UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Alan P. Krug and Jeffrey A. Sample,
(Employee Petitioners),

and

Case Nos. 6-RD-1518 and 6-RD-1519

International Union, United Automobile,
Aerospace, and Agricultural Implement
Workers of America, AFL-CIO,
(Union),

and

Metaldyne Corporation (Metaldyne Sintered Products),
(Employer).

PETITIONERS REQUEST FOR REVIEW

On December 23, 2003, a petition for a decertification election was filed with Region 6 of the National Labor Relations Board ("NLRB") by Petitioners Alan P. Krug and Jeffrey A. Sample ("Petitioners"), duly supported by a showing of support signed by a majority of their co-workers. The petition requests that an election be conducted at Metaldyne Sintered Product's ("Metaldyne" or "Employer") facility in St. Mary's, Pennsylvania, to determine if the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW" or "Union") has the uncoerced support of a majority of employees. On January 21, 2004, Regional Director Gerald Kobell dismissed the election petition pursuant to the so-called "voluntary recognition bar." Pursuant to § 102.67 of the NLRB's Rules and Regulations, Petitioners hereby submit this timely Request for Review.

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, 471-472 (1999) (Member Brame, dissenting). The voluntary recognition bar is not a matter of statute, but instead is a matter of Board policy. As such, Petitioners believe that it is time to reassess the nature of this 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 is an unwarranted and unfair infringement on employee free choice. *See, e.g.*, MGM Grand, 329 N.L.R.B. at 469-475 (Member Brame, dissenting). This is especially true where, as here, voluntary recognition is achieved through a pre-arranged "Partnership Agreement," whereby the employer anoints a particular, hand-picked union with special privileges, conducts mandatory employee meetings praising its new "partner," and then turns a blind eye as the union harasses employees to induce them to sign authorization cards.

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.,* at least 30 days) after voluntary recognition is announced. *See, e.g.*, Levitz Furniture, 333 N.L.R.B. at 723 (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 "Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions."). Such a slight 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 this proposed alteration of Board policies will be discussed in detail herein.

Thus, applying even the alternative approach advocated by the Petitioner, the instant petitions are timely and not subject to any "bar," as it was filed within 30-days from the date Metaldyne designated the UAW as the representative of employees at the St. Mary's location.

FACTS[1]

Metaldyne chose the UAW to be the exclusive bargaining representative of its employees in St. Marys, Pennsylvania. First, Metaldyne signed a secret "Partnership Agreement" with the Union covering these employees. In this agreement, Metaldyne agreed to assist its "partner" with organizing the St. Mary's facility in exchange for, *quid pro quo*, Union commitments regarding how it would conduct itself as a bargaining representative after it took over the plant, as well as other valuable consideration from the UAW.

Second, Metaldyne and the UAW launched a joint organizing drive against St. Mary's employees. Metaldyne management held a mandatory meeting and played a video informing employees that they needed to accept the UAW in the plant and that it was a "win—win situation for all of us." UAW organizers were granted wide access to the St. Mary's facility and personal information about employees so as to facilitate the signing of Union authorization cards.

[1] The facts of this case are amply set forth in the attached Declaration of employee Lori Yost.

Third, on December 1, 2003, Metaldyne formally announced to employees that it had designated the UAW as their bargaining representative. However, Metaldyne did so only after working with the UAW to manipulate the bargaining unit to exclude clusters of employees who did not support the Union, so as to ensure that the UAW could take over the plant.

Employees at Metaldyne St. Mary's were never permitted an NLRB-supervised election to determine if they actually wanted UAW representation. The NLRB has never evaluated– much less determined–whether a majority of Metaldyne St. Mary's employees freely support or oppose UAW representation. Instead, Metaldyne and the Union privately agreed that the UAW is the representative of St. Mary's employees pursuant to their secret "Partnership Agreement."

Days after Metaldyne designated the UAW as the representative of St. Mary's employees, over 50% of employees signed a showing of support for a decertification election. On December 23, 2003, the employees filed a petition requesting that the NLRB conduct an election to determine whether the UAW has the uncoerced support of a majority of employees.

