UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CLARICE K. ATHERHOLT,
(Petitioner)

DANA CORP.,
(Employer) Case No. 8-RD-1976

and

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

PETITIONER CLARICE K. ATHERHOLT'S REQUEST FOR REVIEW

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On January 21, 2004, Regional Director Frederick Calatrello dismissed without a hearing the Petition for a Decertification Election filed in this case. That dismissal was based upon the Board's "voluntary recognition bar" doctrine. See Keller Plastics Eastern Inc., 157 N.L.R.B. 583 (1966); see also Seattle Mariners, 335 N.L.R.B. 563, 566 (2001) (Chairman Hurtgen, dissenting); MGM Grand Hotel Inc., 329 N.L.R.B. 464, 469-475 (1999) (Member Brame, dissenting).

Pursuant to R & R 102.71, Petitioner Clarice K. Atherholt hereby submits this Request for Review. This Request for Review should be granted because this and a companion case (Metaldyne Precision Forming, Nos. 6-RD-1518 and 6-RD-1519), present compelling reasons for reconsideration of the above-referenced cases, and related Board rules and policies. R & R 102.71(a)(2).

I. ISSUES PRESENTED:

1) Where an interested employer (Dana Corporation) uses a secret and exclusive "neutrality agreement" to thrust a hand-picked union (the UAW) onto employees without the benefit of a Board-supervised secret ballot election, should the Board entirely reconsider its "voluntary recognition bar" rule and allow the employees such an election?

2) If the Board will not entirely reconsider and reverse its "voluntary recognition bar" rule in the context of this case, should the Board at least grant a short "window period" under which employees can file for decertification to challenge the "voluntary recognition" unilaterally granted by their employer to a union which it anointed?

II. INTRODUCTION:

Over the years the Board has created a so-called "voluntary recognition bar" to block elections from occurring once "voluntary recognition" has been bestowed on a union by an employer, at least until after a "reasonable" time to negotiate has elapsed. See, e.g., MGM Grand Hotel Inc., 329 N.L.R.B. 464, 469-475 (1999) (Member Brame, dissenting). The "voluntary recognition bar" is not a matter of statute, but instead is a matter of Board policy. But given the growth of "neutrality agreements," which allow interested employers to hand-select and anoint particular unions as their "partners," Petitioner believes that it is time to reassess the nature of the "voluntary recognition bar."

Indeed, the Board should follow its own lead in Levitz Furniture Co. of the Pacific, Inc., 333 N.L.R.B. 717 (2001), and completely reassess – and eliminate – the "voluntary recognition bar," since this bar places too much power in the hands of an interested employer and its "partner" union, and serves as an unwarranted and unfair infringement on employee free choice. See, e.g., MGM Grand Hotel Inc., 329 N.L.R.B. 464, 469-475 (1999) (Member Brame, dissenting). This is especially true where, as here, the "voluntary recognition" is achieved through a pre-arranged "neutrality agreement." Under the secret "neutrality" scheme used in this case, the employer (Dana Corporation) anointed a particular, hand-picked union (the UAW) with special privileges, conducted captive audiences speeches praising its new "partner," and then turned a blind eye as the union harassed and coerced employees to induce them to sign authorization cards. (See Declaration of Clarice K. Atherholt, filed with the Regional Director and attached hereto).

Alternatively, even if the Board will not completely eliminate the "voluntary

recognition bar," the Board should create a "window period" that would allow employees to file for decertification if done within a "reasonable time" (e.g., 45 days) after the "voluntary recognition" is publicly announced. See, e.g., Levitz Furniture Co. of the Pacific, Inc., 333 N.L.R.B. 717, 723 (2001) (overruling 50 years of precedent allowing employers to withdraw union recognition based upon a good faith doubt, but instead allowing for more NLRB secret ballot elections because "we emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions.") Such a change in the "voluntary recognition bar" policy alternatively advocated by the Petitioner will more accurately and adequately balance the Act's paramount interest in employee free choice with the sometimes competing, but much less paramount interest of "industrial stability." The reasons for these proposed alterations of Board policy will be discussed in detail herein.

Thus, applying even the alternative approach advocated by the Petitioner, the instant petition is timely and not subject to any "bar," as it was filed within 45-days from the date that Dana Corporation recognized the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") as the exclusive bargaining representative of employees at the Upper Sandusky location.

III. STATEMENT OF THE FACTS:

The background facts of this case are amply set forth in the accompanying Declaration of Clarice Atherholt (which was also submitted to the Regional Director in support of the Petition). In brief, they are as follows:

Dana and the UAW became parties to a secret "neutrality agreement"in August, 2003. Even though Dana employees in Upper Sandusky are the targets of the agreement, the terms of the agreement were kept secret from them prior to Dana's declaration of "voluntary recognition." (See Declaration of Clarice K. Atherholt, and Ex. 2 thereto). Local management at Dana Upper Sandusky was gagged, and not allowed to inform any employees about the details of the neutrality agreement. Employees were told only that the UAW union organizers would have wide access to employees' personal information and the plant. (Id).

Several months ago, apparently pursuant to the neutrality agreement, UAW organizers came in force to the Dana Upper Sandusky plant, and have stayed there ever since. Dana management held a series of company-paid captive audience meetings at the plant, praising its new "partner." At these meetings, officials from Dana Corporation in Toledo and UAW officials from Detroit told the employees that the UAW and Dana were now "partners," and that this partnership would be beneficial in getting new business from the Big Three into the plant. With a wink and a nod, the implication was that Dana Upper Sandusky would lose work opportunities or jobs if employees did not sign cards and bring in the UAW. (Id).

The UAW's "card check" drive that followed was the antithesis of an NLRB secret-ballot election. UAW organizers did everything they could to harass, coerce and pressure employees into signing union cards. The UAW put constant pressure on some employees to sign cards by having union organizers bother them at work, and repeatedly

call and visit them at home. UAW organizers also misled many employees as to the purpose and finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back. (Id). (This is hardly conduct that would be allowed if formal objections were raised in the context of an NLRB secret-ballot election, which requires "laboratory conditions"). This coercive effort culminated on or about December 4, 2003, when Dana suddenly announced that the UAW was "chosen" as exclusive representative of the Upper Sandusky employees, based upon a count of signed authorization cards. There was no vote and no secret ballot election.

Petitioner strongly believes that is wrong for Dana management to declare the UAW as the representative without a secret ballot vote, especially where, as here, the "voluntary recognition" was not the result of an arms length process, but was instead the result of a secret back room "partnership" deal in which Dana anointed its favored union and bestowed upon it exclusive special privileges. Indeed, over 35% of the Petitioner's fellow employees at Upper Sandusky signed her decertification petition within days after she began circulating it. (Id).

