UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DOUGLAS RICHARDS,
(Petitioner),

CEQUENT TOWING PRODUCTS.,
(Employer)

CASE NO. 25-RD-1447

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO
(Union)

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

On June 9, 2004, the Board voted to review the Regional Director's administrative dismissal of the above-captioned election petition because "it raises substantial issues warranting review." This determination by the Board is correct, as this case raises two important issues that directly implicate employees' § 7 right to choose or refrain from union representation: 1) whether Board policies wrongfully discriminate against employees who exercise their right to refrain from union representation, and 2) the continued relevancy of the Board's election machinery.

First, does the Board's "dual card" doctrine invalidate a union authorization card when an employee also signs a document opposing that union's representation? Here, a *majority* of employees signed a petition opposing representation by the United Steelworkers of America ("USWA" or "Union") prior to employer recognition. If the "dual card" doctrine is applied by the Board without discrimination as to the employees' representational preference (as it should be), the USWA's claim to majority employee support is indefensible, and the "voluntary recognition bar" is thereby inapplicable.

Second, is the exception to the voluntary recognition bar articulated in Smith's Food & Drug Centers, Inc., 320 N.L.R.B. 844 (1996), available to employees who oppose union representation? Put another way, should Baseball Club of Seattle, LP d/b/a Seattle Mariners, 335 N.L.R.B. 563 (2001), be overruled? Here, the petition signed by a *majority* of employees prior to employer recognition also requested that the Board conduct a decertification election in the event that the USWA was recognized by their employer. If Smith's Food is applied by the Board without discrimination as to representational preference (as it should be), then Petitioner's petition is not barred by the voluntary recognition bar, and a prompt election should be held.

The Board is currently engaged in a wholesale review of the voluntary recognition bar in Dana Corp., 341 N.L.R.B. No. 150 (2004).[1] The legal and policy issues under review in that case overlap with the Smith's Food issue under review here. For example, if the Board were to discard its voluntary recognition bar policy, the applicability of the Smith's Food exception to that bar obviously would become a non-issue.

However, this case can be resolved on the "dual card" issue, and without consideration of the Smith's Food issue. Routine application of the well-established "dual card" doctrine in this case will render the USWA's claim to majority status baseless, and the voluntary recognition bar thereby inapplicable. Petitioner respectfully urges the Board to expeditiously resolve this case under the "dual card" doctrine, thereby rendering moot the Smith's Food issue.

Reaching a decision expeditiously is critical to protecting employees' right to freely choose or reject union representation. *See* NLRB Case Handling Manual, ¶ 11000 "Agency Objective" ("expeditious processing of petitions" to be accorded the highest priority). This is especially true here, where the USWA did not have majority employee support at the time of employer recognition. The longer this minority union is permitted to act as exclusive bargaining representative, the more difficult it will be for employees to make a free and uncoerced choice in the secret ballot election.[2]

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[1] Petitioner's counsel is also attorney for the petitioners in Metaldyne Corp., 6-RD-1518 and 6-RD-1519.

[2] See International Ladies Garment Workers v. NLRB, 366 U.S. 731, 738 (1961) ("grant of exclusive recognition to a minority union constitutes unlawful support in violation of [§ 8(a)(2)], because the union so favored is given '*a marked advantage over any other in securing the adherence of employees*'") (emphasis added), quoting NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261, 267 (1938); see also Fuchs v. Jet Spray Corp., 560 F. Supp. 1147, 1156 (D. Mass. 1983) (Section 10(j) injunction requiring employer to withdraw recognition of union that lacked uncoerced support of a majority of employees appropriate to "prevent the recognized union's entrenchment"), aff'd, 725 F.2d 664 (1st Cir. 1983).

STATEMENT OF FACTS

I. The Side Letter and Framework Agreements.

USWA representation was imposed upon Petitioner and his co-workers pursuant to the terms of two agreements between Cequent Towing Products ("Cequent" or "Employer") and the USWA. These Agreements, entitled the "Side Letter" and "Framework for a Constructive Collective Bargaining Relationship" ("Framework") (collectively the "Side Letter and Framework" or "Agreements"), represent a classic "bargaining to organize" scheme, wherein the employer agrees to assist union organizing drives against its employees in exchange for the union agreeing to behave in a manner favorable to the employer's interests.[3] The Agreements are expressly to be kept secret from the employees they target. See Side Letter, ¶ 15.

Under the Agreements, Cequent is obligated to assist the USWA with organizing its non-union employees. Cequent must gag its supervisors from speaking about the USWA or unionization, provide the Union with personal information about employees, and grant USWA organizers who are not Cequent employees access to company facilities. See Framework, ¶¶ I(C)(1-4). Cequent is also obligated to recognize the USWA as the exclusive bargaining representative of employees based on union authorization cards and "without a secret ballot election conducted by the NLRB" See Framework, ¶ I(C)(6). Upon the USWA organizing a targeted facility, the Agreements authorize the automatic imposition of a collective bargaining

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[3] Cequent is a party to an agreement substantially similar to the Agreement in the record, which is between Heartland Industrial Partners, LLP ("Heartland") and the USWA. Heartland is the original party to Side Letter and Framework Agreements with the USWA. Side Letter ¶¶ 2-7 of the Agreements requires Heartland to impose the agreements on companies it acquires (it is an § 8(e) clause). Heartland acquired a controlling interest in Trimas Corporation ("TriMas")–which is Cequent's parent company–in June 2002. *See* Form 10-K Report filed by TriMas with the SEC (document publically available). Heartland caused TriMas (and thereby Cequent) to become a party to the Agreements pursuant to Side Letter, ¶¶ 2-7. *See* USWA Flier of November 11, 2003.

agreement pursuant to a "final offer package interest arbitration" procedure, if a contract is not otherwise reached after 180 days of bargaining. See Framework, ¶ I(F). and Side Letter, ¶ 9(H).

In exchange for Heartland and Cequent's delivery of this invaluable assistance, the USWA sacrificed the interests of the employees targeted for unionization. The USWA also committed to behave in a manner favorable to management. First, the USWA pre-negotiated limits on the wages and benefits employees can attain after they are organized by the Union. See Side Letter, ¶¶ 9(A-B).[4] Second, the USWA waived employees' right to strike in support of any collective bargaining demands. See Framework, ¶ I(F).[5] Finally, the USWA provided Heartland with approximately $25 million of employees' pension money from its ostensibly independent pension fund–the Steelworkers Pension Trust–in consideration for the Agreements.[6]

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[4] Side Letter, ¶ 9(A) limits the wages and benefits at a "newly organized facility"–such as Cequent's facility in Goshen, Indiana–to the wages and benefits of an employer's existing operations and its competitors.

Under Side Letter, ¶ 9(B), wages and benefits at certain newly organized facilities cannot be raised to even that level without "being balanced by a reasonable consideration of" (among other limiting factors) "a period of up to five years for wage increases to reach indicated wage and benefit levels," and "limitation of annual increases in hourly compensation levels no greater than 2X the current rate of annual increases in average hourly compensation in the United States as published by the Bureau of Labor Statistics."

However, Side Letter, ¶ 9(C) states that "the above considerations shall in no way limit, and in fact the parties explicitly acknowledge the appropriateness of placing in the first collective bargaining agreement strong protections of seniority and union security with 'union security' defined broadly to include provisions such as those which . . . require that new employees join the Union, maintain membership and pay dues through payroll deduction." Thus, while the USWA was willing to limit the wages of newly organized employees, it took steps to ensure that the flow of compulsory dues to the Union was guaranteed.