ISSUE TO BE DECIDED

How does the NLRB determine if an employer-recognized union actually has the uncoerced support of a majority of employees?

In a narrow sense, the issue is whether the voluntary recognition bar bars the decertification petition at issue. However, the overarching issue is: how does the NLRB determine if an employer-recognized union actually has the uncoerced support of a majority of employees? Through unfair labor practice proceedings only, through Board supervised secret-ballot elections, or never?

"Never" is not 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 Act 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 NLRB 124, 127 (1948) (emphasis added). The Board cannot abdicate its statutory responsibility to protect employee representational rights by permitting employers and unions to privately determine representational issues as they please. To do so would expose employee rights' to abuse and render the Board's representational machinery obsolete, frustrating Congressional intent.

The issue then is *how*–or through what procedural mechanism–does the NLRB fulfill 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 the Act, or (2) an NLRB-conducted secret-ballot election to determine employees' true representational preferences.

Currently, only the first option is available because of the voluntary recognition bar. The 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. *See* Ford Center for the Performing Arts, 328 N.L.R.B. No. 1 (1999). An employer's voluntary recognition of a union is only evaluated by the NLRB through the limited prism of unfair labor practice proceedings (assuming that a brave employee files unfair labor practice charges).

Petitioners respectfully submit that the second option–representational proceedings

culminating in an election–must be available to the NLRB and employees to determine if an employer-recognized union truly has the uncoerced support of employees. Board conducted elections 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 its dismissal of the election petition, Region 6 erroneously assumed the very issue in question. The Region stated "[s]ince a majority of employees in the instant case have indicated their desire for representation by the Union, it would be anomalous to deprive that majority of their expressed desire for representation based merely on the contrary opinion of a minority group of employees." Decision and Order of NLRB Region 6, p.3, *quoting,* Baseball Club of Seattle, LP, Seattle Mariners, 335 N.L.R.B. 563, 565 (2001) (footnote omitted).

The premise of the sentence is false.[2] **The NLRB** has never determined that "a majority of employees in the instant case have indicated their desire for representation by the Union." Id. **The NLRB** has never investigated the circumstances under which Metaldyne recognized the UAW to determine if rights guaranteed to employees by NLRA were trampled upon, or if employees were permitted to make their choice under "laboratory conditions." **The NLRB** simply has no idea what the uncoerced desires of St. Mary's employees may be with regard to UAW representation.

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[2] The Board's decision in Seattle Mariners and MGM Grand Hotel Inc., 329 N.L.R.B. 464, 465-66 (1999) relied upon this false premise. For the reasons stated below, as well as those provided in the excellent dissents of Members Hurgten and Brame in those decisions, respectively, these 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 (Member Hurgten, dissenting); MGM Grand, 329 N.L.R.B. at 469-475 (Member Brame, dissenting).

The most that can be said is that the Employer and the Union have agreed, between and amongst themselves, that the UAW is the representative of St. Mary's employees.[3] Voluntary recognition means nothing more. However, "[t]he fact that an employer bargains with a union does not tell us 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 a majority of employees signed a showing of support seeking an election days after Metaldyne recognized the UAW.

In order for the NLRB to determine whether St. Mary's employees–not their Employer, not their ostensible Union, **but St. Mary's 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. As demonstrated below, only an election is the proper means for the Board to determine the true representational desires of employees.

If this honorable Board recognizes than an election is the proper method to test whether an employer-recognized union actually has the uncoerced support of employees, it is inherent that the voluntary recognition bar be abandoned or, alternatively, modified to permit 30-days or more for a decertification petition to be filed by employees after voluntary recognition.

