UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

DANA CORPORATION,
Employer,
and Case No. 8-RD-1976

CLARICE K. ATHERHOLT,
Petitioner,
and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,
Union.

METALDYNE CORPORATION (METALDYNE SINTERED PRODUCTS),
Employer,
and Case No. 6-RD-1518
6-RD-1519

ALAN P. KRUG and JEFFREY A. SAMPLE,
Petitioners,
and

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

BRIEF OF THE HR POLICY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to the Notice and Invitation to File Briefs issued in these consolidated cases by direction of the Board on June 14, 2004, the HR Policy Association respectfully submits this brief as *amicus curiae* in

support of the petitioners. The primary purpose of the brief is to reinforce and underscore the crucial importance of the point already noted in the Board's Order Granting Review – *i.e.*, that "the secret ballot election remains the best method for determining whether employees desire union representation."[1] Thus, the brief supports the conclusion that an employer's recognition of a union based solely on authorization cards should not be treated as barring a petition by employees seeking a Board-conducted, secret-ballot election to determine whether in fact a majority of the unit employees want the union's representation.

INTEREST OF THE *AMICUS CURIAE*

The HR Policy Association is an organization of the senior human resource officers of more than 220 of our nation's largest private-sector employers. Collectively, its member companies employ over 19 million people worldwide and over 12 percent of the U.S. private-sector workforce.

Since its founding in 1939 (as the "Labor Policy Association"), the Association's principal mission has been to ensure that laws and policies affecting human resources are sound, practical and responsive to the realities of the modern workplace. To that end, the HR Policy Association provides

[1] 341 NLRB No. 150, slip op. at 1 (June 7, 2004)(citing *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974)).

its members, policy-makers, courts, agencies and the public with in-depth information, analysis and opinion regarding current situations and emerging trends in labor and employment policy.

All of the HR Policy Association's member-companies are employers subject to the National Labor Relations Act (NLRA or "Act"), 29 U.S.C. §§ 151 *et seq.* As such, all have a general stake in how the Act is interpreted and implemented. These companies generally believe that whether or not a unit of employees is to be represented by a union is a decision that should be made by those employees themselves, after hearing views on as many sides of the issue as possible. The American industrial relations system is founded on this principle. While it is not without flaws, the best way for resolving questions concerning representation continues to be by employees expressing their opinion in a secret-ballot election conducted by the National Labor Relations Board (NLRB or "Board"). The secret-ballot election process, which in the vast majority of situations is completed within 60 days after it commences, guarantees confidentiality and protection against coercion, threats, peer pressures, and improper solicitations and inducements by either the employer or the union.

Unfortunately, this system is being threatened by an alternative procedure, known as card-check recognition, which lacks these important

protections. In a card-check recognition, employees typically sign union authorization cards in the presence of union organizers, with no governmental supervision to ensure that the cards accurately reflect the wishes of the signers. Increasingly, moreover, employers are being subjected to pressures from unions to agree to card-check recognition even where there are serious doubts as to whether a majority of the employees would support the union in a secret-ballot election. These pressures often threaten the financial health of the company and may even bring into question its survival. Such corporate pressure campaigns by unions, (commonly known as "corporate campaigns") can put employers in an untenable position, for if the employer insists on a secret-ballot election to ensure its employees' freedom of choice, the employees may lose their jobs because of damage to the company's financial position resulting from the union's tactics.

Thus, the HR Policy Association's members have a substantial and ongoing interest in the fundamental policy issue at stake in these cases, which ultimately boils down to a question of priorities: Is it more important to the effectuation of the Act's purposes to protect the interests of employee freedom of choice and majority rule concerning union representation by ensuring employees an opportunity to express their will through the best

available means – *i.e.*, Board-conducted, secret-ballot elections -- or should those interests be sacrificed in the name of promoting the "stability in labor relations" said to be gained by barring such elections for a period of time after a card-check recognition, even if the employer and the union agreed to the card-check procedure before the union obtained the signed authorization cards? For the reasons detailed below, we believe the answer is obviously that it is more important to assure employees real freedom of choice through secret-ballot elections.

STATEMENT OF THE CASE

In each of these two, consolidated cases, an employer recognized a union based on signed authorization cards. In each case, the employer did so pursuant to an agreement it had entered into with the union *before* the authorization cards were obtained. In neither case had the union's majority status been established through a secret-ballot election. Indeed, in each case, employees promptly responded to the news that their employer had recognized the union by petitioning the Board to conduct an election to determine whether in fact a majority of the employees in the affected unit really wanted the union as their representative. In each case, however, the Board's Regional Director dismissed the employees' petition, ruling that the

employer's voluntary recognition of the union barred any such petition for a "reasonable period of time."

The petitioners in both cases filed timely requests for review of the Regional Directors' orders. By order dated June 7, 2004, the Board, having consolidated the two cases, granted the requests for review. At the same time, the Board granted the petitioners' requests that it solicit *amicus curiae* briefs on the issues raised in the cases. The central issue thus presented is whether the right of employees to express their free choice regarding union representation through a Board-conducted, secret-ballot election effectively can be circumvented through the use of a bar based on a card-check recognition procedure.