Finally, Dana and the UAW have not yet engaged in any negotiations or bargaining sessions since the UAW was recognized on December 4, 2003. (Id). Thus, holding an NLRB-supervised secret ballot election at this time could not upset "industrial stability," since no negotiations have yet begun.

IV. ARGUMENT:

A. How Will the NLRB Ever Determine If an Employer-recognized Union Actually Has the Uncoerced Support of a Majority of Employees?

In a narrow sense, the issue before the Board is whether the "voluntary recognition bar" completely halts the decertification petition filed in this case. However, the overarching issue is how, and whether, the Board will ever determine if an employer-recognized union actually has the uncoerced support of a majority of employees? The Board can determine this either through unfair labor practice proceedings, or through Board supervised secret-ballot elections, or never?

"Never" cannot be considered a viable option, as it is unquestionably the duty of the NLRB to determine whether employees have freely selected or rejected union representation. Congress empowered the NLRB to administer the NLRA and decide representational matters. See 29 U.S.C. §§ 153-54, 159-161.

> 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). The Board cannot abdicate its statutory responsibility to protect employee representational rights and determine independently whether or not an actual uncoerced majority of employees supports the UAW. To abdicate in this way would expose employees' rights to abuse and

render the Board's representational machinery illusory, frustrating Congressional intent.

Thus, the issue is how – or through what procedural mechanism – will the NLRB fulfills its duty to employees in the voluntary recognition context? There are two possible methods: (1) unfair labor practice proceedings challenging an employer's voluntary recognition of a union as being unlawful under § 8 of the Act, or (2) an NLRB-conducted secret-ballot election to determine employees' true representational preferences, under § 9.

Currently, only the first option is possible because of the voluntary recognition bar. This "bar" precludes the NLRB from conducting an election for a "reasonable period of time" after an employer designates a particular union to be the representative of its employees, even if the voluntary recognition came about through chicanery or coercion. See Ford Center for the Performing Arts, 328 N.L.R.B. No. 1 (1999). Thus, under current law an employer's voluntary recognition of a union can only be evaluated through the limited prism of unfair labor practice proceedings, which, as discussed herein, are not a favored procedural mechanism for deciding representational issues.

Petitioners respectfully submit that the second option–representational proceedings culminating in an election–must be made available to the employees, so that the Board may fulfill its proper role and ensure that an employer-recognized union truly has the uncoerced support of employees. Board conducted elections, not ULP charges, are the preferred method "to determine the uninhibited desires of the employees" with regard to union representation. General Shoe Corp., 77 N.L.R.B. at 127.

In his dismissal of the election petition, the Regional Director erroneously assumed the very issue in question. The Regional Director stated that "the union's majority status was established pursuant to a card check by an independent third party, a Federal Mediator." Region 8 Dismissal Letter at p.1, citing, Seattle Mariners, 335 N.L.R.B. 563 (2001).

The premise of this sentence, that the union is in fact the representative of an uncoerced majority of Dana Upper Sandusky employees, is false, or at least unknown to the NLRB.[1] **The NLRB** has never determined whether a majority of employees at Dana Upper Sandusky desire representation by the UAW. **The NLRB** has never investigated the circumstances under which Dana hand-picked and then recognized the UAW, to determine if rights guaranteed to employees by the NLRA were trampled, or if employees were permitted to make their choices under "laboratory conditions." **The NLRB** simply has no idea of the uncoerced desires of Dana Upper Sandusky employees with regard to UAW representation. The most that can be said is that Dana and the UAW have agreed between and among themselves that the UAW is the representative of Dana Upper Sandusky employees. These entities' "voluntary recognition" means nothing more.

Moreover, "[t]he fact that an employer bargains with a union does not tell us

[1] The Board majorities' decisions in Seattle Mariners and MGM Grand Hotel Inc., 329 N.L.R.B. 464, 465-66 (1999) also relied upon this false premise. For the reasons stated below, as well as those provided in the excellent dissents of Chairman Hurtgen and Member Brame in those cases, respectively, both cases were wrongly decided, are contrary to the Act, and should be overruled by this Board. See Seattle Mariners, 335 N.L.R.B. at 566-67 (Chairman Hurtgen, dissenting); MGM Grand, 329 N.L.R.B. at 469-475 (Member Brame, dissenting).

whether the employees wish to be represented by the union." Seattle Mariners, 335 N.L.R.B. at 567 n.2 (Hurtgen dissenting); see also Ladies Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731 (1961) (Employer negotiated with minority union based on erroneous good faith belief that union had majority support of employees). This is particularly true here, where 35% of the Dana Upper Sandusky employees signed a showing of interest seeking a decertification election within days of Dana's announcement that it recognized the UAW.

In order for the NLRB to determine whether Dana Upper Sandusky employees–not Dana, not their ostensible union, **but Dana Upper Sandusky employees**–support or oppose UAW representation, the NLRB must itself evaluate employees' true preferences. Again, there are two avenues available: unfair labor practice proceedings and/or a secret-ballot election. A third possibility is for the NLRB to do nothing, clearly an unacceptable option. As demonstrated below, only an election is the proper means for the Board to determine the true representational desires of the employees.

If this Board recognizes that an election is the proper method to test whether an employer-recognized union actually has the uncoerced support of employees, it follows that the "voluntary recognition bar" must be abandoned, or at least modified to provide employees with a reasonable time (e.g., 45 days) after voluntary recognition is publicly announced to file a decertification petition. Otherwise, employees (such as the Petitioner and her co-workers) are barred from requesting an election despite the chicanery that accompanied Dana's "voluntary recognition" of its hand-picked union, the UAW.

B. Especially in the Context of a Secret and Exclusive Neutrality Agreement, "Voluntary Recognition" is an Employer Choosing a Particular Union to be the Representative of its Employees Without a Secret-Ballot Election. It Does Not Indicate That An Uncoerced Majority of Employees Support Union Representation.

An employer voluntarily recognizing a union does not itself indicate that employees freely wish to be represented by that union. See Seattle Mariners, 335 N.L.R.B. at 567 n.2 (Hurtgen dissenting). 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 can voluntarily recognize a union that has majority employee support, does not have majority support, or whose employee support was obtained through coercion. See Duane Reade, Inc., 338 N.L.R.B. No. 140 (2003).[2] Unless and until NLRB processes are utilized, it is impossible for the NLRB to know whether the employer-recognized union actually has the uncoerced support of a majority of employees. Indeed, employer determinations regarding employees' representational preferences that are not tested by the NLRB in a "neutrality" and "voluntary recognition" context, and cannot be relied on by the Board.