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[3] Region 6's investigation indicates that Metaldyne recognized the UAW pursuant to a "card-check." However, the NLRB does not know of the circumstances under which employees signed (or were coerced to sign) union authorization cards and does not know if employees made their choice under "laboratory conditions" guaranteed by the Act. This again brings up the underlying issue: how (or through what procedures) does the NLRB determine if the union recognized by Metaldyne has the *uncoerced* support of a majority of St. Mary's employees? With an election, or through unfair labor practice proceedings?

Otherwise, employees (such as the Petitioners and their co-workers) are barred from requesting an election and the Board is effectively barred from fulfilling its duty to determine the uninhibited desires of employees with regard to union representation.

ARGUMENT

I. "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 could potentially 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). Unless and until NLRB processes are utilized, it is impossible for the NLRB to know whether an employer-recognized union actually has the uncoerced support of a majority of employees. This is especially true in the context of the pre-arranged "Partnership Agreement" between Metaldyne and the UAW.

The Board cannot rely upon employer determinations regarding employees' representational preferences that are not independently verified 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 employees' organizational freedom.

Auciello Iron Works v. NLRB, 517 U.S. at 790[4]; *see also* Levitz Furniture, 333 N.L.R.B. 717 (employer determinations as to employee support or opposition to union representation

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[4] Note that the UAW is not the Petitioners' "certified union," *see* Brooks v. NLRB, 348 U.S. 96, 101 (1954) ("certification could only be granted as the result of an election"), but nevertheless Petitioners are barred from filing a "decertification petition" because of the voluntary recognition bar.

disfavored); Underground Service Alert Of Southern California, 315 N.L.R.B. 958, 960-61 (1994) (same).

The Board is correct in doubting employer and union determinations as to employees' representational desires. *See* Levitz Furniture, 333 N.L.R.B. at 723. The very essence of employees §§ 7 and 9 rights are at stake. 29 U.S.C. §§ 157 and 159. 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.

Id. at 738-39.

The Supreme Court's reference to placing employee representational rights "in *permissibly careless* employer and union hands" is certainly correct. Id. (emphasis added). Employers have a number of self-interested reasons to enter into a voluntary recognition agreement that have nothing to do with the free and uncoerced choice of employees.[5] This includes the impulse to cut off the organizing drive of a less favored

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[5] In NLRB v. Cornerstone Builders, Inc., 963 F.2d 1075 (8th Cir. 1992), the Eighth Circuit Court of Appeals found employer self-interest as a reason to disfavor employer determinations that a union lacks majority support. "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.

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) *aff'd sub nom.*, Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB, 9 F.3d 218 (2nd Cir. 1993), the union pre-negotiated 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), as a concession to the union during negotiations regarding other bargaining units, *see* Kroger Co., 219 N.L.R.B. 388 (1975), 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), or because the union made promises regarding how it would conduct itself if it became the exclusive bargaining representative, *see* Metaldyne / UAW "Partnership Agreement."

Unions also have an overriding self-interest to enter into voluntary recognition agreements irrespective of whether it reflects the free-choice of employees: organizing. Organizing new facilities is a top union 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]

[6] In United Food and Commercial Workers Locals 951, 7 and 1036 (Meijer, Inc.), 329 NLRB 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 Organizing Costs 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.

The Board must be particularly suspicious of employer determinations made pursuant to a prearranged deal with the union (ie. a so-called "neutrality agreement"). In this context, an employer's recognition of a union is not an arms-length determination, but rather a decision made in conjunction with the favored union.

Here, Metaldyne and the UAW were parties to a "Partnership Agreement" before the Union was recognized. Metaldyne held mandatory meetings at St. Marys informing employees that UAW representation was a "win—win situation for all of us." *See* Declaration of Lori Yost. It would thereby be incredible for the Board to simply accept at face value Metaldyne's claim that its "partner" (the UAW) truly was supported by an uncoerced majority of employees.[7]

History bears out that employers and unions have a propensity to impose union representation on employees even though the employer-favored union does not enjoy their uncoerced support. *See e.g.,* Duane Reade, 338 N.L.R.B. No. 140; Fountain View Care Center, 317 N.L.R.B. 1286 (1995), *enf'd*, 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; Vernitron Electrical Components, 221 N.L.R.B. 464 (1975) *enf'd* 548 F.2d 24 (1st Cir. 1977); Pittsburgh

[7] Metaldyne's averment that the UAW has majority support is particularly questionable considering that a majority of employees signed a showing of support for a decertification election within days after the Employer announced to employees that it had enthroned the UAW as their representative.