SUMMARY OF ARGUMENT

Our national labor policy is founded on the dual cornerstones of employee freedom of choice and majority rule concerning questions of union representation. Under our system, a union chosen by the majority of the employees in a unit appropriate for purposes of collective bargaining becomes the exclusive representative of all the employees in the unit. In this capacity, the union has authority on the employees' behalf to enter into binding agreements with their employer on all matters relating to wages, hours, working conditions and other terms and conditions of employment.

Once such representative status is established, it is not readily dissolved. Consequently, it is vitally important that the procedures used for determining the majority's wishes regarding union representation be as fair, reliable and transparent as possible.

It is now widely recognized that the best method of making these determinations is through secret-ballot elections conducted by the NLRB. Such elections are conducted under elaborate safeguards designed to assure that the prospective voters are informed of their rights and are not misled, coerced, or otherwise improperly influenced in making their choice. Procedural safeguards, carefully developed and refined by the Board over the years, ensure that eligible voters are properly identified and that ballots are kept secure and are not tainted or tampered with. Card-checks, in stark contrast, offer virtually no such safeguards. Under even the best of circumstances, card-checks are likely to reflect the pervasive influence of peer pressures on employees who are solicited to sign authorization cards in full view of pro-union coworkers and/or professional union organizers.

Unfortunately, the right of employees to vote on union representation through secret-ballot elections increasingly is being circumvented through the use of card-checks conducted pursuant to "neutrality agreements" extracted from employers through the use of pressure tactics collectively

known as "corporate campaigns." Where these procedures are used, union representation may no longer be a matter of employee free choice, but instead reflects little more than a deal between the employer and the union, in which an agreement by the employer to let the union represent its employees is the price for relief from the union's relentless harassment.

The right of employees to make their own choice regarding union representation through fair, reliable, secret-ballot procedures is simply too important to be outweighed by the asserted interest in "labor relations stability" said to be served by barring such elections after an employer has recognized a union pursuant to a card-check/neutrality agreement. Indeed, it is doubtful that labor relations stability is advanced at all, in any real sense, by recognition of a union that may never actually have had the support of an uncoerced majority of the employees in the unit it purports to represent.

In any event, the practical effect of the voluntary recognition bar in such circumstances is not merely to foreclose a secret-ballot election for a "reasonable period of time," but ultimately to bar any such election almost indefinitely, in most instances. For the initial voluntary recognition bar can be, and typically is, followed by a "contract bar" that precludes any secret-ballot election for up to three years after the employer and the union sign a collective-bargaining agreement. Thus, employees may be saddled for years

with a bargaining representative that never actually has won a majority of their votes in a free and fair election, but simply badgered their employer into signing first a card-check/neutrality agreement and then a collective-bargaining agreement.

In practical terms, the effect of the voluntary recognition bar rule, at least in the circumstances presented here, is not simply to balance employee freedom of choice against stability in labor relations, but rather to extinguish the former almost entirely in the name of the latter. This is not a recipe for industrial peace, but for long-term frustration and alienation of workers who never get a chance to choose their bargaining representatives through a formal, democratic process. Such a rule, we submit, stands the policies of the Act on their head and must be rejected.

ARGUMENT

THE RIGHT OF EMPLOYEES TO MAKE A FREE CHOICE CONCERNING UNION REPRESENTATION THROUGH A SECRET-BALLOT ELECTION IS TOO IMPORTANT TO BE BARRED BY A CARD-CHECK RECOGNITION PROCEDURE

A. Board-Conducted, Secret-Ballot Elections Are the Best, Most Reliable Means of Determining Employees' Wishes Concerning Union Representation

Because they safeguard employee confidentiality and freedom of choice, Board-conducted, secret-ballot elections have been recognized by

Congress, the courts, and the NLRB as the best and most reliable method of resolving questions concerning union representation.

As originally enacted in 1935, the Wagner Act permitted the NLRB to resolve representation questions through "a secret ballot of employees" or "any other suitable method."[2] Between 1935 and 1947, the Board is estimated to have used card checks – deemed to be one of the "other suitable methods" – in about 20 percent of the representation cases it handled.[3]

In 1947, with the passage of the Labor-Management Relations Act (LMRA), Congress eliminated the "other suitable methods" language from the Act. This change made the secret-ballot election a prerequisite for Board certification of a union.[4] Moreover, Congress explicitly indicated its displeasure with card checks, prohibiting the Board from certifying a union based on that method even when the employer and the union both consent to the procedure.[5]

The elimination of card-check certifications was consistent with the overall approach of the 1947 amendments, changing federal labor policy from promoting unionization to protecting employee free choice in deciding

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[2] Section 9(c) of the Wagner Act, 49 Stat. 449 (1935), *reprinted in* 1 N.L.R.B. 1021, 1026 (1935).
[3] S. Rep. No. 80-105, pt. 2, at 34 (1947)(minority views).
[4] *See* 29 U.S.C. § 159(c).
[5] *See* H.R. Rep. No. 80-245, at 39 (1947), S. Rep. No. 80-105, pt. 2, at 34 (1947) (minority views).

for, or against, union representation. By granting employees "the right to refrain from" joining a union, and by adding prohibitions against union (and not just employer) unfair labor practices, Congress recognized that in order to ensure complete freedom of choice, workers had to be protected from unions as well as employers.