> The Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one. There is nothing unreasonable in giving a short leash to the employer as vindicator of its

[2] Since the existence of unlawful coercion can effectively invalidate all union authorization cards, the question of whether there was unfair pressure or influence during a "card-check" authorization campaign is of the utmost importance. See NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619, 623 (2nd Cir. 1994); NLRB v. Vernitron Elec. Components, Inc., 548 F.2d 24, 26 (1st Cir.1977).

employees' organizational freedom.

Auciello Iron Works v. NLRB, 517 U.S. 781, 790 (1996)[3]; see also Levitz Furniture Co. of the Pacific, 333 N.L.R.B. 717 (2001) (employer determinations as to employee support or opposition to union representation greatly disfavored); Underground Service Alert Of Southern California, 315 N.L.R.B. 958, 960-61 (1994) (same).

The Board's basic refusal to rely on employer and union determinations as to employees' representational desires is well-founded, especially where, as here, Dana and the UAW have their own vested interests in agreeing to "recognition," regardless what any of the Dana Upper Sandusky employees may really think. As the Supreme Court long ago recognized, "[t]here could be no clearer abridgment of § 7 of the Act, assuring employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity," than for an employer to recognize and bargain with a union that does not have majority support. Ladies Garment Workers, 366 U.S. at 737 (quotations omitted). Even an employer bargaining with a union based on a legitimate "good-faith belief" that the union has majority support is flatly unlawful under the Act.

> 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.

[3] Note that the UAW is not the Petitioner's "certified union," see Brooks v. NLRB, 348 U.S. 96, 101 (1954) ("certification could only be granted as the result of an election"), but she is nevertheless barred from filing a "decertification petition."

Id. at 738-39. Employees being represented by a union that did not have the uncoerced support of a majority of employees at the time of recognition is simply intolerable under the Act.

The Supreme Court's reference to placing employee representational rights "in permissibly careless employer and union hands" is certainly correct. Id. (emphasis added). Employers like Dana have a number of self-interested reasons to enter into "voluntary recognition," having nothing to do with the free and uncoerced choice of employees.[4] This includes the impulse to cut off the organizing drive of a less favored union, see Price Crusher Food Warehouse, 249 N.L.R.B. 433 (1980); because of an acceptable bargaining relationship with the union at another facility, see Brooklyn Hospital Center, 309 N.L.R.B. 1163 (1992); or because the UAW union pre-negotiated acceptable collective bargaining terms before recognition, but see Majestic Weaving Co., 147 N.L.R.B. 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2nd Cir. 1966). Here, the UAW clearly made promises to Dana regarding how it would conduct itself if it became exclusive bargaining representative. See Dana/UAW "Partnership Agreement," which, inter alia, waives the employees' right to strike and pre-negotiates

[4] In NLRB v. Cornerstone Builders, Inc., 963 F.2d 1075 (8th Cir. 1992), the Eight Circuit Court of Appeals found employer self-interest as a reason to disfavor an employer voluntarily withdrawing recognition from a union without an election. "Election proceedings provide an objective basis for withdrawals of union recognition. In contrast, unilateral withdrawal is based on the subjective belief *of an inherently biased party*." Id. at 1708.

other terms and conditions of employment favorable to Dana's corporate interests.[5]

[5] The Detroit Free Press just recently reported on the Dana / UAW neutrality agreement, as follows:

> The UAW has organized about 2,000 workers at five Dana Corp. plants from Michigan to Tennessee as the union seeks to rebuild its active ranks and regain power in the auto industry. Along the way, the union faces opposition not only from workers who don't want a union but also from those who want a tougher union that would fight and win better wages, benefits and working conditions. To them, the UAW has become too conciliatory as it strives to gain members. In many ways, the Dana case reflects the UAW's strategy to cope with declining membership. The union is finding common ground with U.S.-based suppliers that do most of their business with Detroit's unionized automakers. Both feel the squeeze of competition from low-wage countries like Mexico and China. And it is harder to handle while their biggest customers are losing market share. So they are meeting halfway. The companies don't fight the union's organizing efforts, and the union doesn't try to extract major concessions.

http://www.freep.com/money/autonews/uaw29_20040129.htm, Detroit Free Press, January 29, 2004. Can it be said that employees caught in the middle of this cozy deal (or "marriage of convenience") are truly supportive of the UAW?

By the same token, unions with drastically shrinking memberships like the UAW also have an overriding self-interest to receive "voluntary recognition," irrespective of whether it reflects the free-choice of the effected employees. Rather obviously, declining unions like the UAW see organizing new facilities as a top priority. 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.[6]

History bears out that employers and unions have a propensity to impose union representation on employees even where the union does not enjoy uncoerced majority support. See e.g., Duane Reade, Inc., 338 N.L.R.B. No. 140 (2003); Fountain View Care Center, 317 N.L.R.B. 1286 (1995), enf'd, 88 F.3d 1278 (D.C. Cir. 1996); Brooklyn

[6] In United Food and Commercial Workers Locals 951, 7 and 1036 (Meijer, Inc.), 329 N.L.R.B. 730, p.3, 7, (1999), the UFCW unions and the Board majority relied upon the expert testimony of a labor economist, Professor Paula Voos. Prof. Voos has written that unions seek to organize for a whole host of reasons, including the desire of union leaders for political aggrandizement and power; the monetary self-interest of union leaders to keep and enhance their own jobs and wages; and the perceived "social idealism" and "ideological gains" brought about by union organizing. See Paula Voos, Union OrganizingCosts and Benefits, 36 Industrial and Labor Relations Review 576, at 577 (July 1983). Professor Voos also wrote that organizing is a profit-making venture for many unions. Id, at 577 & n.5. For example, she recognized that unions often organize larger units precisely because that is "where the money is!" Id., at 578 n.8.

Hospital Center, 309 N.L.R.B. 1163 (1992), aff'd sub nom., Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB, 9 F.3d 218 (2nd Cir. 1993); 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), enf'd, 548 F.2d 24 (1st Cir. 1977); Pittsburgh Metal Lithographing Co., Inc., 158 N.L.R.B. 1126 (1966); Majestic Weaving Co., 147 N.L.R.B. 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2nd Cir. 1966).