Metal Lithographing Co., Inc., 158 N.L.R.B. 1126 (1966); Majestic Weaving Co., 147 N.L.R.B. 859.

The method 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–does not change the fact that the NLRB cannot know what employees' true representational desires are without further NLRB proceedings. The circumstances under which the method for recognition was employed could be egregiously coercive to employee free choice.[8] For example, the mere fact that an employer and a union went through the motions of a "card-check" procedure tells the Board nothing about the circumstances under which authorization cards were solicited or whether the result reflects the uncoerced sentiment of employees.[9]

Here, Metaldyne and the UAW apparently went through a "card-check" procedure, with a third-party arbitrator counting authorization cards harvested by the UAW. However, the Board does not know if the "card-check" was conducted under the

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[8] Since the existence of unlawful coercion can effectively invalidate all union authorization cards, the question whether a "card-check" campaign was conducted fairly, or was the result of threats and coercion, 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).

[9] As an illustration of the principle (*only*), both the Soviet Union and Baathist Iraq conducted "elections," and went through the motions of opening polling places and counting ballots. Yet, few would claim that the election results actually reflected the free choice of the electorate.

"laboratory conditions" guaranteed by the Act, and thus reflects the "uninhibited desires of the employees." General Shoe Corp., 77 NLRB at 127. The NLRB does not know if St. Mary's employees were bullied into signing cards by Union organizers, if the Employer solicited employees to sign cards, if the Employer threatened employees with job loss or plant closure, if the Union 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 Union, if the Employer and the Union negotiated with each other before recognition, if the master employee list (to which the cards were compared) was manipulated, or generally if the conditions and circumstances of the Metaldyne / UAW card check drive at St. Marys were coercive to employee free choice.

Petitioners have offered affirmative evidence that all the above coercive activity occurred. *See* Declaration of Lori Yost. Metaldyne and the UAW will (one assumes) deny that any of the above activity occurred. At this time, the Board does not know which 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 St. Mary's employees.

This again raises the overarching issue: through what procedures does the NLRB find out if an uncoerced majority of employees support the UAW? Does the Board rely solely upon unfair labor practice proceedings, or does it conduct elections to discover the true wishes of employees?

II. 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 St. Mary's 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," without regard to employee free choice, to stifle elections.

Whether a union recognized by an employer has the *uncoerced* support of a majority of employees cannot be fully evaluated in a representational hearing. *See* NLRB Casehandling Manual, ¶¶ 11228 and 111184; Lawrence Typographical Union v. McCulloch, 349 F.2d 704 (D.C. Cir. 1965); Union Manufacturing Co., 123 N.L.R.B. 1633, 1633-34 (1959); Worden-Allen Co., 99 N.L.R.B. 410, 410 n. 1 (1952); Standard Cigar Co., 117 N.L.R.B. 852 (1957). Thus,

the voluntary recognition bar blocks elections without regard for whether the union shielded from Board elections ever had the uncoerced support of a majority of employees in the first place. Elections are barred based on little more than an employer agreeing to recognize a union based on what these interested parties claim was proof of majority support.[10] 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.

[10] As discussed above, the fact that an employer recognizes a union itself indicates nothing with regard to whether employees actually support the employer designated union. *See* Argument, Section 1, pg. 7-12, *supra*.

