3d 268, 273 (4th Cir. 1997) (citation omitted); *Overnite Transportation Co. v. NLRB,* 280 F.2d 417, 436 (4th Cir. 2002) (en banc) (same). 'An election, not a bargaining order, remains the traditional, as well as the preferred method for determining the bargaining agent for employees,'" *Overnite Transportation*, 280 F.3d. at 436, quoting *NLRB v. Apple Tree Chevrolet, Inc.*, 608 F.3d 988, 996 (4th Cir. 1979) (*Apple Tree I*), *on appeal after remand*, 671 F.2d 838 (1982) (*Apple Tree II*); *Be-Lo Stores*, 126 F.2d at 273 (identical). A bargaining order is "an extraordinary remedy available to the Board to overcome the polluting effects of the employer's unfair labor practices on the electoral atmosphere." *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446, 448 (5th Cir. 1970), *cert. denied*, 400 U.S. 957 (1970) (*American Cable II*); accord: *NLRB v. U.S.A. Polymer Corp.*, 272 F.3d 289, 297 (5th Cir. 2001), *cert. denied*, 536 U.S. 939 (2002). "A bargaining order . . . is an extraordinary remedy that we scrutinize very closely when imposed by the Board without a new election." *NLRB v. Taylor Mach. Products,* 136 F.3d 507, 519 (6th Cir. 1998) (internal quotation marks omitted); accord: *Exchange Bank v. NLRB*, 732 F.2d 60, 63 (6h Cir. 1984). "A bargaining order is strong medicine . . . to be implemented with the utmost care." *Intersweet v. NLRB*, 125 F.3d 1064, 1068 (7th Cir. 1997) (internal quotation marks omitted); *America's Best Quality Coatings*, 44 F.3d 516, 520 (7th Cir. 1995), cert. denied, 515 U.S. 1158 (1995) (identical); *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, 481 (7th Cir. 1994), *cert. denied*, 513 U.S. 1080 (1995) (same). "A bargaining order is an 'extreme remedy' authorized 'where an employer's conduct during an election campaign is so disruptive as to taint any "re-rerun" election." *Gardner Mechanical Services, Inc. v. NLRB*, 115 F.3d 636, 642 (9th Cir. 1997), quoting *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1368 (9th Cir. 1981).

454 U.S. 894 (1981); *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978); *Jerr-Dan Corp.*, 237 N.L.R.B. 302, 303 (1978), *enfd*. 601 F.2d 575 (3d Cir. 1979 (table)). Indeed, referencing, as noted above, the "designated or selected" language found in Section 9(a) in *Gissel*, 395 U.S. at 596-597, the Court declared that,

> Almost from the inception of the Act . . . it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provisions of § 8(a)(5)—by showing convincing support, for instance . . . by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.

Thus, the legality of voluntary recognition based upon evidence of majority status in the form of authorization cards is not at issue in this case. What is in controversy is the Board doctrine barring access to a Board-supervised election in the face of mass employee dissatisfaction with the employer's award to a third party of the right to co-determine their wages, hours, and conditions of employment. In *Keller Plastics Eastern, supra*, 157 N.L.R.B. 583, the Board ruled for the first time that an employer did not violate Section 8(a)(2) and (1) of the Act by executing a contract about three weeks after voluntary recognition of the union, although by that time the union had lost majority status through no fault of the employer's. The Board decided that a union needs a "reasonable period of time" to engage in collective bargaining. *Id.* at 587. In *Sound Contractors Assn.*, *supra*, 162 N.L.R.B. 364, 365, the Board indicated that valid voluntary recognition would similarly bar a decertification petition, although the facts in *Sound* did not show legitimate recognition.

In the *Metaldyne* and *Dana* cases, the facts persuasively showed why the Board should not permit an authorization card majority to cut off employees' right to an election. In both cases, the employees rebelled against their employers' recognition of the Union by gathering *within days* sufficient support to hold a decertification election, 50% of the employees in

Metaldyne and more than 35% in *Dana*. Moreover, employees with knowledge of the Union campaign at each plant reported such conduct as Union pressure and harassment for employees to sign cards at home and at work, misleading statements about the purpose and finality of the cards offered for signature, and concealment from the employees of the terms of the recognition agreement. Manipulation of the scope of the unit based on extent of organization was reported at Metaldyne. In fact, that would be contrary to the explicit statutory terms that "[i]n determining whether a unit is appropriate...the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). Essentially, the forty-five day window to allow employees to file "objections" to the union's representation of majority status to their employer allows this expression.[4]