[5] The USWA's sacrifice in the Agreements of the right to strike is a massive concession by the Union made at the expense of employees it did not then represent. This concession unquestionably destroysemployee bargaining leverage to obtain favorable terms and conditions of employment. "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms." NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967); see also Pattern Makers League v. NLRB, 473 U. S. 95, 129 (1985) ("The strike or the threat to strike is the workers' *most effective* means of pressuring employers, and so lies at the center of the collective activity protected by the Act.") (emphasis added).

[6] See William Greider, *The Soul of Capitalism*, Simon & Shuster, p. 145 (2003).

The terms of the Agreements are not precatory and are not mere guidelines. Their provisions are fully enforceable under the binding arbitration provisions of Framework, ¶ I(G), and in a federal court under 29 U.S.C. § 185 (unless otherwise held unlawful).[7] See UAW v. Dana Corp., 278 F.3d 548 (6th Cir. 2002). The "sweetheart deal" the USWA pre-negotiated at employees' expense in Side Letter, ¶¶ 9(a-b) is also enforceable under the "final offer package interest arbitration" procedures of Framework, ¶ I(F). See Framework, ¶¶ I(F)(1) and (4).

Under current Board policies, the Side Letter and Framework Agreements preclude the use of the Act's representational mechanisms. The voluntary recognition provisions of the Framework, ¶¶ I(C)(5-6), waive the right of the employer and the union to request a Board-supervised election. See Central Parking Sys., Inc., 335 N.L.R.B. 390 (2001); Verizon Info. Sys, 335 N.L.R.B. 558 (2001). After recognition, an election petition filed by employees is barred by the voluntary recognition bar. See, e.g., MGM Grand Hotel Inc., 329 N.L.R.B. 464, 471-472 (1999). The terms calling for binding arbitration after 180 days of bargaining–Framework, ¶ I(F) and Side Letter, ¶ 9(H)–effectively guarantee that a contract will be signed before the voluntary recognition bar expires. The contract bar then precludes an election for approximately three more years. See Waste Mgmt., 338 N.L.R.B. No. 155 (2003). In short, the USWA and Cequent's Agreements operate to lock in employees, and lock out the NLRB and its representational procedures.

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[7] The USWA negotiating an agreement with Heartland/Cequent regarding employees' terms and conditions of employment in Side Letter, ¶¶ 9(A-B), at a time during which the USWA did not represent those employees, constitutes unlawful pre-recognition bargaining under Majestic Weaving Co., 147 N.L.R.B. 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2d Cir. 1966). Side Letter, ¶¶ 2-7, which requires Heartland to impose the Agreements on companies with which it does certain business, is unlawful under § 8(e) of the Act.

II. Cequent Selected the USWA to Be the Representative of Its Employees in Goshen Despite a Petition Signed by a Majority of Employees Against USWA Representation.

Petitioner Douglas Richards is employed by Cequent at its facility in Goshen, Indiana. In October 2003, the USWA launched an organizing campaign against Petitioner and his co-workers under the terms of the Agreements. Cequent management informed employees that the USWA had 90 days (until January 20, 2004) to collect union authorization cards from employees. See Declaration of Richards, ¶ 3; Framework, ¶ I(C).

Cequent assisted the USWA's organizing drive against its employees in the manner required by the Agreements. Cequent granted USWA organizers, who were not Cequent employees, access to the Goshen facility. Declaration of Richards, ¶ 7. Cequent also provided the Union with personal information about employees, which USWA organizers used to repeatedly visit employees' homes to pressure them to sign union authorization cards. Id. at ¶ 6.

Despite employer assistance, the USWA apparently was unable to induce a majority of employees to sign union authorization cards by the deadline of January 20, 2004, as the Union did not demand recognition. Id. at ¶ 7. However, instead of ending the organizing campaign, Cequent granted the Union an additional 60 days to collect more authorization cards from employees. Id. at ¶ 8.

Shortly thereafter, Petitioner and his co-workers circulated a petition amongst Goshen employees. The petition states in full:

PETITION AGAINST USWA "REPRESENTATION"

The undersigned employees do NOT want to be "represented" by the United Steelworkers of America ("USWA"), do NOT want to join the USWA, and do NOT support the USWA in any manner.

To the extent that any of the undersigned employees have ever previously signed a USWA membership or "authorization card," the undersigned employee hereby REVOKES that card. More specifically, that our employer, the USWA, and all third parties or arbitrators take NOTICE that any such card signed by an undersigned employee is NULL and VOID.

Should our employer ever voluntarily recognize the USWA as the bargaining representative of employees, the undersigned employees hereby petition the National Labor Relations Board to hold a decertification ELECTION to determine whether the majority of employees truly wish to be represented by the USWA.

("Showing of Interest"); Id. at ¶ 9.[8]

As the dates on the Showing of Interest make clear, large numbers of Cequent employees signed this petition within days of it first being circulated. Overall, approximately 236 employees signed the Showing of Interest. There are approximately 400 to 450 employees at Cequent's Goshen facility. See Declaration of Richards, ¶ 11. The petition was thereby signed by a majority of employees under either estimate.

In order to ensure that Cequent did not count any employee who signed the Showing of Interest as a USWA supporter, Petitioner delivered signed Showing of Interest forms to Cequent. Specifically, Petitioner delivered these forms to Colin Hindman, head of human resources at Cequent Goshen's facility, on several occasions in February 2004. Mr. Hindman accepted the Showing of Interest forms signed by employees. Petitioner documented each delivery. Id. at ¶¶ 12-18.

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[8] Colloquially, this document would be called a "petition," and is called a "petition" by Mr. Richards in his Declaration. However, this document will be referred to as the "Showing of Interest" in this brief so as not to confuse it with the decertification "petition" filed with the NLRB (i.e. NLRB Form 502).

Petitioner also provided the Showing of Interest forms to the USWA on numerous occasions in February 2004. Id. at ¶¶ 20-23. This was done so that the USWA would return or destroy any union authorization card that a signatory employee may have signed, in accordance with the express wish of each employee who signed the Showing of Interest. Id. at ¶ 20. Petitioner documented his repeated deliveries of employee-signed Showing of Interest forms to the USWA. Id. at ¶¶ 20-23.

In addition to signing the Showing of Interest, some employees sent a letter to the USWA expressly requesting that the Union return their authorization card. A form revocation letter developed by Petitioner, and provided to employees, states: "After reconsideration I, _____ have decided that I do not want to be a member of the Steelworkers Union or have them represent me in bargaining with Cequent and am requesting that my signed union card be returned to me." Id. at ¶¶ 25-26. At least several employees delivered this form to the USWA and/or Cequent. Id.

Despite all of this, the evidence indicates that the USWA disregarded employees' express desire to not be counted as Union supporters. Petitioner is unaware of the USWA returning even one authorization card to any employee, or otherwise confirming that his or her card was destroyed. Id. at ¶¶ 24 & 26. Instead, USWA organizers responded to the employees' revocations by going to the homes of signatory employees (in some cases several times) to pressure them into signing an additional union authorization card! Id.

On or about March 15, 2004, the USWA demanded that Cequent voluntarily recognize the USWA pursuant to the terms of the Side Letter and Framework. Id. at ¶ 27. This demand was made in the face of the Showing of Interest against USWA representation signed by a majority of employees. Cequent and the USWA scheduled a meeting at the Holiday Inn in Goshen, Indiana for March 22, 2004, at which a third party was to compare the USWA's authorization cards to a company list of employees to determine if the USWA had the support of a majority of employees. Id. at ¶ 28.

On March 16, 2004, a letter and copy of the employee-signed Showing of Interest forms were sent to the Employer. See March 16, 2004, Letter from Petitioner's attorney, William Messenger, to Colin Hindman. The letter requests that:

> Cequent and any third party arbitrator(s) accept, respect, and give full affect to these petitions. In particular, this means that when Cequent and/or a third party arbitrator attempts to determine if the USWA has the support of a majority of employees, all employees who signed the petitions are *not* counted as being supporters of the USWA.