Even if the propriety of an employer's voluntary recognition of a union could be fully evaluated in the representational context, the evaluation would itself be wholly determinative and an election a nullity. If an investigation disclosed that the employer-recognized union did not have the uncoerced support of employees, then the union could be automatically decertified as a function of law.[11] An election would obviously be unnecessary. If an investigation did not disclose conclusive proof of coercive activity, then an election would be precluded by the voluntary recognition bar. No matter what the investigation's conclusion, the issue of whether an employer-recognized union has the uncoerced support of employees is decided solely by the after-the-fact investigation, and not by an election.[12]

Unfair labor practice proceedings are the only avenue currently available to the Board and employees to determine whether an employer-selected union has the uncoerced 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 results are wholly determinative.[13]

As discussed below, an unfair labor practice proceeding is woefully inadequate to

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[11] *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).

[12] Thus, the Board requiring a finding of coercive activity to avoid the voluntary recognition bar is the equivalent to relying solely upon an after-the-fact investigation to decide whether an employer-recognized union has the support of uncoerced majority of employees. It is little different from relying solely upon unfair labor practice proceedings to decide the issue.

[13] 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 election is unnecessary. If the General Counsel exercises his prosecutorial discretion to not prosecute, then an election is blocked by the voluntary recognition bar. No matter what the outcome of the unfair labor practice charges, the election is a nullity.

answer the fundamental question: does the employer-designated union have the support of employees (ie. does the UAW have the uncoerced support of a majority of employees)? This is a question that the NLRA's representational procedures are designed to answer.

Moreover, what Petitioners and over 50% of their co-workers truly desire is not to punish Metaldyne and the UAW for their offenses against American labor law. As Region 6 noted, Petitioners could have filed unfair labor practice charges, but chose not to. Instead, a majority of employees at Metaldyne St. Marys want an opportunity to vote on whether the UAW should be their representative. They want an election, not a prosecution.

III. An Election, Not An Unfair Labor Practice Proceeding, Is the Proper Method for the NLRB to Determine If Employees Support or Oppose the Union Selected By Their Employer.

A. A Secret-Ballot Election is the Act's Designated Method for Determining If Employees Support or Oppose Union Representation.

The NLRB's statutory representation procedures were established to determine whether employees support or oppose the representation of a particular union. With §§ 9(b) and (c) of the Act, *see* 29 U.S.C. §§ 159(b) and (c), Congress vested with the Board the duty to direct and administer secret ballot elections 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, 100 (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).

Board conducted elections are also far more expedient than unfair labor practice procedures. In Linden Lumber, the Supreme Court acknowledged that elections are the faster method through which to resolve 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 in this context, as it is very unlikely that there will be blocking charges to delay an election when both Metaldyne and the UAW are already aligned together as "partners." *See* Metaldyne / UAW "Partnership Agreement."

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); *see also* MGM Grand, 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.")

B. Unfair Labor Practice Proceedings Cannot Substitute For Secret Ballot Elections to Determine If Employees Support or Oppose the Representation of the Union Recognized By Their Employer.

An unfair labor practice proceeding is 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 can only evaluate if employees freely desire that union's representation via an unfair labor practice proceeding.

An unfair labor practice proceeding is inadequate to determine whether employees support or oppose union representation because that is not what Congress designed the mechanism to accomplish. Sections 10 and 11 of the Act empower the NLRB to prevent and remedy violations of the Act. *See* 29 U.S.C. §§ 160-61. Sections 3(d) and 10 of the Act task the General Counsel with investigating unfair labor practice charges, issuing and prosecuting complaints, and seeking compliance with Board orders. *See* 29 U.S.C. §§ 153(d) and 161. However, these sections of the Act were not designed to determine the representational wishes of employees. Congress specifically enacted § 9 of the Act for that purpose. *See* 29 U.S.C. § 159. The Board using unfair labor practice proceedings as a substitute for representational elections is analogous to replacing democratic government with a police force.

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. § 3(d); *see also* NLRB v. UFCW, 484 U.S. 112 (1987) (General Counsel has unreviewable discretion to issue or not issue unfair labor

practice complaints). The General Counsel resolving 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.