If only extremely severe employer misconduct can operate to require bargaining based on less reliable cards and eliminate access to the Board's election machinery, how can the Board justify removing employees' right to an election where there has been no anti-union misconduct, where there is evidence of union misconduct, and where the employees themselves demand the exercise of their Section 7 rights by secret ballot? Two members in the majority in favor of the grant of review here, 355 N.L.R.B. No. 157 at slip op. 1, do not even assert that "industrial peace" or any other policy of the Act is at risk from the allowance of the Board's election process.[5] Chairman Liebman suggests in her reasons for granting review of the instant petitions for review here, that "the asserted benefits of the *Dana* regime outweigh its costs." Yet, of the 1,111 voluntary recognition notices issued by the Board in the three years under *Dana*, only 85 petitions were filed, resulting in 54 elections. *See* Notice August 31, 2010. So, the cost burden

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4It should also be noted that in circumstances where the union's recognition is based on a demand without a actual showing of majority interest, there is no basis to assert an election bar, as set forth *infra*.

[5]These are policies observed in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 38 (1987); *Brooks v. NLRB*, 348 N.L.R.B. 96, 103 (1954)

on the Board has been about 1 election in every Region during this period—not a severe burden of time and resources on the Agency.

What is remarkable is what has become of the arguments of the dissenters in *Dana* based on the three year "experiment" here.

First, it was asserted that *NLRB v. American National Insurance Co.*, 343 N.L.R.B. 96, 103 (1954), asserted the proposition that, "'The [NLRA] is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers." slip op. 2. The dissenters argued at slip op. 2-3, that the legitimacy of voluntary recognition, which is a concept not disputed here, declares that the Board must "'promot[e] voluntarily recognition and protect[] the stability of collective-bargaining relationships,'" citing *Ford Center for the Performing Arts*, 328 N.L.R.B. 1 (1999). They further argued, at slip op. 3, that, "negotiations can succeed . . . and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time," quoting *Keller Plastics*, *supra*, 157 N.L.R.B. at 587. They further quoted, at slip op. 3, *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705-706, to the effect that "'a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.'"[6] The dissenters also argued that employee rights are protected because they can file charges that the employer violated Section 8(a)(2) of the Act by "recogniz[ing] a union that lacked uncoerced

[6] *Franks Bros.* is very different from the issue and facts before the Board in this case. In *Franks*, the employer was guilty of an unlawful refusal to bargain after valid recognition, there was no sign of employee disaffection, and the employer's defense rested solely upon its contention that normal turnover in the unit should undo its bargaining obligation. Under such circumstances, requiring bargaining for a reasonable period of time is not illogical. Here, however, there was no unlawful refusal to bargain by either Metaldyne or Dan*a*, and there was affirmative evidence of employee resistance to the recognition in the form of showings of interest exceeding one half or third of the units.

majority support," since such recognition, if established, and even if done in good faith, would result in an order to withdraw recognition from the labor organization. slip op. 4-5. Finally, they contend that eliminating the voluntary recognition bar, or limiting it to 30 or 45 days following recognition, would vitiate the concept of voluntary recognition and discourage employers from entering into such agreements. slip op. 5.

Unfortunately for the dissenters, the disaster did not occur. That is not the point, though. The "Act is wholly neutral when it comes to that basic choice" on the question of representation." *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973). The flaw in the competing line of reasoning is that only where there is a reasonable certainty that the employees desire union representation in the first place, in the form of exercise of their statutory rights under Section 7, can *policy* considerations be taken into account by the Board. *See Shelton v. Tucker*, 364 U.S. 479 (1960) (right not to join equally as important as the right to join a labor organization).

In *Metaldyne* and *Dana*, where more than one-half and one-third, respectively, of the unit employees demanded an election *within days* of recognition, there can be no such reasonable certainty and the Board used its election machinery to determine the employees' true desires. After all, in *Ladies Garment Wrkrs. Union*, *supra*, 566 U.S. 731, 737, the Court found unlawful a grant and acceptance of recognition involving a minority union, even assuming the parties' good faith, declaring, "There could be no clearer abridgment of § 7 of the Act, assuring employees of the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity." [footnote omitted]

Nor can there be "industrial stability," if the relationship between the employer and the union goes forward from the outset in the face of sufficient employee disaffection – even majority disaffection in the case of *Metaldyne* – to support a question concerning representation.