Indeed, excessive union power was the major campaign issue that had swept the Republicans into power prior to the 1947 amendments. Thus, adding balance to the Wagner Act was a major priority of the 80th Congress, as evidenced by the strong language used by the House Education and Labor Committee in describing the need for the bill:

> For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act. His whole economic life has been subject to the complete domination and control of unregulated monopolists. He has on many occasions had to pay tribute to get a job. He has been forced into labor organizations against his will. At other times when he has desired to join a particular labor organization he has been prevented from doing so and forced to join another one. He has been compelled to contribute to causes and candidates for public office to which he was opposed. He has been prohibited from expressing his own mind on public issues. He has been denied any voice in arranging the terms of his own employment …. In short, his mind, his soul, and his very life have been subject to a tyranny more despotic than one could think possible in a free country.[6]

[6] H.R. Rep. No. 80-245, at 7 (1947)("Necessity for Legislation").

In rejecting card-check certifications, Congress emphasized that "one of the principal purposes of the National Labor Relations Act is to give employees *full freedom* to choose whether or not to choose representatives for collective bargaining."[7] To this end, the 1947 Act "guaranteed in express terms the right of employees to refrain from collective bargaining or concerted activity if they choose to do so."[8] To ensure that this important goal would be protected in practice, Congress specifically moved toward the secret-ballot election process:

> The bill prescribes rules for the new Board to follow in setting up units for collective bargaining and in holding elections to determine whether or not employees wish labor unions to bargain for them. These rules do away with the practices of the old Board by which it has subjected literally millions of workers to control by labor unions notwithstanding that the employees did not wish the unions to represent them and voted against the unions in the Board's elections.[9]

To be sure, the 1947 revisions of the NLRA did not entirely prohibit the use of card checks in recognizing a union. The Supreme Court, in its 1969 decision in *NLRB v. Gissel Packing Co.*,[10] concluded that the Act still permitted methods of selection other than Board-conducted elections – including card checks in particular – to be used to determine majority

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[7] H.R. Rep. No. 80-245, at 4 (1947)(emphasis added).
[8] *Id.*
[9] H.R. Rep. No. 80-245, at 7 (1947)("Rights of Workers").
[10] 395 U.S. 575 (1969).

support for a union.[11] Nevertheless, the *Gissel* decision was by no means a glowing endorsement of card checks. On the contrary, the Court deferred to the Board's expertise and stated, "The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory – indeed the preferred – method of ascertaining whether a union has majority support."[12]

In making this observation in *Gissel* about the preferred status of secret-ballot elections in the scheme of the Act, the Supreme Court noted with approval a lower court's "comparison of the card procedure and the election process":

> The *unreliability of the cards* is not dependent upon the possible use of misrepresentations and threats…. It *is inherent,* as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees.[13]

The Supreme Court further acknowledged that recognition of a union based on authorization cards is fraught with dangers:

> We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been [card solicitation] abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely

[11] *Id.* at 601-03.
[12] *Id.* at 602 (footnote omitted).
[13] *Id.* at 602 n.20 (quoting *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 566 (4th Cir. 1967)) (emphasis added).

> to authorize it to seek an election to determine that issue. And we would be equally blind if we did not recognize that various courts of appeals and commentators have differed significantly as to the effectiveness of the Board's [attempts] to cure such abuses.[14]

As a result, the Court significantly limited the issuance of bargaining orders based on authorization cards to those instances in which the so-called "laboratory conditions" of the secret-ballot election are irreparably tainted in advance by employer misconduct.[15] That position was reiterated five years later in *Linden Lumber Div., Summer & Co. v. NLRB*, where the Supreme Court unequivocally ruled that an employer could not be *required* to recognize a union without a secret ballot election unless the election process itself was tainted by the employer's unfair labor practices.[16] The *Linden Lumber* opinion, written by noted liberal Justice William O. Douglas, reinforced the idea that card checks are inherently unreliable and that "[i]n terms of getting on with the problems of inaugurating regimes of industrial peace, *the policy of favoring secret elections under the Act is favored*."[17]

The advantages of secret-ballot elections over card-check recognition procedures are multiple and manifest. Unlike the ballots cast in Board-conducted elections, union authorization cards typically are signed in the

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[14] *Gissel Packing*, 395 U.S. at 604 (footnote omitted).
[15] *Id.* at 601 n.18.
[16] 419 U.S. 301, 310 (1974).
[17] *Id.* at 307 (emphasis added).