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

Perhaps worst of all, a more lenient standard 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. *See* General Shoe Corp., 77 N.L.R.B. at 127. 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 a massed group within 24 hours of an election, *see* Peerless Plywood Co., 107 N.L.R.B. 427 (1953); and a union or employer keeping a list of employees who 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!** When an employee signs (or refuses to sign) a union authorization card, they are not likely to be alone.[14] Indeed, it is likely that this decision is made in the presence of one or more union organizers soliciting them to sign a card. This solicitation could occur during or immediately after a union mass meeting or rally. The employee's decision is not secret as in an election, as the union certainly has a list of who has signed a card and who has not. A choice against union representation does not end the decision-making process for an employee in the maw of card check drive, but often represents only the beginning for that employee.[15]

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[14] Since a union authorization card is ostensibly the equivalent to casting a ballot in a card check drive, 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 their choice as to union representation.

[15] The facts in this case bear out these concerns. As noted above and as attested to by the attached

Declaration of Lori Yost, 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 also misled many 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 conduct that would be allowed if the NLRB had been supervising a secret ballot election.

In sharp contrast, in an NLRB-conducted election, each employee makes their choice once, in private. There is no one with them at the time of decision. The ultimate choice of the employee is secret. Once they have made the decision "yea or nay" by casting their ballot, the process is at an end.

The Board has recognized that non-electoral evidence of employee support–even if untainted by any unfair labor practices–is not nearly as reliable in gauging employee support as an election. In Underground Service Alert, 315 N.L.R.B. 958, 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 of employees delivered a signed petition to their employer making clear that they did not support union representation. The employer withdrew recognition. An investigation revealed no "impropriety, taint, factual insufficiency, or unfair labor practice of any type with respect to this employee petition." Id. at 959. Yet, the Board held that the employer violated § 8(a)(5) by withdrawing recognition because the election results were a far superior indicator of employee wishes. The employee petition was 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;[16] *see also* MGM Grand, 329 N.L.R.B. at 471 (Member Brame, dissenting).[17]

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, the NLRB cannot use unfair labor practice proceedings, as opposed to a secret-ballot election, to evaluate if an uncoerced majority of employees' truly support the union recognized by their employer.

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

The Board strongly favors elections over unfair labor practice proceedings to determine employees' choice as to union representation when a union seeks to acquire recognition, and when an employer seeks to revoke recognition from a union. Consistent Board policy thereby favors elections when employees seek to determine if the union chosen by their employee has their support.

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. The election procedure is strongly favored. 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 practice proceedings–effectively litigating its way into power–is disfavored as 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).[18] 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. *See* Skyline Distributors v. NLRB, 99 F.3d 403, 404 (D.C. Cir. 1996). A union must also demonstrate to the NLRB and reviewing Courts that has the uncoerced 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 § 8(a)(5) charges, or (2) file a petition for an 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). Id. at 723-26. Simultaneously, the Board was "lowering the showing necessary for employers to obtain elections and reducing the temptation to act unilaterally." Id. at 725.

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 an employer designates a 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, 502 U.S. at 532; *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 current Board policy, employers and unions have more ability to demand an election, and more power to determine who is the bargaining representative of employees, than employees themselves do.

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

As established above, a Board-certified election is the proper method for the NLRB 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 must be completely abandoned or, alternatively, a window period of at least 30-days be established for the filing of election petitions after an employer voluntarily recognizes a union.

A. Abandon the Voluntary Recognition Bar Policy

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 criterion apply with equal force to the voluntary recognition bar and favor the abandonment of the rule.

Inconsistent 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," Sanitary Laundry, 441 F.2d at 1369, it cannot (and should not) adopt policies inconsistent with the NLRA itself.

The Act expressly grants the right to petition for an election under a variety of circumstances. *See* 29 U.S.C. §§ 159(c)(1) and (e)(1), 158(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." 29 U.S.C. § 159(c)(1)(A)(ii) (emphasis added).