Id. The letter further warns that Cequent's recognition of the USWA, in the face of the Showing of Interest, would be unlawful. Id. Representatives of Cequent subsequently acknowledged receipt of the letter. See Declaration of Richards, ¶ 30.

At its March 22, 2004 meeting, Cequent selected the USWA to be the representative of its employees in Goshen. Id. at ¶ 31. Region 25's investigation indicates that the Showing of Interest was presented to the arbitrator at the meeting.

> The evidence shows that an independent arbitrator, after examining both signed union authorization cards and signed employee petitions documenting opposition to the union and also revoking any union authorization card previously signed by the signatory employees, concluded that the Union had the support of a majority of employees. The Employer then extended recognition to the Union on the basis of the arbitrator's findings.

Region 25 Decision to Dismiss of April 23, 2004.

While the Showing of Interest may have been "examined" at the meeting, it is readily apparent that it was not respected or given any legal affect. Clearly, the Showing of Interest was signed by a majority of employees. Thus, it is equally clear that the "third party arbitrator" must have counted as Union supporters at least some employees who signed the Showing of Interest. But, as discussed below, counting any employee who signed the Showing of Interest as a Union supporter is directly contrary to the Board's long standing "dual card" doctrine.

Within **three days** of Cequent anointing the USWA to be the representative of its employees in Goshen, Petitioner filed a petition for a decertification election with Region 25. The petition was supported by the Showing of Interest, duly signed by a majority of employees **before** the date Cequent recognized the USWA. The Showing of Interest plainly states:

> Should our employer ever voluntarily recognize the USWA as the bargaining representative of employees, the undersigned employees hereby petition the National Labor Relations Board to hold a decertification ELECTION to determine whether the majority of employees truly wish to be represented by the USWA.

Showing of Interest.

The express desire of employees for an election was rejected by Region 25. The Region dismissed the decertification petition pursuant to the voluntary recognition bar. That determination is now under review by the Board. Petitioner urges that the Board give full affect to the unmistakable desire of a majority of employees for a secret-ballot election.

ARGUMENT

The National Labor Relations Act ("NLRA" or "Act") grants employees a statutory right to petition for a secret-ballot election "assert[ing] that the individual or labor organization . . . currently recognized by their employer as the bargaining representative, is no longer a representative." 29 U.S.C. § 159(c)(1)(A)(ii). The Board nevertheless currently follows a "voluntary recognition bar" policy that blocks elections from occurring after an employer recognizes a union, at least until a "reasonable" time to negotiate has elapsed. See, e.g., Ford Center for the Performing Arts, 328 N.L.R.B. 1 (1999); MGM Grand Hotel, 329 N.L.R.B. at 471-72 (Member Brame, dissenting). The voluntary recognition bar is not a matter of statute, but instead is a creature of Board policy. 329 N.L.R.B. at 471-72.

Under current law, the voluntary recognition bar does not apply in at least two circumstances. First, the bar does not apply if the employer-recognized union did not have the support of a majority of employees at the time of recognition. Second, the bar is inapplicable if a petitioner acquired the documented support of over 30% of employees for an election before the employer voluntary recognized the union. See Smith's Food & Drug Centers, Inc., 320 N.L.R.B. 844 (1996) (hereinafter "Smith's Food exception"); see also Rollins Transport. Sys., 296 N.L.R.B. 793 (1989); King Manor Care Center, 303 N.L.R.B. 19 (1991).

Here, Petitioner's Showing of Interest against Union representation and for a decertification election was signed by a majority of employees *before* Cequent selected the USWA to be the representative of its employees. Thus, both exceptions to the voluntary recognition bar preclude the operation of the bar. The USWA did not have the support of a majority of the employees at the time of recognition, as the Showing of Interest invalidates any

union authorization card a signatory employee may have signed under the Board's "dual card" doctrine. See Le Marquis Hotel, LLC, 340 N.L.R.B. No. 64, at 7 (2003). The Smith's Food exception is similarly applicable because over 30% of employees signed a showing of interest for a decertification election prior to employer recognition.

Notwithstanding the clear application of two exceptions to the voluntary recognition bar, Region 25 dismissed the election petition. The sole reason for the dismissal is that Petitioner and a majority of his coworkers **opposed** the USWA's representation, instead of supporting the representation of a rival union. If Petitioner and his coworkers had signed a showing of interest in support of a rival union, the "dual card" doctrine would have clearly invalidated the USWA's claim to majority support, and/or the Smith's Food exemption would have applied. In short, Petitioner and his colleagues were discriminated against **because** they chose to exercise their §§ 7 and 9 rights to refrain from union representation instead of supporting union representation.

These facts raise the overarching policy question at issue in this case: Does the Act permit the NLRB and its representational machinery to discriminate against employees who choose to refrain from union representation in favor of employees who support union representation? The answer to this question will largely resolve the two specific legal issues that are dispositive here.

First, does the Board's "dual card" doctrine invalidate a union authorization card when the signatory employee also signs a document opposing union representation? It is firmly established that a union authorization card is null and void if the signatory employee also signs a card **supporting** the representation of a different union. See, e.g., Alliant Foodservice, Inc., 335 N.L.R.B. 695 (2001). A non-discriminatory application of this rule mandates that the same result also occur when a signatory employee signs a document **opposing** union representation. Here,

application of this rule would render the USWA's ostensible claim to support by a majority of the employees untenable, and the voluntary recognition bar inapplicable.

Second, does the Smith's Food exception to the voluntary recognition bar apply to employees who choose to refrain from union representation? It is well recognized that the voluntary recognition bar does not apply to election petitions supported by a showing of interest, signed prior to employer recognition, that **supports** the representation of another union. See Smith's Food, 320 N.L.R.B. at 844-45. A non-discriminatory application of this rule mandates the same result when an election petition is supported by a showing of interest, signed prior to employer recognition, that **opposes** union representation. Of course, this would require overruling the anomalous and discriminatory ruling of Baseball Club of Seattle, LP d/b/a Seattle Mariners, 335 N.L.R.B. 563 (2001). That result is warranted here.

The Board must choose the path of non-discrimination, as the continuing viability and relevance of the § 9 of the Act is at stake. Agreements between employers and unions such as the Side Letter and Framework Agreements threaten to deprive employees of their right to a Board conducted secret-ballot election under § 9(c)(1)(A)(ii) of the Act, and to exclude the Board entirely from the representational process. The Board must prevent the NLRA's representational machinery from sliding into irrelevance and obsolescence.

I. Overarching Policy Issue: Does the NLRA Discriminate Between Employees Who Choose to Refrain from Union Representation in Favor of Those Who Support Union Representation?

The text of the NLRA makes clear that the Act equally protects the right of employees to support union representation and to oppose union representation. The Act does not permit discrimination against employees who wish to refrain from union representation in favor of those

who desire it.

Section 7 of the Act could not be more clear: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the **right to refrain from any or all such activities.**" 29 U.S.C. § 157 (emphasis added). Similarly, § 8(a)(3) precludes "discrimination in regard to hire or tenure of employment or any term or condition of employment to **encourage or discourage** membership in any labor organization." 29 U.S.C. § 158(a)(3) (emphasis added); see also 29 U.S.C. 158(b)(2). With regard to representational proceedings, § 9 grants employees the right to file an election petition "alleging that a substantial number of employees (i) wish to be represented for collective bargaining . . . **or** (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a)." 29 U.S.C. § 159(c) (emphasis added).