presence and full view of an interested party – a pro-union coworker or an outside union organizer – with no governmental supervision. There is no question that this absence of supervision has resulted in deceptions, coercion, and other abuses over the years.[18] Even in the best of circumstances, an employee is likely to feel the influence of peer pressure from pro-union coworkers to sign the card.[19] At worst, employees may be subjected to deception and even threats of physical harm by organizers to get them to sign the cards.[20]

The Board's secret-ballot election procedures afford numerous safeguards that are simply lacking when recognition is based on a card-check. To cite just a few examples:

- Before a Board-conducted election takes place, employees are notified of their rights through the posting of NLRB-approved notices that explain the significance of the election and the procedures to be followed. In card-check situations, in contrast, workers typically receive only such information as the union

[18] See Appendix A for a list of cases that illustrate the long history of using deception, coercion and other abuses employing such tactics in the solicitation of authorization cards. It is important to note that the overwhelming majority of these solicitation abuses were discovered only because the company resisted unionization—the very element that the corporate campaign, see infra, is designed to eliminate.

[19] *See, e.g., City Welding & Mfg. Co.*, 191 N.L.R.B. 124 (1971).

[20] *See, e.g., HCF, Inc. d/b/a Shawnee Manor*, 321 N.L.R.B. 1320 (1996) (employee testified that individual soliciting signatures said "the union would come and get her children and it would also slash her car tires" if she did not sign the card).

organizers choose to impart to them when soliciting their signatures.

- In elections, "captive-audience" speeches within 24-hours of the election are prohibited. In card-checks, employees may be subjected to unrebutted, pro-union sales pitches with no letup until they sign cards.
- NLRB rules prohibit electioneering near polling places and thus give employees a last chance to think about the issue of representation free from badgering by either party. Solicitation of authorization cards, however, may be accompanied by constant and unrelenting pro-union propaganda, as long as it does not rise to a material misrepresentation about the consequences of signing the card.
- NLRB elections are conducted by neutral Board agents in conjunction with an equal number of observers selected by the employer and the union to assure procedural fairness. Authorization cards typically are solicited solely in the presence of partisan union organizers.
- In elections, the names of prospective voters are checked against previously established eligibility lists before the employees may

cast their ballots. In contrast, anyone may sign a union authorization card. Although cards may be invalidated if forgery is proved, there is no safeguard that prohibits forgeries before the fact.

- NLRB agents physically inspect ballot boxes immediately prior to the voting and seal the boxes immediately afterward to prevent tampering. Signed authorization cards, in contrast, remain in the control of the union at all times.
- In elections, employees vote independently, without assistance or interference from agents of the union or the employer. In contrast, union organizers can and do fill out and even sign authorization cards on behalf of employees, with their express or implied permission (also obtained under peer pressure, if not actual coercion), even if the employees have never actually read the cards.
- Election ballots are tallied by NLRB agents in the presence of employer and union observers to assure an accurate count. In card-check proceedings, there is no requirement that the cards be counted or names verified by a disinterested party.

- Most importantly of all, election ballots are secret. They are marked and cast in private, assuring that no one can see how any individual voted. No name or other identifying information appears on the ballots to allow anyone to determine how any individual voted. In contrast, card-check procedures afford no confidentiality whatsoever. Whether an employee signed an authorization card or not is an open fact, known to everyone – coworkers, union agents and ultimately employer agents.

Even organized labor has sung the virtues of secret-ballot elections at times – particularly when the issue has been whether or not a union should continue to represent a group of employees who apparently no longer support it. In a brief filed with the Board several years ago, the AFL-CIO quoted the U.S. Supreme Court, saying:

> a representation election "is a solemn … occasion, conducted under safeguards to voluntary choice,' …[whereas] other means of decision-making are "not comparable to the privacy and independence of the voting booth," and [the secret-ballot] election system provides the surest means of avoiding decisions which are " the result of group pressures and not individual decision[s]."[21]

[21] Joint brief of AFL-CIO *et al.* in *Chelsea Industries & Levitz Furniture Co. of the Pacific, Inc.*, Nos. 7-CA-36846 *et al.*, at 13 (May 18, 1998)(quoting *NLRB v. Gissel Packing Co.*, 365 U.S. 575, 602 (1969) and *Brooks v. NLRB*, 348 U.S. 96, 99-100 (1954)).

Organized labor also has been quick to embrace the secret ballot abroad. For example, on February 28, 2001, AFL-CIO President John Sweeney wrote that "[t]he secret ballot is a fundamental, democratic right … and the denial of a secret ballot in this election will mean the denial of the freedom of association."[22] Mr. Sweeney was referring to a union election in Mexico during which employees were required to vote by declaring their preference in front of union and employer representatives.

Legislators likewise have heralded the secret-ballot election in similar cases. For example, in a letter sent on August 29, 2001, Rep. George Miller (D-CA) and 15 other Members of Congress wrote, "[W]e feel that the secret ballot election is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose."[23]

An incident two years ago in upstate New York highlights how union leaders hold out secret-ballot elections as sacrosanct when it suits their purposes. Frontier Communications had agreed to recognize the Rochester Telephone Workers Association, an independent union.[24] This did not sit well with the Communications Workers of America, which filed a charge with the Board. CWA Local 1170 President Linda McGrath stated,

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[22] Mark Stevenson, *Fox Faces Test on Labor Policy*, AP Online, Mar. 2, 2001.
[23] Letter from U.S. Rep. George Miller *et al.* to Junta Local de Conciliacion y Arbitrraje del Estado de Puebla, Aug. 29, 2001.
[24] Eric Walter, *Frontier, Union Face Off*, Henrietta (NY) Post, July 19, 2002.