Congress only saw fit to prohibit the conduction of an election when "within a twelve month period, a valid **election** shall have been held." 29 U.S.C. § 159(c)(3) (emphasis added). A similar bar against elections after voluntary recognition was not included in the Act. Yet, Congress clearly recognized the situation of a union "currently recognized by their employer" that was not "certified" (ie. chosen through a secret ballot election),[19] and expressly granted employees the right to request a decertification election. 29 U.S.C. § 159(c)(1)(A)(ii). Accordingly, Congress did not intend that unions recognized by an employer be shielded from election petitions authorized under § 9(c)(1)(A)(ii) (which is the authority under which Petitioners request an election).

The Supreme Court recognized this 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). This includes "protection against the filing of new election petitions by rival unions or employees seeking decertification for 12 months (s 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, 348 U.S. 96.

Undermines 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 unknown to the Board. As such, the policy tolerates the strong potential of employees being represented by a union that has never commanded their uncoerced support, which is one of the most egregious possible violations of the NLRA.

The voluntary recognition bar is a house built upon sand. It is premised on the notion that a union designated by an employer actually has the uncoerced support of a majority of employees. The voluntary recognition 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).[20] Thus, the Board applied the same

presumption of legitimate majority status to employer-recognized unions as it does to NLRB-certified unions.

This 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. *See* Argument, Sections I-II, pp.7-15, *supra*. Nor could the Board discover this fact in the representational context. *See* Argument, Section II, pp.12-15., *supra*. All that is known to the Board is that an employer selected a particular union as the representative of its employees upon what it avers was a showing of majority support. But, "[t]he 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 (Hurtgen dissenting); Argument, Sections I, pp. 7-12, *supra*. 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, a minority, or even any employees.

It is therefore untenable for the Board to accord the same presumption of majority status to employer-recognized unions as to NLRB-certified unions. *See* MGM Grand, 329 N.L.R.B. at 471 (Member Brame, dissenting) ("Voluntary recognition is fundamentally different from a 'solemn' election conducted under 'laboratory conditions.'")(footnotes omitted). It is the NLRB's duty to ensure that employees' representational desires are realized. *See* 29 U.S.C. §§ 159-61; General Shoe Corp., 77 N.L.R.B. at 127. The Board cannot abdicate this duty to employers, nor can it blindly trust employer determinations as to the wishes of its employees. *See* Argument, Sections I, pp.7-12, *supra*. 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.

Deprived of this false premise, the entire voluntary recognition crumbles. The Act's fundamental interest of employee free choice–which always weighed against the voluntary recognition bar in any event–completely supports the abolition of the bar.[21]

Not Necessary to Give Effect to Other Policies under the Act. The interest in stable collective bargaining relations, which ostensibly supports the voluntary recognition bar, is not furthered by the bar's existence. Stability in a collective bargaining relationship is only a legitimate interest **if** an uncoerced majority of employees have freely selected and support a union's representation. *See* Levitz Furniture, 333 N.L.R.B. at 731 (Hurtgen concurring).[22] Again, until an election is conducted, the NLRB does not know if the employer-selected union has the uncoerced support of a majority of employees. Accordingly, the interest in collective bargaining stability cannot be impugned to the relationship between an employer and employer-recognized union before an election is conducted.

This is certainly correct, as it is undisputable there is no legitimate interest in a stable collective bargaining relationship between an employer and a union that does not have the uncoerced support of a majority of employees. *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 based on coerced employee 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 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 "stabilize" bargaining relationships that are potentially built upon minority employee support or coercion. Nor is it acceptable for the Board to turn a "blind-eye" to the problem and simply trust on faith employer determinations that the union they designate has the uncoerced support of a majority of employees. Yet, the Board's current voluntary recognition bar policy does exactly this by shielding employer-selected unions from the NLRA's election procedures without regard for the validity of the bargaining relationship being protected. The voluntary recognition bar must be abolished.

B. In the Alternative, Employees Should be Permitted to Request an Election For at Least 30-Days After Their Employer Voluntarily Recognizes a Union.