The courts and Board have similarly recognized that the Act equally protects employees' rights to support and oppose union representation. See Radio Officers Union of Commercial Tel. Union v. NLRB, 347 U.S. 17, 40 (1954) ("The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood"); Pattern Makers League v. N.L.R.B., 473 U.S. 95, 104 (1985) ("policy of voluntary unionism [is] implicit in 8(a)(3)"); Lee Lumber & Bldg. Material Corp. v. NLRB, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) ("employee free choice . . . is a core principle of the Act,") citing Skyline Distrib. v. N.L.R.B., 99

F.3d 403, 411 (D.C. Cir. 1999); Bloom v. NLRB, 153 F.3d 844, 849-50 (8th Cir. 1998) ("[e]nlisting in a union is a wholly voluntary commitment; it is an option that may be free undertaken or free rejected."), vacated on other grounds sub nom., OPEIU Local 12 v. Bloom, 525 U.S. 1133 (1999); Rollins, 296 N.L.R.B. at 793 ("The paramount concern in such instances must be the employees' right to select among two or more unions, **or indeed to choose none.**") (emphasis added).

The Act's policy of "encouraging the practice and procedure of collective bargaining," 29 U.S.C. § 151, does not mean that the Act endorses favoritism towards employees who support union representation over those who wish to refrain from union representation. To the contrary, collective bargaining is predicated on the exercise of employee free choice. See 29 U.S.C. § 151 (Act's purpose is "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing").

> [T]he interest of fostering the collective bargaining process [is based] * * * upon the preamble to the Act which states that the policy of the United States is to "encourage the practice and procedure of collective bargaining." However, the Act itself, in its substantive provisions, gives employees the fundamental right to choose whether to engage in collective bargaining or not. The preamble and the substantive provisions of the Act are not inconsistent. Read together, they pronounce a policy under which our nation protects and encourages the practice and procedure of collective bargaining **for those employees who have freely chosen to engage in it.**

Levitz Furniture Co., 333 N.L.R.B. 717, 731 (2001) (Member Hurtgen, concurring) (emphasis added); see also In re MV Transportation, 337 N.L.R.B. 770, 772 (2002) (the "preservation of the stability of bargaining relationships . . . is a matter of policy and operates with respect to those situations where employees have chosen a bargaining relationship") (citations omitted).

Former Member Hurtgen is absolutely correct. It is undisputable that the Act does not favor "collective bargaining" between an employer and a union that **lacks** the uncoerced support of a majority of employees. See International Ladies Garment Workers Union v. NLRB, 366 U.S. 731, 737 (1961) ("There could be no clearer abridgment of § 7 of the Act" than for a union and employer to enter a collective bargaining relationship when a majority of employees do not support union representation); Majestic Weaving Co., 147 N.L.R.B. 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2d Cir. 1966) (employer negotiating with minority union unlawful even if conditioned upon union obtaining majority support in the future). Accordingly, the Act equally protects the right of employees to support or to oppose union representation.

II. If an Employee Signs a Document Stating That He Opposes the Representation of a Union, Does That Invalidate a Union Authorization Card that the Employee Signed, Under the Board's "Dual Card" Doctrine?

The voluntary recognition bar does not apply if the employer-selected union did not have the support of a majority of employees at the time of recognition. A majority of Cequent employees signed the Showing of Interest against USWA representation prior to Cequent recognizing the USWA. If Region 25 had applied the Board's "dual card doctrine" to the facts of this case, the USWA's claim of majority employee support would be bogus (as would its voluntary recognition bar defense to the election petition).

Under the Board's voluntary recognition bar policy, Cequent employees cannot be deprived of their statutory right to a secret ballot decertification election (see § 9(c)(1)(A)(ii)) unless and until the USWA and Cequent prove that the employer-selected union had the support of a majority of employees at the time of recognition. See Smith's Food, 320 N.L.R.B. at 846 ("a voluntary and good-faith recognition of a union by the employer based on an unassisted and

uncoerced showing of interest from a **majority of unit employees** will bar a petition") (emphasis added); *see* also id. at 846 n.3 (the "general requirements of Sound Contractors Assn., 162 N.L.R.B. 364 (1967), for establishing a recognition bar . . . includ[e] the requirements that recognition must be in good faith and on the basis of a previously demonstrated majority status"); Josephine Furniture Co., 172 N.L.R.B. 404, 405 (1968) ("as it does not affirmatively appear that the Retail Clerks had demonstrated its majority prior to the granting of recognition it is clear that such recognition cannot bar an election at this time").[9]

A "good-faith" but erroneous belief that a union has majority employee support is insufficient to support either a collective bargaining relationship or the voluntary recognition bar where the union lacked the actual support of employees. See International Ladies Garment Workers, 366 U.S. at 739. It is thereby **irrelevant** whether Cequent, the USWA, or the arbitrator hired by the parties possessed or lacked knowledge of employees' true representational preferences at the time of employer recognition. See Rollins, 296 N.L.R.B. at 794-95 (employer knowledge of employees' representational preferences is not dispositive in the representational context, but rather the issue is the existence of employee support); Alliant Foodservice, Inc., 335 N.L.R.B. 695 (2001) ("dual card" doctrine invalidated union authorization cards relied on by employer to recognize union, even though employer had no knowledge of the cards signed for the another union).

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[9] However, when applying the bar, the Board does not require or examine whether the employer-recognized union enjoyed the **uncoerced** support of a majority employees, but merely whether the union can prove majority employee support (irrespective of how such support was obtained).

In any event, Cequent and the USWA had full knowledge prior to employer recognition that a majority of employees signed the Showing of Interest forms opposing union representation. See Declaration of Richards, ¶¶ 12-18 (delivery of Showing of Interest to Cequent); id. at ¶¶ 20-23 (delivery of Showing of Interest to USWA); March 16, 2004, Letter from William Messenger to Colin Hindman (sending the Showing of Interest to Cequent with a warning that recognition in the face of the document would be unlawful). Thus, any claim by Cequent and the USWA that the recognition of the Union was pursuant to a "good faith" belief that the USWA had majority employee support falls flat.

The Showing of Interest states that "[t]he undersigned employees do NOT want to be represented by the [USWA], do NOT want to join the USWA, and do NOT support the USWA in any manner.") (emphasis in original). It further states:

> To the extent that any of the undersigned employees have ever previously signed a USWA membership or "authorization card," the undersigned employee hereby REVOKES that card. More specifically, that our employer, the USWA, and all third parties or arbitrators take NOTICE that any such card signed by an undersigned employee is NULL and VOID.

Id. (emphasis in original).

Under the Board's well-established "dual card" doctrine, the Showing of Interest automatically nullifies any USWA authorization card that a signatory employee signs.[10] Under this doctrine, where an employee signs an authorization card for each of two unions, the card of neither union is regarded as a valid designation that may be counted towards a union's majority.

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[10] Pattern Makers, 473 U.S. 95 (1985), also supports the notion that the Showing of Interest revokes any union authorization card an employee may have signed. Pattern Makers established that employees have a § 7 right to resign their union membership at any time and without restriction. Since the act of signing a union membership card is equally protected under § 7 with signing a union authorization card, it is logical that the act of rescinding or revoking either card should be equally protected.

See Le Marquis Hotel, 340 N.L.R.B. No. 64, at 7 (2003)[11]; Alliant Foodservice, 335 N.L.R.B. 695 (2001); Human Dev. Ass'n v. NLRB, 937 F.2d 657, 665-66 (D.C. Cir. 1991). The dual card doctrine "has been consistently applied by the Board, and supported by the courts." Le Marquis Hotel, 340 N.L.R.B. No. 64, at 7 (numerous citations omitted).