"Ordinarily, the employees of a facility … would be allowed to hold an election to choose their own union, not to have one chosen for them by the company…. By choosing a union to represent them, the company violated the employees' rights."[25]

Ms. McGrath's point was that it should be employees – and not the employer – who decide who should represent them. The point applies equally to whether the employees should be represented by a union at all. The NLRA should be implemented to empower employees to decide issues of representation, not employers and not unions. As Ms. McGrath recognized, the way to do that is to permit secret-ballot elections.

B. With the Rise of "Corporate Campaigns," Employers Increasingly Are Being Forced To Agree to Card-Check Recognition Even Where It Is Extremely Doubtful That the Union Represents an Uncoerced Majority of the Unit Employees

Historically, card-check recognition has been tolerated because of an assumption that, with a legal right to refuse card-check recognition, employers will agree to forgo elections only when it is clear that such elections would be superfluous because there is no question that a majority of the employees want the union. In recent years, however, employers

[25] *Id.*

increasingly have been forced into recognition of unions by a strategy of pressure tactics called the "corporate campaign."

Although there is no simple definition of the term "corporate campaign," the substance of the strategy is now well-documented by academics, courts, and the unions themselves.[26] The U.S. Court of Appeals for the D.C. Circuit summed it up well when it stated that a corporate campaign:

> encompasses a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer's good will with employees, investors, or the general public.[27]

The AFL-CIO likewise describes the process as follows:

> A coordinated corporate campaign applies pressure to many points of vulnerability to convince the company to deal fairly and equitably with the union. In such a campaign, the strategy includes workplace actions, but also extends beyond the workplace to other areas where pressure can be brought to bear on the company. It means seeking vulnerabilities in all of the company's political and economic

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[26] *See, e.g.*, *Diamond Walnut Growers v. NLRB*, 113 F.3d 1259 (D.C. Cir. 1997) (generally discussing union corporate campaign tactics); *Food Lion v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997) (defining the term "corporate campaign"). *See also* Industrial Union Dep't, AFL-CIO, Developing New Tactics: Winning With Coordinated Corporate Campaigns (1985); Dan LaBotz, A Troublemaker's Handbook (1991); Service Employees Int'l Union, Contract Campaign Manual (1998); Herbert R. Northrup, *Corporate Campaigns: The Perversion of the Regulatory Process*, 17 J. Lab. Research (1996); Jarol B. Manheim, The Death of a Thousand Cuts: Corporate Campaigns and the Attack on the Corporation (2000).

[27] *Food Lion*, 103 F.3d at 1014 n.9.

> relationships—with other unions, shareholders, customers, creditors and government agencies—to achieve union goals.[28]

A more graphic description of a corporate campaign was provided by AFL-CIO Secretary-Treasurer Richard Trumka:

> Corporate campaigns swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow.[29]

Corporate campaigns can involve a seemingly unlimited number of individual pressure tactics. For example, one common tactic is the use of legal and regulatory harassment, as described in *A Troublemaker's Handbook* – a veritable how-to manual for corporate campaigns:

> Private companies are subject to all sorts of laws and regulation, from the Securities and Exchange Commission to the Occupational Safety and Health Act, from the Civil Rights Act to the local fire codes. Every law or regulation is a potential net in which management can be snared and entangled. A complaint to a regulatory agency can cause the company managerial time, public embarrassment, potential fines, and the cost of compliance. One well-placed phone call can do a lot of damage.[30]

One UFCW official, in an article about how his union drove a grocery concern out of business, explained this strategy as "putting enough pressure

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[28] Industrial Union Dep't, AFL-CIO, *supra* note 26, at 1.

[29] *Union Officials Stress International Scope of Organizing, Bargaining Campaigns*, Daily Lab. Rpt. (BNA), Nov. 16, 1992, at A-5.