If the Board lacks the majority necessary 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 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 interest of "industrial stability" with the Act's paramount interest in "employee free choice." *See* MGM Grand, 329 N.L.R.B. at 468 (Member Hurtgen, dissenting) ("While the first factor represents a policy choice, the latter one is expressly in the Act, and indeed lies at the heart of the Act"). The creation of a window period of at least 30-days after an employer voluntarily recognizes a union is also consistent with the current framework of the voluntary recognition bar.

The interest in employee free choice strongly supports allowing employees to exercise their §§ 9 and 7 rights to request an election, and thereby freely choose or reject union representation. Also, where as here, a petition for a decertification is filed within 30-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 collecting 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 30-days of voluntary recognition indicates that the legitimacy of the employer-recognized union's status is questioned by employees, here, a majority of them. Only a promptly conducted NLRB election can put to rest these valid questions regarding the union's legitimacy.

Most importantly, the "30-day window period rule" proposed by Petitioners 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, 157 N.L.R.B. at 587. 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 30-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. It is likely that bargaining negotiations will not have begun, or will surely be in their infancy, within the 30-day period after recognition is announced. Indeed, the evidence in this case shows that negotiations have not even begun, so it is impossible for the union and the employer to argue that a prompt election would harm industrial stability. *See* Declaration of Lori Yost.

Quite simply, conducting elections upon employee petition within 30-days of voluntary recognition is by far a better policy to protect employee representational rights than depending solely upon 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.

V. 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, 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" (or "voluntary recognition agreements").[23] The Metaldyne / UAW "Partnership Agreement" is of this ilk. These private, often secret agreements, require that an employer voluntarily recognize the favored union without a secret-ballot election. The agreements also frequently require that an employer 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. *See* UAW / Metaldyne "Partnership Agreement."

The issue for the Board is whether it will acquiesce to unions and employers replacing NLRB-conducted secret-ballot elections with whatever private mechanism the parties happen to agree on. The Board upholding the voluntary recognition bar as it currently exists is a huge step towards the Board surrendering its role in the representational process. Since both unions and employers contractually waive their right to request a Board-supervised election under a "voluntary recognition agreement," *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 petition in this context. But, the voluntary recognition bar slams the door on employees seeking access to the Board's election machinery. Thus, unless the voluntary recognition bar is abandoned or modified, there is simply no party left in the "voluntary

recognition agreement" context that can demand a Board election.

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, 502 U.S. at 532, and with administering § 9 of the Act. *See* General Shoe Corp., 77 N.L.R.B. at 127 (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 irrelevant. *See* Gissel Packing,, 395 U.S. at 601-602; MGM Grand, 329 N.L.R.B. at 469-475 (Member Brame, dissenting).

In short, if the Board does not abolish or modify the voluntary recognition bar as advocated by the Petitioners, it representational apparatus 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).

CONCLUSION

For these reasons, the Petitioners Request for Review should be GRANTED, the decision of Region 6 be REVERSED, and a decertification election expeditiously conducted.

Respectfully Submitted,

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William L. Messenger
National Right to Work
Legal Defense Foundation
8001 Braddock Rd., Suite 600
(703) 321-8510
(703) 321-9319 (fax)

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the foregoing by Federal Express on __________________ , 2004:

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 - 14th Street, NW
Washington, DC 20570-0001

Gerald Kobell, Regional Director
National Labor Relations Board, Region 6
1000 Liberty Ave.
Pittsburgh, PA 15222-4173

Metaldyne Corp. (Metaldyne Sintered Pro.)
Ms. Seanna D'Amore
West Creek Road
PO Box 170
St. Mary's, PA 15857

James M. Stone, Esq.
David E. Weisblatt, Esq.
McDonald Hopkins Co., LPA
2100 Bank One Center
600 Superior Avenue
Cleveland, OH 44114-2653

Betsy A. Engel, Esq.
International Union, United Automobile,
Aerospace, and Agricultural Implement
Workers of America, AFL-CIO
8000 Jefferson Avenue
Detroit, MI 48214