The "dual card" doctrine naturally applies to employees who sign a union authorization card and a card (or petition or letter) stating that they **oppose** the representation of a union. Petitioner knows of no case holding that the "dual card" doctrine does not apply to employees who express their opposition to the representation of a union, as opposed to expressing their preference for another union. Nor should the Board limit the doctrine in this manner, as the Act does not permit Board policies that discriminate against employees who exercise their § 7 right to refrain from union representation. See "Argument," Section I, infra.

The existence of a rival union is unnecessary under the "dual card" doctrine. The question the doctrine was designed to address is whether an employer-recognized union had the support of a majority of employees at the time of recognition. The doctrine does not exist to evaluate the level of support enjoyed by a rival union. See Human Dev. Ass'n, 937 F.2d at 668 ("The dual doctrine . . . governs the Board's assessment of a union's claim to majority status regardless of whether a rival union can raise a question concerning representation."). Whether the USWA had majority employee support at the time of recognition is precisely the question at

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When an employee has signed authorization cards for two unions, the card of neither Union will be regarded as a valid designation which can be counted toward a majority, unless the record is sufficiently probative to 'clearly dissipate the ambivalence as to intent that is inherent in dual card situations, and to leave no doubt that at the time material to the determination of majority status, the dual card signer intended only one of his cards, and which of them to evidence his designation of a bargaining agent.'

Le Marquis Hotel, 340 N.L.R.B. No. 64, at 7 (citations omitted).

issue here.

In fact, the basis for applying the "dual card" doctrine is actually much **stronger** in a situation in which an employee signs a document opposing union representation, as opposed to one who signs a document merely supporting the representation of another union. The "dual card" doctrine is based on the principle that if an employee signs a card for two unions, "it is not then possible to determine from the cards which of the two unions the employee has selected as an exclusive bargaining agent." Crest Containers Corp., 223 NLRB 739, 741 (1976); see also Flatbrush Manor Care Center, 287 N.L.R.B. 457, 471 (1987) (Board established "dual card" doctrine "essentially because it is impossible to determine which of the two unions the employee wished to represent him"); Alliant Foodservice, 335 N.L.R.B. at 696 ("one cannot definitively infer any clear choice by the dual-card signers. Accordingly, it is far better to resolve these matters by an election."). Thus, mere uncertainty as to an employee's true representational preference is the basis for invalidating both cards. This is in spite of a reasonable possibility that an employee who signs a card for two unions may be amenable to the representation of either union. Id., (Member Liebman, dissenting) (arguing that Board should presume that employee who signs authorization cards for two different unions supports the representation of either union, and that both cards should be considered valid).

When an employee signs an authorization card for a particular union and a card (or petition) stating that he flatly opposes the representation of that particular union, there is inherent uncertainty as to the employee's true representational preference. The evidence is utterly diametric and conflicting. Unlike the situation where an employee signs two union authorization cards, here there is no possible way in which these documents could simultaneously be given

affect or both represent the true desire of the employee.

Here, the Showing of Interest states in explicit language that the signatory employee does "NOT" want to be represented by the USWA and revokes any Union authorization card that he or she may have signed. Cequent employees could not make their desires more plain.

Case law supports application of the "dual card" doctrine to this case. In Katz's Delicatessen, 316 N.L.R.B. 318 (1995), enforced, 80 F.3d 775 (2d Cir. 1996), the Board and Second Circuit recognized that a petition stating that the signatory employees were "in no way interested in any other labor organization representing [them] other than H.E.R.E. Local 100," invalidated the authorization cards of another union. 80 F.3d at 765-66.

Applying the "dual card" doctrine to the facts of this case, the USWA's claim to the support of a majority of employees upon employer recognition becomes unsupportable. Any USWA authorization card signed by an employee either *before* or *after* that employee signed the Showing of Interest is invalid and cannot be counted towards the USWA's ostensible majority.[12]

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[12] There is a strong possibility that some employees were pressured into signing USWA authorization cards after they signed the Showing of Interest. The Showing of Interest was delivered to the USWA on several occasions. *See* Declaration of Richards, ¶¶ 20-23. USWA organizers then went to the homes of at least some signatory employees (in some cases several times) to make them sign another union authorization card. Id. at ¶¶ 24 & 26.

A union authorization card signed by an employee **after** that employee signed the Showing of Interest is invalid and cannot be counted towards the union's ostensible majority under the "dual card" doctrine. The doctrine does not simply invalidate a former indication of an employee's representational preference in favor of a later indication of the employee's preference. Instead, the doctrine invalidates both indications of the employee's representational preference, regardless of which was signed first.

For example, if an employee first signed a card for union A, and then signed a card for union B, both cards are invalid because it is unclear which union (if either) the employee supports. The card supporting union B is not valid merely because it was the last document signed. Similarly here, if an employee signed the Showing of Interest against USWA representation and then signed a union authorization card, it is unclear what that employee actually supports, irrespective of which was signed first.

Two-hundred thirty-six (236) employees signed Petitioner's Showing of Interest against USWA representation. This constitutes a majority of employees, as there are between 400 and 450 employees in the bargaining unit at Cequent's Goshen facility. *See* Declaration of Richards, ¶¶ 12-18. Moreover, several employees also sent letters to the Respondents stating they were revoking their Union authorization cards. Id. at ¶¶ 25-26. Therefore, it is **mathematically impossible** for the USWA to have had the support of a majority of employees when Cequent recognized the Union on March 22, 2004.[13]

Accordingly, Region 25 erred in dismissing the election petition. The voluntary recognition bar does not block Petitioner's petition for a decertification election. The USWA did not have the actual support of a majority of employees at the time of recognition as a result of the Showing of the Interest.

III. Is the Smith's Food Exception to the Voluntary Recognition Bar Available to Employees Who Oppose Union Representation, i.e., Should Seattle Mariners be Overruled?

Under the Smith's Food exception, the voluntary recognition bar is inapplicable if a showing of interest is signed by more than 30% of employees before an employer selects a union representative. See 320 N.L.R.B. 844 (1996); Rollins, 296 N.L.R.B. 793 (1989).[14] Petitioner has amply satisfied the requirements for this exception to the Board's voluntary recognition bar

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[13] The Union's claim to majority support becomes even more far-fetched considering there likely are many employees who did not sign the Showing of Interest or a USWA authorization card (i.e., the employee did not sign anything). Employees who did not sign a Union authorization card cannot be counted as a USWA supporter.

[14] In Rollins, the Board reaffirmed its policy that the voluntary recognition bar would not apply "where the petition is filed within a reasonable time after the employer grants recognition, so long as the petition is based on support gained prior to the grant of recognition," id. at 795. In Smith's Food, the Board modified the rule to require that a petitioner secure the documented support of at least 30% of employees prior to employer recognition of a union to avoid the affects of the recognition bar.

policy.

Outrageously, in Baseball Club of Seattle, LP d/b/a Seattle Mariners, 335 N.L.R.B. 563 (2001), two Board members ruled that the Smith's Food exception is only available to employees who support union representation, and not to employees who exercise their §§ 7 and 9 right to oppose union representation. Seattle Mariners involved approximately 186 out of 453 employees signing a petition "indicating that they did not desire representation by the Union" before the employer recognized the union. 335 N.L.R.B. at 564. After the employer recognized the union, the employees filed a decertification petition. The employees argued that the voluntary recognition bar did not apply under the rule articulated in Smith's Food. Over a vigorous (and correct) dissent by Chairman Hurtgen, two Board members held that the rule of Smith's Food did not apply and that the petition was blocked by the voluntary recognition bar.