[30] LaBotz, *supra* note 26, at 127.

on employers, costing them enough time, energy and money to either *eliminate them* or get them to surrender to the union."[31]

Organized labor has made no secret about its willingness to use virtually any means to force employers to accept card-check recognition and neutrality agreements. Indeed, in his first speech as the new president of the UAW, Ron Gettelfinger reportedly pledged that the union "would use its leverage whenever possible to pressure employers to remain neutral during union recruiting drives and [agree to] so-called 'card checks' …."[32] Meanwhile, the Hotel Employees and Restaurant Employees union (HERE) claims with pride that 80 percent of the 9,000 workers the union organized in 2001 never cast a ballot.[33]

When an employer submits to a card-check recognition and neutrality agreement in the face of an active or threatened corporate campaign by a union, the employer's primary concern is typically self-preservation, not preservation of its employees' right of freedom of choice regarding union representation. The employer seeks to protect its business against the union's relentless pressure tactics, even if that may mean that its employees

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[31] Joe Crump, *The Pressure Is On: Organizing Without the NLRB,* 18 Lab. Rel. Rev. 33, 35-36 (1991) (emphasis added).
[32] *Auto Union Chief Vows to Bolster Ranks,* Reuters, June 8, 2002.
[33] David Wessel, *Some Workers Gain With New Union Tactics,* Wall St. J., Jan. 31, 2002, at A-1.

are forced to accept representation by a union that a majority of them would reject if given the opportunity to vote by secret ballot. Thus, the only mechanism available to protect the employees' freedom of choice in these circumstances is the Board's election procedure. When employees' access to that procedure is barred, the employees are denied their most fundamental right under the NLRA.

The case involving MGM Grand Hotel and Casino employees is a good example of how a card check agreement signed during the heat of a corporate campaign works to thwart the will of the employees. The Las Vegas hotel had opened for business in December 1993 and, for nearly three years, operated nonunion while the Hotel Employees & Restaurant Employees International Union (HERE) waged an extensive corporate campaign against the company demanding that it agree to a card check recognition. The tactics HERE used to pressure MGM Grand included the union's use of its political clout in Detroit to threaten to deny the MGM Grand a license necessary to open a major new casino in that city. The campaign also included negative reports issued to investment analysts, a sit-in of 500 people in the hotel's lobby, and numerous public demonstrations.[34]

[34] Michelle Amber, *First Pact Between HERE, MGM Grand Calls for On-site Child Care Facility*, Daily Lab. Rpt. (BNA), Nov. 21, 1997, at A-1; Aaron Bernstein, *Sweeney's*

Ultimately, on November 15, 1996, the company voluntarily recognized HERE as the exclusive collective bargaining representative of its employees on the basis of a card check. At that time, there were approximately 2,900 employees. This number increased to approximately 3,100 employees by October 1997.

The hotel's recognition of the union was not well received by the employees. Many believed that their co-employees had been coerced into signing the cards, including threats of being fired or deported. One employee was reportedly even told that if management learned she was gay, she would be fired by the company if she didn't sign a card so that the union could protect her.[35] Events soon made it clear that a majority of the employees did not support the union. Petitions for an election—signed by over 60 percent of the employees—were filed by the employees with the NLRB regional office on April 17, 1997, September 16, 1997, and November 6, 1997. These were dismissed on the basis that a "reasonable time to bargain" had not elapsed.

Finally, on November 8, 1997, two days after the employees filed the third petition, the company announced to its employees that it had reached a

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Blitz, Bus. Week, Feb. 17, 1997, at 56; Steven Greenhouse, *Unions, Bruised in Direct Battles With Companies, Try a Roundabout Tactic*, N.Y. Times, Mar. 10, 1997, at B-7.

[35] Lisa Kim Bach, *MGM Workers Seek to Oust Culinary*, Las Vegas Rev. J., Apr. 23, 1997, at D-1.

tentative collective-bargaining agreement with HERE and on November 13, 1997, two days before the one-year anniversary of the company's recognition of HERE, the union held a ratification vote at its headquarters. Although the voting was open to all employees, fewer than one-third of the bargaining unit employees participated in the ratification vote, and the collective bargaining agreement was approved by a vote of 740 to 103.

Eventually, despite clear evidence to the contrary, a divided National Labor Relations Board upheld the decisions by the regional office to deny the employees a secret ballot election.[36] Under the law, the employees could not appeal the Board's decision, because federal courts are barred from considering appeals from employees in cases involving NLRB election processes. This case amply demonstrates how, in the absence of a secret-ballot election, union tactics dominate employee free choice and why the Board should permit secret ballot elections in the face of card check agreements.

[36] *MGM Grand Hotel, Inc*., 329 N.L.R.B. 464 (1999).

C. The Importance of Assuring Employees Freedom of Choice Through Secret-Ballot Elections Clearly Outweighs Any Asserted Benefit to Labor Relations Stability Thought To Be Gained by the "Voluntary Recognition Bar," Particularly in the Circumstances Presented Here

The "voluntary recognition bar," which blocks elections from occurring once an employer has "voluntarily" recognized a union until after a "reasonable" time to negotiate has elapsed, is a matter of Board policy and is not mandated by statute. Regardless of whether this policy made sense in earlier times, the current realities of corporate campaigns and the substantial evidence of the lack of safeguards and potential for deception and coercion in the card-check procedure makes clear that the voluntary recognition bar no longer serves a legitimate purpose.