The methods with which an employer voluntarily recognizes a union–whether it be pursuant to a "card check," a petition, a decision by a third party, or the drawing of lots–do not change the fact that the NLRB does not know what employees' true representational desires are without further NLRB proceedings. The circumstances underlying the "voluntary recognition" could well be egregiously coercive to employee free choice, and the mere fact that Dana and the UAW went through the motions of a "card-check" procedure tells the Board nothing about the circumstances under which cards were collected or whether the result reflects the uninhibited free choice of

employees.[7]

Here, the Board does know that Dana and the UAW used a "card-check," with a third-party "mediator" counting the cards collected by the UAW. However, the Board does not know if the "card-check" was conducted under "laboratory conditions" guaranteed by the Act, or whether it reflects the "uninhibited desires of the employees." General Shoe Corp., 77 N.L.R.B. at 127. The NLRB does not know if employees were bullied into signing cards by UAW organizers, if Dana solicited employees to sign cards, if Dana and the UAW threatened employees with job loss or plant closure, if the UAW prohibited employees from rescinding their support for the union, if employees were misled as to their rights, if employees were promised benefits to support the UAW, if Dana and the UAW negotiated with each other before recognition, if the master employee list (to which the cards were compared) was manipulated to exclude or include from the bargaining unit certain groups of employees, or any of the conditions and circumstances underlying the Dana/UAW card check drive at Upper Sandusky.

Petitioner has offered evidence that all the above coercive activity occurred. See Declaration of Clarice Atherholt. Petitioner assumes that Dana and the UAW will deny that any of the above activity occurred, but at this time the Board does not know which

[7] As an illustration of this principle, both the Soviet Union and Baathist Iraq conducted "elections," and went through the motions of opening polls and counting ballots. Yet, few would claim that the election results actually reflected the free choice of the electorate.

version of events, if either, is true. At this time, the Board does not know whether the UAW has the support of an uncoerced majority of Upper Sandusky employees. But the Board does know that at least 35% of the employees want a free and fair election, and that they filed their decertification petition promptly after being told that Dana had selected the UAW as their bargaining representative.

This again raises the overarching issue: through what procedures will the Board determine if an uncoerced majority of employees at Upper Sandusky support the UAW? Does the Board rely solely upon unfair labor practice proceedings (an inferior method to determine representational issues), or does it conduct secret-ballot elections to discover the true wishes of employees?

C. Under Current Board Policy, Whether an Employer-Recognized Union Has the Support of An Uncoerced Majority of Employees Can be Evaluated Only Through Unfair Labor Practice Proceedings.

Under current Board policy, the NLRB can only evaluate whether the UAW has the uncoerced support of a majority of Upper Sandusky employees through unfair labor practice proceedings. The "voluntary recognition bar" blocks elections irrespective of whether the employer-designated union had the uncoerced support of employees in the first place. The voluntary recognition bar is thus applied "blindly" by the Board, without regard to the underlying issues of employee free choice.

Indeed, the propriety of an employer's voluntary recognition can not be investigated in a representational proceeding in a manner that would leave an election as a

viable option. If an investigation determined that a union does not have the uncoerced support of employees at the time of recognition, then the employer-recognized union could be automatically decertified as a function of law. See Duane Read Inc., 338 N.L.R.B. No. 140, p.3 (remedy for improper recognition is for employer to cease and desist from recognizing and bargaining with union, and for union to cease and desist from acting or claiming to act as the representative of employees). An election would obviously be unnecessary.

The voluntary recognition bar applies "blindly," without concern for whether the employer-recognized union has the uncoerced support of employees. The "bar" blocks elections based on little more than an interested employer agreeing to recognize an interested union, based on what these interested parties claim was proof of majority support. What this means as a practical matter is that an employer could recognize a union under egregiously coercive conditions, and the voluntary recognition bar would still protect that union against a secret ballot election.

Thus, under current Board law unfair labor practice proceedings are the only avenue available to the employees to determine whether an employer-selected union has the support of employees. This is true irrespective of whether an employee files only unfair labor practice charges, or both charges and an election petition. Again, in either case, the results of the unfair labor practice proceedings are wholly determinative.[8]

[8] If the unfair labor practice proceedings demonstrate that the union does not have the uncoerced support of employees, the union is removed as exclusive representative and an

As discussed below, an unfair labor practice proceeding is woefully inadequate to answer the fundamental question: does the employer-designated union have the support of employees (i.e., does the UAW have the support of a majority of Dana Upper Sandusky employees)? This is the question that the NLRA's representational procedures are designed to answer – but fail to do so because of the "voluntary recognition bar."

Moreover, what Petitioner and her co-workers truly desire is not to punish Dana and the UAW for their offenses against American labor law, or to seek a "remedy" after prosecution in a ULP case. Clearly Petitioner could have filed an unfair labor practice charge, but she chose not to. Instead, she and over 35% of her fellow employees seek an opportunity to vote on whether the UAW should be their representative. They want an election, not a ULP prosecution by the General Counsel.

D. Elections, Not Unfair Labor Practice Proceedings, Are the Proper Method for the NLRB to Determine If Employees Support or Oppose the Union Selected By Their Employer.

1. Secret-Ballot Elections Are the NLRB's Preferred Method for Determining If Employees Support or Oppose Union Representation.

The NLRB's statutory representation procedures were established precisely to

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election is unnecessary. If the General Counsel exercises his prosecutorial discretion and for whatever reason does not prosecute, then an election is blocked by the voluntary recognition bar. No matter what the outcome of the unfair labor practice charges, the attempt by the employees to secure a secret ballot election is a nullity.

determine whether employees support or oppose representation by a particular union. In §§ 9(b) and (c) of the Act, Congress vested the Board with the duty to direct and administer secret ballot elections and decide representational issues so as "to determine the uninhibited desires of the employees." General Shoe Corp., 77 N.L.R.B. at 127; 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").

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 (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 Service Alert, 315 N.L.R.B. at 960; NLRB v. Cornerstone Builders, Inc., 963 F.2d 1075, 1078 (8th Cir. 1992); MGM Grand Hotel Inc., 329 N.L.R.B. 464, 469-475 (1999).

Board conducted elections are also far more expeditious than unfair labor practice procedures in determining whether a union has been properly designated as the exclusive bargaining representative. In Linden Lumber, the Supreme Court acknowledged that

elections are the faster method through which to resolve such disputes. "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." Id. at 307. This is particularly true here, as it is very unlikely that the UAW would ever file "blocking charges" to delay an election when both it and Dana are already "partners."