The Board is currently reviewing the propriety of the entire voluntary recognition bar in Dana Corp., 341 N.L.R.B. No. 150 (2004). If the Board strikes down the bar, the Smith's Food exception and the Seattle Mariners decision become non-issues. Petitioner urges the Board to abandon the voluntary recognition bar. However, in the event that the voluntary recognition bar or some portion of it survives, to such an extent that the Smith's Food exception remains relevant, Petitioner urges that Seattle Mariners be overruled.[15]

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[15] In the Request for Review, Petitioner also argued that Seattle Mariners is distinguishable because here a majority of employees signed the Showing of Interest. Petitioner continues to advance that argument and hereby reiterates and incorporates the reasons supporting. See Request for Review, pp. 22-24.

Indeed, Seattle Mariners should be overruled as inconsistent with the Act pursuant to Chairman Hurtgen's dissent in that case. 335 N.L.R.B. at 565-67 (2001) (Chairman Hurtgen, dissenting). The Seattle Mariners decision flatly discriminates between employees based on whether they exercise their §§ 7 and 9 rights to support union representation, or exercise the same rights to refrain from union representation. If Board policy is that an election shall be held if the petitioner demonstrates a 30% showing of interest that predates employer recognition (i.e., the Smith's Food exception), then this rule must be applicable irrespective of whether Petitioner supports or opposes union representation. See "Argument," Section I, infra.

As Chairman Hurgten stated in his dissent, the majority opinion in Seattle Mariners has "drawn a distinction between the Section 7 right to choose between rival unions and the Section 7 right to choose between a union and no union at all. Clearly, this approach is contrary to the Act and statutory policy." 335 N.L.R.B. at 565 (Chairman Hurtgen, dissenting). As established above, a policy that discriminates between employees based on whether they support or oppose union representation is, in fact, directly contrary to the Act.

Petitioner finds it difficult to improve upon former Chairman Hurtgen's well-reasoned dissenting opinion in Seattle Mariners. Accordingly, Petitioner expressly incorporates Chairman Hurtgen's opinion, and all arguments raised therein, as grounds for the Board to overrule Seattle Mariners. In addition, several points supporting the reversal of Seattle Mariners will be elaborated upon below.

First, the supposition in Seattle Mariners that a union has majority employee support merely because an employer recognizes and bargains with that union is false. Second, the Act favors secret-ballot elections to determine the true representational desires of employees, not

deference to the self-interested determinations of employers and unions. Third, Seattle Mariners is inconsistent with the Board's decision in Rollins holding that elections are favored when there is any question as to a recognized union's claim to majority support. Fourth, Seattle Mariners is inconsistent with the Board's decision in Levitz Furniture, 333 NLRB 717 (2001) Finally, if the Board preserves the voluntary recognition bar, failing to overrule Seattle Mariners will leave the NLRB's representational machinery utterly unusable in the face of agreements such as the Side Letter and Framework.

A. "Voluntary Recognition" of a Union by an Employer Pursuant to a Pre-Negotiated Agreement with That Union Does Not Prove That an Uncoerced Majority of Employees Support Union Representation.

In Seattle Mariners, the majority accepted at face value the notion that "a majority of employees in the instant case have indicated their desire for representation by the Union," simply because "the Employer extended recognition and engaged in bargaining based on [an] arbitrator's determination." 335 NLRB at 565 & n.7. Based on this unproved assumption of majority support, the Board held that "it would be anomalous to deprive that majority of their expressed desire for representation," id. at 565, by conducting an election.

This fundamental misconception–that an employer recognizing a union means that a majority of employees must have desired union representation–is the basis of the Seattle Mariners decision. This misconception is the primary grounds for overruling it. See Dana Corp., 341 N.L.R.B. No. 150, at 1 (Board reviewing propriety of voluntary recognition bar because, in part, "an agreement was reached between the union and employer *before* authorization cards, evidencing the majority status, were obtained") (emphasis in original).

In Seattle Mariners, Chairman Hurtgen properly recognized that "[t]he fact that an employer bargains with a union does not tell us whether the employees wish to be represented by the union." 335 N.L.R.B. at 567 n.2 (Chairman Hurtgen, dissenting). "There can be many reasons for an employer wanting to recognize a particular union." Id. at 567. The facts bear out Chairman Hurtgen's observations.

That an employer voluntarily recognizes a union does not itself indicate that employees freely wish to be represented by that union. Voluntary recognition means only that an employer has selected a particular union to be the representative of its employees without a Board-certified election. An employer could potentially recognize a union that has majority employee support, does not have majority support, or whose employee support was obtained through coercion. Unless and until a Board-certified secret-ballot election is conducted, it is impossible for the NLRB to know whether an employer-recognized union actually has the uncoerced support of a majority of employees.

The Board cannot blindly rely upon an employer's determination regarding its employees' representational preferences when they are not independently verified by a Board election. See Auciello Iron Works, Inc., 517 U.S. 781, 790 (1996) ("There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom."); see also Levitz Furniture, 333 N.L.R.B. at n.45 (employer determinations as to employee support or opposition to union representation is disfavored); Underground Serv. Alert, 315 N.L.R.B. 958, 960-61 (1994) (same); NLRB v. Cornerstone Bldrs., Inc., 963 F.2d 1075, 1708 (8th Cir. 1992) (same). In International Ladies Garment Workers, 366 U.S. at 738-39, the Supreme Court rejected an employer's "good-faith belief" defense to bargaining with a union that it erroneously

believed had majority employee support because of the danger of trusting such employer determinations.

> To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act-that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives.

Id.

The Supreme Court's reference to placing employee representational rights "in **permissibly careless** employer and union hands" is correct. Id. (emphasis added). Employers have a myriad of self-interested reasons to voluntarily recognize a union that have nothing to do with the free choice of employees, including: (a) an existing bargaining relationship with the union at another facility, see Brooklyn Hospital Center, 309 N.L.R.B. 1163 (1992) aff'd sub nom. Hotel, Hospital Nursing Home & Allied Services, Local 144 v. NLRB, 9 F.3d 218 (2d Cir. 1993); (b) the union pre-negotiating acceptable collective bargaining terms before recognition, see Majestic Weaving Co., 147 N.L.R.B. 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2nd Cir. 1966); (c) as a concession to the union during negotiations regarding other bargaining units, see Kroger Co., 219 N.L.R.B. 388 (1975); and (d) to avoid pressure from a union corporate campaign, see Herbert R. Northrup & Charles H. Steen, Union "Corporate Campaigns" as Blackmail: the RICO Battle at Bayou Steel, 22 Harv. J. L. & Pub. Pol'y 771 (1999).[16]

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[16] Unions similarly have an overriding self-interest to accept employer recognition irrespective of whether it reflects the free choice of employees: money and power. Organizing new facilities is a top union priority, because every new facility organized brings more members into the union, more money into union coffers through compulsory dues payments, and places more power in the hands of union officials.

History demonstrates the propensity of employers and unions to enter into collective bargaining relationships despite a lack of uncoerced majority employee support for the union. See, e.g. Duane Reade, Inc., 338 N.L.R.B. No. 140 (2003), enforced, No. 03-1156, 2004 WL 1238336 (D.C. Cir. June 10, 2004) (employer unlawfully assisted its hand-picked union in coercing employees to sign union authorization cards so that voluntary recognition could be bestowed upon the favored union).[17]

The Board must be particularly suspicious of employer "determinations" as to the representational preferences of employees made pursuant to prearranged deals with a favored union (i.e., so-called "neutrality agreements"). See Dana Corp., 341 N.L.R.B. No. 150, at 1. In this context, an employer's recognition of a union is not an arms-length transaction ostensibly made in response to a groundswell of support for a union. Instead, it is a decision made in conjunction with one favored union.