If the card-check recognition procedure was a reliable indicator of employee choice, it would make sense to have a "voluntary recognition bar" similar to the "election bar" which prohibits both employees and employers from filing election petitions for a one year period following a Board conducted secret ballot election. The election bar exists because after a Board-conducted secret ballot election there is no question as to the majority status of a union, and, therefore, the election bar serves the dual purpose of "encouraging the execution of a collective bargaining contract and

enhancing the stability of labor relations."[37] In contrast, with the card-check recognition procedure, particularly considering the use of the "corporate campaign," there *is* a question as to majority status. The same presumption of majority status given after a secret ballot election should not be given after card-check recognition. In fact, if a valid petition is filed with the Board seeking an election after the voluntary recognition, as is the case here, the presumption should be that the card-check procedure did not adequately determine majority status.

The sole justification asserted for barring secret-ballot elections for a period of time after an employer voluntarily recognizes a union based on authorization cards is that "industrial peace and stability of labor management relations" assertedly are enhanced by affording the employer and the union a "reasonable period of time" in which to negotiate for a first collective-bargaining agreement, free the pressures that surround an election.[38] The first priority of the Board, however, should be to ensure "employee free choice," not stability in labor management relations. The issue of stability in labor management relations should not even be considered before the Board ensures that the union the Board seeks to allow the opportunity to negotiate an agreement is, in fact, the union that the

[37] *Centr-O-Cast & Eng'g Co.*, 100 N.L.R.B. 1507, 1508 (1952)(footnote omitted).
[38] *See Dana Corp.*, 341 NLRB No. 150, slip op. at 4 (dissenting opinion).

majority of the employees want, if any at all. After all, the fundamental and overriding principle of the Act is "voluntary unionism."[39]

Furthermore, it is extremely doubtful that the prospects of labor-relations stability actually are improved, at least in the long run, by a procedure that saddles employees with a bargaining representative a majority of them may, in fact, not want. On the contrary, employees who find themselves barred from expressing their free choice regarding union representation by secret ballot, and instead are forced to accept representation by a union their employer has agreed to foist on them, are likely to feel lasting resentments that are likely to undermine stability in labor relations for years to come.

Moreover, although theoretically the "voluntary recognition bar" remains in effect only for a "reasonable period of time," in actual practice its effect is often to bar employees from the only real chance they would otherwise have in years to challenge the incumbency of the union their employer has agreed to recognize. For, while the "voluntary recognition bar" is in effect, the employer and the union can – and, in circumstances where the employer is acting to avoid corporate campaign pressures, almost certainly *will* – enter into a collective-bargaining agreement which, in turn,

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[39] *See Pattern Makers' League v. NLRB*, 473 U.S. 95, 102-03 (1985).

will trigger a "contract bar" that further precludes any secret-ballot election for the life of that contract, up to three years. In this way, even a union that never could have won a majority of the employees' votes in a secret-ballot election can remain immune for years from challenge to its status as the employees' exclusive bargaining agent.

Thus, the ultimate effect of the "voluntary recognition bar" policy is to deprive employees of access to the NLRA's statutorily-preferred, secret-ballot election procedure, not merely for a "reasonable period of time," but virtually in perpetuity. We submit that this result goes far beyond any balancing of interests permitted by the Act and, instead, amounts to an obliteration of the employees' fundamental freedom of choice.

The unfortunate reality is that the Board's voluntary recognition bar policy contributes to a regime in which employees actually are stripped of their right to choose a bargaining representative freely, rather than protect employee free choice. The voluntary recognition bar fosters the use of deception, coercion and other abuses that accompany corporate campaigns, neutrality agreements and card-recognition agreements. The fact that the Board is the administrative agency whose primary purpose is to ensure employee free choice, which the Board does admirably through the secret

ballot election process, compels that the Board abolish the voluntary recognition bar policy.

CONCLUSION

For the reasons set forth above, the *amicus curiae*, the HR Policy Association, submits that the right of the petitioners in these cases to Board-conducted, secret-ballot elections should not be barred by their employers' voluntary recognition of the unions.

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I hereby certify that on this 15th day of July, 2004, a true and correct copy of the foregoing Brief of the HR Policy Association as *Amicus Curiae* in Support of Petitioners was served by U.S. first class Mail, postage prepaid, addressed as follows:

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APPENDIX A

Cases illustrating the long history of using deception, coercion and other abuses in the solicitation of authorization cards.

Evergreen Healthcare, Inc. v. NLRB, 104 F.3d 867 (6th Cir. 1997) (pressure)

Findlay Indus., Inc., 323 N.L.R.B. No. 139 (May 22, 1997) (forgery)

HCF, Inc., 321 N.L.R.B. 1320 (1996) (coercion)

Polyclinic Med. Ctr. of Harrisburg, 315 N.L.R.B. 1257 (1995) (misrepresentation)

Dayton Hudson Dep't Store Co., 314 N.L.R.B. 795 (1994) (forgery)

Gaylord Bag Co., 313 N.L.R.B. 306 (1993) (promised benefits)

DTR Indus., Inc., 311 N.L.R.B. 833 (1993) (misleading statements)

Somerset Welding & Steel Inc., 304 N.L.R.B. 32 (1991) (misleading statements)

Hicks Oils & Hicksgas, 293 N.L.R.B. 84 (1989) (misleading statements), *enf'd*, 942 F.2d 1140 (7th Cir. 1991)