Since NLRB-conducted secret-ballot elections are the best means to effectuate employee free choice as to union representation, it is imperative that the Board favor this option. After all, it is "employee free choice" that must be granted the greatest weight in any analysis, as the fundamental and overriding principle of the Act is "voluntary unionism." Pattern Makers v. NLRB, 473 U.S. 95, 102-03 (1985); see also Lee Lumber & Building 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 Distributors 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); MGM Grand Hotel Inc., 329 N.L.R.B. 464, 469-475 (1999) (Member Brame, dissenting).

2. Unfair Labor Practice Proceedings Cannot Substitute For Secret Ballot Elections to Determine If Employees Support or Oppose the Union Selected By Their Employer.

Unfair labor practice proceedings are an exceedingly poor substitute for a secret-ballot election to determine the representational wishes of employees. However, in lieu of permitting employees to promptly request an election after their employer selects a union to represent them, the Board currently can only evaluate whether employees freely desire that union's representation via an unfair labor practice proceeding.

Unfair labor practice procedures are inadequate to determine whether employees support or oppose union representation because that is not what the procedures are designed to accomplish. Sections 10 and 11 of the Act empower the NLRB to prevent and remedy violations of the Act. Sections 3(d) and 10 of the Act assign the General Counsel with the responsibility of investigating unfair labor practice charges, issuing and prosecuting complaints, and seeking compliance with Board orders in Court. However, these sections of the NLRB were not designed to determine the representational wishes of employees. Congress specifically enacted § 9 of the Act for that purpose.

Unfair labor practice proceedings are dependent upon a brave employee filing an unfair labor practice charge challenging the arrangement between his employer and ostensible union representative. Even if an employee does file a charge, it is then filtered sparingly through the General Counsel's prosecutorial lens. See 29 U.S.C. § 153(d); NLRB v. UFCW, 484 U.S. 112 (1987) (General Counsel has unreviewable discretion to issue or not issue complaints in ULP cases). Allowing the General Counsel to resolve what is effectively a representational issue–determining whether the union designated by an employer has the uncoerced support of a majority of employees–should give the Board

pause, as Congress solely empowered the Board to decide representational issues. See 29 U.S.C. § 159.

Moreover, an after-the-fact investigation of an unfair labor practice allegation does not affirmatively determine the wishes of employees. It merely hunts for unfair labor practices. It is impossible for the General Counsel, after-the-fact, to divine the true wishes of employees by trying to piece together all the myriad events and circumstances that occurred in a "card check" drive.

Perhaps most problematic of all, a more stringent standard of union and employer conduct is used in unfair labor practice proceedings than in representational proceedings. Conduct that does not rise to the level of an unfair labor practice can still be found to violate employee free choice under the "laboratory conditions" standard for representation proceedings. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948). Thus, a union can become an exclusive bargaining representative through a "card-check" procedure by engaging in conduct that would have precluded it from obtaining such status through a secret-ballot election.

For example, in an NLRB conducted secret-ballot election, the following conduct has been held to upset the "laboratory conditions" necessary to guarantee employee choice and has caused entire elections to be held invalid: electioneering activities at the polling place, see Alliance Ware Inc., 92 N.L.R.B. 55 (1950) and Claussen Baking Co., 134 N.L.R.B. 111 (1961); prolonged conversations by representatives of a union or employer with prospective voters in the polling area, see Milchem Inc., 170 N.L.R.B. 362

(1968); electioneering among the lines of employees waiting to vote, see Bio-Medical Applications of P.R., 269 N.L.R.B. 827 (1984) and Pepsi Bottling Co. of Petersburg, 291 N.L.R.B.578 (1988); speechmaking by a union or employer to massed groups or captive audience within 24 hours of the election, see Peerless Plywood Co., 107 N.L.R.B. 427 (1953); and a union or employer keeping a list of employees who have voted as they went into the polling place (other than the official eligibility list). See Piggly-Wiggly, 168 N.L.R.B. 792 (1967).

The above conduct–which disturbs the "laboratory conditions" necessary for employee free choice–does not, without more, amount to an unfair labor practice. Yet, **this conduct occurs in almost any card check drive, including the one conducted here by Dana and the UAW!** When an employee signs (or refuses to sign) a union authorization card, he or she is not likely to be alone.[9] Indeed, it is likely that this decision is made in the presence of one or more union organizers soliciting the employee to sign a card. This solicitation could occur during or immediately after a union mass meeting or a company-paid captive audience speech. The employee's decision is not secret, as in an election, since the union clearly has a list of who has signed a card and who has not. A choice against signing a union authorization card does not end the decision-making process for an employee in the maw of "card check drive," but often

[9] Since a union authorization card is ostensibly the equivalent to casting a ballot, the place where an employee signs (or refuses to sign) a card is the functional equivalent to a polling place in an election, as it is where the employee makes his or her choice.

represents only the beginning of harassment and intimidation for that employee.[10]

In sharp contrast, each employee participating in an NLRB-conducted election makes his or her choice one time, in private. There is no one with the employee at the time of decision. The ultimate choice of the employee is secret from both the union and the employer. Once the employee has made the decision "yea or nay" by casting a ballot, the process is at an end.

Fully recognizing this principle, the Board has held that non-electoral evidence of employee support–even if untainted by any unfair labor practices–are not nearly as reliable in gauging employee support for a union as an election. In Underground Service Alert Of Southern California, 315 N.L.R.B. 958 (1994), the Board was confronted with a situation where a majority of employees voted for union representation in a decertification election. But, well before the election results were known, a solid majority

[10] The facts in this case bear out these concerns. As noted above and as attested to by the attached Declaration of Clarice Atherholt, UAW organizers did everything they could to coerce employees into signing union cards. The UAW put constant pressure on some employees to sign cards by having union organizers bother them at work, and repeatedly call and visit them at home. UAW organizers misled employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back. This is hardly "laboratory conditions" conduct that would be allowed if the NLRB had been supervising a secret-ballot election.

of employees delivered a signed petition to their employer making clear that they did not support union representation. The employer withdrew recognition. Even though the investigation revealed no "impropriety, taint, factual insufficiency, or unfair labor practice of any type with respect to this employee petition," id. at 959, the Board held that the employer violated the § 8(a)(5) of the Act because the election results were a far superior indication of employee wishes. The employee petition was considered a "less-preferred indicator of employee sentiment," particularly as compared to "the more formal and considered majority employee preference for union representation which was demonstrated by the preferred method--the Board-conducted secret-ballot election." Id. at 961.

> One of the attributes of Board-conducted elections that make them a more reliable indicator of employee choice is that they provide, through the objection and challenge procedures, an orderly and fair method for presentation and reasoned resolution of questions concerning the fairness of the process and whether particular individuals are eligible to have their preferences on union representation counted.