Here, Cequent and the USWA are parties to the secret Side Letter and Framework Agreements. See Side Letter, ¶ 15 (Agreements to be confidential). These extensive Agreements include terms regarding how a facility is to be organized by the USWA, hiring preferences, the imposition of the Agreements on other employers, dispute resolution, and bargaining in newly organized units. See Framework, ¶¶ I(C-F). Petitioner's workplace was organized by the USWA with Cequent's assistance, as per the provisions of Framework, ¶¶

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[17] See also Fountain View Care Center, 317 N.L.R.B. 1286 (1995), enforced, 88 F.3d 1278 (D.C. Cir. 1996); Brooklyn Hospital Center, 309 N.L.R.B. 1163; Famous Casting Corp., 301 N.L.R.B. 404 (1991); Systems Management, Inc., 292 N.L.R.B. 1075 (1989), remanded on other grounds, 901 F.2d 297 (3rd Cir. 1990); Anaheim Town & Country Inn, 282 N.L.R.B. 224 (1986); Meyer's Cafe & Konditorei, 282 N.L.R.B. 1 (1986); SMI of Worchester, 271 N.L.R.B. 1508 (1984); Price Crusher Food Warehouse, 249 N.L.R.B. 433 (1980); Vernitron Electrical Components, 221 N.L.R.B. 464 (1975), enforced, 548 F.2d 24 (1st Cir. 1977); Pittsburgh Metal Lithographing Co., 158 N.L.R.B. 1126 (1966); Majestic Weaving Co., 147 N.L.R.B. 859 (1964).

I(C)(1-4). See Declaration of Richards, ¶¶ 6-7.

The USWA pre-negotiated concessions favorable to Cequent (but not its employees) in the Agreements that are to take effect upon the unionization of a facility. As noted in the Statement of Facts, infra, the Union agreed to limits on employee's wages and benefits, see Side Letter, ¶¶ 9(A-B), and waived employees' right to strike in support of any collective bargaining demands. See Framework, ¶ I(F). The USWA also provided Heartland (Cequent's parent company) with approximately $25 million in employee pension money from its ostensibly independent pension fund–the Steelworkers Pension Trust–in consideration for the Agreements. See note 4, supra. Cequent thereby had a strong incentive to declare the USWA to be the representative of its employees, irrespective of its employees' actual wishes. Considering the extensive mutual aid and assistance Cequent and the USWA exchanged prior to recognition, it is inconceivable that this Board would simply accept at face value the employer's claim that a majority of employees actually support the USWA. This is especially true given the fact that a majority of Cequent employees signed the Showing of Interest opposing USWA representation before the Union was recognized.

The Board should also note that the effects of Side Letter and Framework Agreements occur in the context of "one union." The Agreements do not apply to facilities where there is the significant presence of a rival union. See Side Letter, ¶ 3(B). This undermines the supposition in Seattle Mariners that "[t]he possibility that . . . undue employer interference, as discussed by the Board in Smith's Food, could thwart the employees' choice of their bargaining representative is simply not present" when only one union is involved. Seattle Mariners, 335 N.L.R.B. at 565. Instead, as Chairman Hurtgen recognized, "[e]mployer influence can also be brought to bear in a

one-union situation. There can be many reasons for an employer wanting to recognize a particular union." Id. at 567 (Chairman Hurtgen, dissenting).

Accordingly, Seattle Mariners is a house built upon sand. In the current age of prevalent "bargaining to organize" agreements such as the Side Letter and Framework, the "[t]he fact that an employer bargains with a union does not tell us whether the employees wish to be represented by the union." Id. at 567 n.2 (Chairman Hurtgen, dissenting). Deprived of the false assumption that an employer's choice as to union representation is reflective of employees' choice as to union representation, there is no basis to block an election petition that is supported by a majority of employees prior to employer recognition.

B. A Secret-Ballot Election Is the Best Method for Protecting Employees' Fundamental § 7 Right to Support or Oppose Union Representation.

The Seattle Mariners decision gives short shrift to both employee free choice and the Board's policy favoring secret-ballot elections. Employee free choice must be granted the greatest weight in any analysis, as the fundamental and overriding principle of the Act is "voluntary unionism." Pattern Makers, 473 U.S. at 102-03; see also Lee Lumber, 117 F.3d at 1463 (Sentelle, J., concurring) ("employee free choice . . . is a core principle of the Act") (citations omitted); MGM Grand Hotel, 329 N.L.R.B. at 472 (Member Brame, dissenting) ("Employees' Section 7 rights comprise the core of the Act and, in applying the balancing process, the Board must show special sensitivity toward employees' rights."); Dana Corp., 350 N.L.R.B. No. 150, at 1 (Board to review propriety of voluntary recognition bar because of "the importance of Section 7 rights of employees").

Congress created the Board's statutory representation procedures to effectuate employee free choice and to determine whether employees support or oppose union representation. With §§ 9(b) and (c) of the Act, Congress vested with the Board the duty to direct and administer secret-ballot elections "to determine the uninhibited desires of the employees." General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

The Supreme Court has long recognized that secret-ballot elections are the preferred method for gauging whether employees desire union representation. *See* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 304, 307 (1974); NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory--indeed the preferred--method of ascertaining whether a union has majority support"); Brooks v. NLRB, 348 U.S. 96, 99 (1954) ("an election is a solemn and costly occasion, conducted under safeguards to voluntary choice"). The Board has similarly "emphasize[d] that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions." Levitz Furniture, 333 N.L.R.B. at 723, citing Gissel, 395 U.S. at 602; Underground Serv. Alert, 315 N.L.R.B. at 960; Dana Corp., 341 N.L.R.B. No. 150, at 1 ("the fact remains that the secret-ballot election remains the best method for determining whether employees desire union representation") (citation omitted).

C. Seattle Mariners Is Inconsistent with the Board's Decision in Rollins.

In Rollins Transportation System, Inc., 296 N.L.R.B. 793 (1989), the Board reaffirmed its policy that the voluntary recognition bar would not apply to a "petition . . . based on support gained prior to the grant of recognition." Id. at 795. The reason for this rule was that "[t]he paramount concern in such instances must be the employees' right to select among two or more

unions, or indeed to choose none." Id. at 793. "A Board election is the arena for exercise of the employee's right to free choice, a right closely guarded by the Act." Id. The Seattle Mariners Board disregarded these interests and the logic underlying Rollins.

In Rollins, two unions secured signed authorization cards from a majority of employees at the time the employer recognized one of the unions. The Board properly noted that the overriding interest at issue was "employees' Section 7 rights to decide **whether** and by whom to be represented." 296 N.L.R.B. at 794 (emphasis added). The Board wisely declined to defer to the employer's determination as to whether and by whom the employees should be represented, as that would "impose a collective bargaining representative on the employees on the basis of the employer's action rather than the employees' free choice." Id. Not deferring to an employer's choice as to union representation was particularly compelling where (as here) there were conflicting claims as to whom a majority of employees support.

> [D]ueling claims of card majorities on the same day suggest that some of the same employees signed authorization cards for both Unions during the same time period. While such evidence of dual cards is by no means the only acceptable proof of simultaneous organizing efforts, it does imply that at the time of recognition some employees were uncertain which union they actually supported. This circumstance merely emphasizes the danger inherent in allowing a recognition bar to strip from employees the benefits of a Board-supervised arena in which to weigh the contestants' positions and render their decision.

Id. at 793-94. The Rollins Board appropriately concluded that a secret-ballot election is the proper method for determining employees' true preferences where there is conflicting evidence of employee support. See id. at 793 ("A Board election is the arena for exercise of the employee's right to free choice, a right closely guarded by the Act.").

Here, the Board should also hold a secret-ballot election to determine the true representational preferences of Cequent employees, for their free choice is the paramount interest at stake. Cequent's determination that its employees support USWA representation is entitled to no deference, particularly where there is conflicting evidence of employee representational desires. As in Rollins, only a Board conducted secret-ballot election can determine employees' true representational preferences.