As the Board recognized in *Gourmet Foods*, *Inc.*, 270 N.L.R.B. 578, 584 (1984), holding impermissible nonmajority bargaining orders, "[I]t is the culmination of choice *by a majority of employees* that leads to the process of collective bargaining: the choice by a majority gives legitimacy and effectiveness to a union's role as exclusive bargaining representative and correlatively gives rise to an employer's obligation to deal exclusively with that representative." (Emphasis in original). In the same decision, the Board quoted the author of the Act, Senator Wagner, as saying, "[C]ollective bargaining can be really effective only when workers are sufficiently solidified in their interests to make one agreement covering all. This is possible only by means of majority rule."[7] *Id.* The Board further quoted the Senator, "Workers find it easier to approach their employers in a spirit of good will if they are not torn by internal dissent."[8] *Id.*

The Supreme Court itself has declared that, "In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored." *Linden Lumber Div*, *supra*, 419 U.S. 302, 307. Based on the substantial showings of interest for a decertification election in both cases, the fact that cards are considered inherently less reliable than elections, and the declaration facts throwing grave doubts on how these cards were actually solicited, there can be little question that the Metaldyne and Dana workforces were "torn by internal dissent," and that a stable collective bargaining relationship leading to "industrial peace" can only be the product of a Board-conducted election at each plant.

Utilizing the Board's unfair labor practice mechanism is no substitute for a Board election. In the first place, as pointed out above, the Board demands a much higher standard of conduct in elections than in unfair labor practice proceedings. In representation proceedings, the

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[7]Citing "Hearings on S. 1958 before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. (1935), reprinted in I Leg. Hist. of the National Labor Relations Act, 1935, at 1419 (1949)."

[8]Citing,"79 Cong. Rec. 7565 (1935), reprinted in 2 Leg. Hist. of the National Labor Relations Act, 1935, at 2336 (1949)."

Board insists upon maintaining "laboratory conditions," and will overturn an election, based upon proper objections, where those conditions have not been obtained, even in the absence of unfair labor practices. As we have seen, conduct involving forged documents, alteration of Board documents to imply Board endorsement, racial appeals, captive audience speeches within 24 hours of an election, waivers of union initiation fees if contingent upon union support, coercive supervisory conduct on behalf of the union, electioneering at or near the polls, prolonged conversation between a party and employees waiting in line to vote, and unofficial list keeping, runs afoul of the laboratory conditions ideal but does not merit action as unfair labor practices. As noted, the Board also takes prophylactic steps on ensure the validity of the ballot, including use of election notices, impartial Board Agents, observers from both sides, etc.

Furthermore, unfair labor practices proceedings are much lengthier than a Board election. The Supreme Court emphasized this in *Linden Lumber Div.*, *supra*, 419 U.S. 302, 306, when it noted that, "The Board's experience indicates that the median time in a contested [unfair labor practice] case is 388 days [citation omitted]. On the other hand, the median time for an election and the decision of the Regional Director is about 45 days," [footnotes omitted],[9] in FY 2003, the median time for processing an unfair labor practice case from filing of the charge to Board decision had risen to 647 days. Table 23, *Sixty-Eighth Annual Report of the National Labor Relations Board for Fiscal Year 2003* (Washington, D.C. 2004), but was reduced back down to 100 days in 2009. Chart 6B, *Seventy-Fourth Annual Report of the National Labor Relations Board for Fiscal Year 2003* (Washington, D.C. 2009). Of course, forty-five days is the Board standard for holding elections.

Finally, it cannot go unrecognized that the employees themselves have chosen to resolve

[9]The Court also observed that the time between N.L.R.B. and the Board's ruling in the two consolidated cases at hand in *Linden* was four and a half years and six and a half years. *Id.* at 306.

this matter by exercising their statutory right to an election, rather than to set off an extended unfair labor practices case proceeding that could leave their plants in turmoil for years. They want swift, affirmative evidence of the desires of their fellow employees, not years of protracted litigation that in any case would not reach "objectionable" as opposed to "unlawful" conduct.