Id. at 960;[11] see also NLRB v. Cayuga Crushed Stone, 474 F.2d 1380, 1383 (2nd Cir.

[11] The Board in Underground Service Alert quoted with approval Member Oviatt's accurate observation that:

> The election, typically, also is a more reliable indicator of employee wishes because employees have time to consider their options, to ascertain critical facts, and to hear and discuss their own and competing views. A period of reflection and an opportunity to investigate both sides will not necessarily be available to an employee confronted with a request to sign a petition rejecting the union. No one disputes that a Board-conducted election is much less subject to tampering than are petitions and letters.

Id. at 960, quoting W. A. Krueger Co., 299 N.L.R.B. 914, 931 (1990) (Member Oviatt, concurring in part and dissenting in part).

1973).[12]

Thus, even a card-check drive devoid of conduct that could constitute an unfair labor practice does not approach the "laboratory conditions" guaranteed in a Board-conducted election. Employees are entitled to "laboratory conditions" to make a free choice as to whether they desire union representation. Under the NLRA, it is the Board's duty "to establish those conditions; it is [the Board's] duty to determine whether they have been fulfilled." General Shoe Corp., 77 N.L.R.B. at 127. Accordingly, an unfair labor practice proceeding evaluating an employer's voluntary recognition of a union, after-the-fact, is not adequate and cannot substitute for a secret-ballot election.

3. The Board Favors Secret-Ballot Elections Over Unfair Labor Practice Proceedings With Regard to Grants and Withdrawals of Recognition.

The Board and the courts have strongly and consistently favored secret-ballot elections over unfair labor practice proceedings to determine employees' choice as to

[12] "There is no doubt but that an election . . . conducted secretly . . . after the employees have had the opportunity for thoughtful consideration, provides a more reliable basis for determining employee sentiment than an informal card designation procedure where group pressures may induce an otherwise recalcitrant employee to go along with his fellow workers." Cayuga Crushed Stone, 474 F.2d at 1383.

union representation, both when a union seeks to acquire recognition and when an employer seeks to withdraw recognition from a union.

For example, a union seeking recognition "faced with an unwilling employer has two alternative remedies . . . It can file for an election; or it can press unfair labor practice charges against the employer under Gissel." Linden Lumber, 419 U.S. at 306. But the election procedure is strongly favored, and an employer may insist that the union invoke Board election procedures–irrespective of the employee support a union claims it has–without violating the § 8(a)(5) of the Act. Id. at 310; see also Gissel, 395 U.S. at 609-10; Levitz Furniture, 333 N.L.R.B. at 733 ("In sum, a union with undoubted majority support had no entitlement to initial recognition absent an election.").

A union establishing itself as a bargaining representative through unfair labor practices–effectively litigating its way into power–is considered an "extreme remedy." Douglas Foods Corp. v. NLRB, 251 F.3d 1056, 1066 (D.C. Cir. 2001), quoting Avecor, Inc. v. NLRB, 931 F.2d 934, 938-39 (D.C. Cir. 1991).[13] First, a union must first prove that the employer committed unfair labor practices that were "outrageous and pervasive" or that undermined the possibility of a fair election in a manner that cannot be erased by other remedies. Skyline Distributors v. NLRB, 99 F.3d 403, 404 (D.C. Cir. 1996). Second, a union must prove to the NLRB and reviewing courts that is has the uncoerced

[13] A bargaining order is an extreme remedy because the NLRB mandating that a particular union be the representative of employees without a secret-ballot election places incredible stress on employees' § 7 rights. See Peoples Gas System, Inc. v. N. L. R. B., 629 F.2d 35, 45 (D.C. Cir. 1980); Douglas Foods, 251 F.3d at 1066.

support of a majority of employees. See Gourmet Foods, 270 N.L.R.B. 578 (1984). "A bargaining order will not issue of course, if the union obtained the cards through misrepresentation or coercion." Gissel, 395 U.S. at 591.

Conversely, an employer contemplating withdrawing recognition from an incumbent union that it believes no longer enjoys the support of a majority of employees has two options: (1) unilaterally withdraw recognition and likely face unfair labor proceedings upon the union filing a § 8(a)(5) charge, or (2) file a petition for a election.

In Levitz Furniture, the NLRB held that elections were strongly preferred over unilateral employer actions likely to result in unfair labor practice charges. "We agree with the General Counsel and the unions that Board elections are the preferred means of testing employees' support." Id., 333 N.L.R.B. at 725. In order to create an incentive for employers to use the NLRB's election machinery, the Board dramatically raised the standard under which an employer could lawfully withdraw recognition (and thus prevail in unfair labor practice proceedings). The Board simultaneously lowered the showing necessary for employers to obtain elections and reduced the temptation to act unilaterally. Id. at 728-29.

Therefore, Board policy strongly favors elections, not unfair labor practice proceedings, to determine employees' true representational preferences when (1) a union seeks to become the exclusive representative of employees, and (2) when an employer seeks to remove a union as the exclusive representative of employees. A consistent interpretation of the Act thereby mandates that employees have the right to request an

election when a self-interested employer unilaterally designates a self-interested union to be their representative.

After all, **it is the employees' rights that are at issue!** The Supreme Court long ago recognized, 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, 329 N.L.R.B. at 575 (Member Brame, dissenting) ("employees do not exist to ensure the survival or success of unions."). Similarly, in Levitz Furniture the Board 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.

Id., 333 N.L.R.B. at 728. It is thereby incredible (as well as perverse) that under the Board's current voluntary recognition bar policy, employers and unions have more power to demand elections and unilaterally determine who is to be employees' collective bargaining representative than do the employees themselves.

E. In Order to Conduct Elections to Determine If Employees Support or Oppose the Employer-Recognized Union, the Voluntary Recognition Bar Must be Abolished or a Window Period Must Be Established For the Filing of Election Petitions.

As established above, Board-certified elections are the proper method to

determine whether an employer-selected union enjoys the uncoerced support of a majority of employees. In order to permit such elections to occur, the voluntary recognition bar should be completely abandoned. Alternatively, a window period of at least 45-days after the union is publicly recognized should be established for the filing of election petitions.