D. Seattle Mariners Is Inconsistent with the Board's Decision in Levitz Furniture.

In Levitz Furniture Co., 333 N.L.R.B. 717 (2001), the Board recognized that elections are favored when an employer seeks to **withdraw** recognition from a union. A consistent and non-discriminatory application of Board policy thereby also favors secret-ballot elections over employer determinations when an employer considers **granting** recognition to a union.

An employer contemplating the withdrawal of recognition from an incumbent union has two options: (1) withdraw recognition based on evidence that the union lacks majority support, or (2) file a petition for an election. The Levitz Furniture Board held that elections were the strongly preferred option. Id., at 725 ("We agree with the General Counsel and the unions that Board elections are the preferred means of testing employees' support."). The Board created incentives for employers to use the NLRB's election machinery by simultaneously raising the standard under which an employer could unilaterally withdraw recognition without violating the Act, id. at 723-26, and "lowering the showing necessary for employers to obtain elections and reducing the temptation to act unilaterally." Id. at 725.

An employer **extending** recognition to a union, and an employer **withdrawing** recognition from a union are two sides of the same coin. If Board conducted elections are favored over employer determinations when recognition may be withdrawn from a union, then elections are also favored over employer determinations when recognition may be extended to a union. The Act does not tolerate discrimination between employees based on their representational preferences. *See* "Argument," Section I, infra.

E. Failure to Overrule Seattle Mariners Will Permit Self-Interested Employers and Unions to Render the Representation Procedures of Section 9 Unusable and Irrelevant by Entering Into Agreements That Require Voluntary Recognition Without an Election and the Execution of a Contract Shortly Thereafter.

The relevance and continued viability of § 9 of the Act and the NLRB's representational procedures are directly at issue in this case. As is well known, unions are attempting to evade Board representational procedures–and their attendant "laboratory conditions" for protecting employee free choice–by enticing or pressuring employers to sign so-called "neutrality agreements."[18] The Side Letter and Framework Agreements are of this ilk. If the Board fails to order an election in this case, it is acknowledging that employers and unions can completely deprive individual employees of access to the Board's representational procedures by signing agreements such as the Side Letter and Framework.

Two provisions of the Side Letter and Framework Agreements render the Act's representational provisions unavailable to employees, at least under current Board policy. First, Cequent is required to voluntary recognize the USWA on the basis of authorization cards and

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[18] See e.g. Roger C. Hartley, Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement, 22 Berkeley J. Emp. & Lab. L. 369 (2001); Brent Garren, The High Road to Section 7 Rights: The Law of Voluntary Recognition Agreement, 19 Lab. Law. 263 (2003).

without an election. See Framework, ¶¶ I(C)(5-6). This waives both the Employer and Union's right to request a Board-supervised election. See Central Parking Sys. Inc., 335 N.L.R.B. 390 (2001); Verizon Info. Sys., 335 N.L.R.B. 558 (2001). This recognition also bars employee petitions for a decertification election under the voluntary recognition bar. See MGM Grand Hotel, 329 N.L.R.B. 464 (1999); Seattle Mariners, 335 N.L.R.B. 563 (2001).

Second, Framework, ¶ I(F) and Side Letter, ¶9(H) establish a "final offer package interest arbitration" procedure that imposes a collective bargaining agreement if an agreement is not reached after 180 days of bargaining. See also USWA Flier of November 11, 2003 (promising contract in six months). This provision effectively ensures that a contract will be signed before the voluntary recognition bar expires. See e.g. MGM Grand Hotel, 329 N.L.R.B. 464 (1999) (recognition bar lasts over one year). The contract bar then precludes an election for approximately three more years. See Waste Mgmt., 338 N.L.R.B. No. 155 (2003).

Thus, under current Board policy, the Side Letter and Framework Agreements block election petitions because (i) employer recognition triggers the voluntary recognition bar; (ii) the "binding interest arbitration" procedures ensure that a collective bargaining agreement is signed before the voluntary recognition bar expires; and (iii) the signing of the collective bargaining agreement triggers the "contract bar," which bars petitions for another three years. Under this regime, it is **impossible** for any party (employee, union or employer) to obtain a secret-ballot election for close to four years. Unless the Board changes its current policy, the Board's representational machinery is unusable and irrelevant.

The Board must not permit an employer and union to completely strip employees of their statutory right to a decertification election. After all, it is the employees' rights that are at issue, not the rights of unions or employers. *See* Rollins, 296 N.L.R.B. at 793. The Supreme Court long ago recognized that by "its plain terms . . . the NLRA confers rights only on employees, not on unions . . . ." Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992); see also MGM Grand Hotel, 329 N.L.R.B. at 475 (Member Brame, dissenting) ("employees do not exist to ensure the survival or success of unions"). With regard to employers, the Board in Levitz Furniture stated:

> It is well to bear in mind, after all, that it is the employees' Section 7 right to choose their bargaining representatives that is at issue here. Strictly speaking, employers' only statutory interest is in ensuring that they do not violate Section 8(a)(2) by recognizing minority unions.

333 N.L.R.B. at 728. It would thereby be perverse for the Board to permit Cequent and the USWA to utterly deprive employees of their right to an election.

The Board also must not (and cannot) abdicate its statutory duties to the self-interested desires of employers and unions. Congress empowered **the NLRB** to administer the NLRA and decide representational matters. See 29 U.S.C. §§ 153-154, 159-161. The Board is thereby charged with the responsibility of protecting employee rights under § 7 of the Act, *see, e.g.,* Lechmere, 502 U.S. at 532, and with administering § 9 of the Act.

> In election proceedings, it 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 the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled.

General Shoe Corp., 77 N.L.R.B. 124, 127 (1948) (emphasis added); see also NLRB v. Sanitary Laundry, 441 F.2d 1368, 1369 (10th Cir. 1971) (Section 9 of the Act imposes on the Board "the broad duty of providing election procedures and safeguards"). Since the secret ballot election is

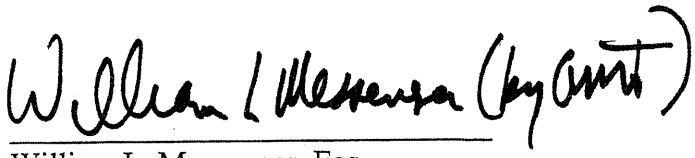
"the most satisfactory–indeed the preferred–method of ascertaining whether a union has majority support," the NLRB must not sit passively on the sidelines and allow its representational processes to become irrelevant. See Gissel Packing., 395 U.S. at 601-02; MGM Grand Hotel, 329 N.L.R.B. at 469-75 (Member Brame, dissenting).

If the Board does not guarantee employees some avenue to protect their right to election, the NLRB's representational apparatus will surely slide into irrelevance and obsolescence. See Charles I. Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?, The Lab. Law. (Fall 2000). The NLRB must overrule Seattle Mariners (if not the entire voluntary recognition bar), and grant the Petitioner and his co-workers the election they desire.

CONCLUSION

A majority of employees at Cequent's Goshen facility flatly stated that they wanted a Board-conducted election prior to their employer selecting a union to represent them. The Board should respect these employees' wishes, and not the self-interested desires of Cequent and the USWA to deprive employees of their statutory right to a decertification election. Accordingly, the Board should find the voluntary recognition bar inapplicable due to the USWA's lack of majority employee support at the time of employer recognition under the "dual card" doctrine. Alternatively, the Board should find that the Smith's Food exception to the voluntary recognition bar is applicable. The decision of Region 25 should be REVERSED, and a decertification election expeditiously conducted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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