Permitting this to occur solely as a Section 8(a)(2) charge (as it has been suggested) also makes little sense because the employees would likely have to hire an attorney to set forth their positions. Second, the General Counsel has unlimited discretion to deny the charge and not issue a complaint against an employer—thereby denying the exercise of the electoral right. *NLRB v. UFCW, Local 23*, 484 U.S. 112, 126 (1984). Third, the General Counsel can settle the matter with the parties with unreviewable discretion by the Board or the federal Courts, as well. *Id*. at 131. Therefore, employees may never be allowed to have their Section 7 right vindicated at all if the General Counsel and not the Board is the gatekeeper to their Section 7 electoral rights.

Nor can there be anything to the contention that lifting the voluntary recognition bar has removed the incentive to enter into voluntary recognition agreements.[10] The 1,111 voluntary agreements since *Dana* show this is not true. The Board should provide no incentive for an employer to recognize a minority union because doing so is specifically illegal under Section 8(a)(2). *Ladies Garment Wrks. Union, supra.*

In *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), the Court ruled that support for a minority union in violation of Section 8(a)(2) cannot be accomplished even in good faith. The Court found that the resulting contract bar rule to employee petitions "creates an

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10It is the burden of the party alleging the existence of a 9(a) relationship in the construction industry to prove its existence. *Casale Ind.*, 311 N.L.R.B. 951, 952 (1993); *J & R Tile, Inc.*, 291 N.L.R.B. 1034, 1035 (1988). This is the uninterrupted position of the Board since the seminal case of *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375, 1385 (1987): "In light of the legislative history and the traditional prevailing practice in the construction industry, we will require the party asserting the existence of a 9(a) relationship to prove it."

opportunity for construction companies and unions to circumvent both section 8(f) protections and *Garment Workers'* holding by colluding at the expense of employees and rival unions*."* *Id.* at 537. By doing so there, the Board "neglected its fundamental obligation to protect employee section 7 rights*."* *Id.* If, however, the voluntary recognition bar does not exist, an employer wishing to accommodate a union as well as protect its employees' rights, can simply enter into the agreement, recognize the union based on cards, and abide by the results of an election if employees seek one upon a proper showing of interest.

The Board should build upon its recent decision to place more trust in elections than unilateral action. In *Levitz Furniture*, *supra*, 333 N.L.R.B. 717, the Board abandoned its half century old policy of permitting employers to withdraw recognition based only upon a "good faith doubt" of a union's majority status, and at the same time made it easier for employers to file for elections by redefining the good-faith reasonable doubt necessary to support a petition as "uncertainty" concerning a union's majority status, rather than "disbelief" of its continued majority.

In *Levitz*, *id.* at 725-26, the Board rejected the unions' position that an election should always be held before an employer withdrawal of recognition, deciding that an employer could still withdraw recognition based upon actual evidence of loss of majority status, such as a petition signed by an employee majority (the facts in *Levitz* itself). There is no inconsistency between permitting employer withdrawal of recognition based upon an employee petition, and directing an election in the circumstances of *Metaldyne* and *Dana*, because there is substantial conflicting evidence concerning the Unions' majority status in these cases, authorization cards versus showings of interest exceeding 50% and 35% of the workforce respectively. In fact, the logic of *Levitz* dictates that elections be held here, since the Board noted that "[C]onflicting evidence would tend to produce good-faith uncertainty," *Id.* at 730. In other words, if good-faith

uncertainty is sufficient to obtain an election based upon an employer petition, surely it must be adequate to support an election petition filed by employees.[11]

In short, the Board's abandonment of the voluntary recognition bar doctrine for 45 days after recognition has been extended is exemplary and should be continued. Freedom of choice and majority rule, the inextricable "twin pillars" of the Act are both denied when the Board bars access to its election processes by giving conclusive effect to "voluntary recognition" agreements that may serve employer and union but not employee interests. As we have seen, the Supreme Court has declared that authorization cards as a means of determining employee sentiment, and are less reliable than elections.[12] The courts of appeals approve the use of cards in lieu of an election only where extraordinary employer misconduct has tainted the atmosphere.[13] And much conduct that can infect the atmosphere of an election is objectionable but not