1. Overrule the Voluntary Recognition Bar

In Levitz Furniture, the Board overruled the 50-year old rule of Celanese Corp., 95 N.L.R.B. 664 (1951). The Board did so on the grounds that, "[t]o begin, the Celanese rule is not compelled by the text of the Act." Levitz Furniture, 333 N.L.R.B. at 724. Second, the Celanese rule "undermines central policies of the Act," such as employee free choice. Id. Third, the rule was not "necessary to give effect to other policies under the Act." Id. All of these criteria apply to the voluntary recognition bar, and all favor the abandonment of the rule, especially in situations where an employer-provided "neutrality agreement" is tantamount to the employer hand-picking the victorious union.

a. Inconsistent With the Plain Text of the Act. It is well known that the voluntary recognition bar is not statutorily mandated by the NLRA, but rather is a creature of Board policy. Its existence, however, is inconsistent with the structure of the Act itself. While the Board has "the broad duty of providing election procedures and safeguards," NLRB v. Sanitary Laundry, 441 F.2d 1368, 1369 (10th Cir. 1971), it cannot (and should not) adopt policies inconsistent with the NLRA itself, such as denying elections when there is proper justification for holding them.

The Act expressly grants the right to petition for an election under a variety of

circumstances. See §§ 9(c)(1), 9(e)(1), 8(b)(7)(c). This includes the right of an employee to petition for an election "assert[ing] 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." § 9(c)(1)(A)(ii) (emphasis added).

Yet, Congress only saw fit to prohibit such elections when "within a twelve month period, a valid election shall have been held." § 9(c)(3). A similar one-year bar against elections was not expressed if the union gained power via a neutrality agreement and voluntary recognition. Indeed, Congress recognized the situation of a union "currently recognized by their employer" that was not "certified" (i.e., chosen through a secret ballot election),[14] and expressly granted employees the right to request a decertification election. § 9(c)(1)(A)(ii). Accordingly, Congress did not intend that unions not certified through an election, but rather enthroned by an employer, be shielded from election petitions authorized under § 9(c)(1)(A)(ii).

The Supreme Court also recognized this in Gissel Packing, holding that "[a] certified union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order and which, Congress could determine, should not be dispensed unless a union has survived the crucible of a secret ballot election." 395 U.S. at 598-99 (footnote omitted, emphasis added). This includes

[14] Brooks v. NLRB, 348 U.S. 96, 101 (1954) ("Board certification could only be granted as the result of an election") citing § 9(c)(1).

"protection against the filing of new election petitions by rival unions or employees seeking decertification for 12 months (§ 9(c)(3)), [and] protection for a reasonable period, usually one year, against any disruption of the bargaining relationship because of claims that the union no longer represents a majority." Id. at 599 n.14, citing Brooks v. NLRB, 348 U.S. 96 (1954).

b. Undermines The Central Policies of the Act. The voluntary recognition bar is deeply offensive to the Act's overriding interest in employee choice. The bar shields from secret-ballot elections employer-recognized unions whose actual support amongst employees is not known to the Board. As such, the policy tolerates the strong potential that employees are being represented by a union that has never commanded their uncoerced support, which is one of the most egregious possible violations of Act.

The voluntary recognition bar is a house built upon sand. Especially in the context of a secret neutrality agreement like the one Dana gave the UAW, it is premised on the notion that a union designated by an employer actually has the uncoerced support of a majority of employees. The bar was created in this short, unreflective paragraph:

> With respect to the present dispute which involves a bargaining status established as the result of voluntary recognition of a majority representative, we conclude that, like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining.

Keller Plastics Eastern, Inc., 157 N.L.R.B. 583, 587 (1966).[15] Thus, the Board applies the same presumption of legitimate majority status to employer-recognized unions as it would to NLRB-certified unions.

But the underlying premise is **false**. As established at length above, when the Board imposes the voluntary recognition bar, it does not know if the employer-recognized union has the uncoerced support of a majority employees. Nor could the Board discover this fact in the representational context. All that is known to the Board is that an employer (Dana) selected a particular union (the UAW) as the representative of its employees based upon what it avers was a showing of majority support. "The fact that an employer bargains with a union does not tell us whether the employees wish to be represented by the union." Levitz Furniture, 333 N.L.R.B. at 567, n.2 (Member Hurtgen, dissenting). Unless and until the NLRB conducts an election, the Board has no way of knowing whether an employer-designated union has the uncoerced support of a majority,

[15] Note that election certifications, bargaining orders, and NLRB settlement agreements all are done under Board auspices and supervision, unlike a voluntary recognition agreement which is a purely private agreement between two interested parties, neither one of which possesses § 7 rights.

a minority, or even any employees.[16]

It is therefore untenable for the Board to accord the same presumption of majority status to employer-recognized unions as to NLRB-certified unions. It is the NLRB's duty to determine and ensure that employees' representational wishes are realized. See 29 U.S.C. § 159; General Shoe Corp., 77 N.L.R.B. at 127. The Board cannot delegate this duty to interested employers who anoint favored unions with special privileges and secret agreements. Nor should the Board blindly trust employer determinations as to the wishes of its employees. The Supreme Court long ago recognized that it is reasonable to give "a short leash to the employer as vindicator of its employees' organizational freedom." Auciello Iron Works v. NLRB, 517 U.S. at 790.

[16] This is particularly true since the existence of coercion effectively invalidates all union authorization cards. See NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619, 623 (2nd Cir. 1994); NLRB v. Vernitron Elec. Components, Inc., 548 F.2d 24, 26 (1st Cir.1977); Amalgamated Local Union 355 v. NLRB, 481 F.2d 996, 1002 n. 8 (2d Cir.1973).

Deprived of this false premise, the "voluntary recognition bar" crumbles. The Act's fundamental interest of employee choice–which always weighed against the voluntary recognition bar in any event–completely supports the abolition of the bar.[17]

[17] The highly dubious notion that this interest could support an election bar–on the grounds that it protects the choice of the majority that originally chose union representation–is inapplicable here because it is not known to the NLRB if the union designated by the employer has the uncoerced support of employees. Compare Seattle Mariners, 335 N.L.R.B. at 565 and 335 N.L.R.B. at 566-67 (Chairman Hurtgen, dissenting).

c. Not Necessary to Give Effect to Other Policies under the Act. The interest in stable collective bargaining relations, the interest that ostensibly supports the voluntary recognition bar, is not furthered by the bar's existence. The interest in stable collective bargaining relationships is only a legitimate interest **if** a majority of employees have freely selected union representation. See Levitz Furniture, 333 N.L.R.B. at 731 (Member Hurtgen, concurring).[18] Unless and until the NLRB conducts an election, the NLRB does not know if the employer-selected union has the uncoerced support of a majority of employees. Accordingly, the governmental interest in "stable collective bargaining" does not exist in the absence of a true majority representative. See Ladies Garment Workers., 366 U.S. at 737 ("There could be no clearer abridgment of § 7 of the Act"). Parties to a collective bargaining relationship not based on uncoerced majority support are not entitled to "a reasonable time to bargain and to execute the contracts resulting from such bargaining." Keller Plastics Eastern, Inc., 157 N.L.R.B. at 587. To the contrary, "[t]he

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[18] [T] 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, 333 N.L.R.B. at 731 (Member Hurtgen, concurring) (emphasis added); see also Seattle Mariners, 335 N.L.R.B. at 565 ("the Act is premised on the concept of majority rule."); MGM Grand, 329 N.L.R.B. at 575 (Member Brame, dissenting) ("But the Board must never forget that unions exist at the pleasure of the employees they represent. Unions represent employees; employees do not exist to ensure the survival or success of unions.")

law has long been settled that a 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'" Ladies Garment Workers., 366 U.S. at 738 (citations omitted).

It is unconscionable for the NLRB to tolerate the potential of employees being represented by a union that may have never enjoyed their uncoerced support. The Board cannot turn a "blind-eye" to the problem and trust on faith determinations by self-interested employers as to which union (if any) its employees support. It is the Board's statutory duty to protect employee rights. Yet, the Board's current voluntary recognition bar shields employer-selected unions from NLRB election procedures without concern for whether the relationship so shielded has the support of employees. The voluntary recognition bar must be abolished.

2. In the Alternative, Employees Should be Allowed to File for Decertification If Done Within 45-Days of the Date That the "Voluntary Recognition" Is Publicly Announced

If the Board refuses to completely shed the voluntary recognition bar, it is urged that employees at least be provided a narrow window period to request an election after their employer publicly declares that they are represented by a union. Such a slight change in the Board's "recognition bar" policy will more accurately and adequately balance the Act's paramount interest in employee free choice with the ostensibly competing, but much less paramount interest of "industrial stability." The creation of a

window period of 45-days after an employer voluntarily recognizes a union is consistent with the current framework of the voluntary recognition bar.

The interest in employee free choice still strongly supports allowing employees to exercise their §§ 9 and 7 rights to request an election, and freely choose or reject union representation. Also, where as here, a petition for a decertification is filed within 45-days after an employer announces voluntary recognition of a union, the NLRB will be promoting the interest of industrial stability when it conducts an election.

The ultimate factor ensuring a stable collective bargaining relationship is for the union to actually have the support of a majority of employees, and for all parties to know that. A decertification petition filed by employees within 45-days of voluntary recognition indicates that the legitimacy of the employer-recognized union's status is questioned by employees. Only a promptly conducted NLRB election can put to rest these valid questions regarding the union's legitimacy.

Most importantly, a "45-day window period rule" proposed by the Petitioner as an alternative ground to reverse the Regional Director does not in any way interfere with collective bargaining negotiations between the parties. It has been held that the voluntary recognition bar persists for a "reasonable time." Keller Plastics Eastern, Inc., 157 N.L.R.B. 583, 587 (1966). A reasonable time "does not depend on either the passage of time or on the number of meetings between the parties, but instead on what transpired and what was accomplished during [bargaining] meetings." Lee Lumber & Building Material Corp., 322 N.L.R.B. 175, 179 (1996), remanded, 117 F.3d 1454 (D.C. Cir. 1997). In

determining whether there has been bargaining for a reasonable time, "[t]he Board considers the degree of progress made in negotiations, whether or not the parties are at impasse, and whether the parties are negotiating for an initial contract." Id.

Permitting employees a mere 45-day period to request an NLRB election and determine if there is truly majority support for union representation would not in any way interfere with negotiations. Indeed, such negotiations have not yet begun in this case (see Declaration of Clarice K. Atherholt), and this will likely be true in most cases. Thus, it is impossible for the union and the employer to argue that a prompt election would harm industrial stability, since no negotiations have even occurred.

Quite simply, conducting elections upon employee petition within 45-days of voluntary recognition is by far a better policy to protect employee representational rights than depending solely upon the unfair labor practice procedures. Such an election will, when held in a timely manner, conclusively determine if a union truly has the support of employees. Unfair labor practice proceedings, which can drag out for years, cannot do the same.

F. Abolishing or Modifying the Voluntary Recognition Bar is Necessary to Effectuate the Congressional Command that the NLRB Protect Employee Rights.

The relevance of the NLRB and § 9 of the Act is directly at issue in this case. As is well known, virtually every union in America is now 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" (or "voluntary recognition agreements").[19] The Dana / UAW "Partnership Agreement" is of this ilk. These private, secret agreements require that an employer voluntarily recognize the union without an election. Here, they actually require Dana to affirmatively assist union organizing efforts by imposing "gag" orders on supervisors, granting union organizers access to company facilities, providing personal information about employees to the union, and making captive audience presentations to employees on behalf of the favored union.

The question for the Board is whether it will acquiesce to unions and employers replacing NLRB-conducted secret-ballot elections with whatever private mechanisms those two self-interested parties happen to agree on. Upholding the voluntary recognition bar as it currently exists is a huge step towards surrendering the Board's role in the representational process. Since both unions and employers contractually waive their right to request a Board-supervised election under "voluntary recognition agreements," see Central Parking, 335 N.L.R.B. No. 34 (2001) and Verizon Information Systems, 335 N.L.R.B. No. 44 (2001), employees are the only parties left that could file an election

[19] 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).

petition. But, the voluntary recognition bar slams the door on employees seeking access to the Board's election machinery.

The Board cannot (and should not) abdicate its statutory duties to self-interested employers and unions. Congress empowered **the NLRB** to administer the NLRA and decide representational matters. See 29 U.S.C. §§ 153-54, 159-161. The Board is thereby charged with the responsibility of protecting employee rights under § 7 of the Act, see, e.g., Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992), and § 9 of the Act. See General Shoe Corp., 77 N.L.R.B. at 127 (1948) (It is the Board's "duty to establish [laboratory] conditions; it is also our duty to determine whether they have been fulfilled"). 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 both abused and irrelevant. See Gissel Packing Co., 395 U.S. at 601-602 (1969); MGM Grand, 329 N.L.R.B. at 469-475 (1999) (Member Brame, dissenting).

In short, if the Board does not abolish or modify the voluntary recognition bar as advocated by the Petitioner, it will surely slide into irrelevance and obsolescence. See Charles I. Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?, The Labor Lawyer (Fall, 2000).

V. CONCLUSION: The Regional Director's dismissal of the petition raises a substantial question of law or policy. Under R & R 102.71, the Board should grant this Request for Review, overturn the Regional Director's dismissal, and order the holding of an immediate election.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Request for Review was sent by Federal Express overnight delivery to:

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_____
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