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11Recent decision of the Board makes it appear that the Board desires to abandon elections as a method of ascertaining employee representation sentiment, despite the statutory mechanism. Curiously, the Board has engaged in decisionmaking that has all but written *Deklewa* out of existence altogether. In the building and construction industry, the Congress made access to representation elections available at all times under Section 8(f). In *Central Illinois Constr.*, 335 N.L.R.B. 717 (2001), the Board allowed the conversion of Section 8(f) agreements into Section 9(a) agreements under certain conditions. The Board reaffirmed *Deklewa's* adoption of a rebuttable presumption that a construction industry agreement was under Section 8(f) and *placed the burden of proving it to be a Section 9(a) agreement on the party asserting it to be so.* 335 N.L.R.B. at 718. But, it further ruled that,

> We therefore adopt the requirements stated by the Tenth Circuit in *Triple C Maintenance, Inc.* and *Oklahoma Installation Co*. A recognition agreement or contract provision will be independently sufficient to establish a union's 9(a) representation status where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support.

Central Illinois Const., 335 N.L.R.B. at 720.

The prospect of employee elections in construction industry prehire agreements now is wishful. Magic word use of Section 9(a) enabling language in union recognition clauses now meet the *Central Illinois Constr.* burden, barring employee resort to an election. *See* LeClercq, *Section 8(f) Prehire Agreements and the Exception to Majority Representation: Are Construction Workers Getting the Shaft?*, 27 Hofstra Lab. & Emp. L.J. 51 (Fall 2009).

[12]*Gissel*, 395 U.S. at 603.

[13]See n. 3, *supra*, and accompanying text.

unlawful, making it impossible to use the Board's unfair labor practice machinery after the fact.

In *Levitz*, *supra*, 333 N.L.R.B. 717, the Board ruled that where employer election petitions are supported by mere "uncertainty," of the union's majority status, rather than "disbelief," an election must be held. Inarguably, the prompt filing of decertification petitions by Metaldyne and Dana employees with more than 50% and 35% support, taken in tandem with the allegations of union misconduct in securing the authorization cards upon which recognition was based, raises at least the same level of uncertainty the Board identified in *Levitz*. Indeed, in the case of *Metaldyne*, since the petition was backed more than half the unit employees, withdrawal of recognition without even holding an election would be justified were it not for the voluntary recognition bar.

Nor may credence be given to arguments that policy choices in favor of "industrial stability" support retaining the bar. Policy choices in favor of collectivization cannot override employees' statutory right to refrain from unionization. Indeed, the Board relying heavily on Senator Wagner, in *Gourmet Foods*, *supra*, 270 N.L.R.B. 578, 584 emphasized that collective bargaining cannot be effective without the legitimacy conferred by majority status – a status that is at least far from clear and at worst absent in the instant cases. Apart from not reaching all the conduct that can interfere without an election, resort to unfair labor practice charges is a lengthy process that cannot positively ascertain the employees' will. Removing the voluntary recognition bar has not discouraged employers from entering into recognition agreements except where they seriously doubt their own employees' will support unionization by fiat.

That fact that the statute expressly provides that the Board hold elections, but not when, is not a basis for denying Section 7 rights that always exist vis-a vis voluntary agreements with labor organizations that assert majority employee support at some point in time. Even if voluntary agreements may be said to be "favored," they are clearly not the "preferred" method

the Congress instituted for ascertaining employee Section 7 interest in organization.

Therefore, because every good reason based upon statutory rights as well as practical considerations support eliminating the voluntary recognition bar as the Board in *Dana Corporation* has done, and no persuasive arguments can be adduced against lifting the ban, we urge the Board to maintain the rule in *Dana Corporation*.

CONCLUSION

WHEREFORE, *amicus curiae* Center on National Labor Policy, Inc. respectfully requests that the Board not reverse its decision in *Dana Corporation*, and direct that the Regional Directors in these cases processes the petitions.

Respectfully submitted,

/s/ Michael E. Avakian
Michael E. Avakian
CENTER ON NATIONAL LABOR POLICY, INC.
5211 Port Royal Road, Suite 610
North Springfield, VA 22151
(703) 321-9180

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Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I have served one copy of the amicus curiae brief of the Center on National Labor Policy, in this cause was filed electronically with the Board on this 1st day of November 2010.

/s/ Michael E. Avakian
Michael E. Avakian
CENTER ON NATIONAL LABOR
POLICY, INC.
5211 Port Royal Road, Suite 610
North Springfield, VA 22151