Pembrook Management Inc., 296 N.L.R.B. 1226 (1989) (misleading statements)

Nissan Research & Dev., Inc., 296 N.L.R.B. 598 (1989) (misrepresentation)

Salvation Army Williams Memorial Residence, 293 N.L.R.B. 944 (1989) (misrepresentation)

Montgomery Ward & Co., 288 N.L.R.B. 126 (1988) (misleading statements), *enf'd in part, denied in part*, 668 F.2d 291 (7th Cir. 1981)

Camvac Int'l, Inc., 288 N.L.R.B. 816 (1988) (misleading statements)

Calplant Constr., 279 N.L.R.B. 854 (1986) (promised benefits)

NLRB v. Horizon Air Servs., Inc., 761 F.2d 22 (1st Cir. 1985) (misleading statements)

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Burlington Indus., Inc. v. NLRB, 680 F.2d 974 (4th Cir. 1982) (misrepresentation)

Paul Distributing Co., 264 N.L.R.B. 1378 (1982) (promised benefits)

Republic Corp., Advanced Mining Group, 260 N.L.R.B. 486 (1982) (misleading statements)

Twin County Trucking, Inc., 259 N.L.R.B. 576 (1981) (misrepresentation, pressure)

NLRB v. Sanford Home for Adults, 669 F.2d 35 (2d Cir. 1981) (coercion)

Tipton Elec. Co. v. NLRB, 621 F.2d 890 (8th Cir. 1980) (misleading statements)

Montgomery Ward & Co., 253 N.L.R.B. 196 (1980) (misleading statements)

Stanley M. Feil, Inc., 250 N.L.R.B. 1154 (1980) (misrepresentation)

Dresser Indus., Inc., 248 N.L.R.B. 33 (1980) (misrepresentation, misleading statements)

Mid-East Consol. Warehouse, A Div. of Ethan Allen, Inc., 247 N.L.R.B. 552 (1980) (peer pressure)

NLRB v. Roney Plaza Apartments, 597 F.2d 1046 (5th Cir. 1979) (peer pressure, misrepresentation)

Medline Indus., Inc. v. NLRB, 593 F.2d 788 (7th Cir. 1979) (pressure, misrepresentation)

J.P. Stevens & Co., 244 N.L.R.B. 407 (1979) (misrepresentation, pressure, misleading statements), *enf'd*, 668 F.2d 767 (4th Cir. 1982), *vacated on other grounds*, 458 U.S. 1118 (1982)

Holiday Inn of Perrysburg, 243 N.L.R.B. 280 (1979) (misleading statements), *enf'd in part, denied in part*, 647 F.2d 692 (6th Cir. 1981)

Olympic Villas, 241 N.L.R.B. 358 (1979) (forgery, pressure)

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NLRB v. Randall P. Kane, Inc. d/b/a The Catalyst, 581 F.2d 215 (9th Cir. 1978) (misleading statements)

Case, Inc., 237 N.L.R.B. 798 (1978) (misrepresentation), *aff'd in part, rev'd in part sub nom. NLRB v. Gibraltar Indus., Inc.*, 653 F.2d 1091 (6th Cir. 1981)

L'Eggs Prods., Inc., 236 N.L.R.B. 354 (1978) (misrepresentation), *aff'd in part, set aside in part*, 619 F.2d 1337 (9th Cir. 1980)

Serv-U-Stores, Inc., 234 N.L.R.B. 1143 (1978) (misrepresentation)

Stride Rite Corp., 228 N.L.R.B. 224 (1977) (misrepresentation, promised benefits)

The Holding Co., 231 N.L.R.B. 383 (1977) (promised benefits, misleading statements)

W&W Tool & Die Mfg. Co., 225 N.L.R.B. 1000 (1976) (misleading statements)

Scotts IGA Foodliner, 223 N.L.R.B. 394 (1976) (promised benefits), *enf'd*, 549 F.2d 805 (7th Cir. 1977)

Hedstrom Co., 223 N.L.R.B. 1409 (1976) (misleading statements), *review denied, order enf'd*, 629 F.2d 305 (3d Cir. 1980)

Walgreen Co., 221 N.L.R.B. 1096 (1975) (misleading statements)

Bookland, Inc., 221 N.L.R.B. 35 (1975) (misrepresentation)

Fort Smith Outerwear, Inc. v. NLRB, 499 F.2d 223 (8th Cir. 1974) (misrepresentation, promised benefits)

Rowand Co., Inc., 210 N.L.R.B. 95 (1974) (coercion)

Dexter IGA Foodliner, 209 N.L.R.B. 369 (1974) (pressure)

NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973) (promised benefits)

Area Disposal, Inc., 200 N.L.R.B. 354 (1972) (misleading statements)

American Beauty Baking Co., 198 N.L.R.B. 327 (1972) (pressure)

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Claremont Polychem. Corp., 196 N.L.R.B. 613 (1972) (promised benefits)

City Welding & Mfg. Co., 191 N.L.R.B. 124 (1971) (pressure)

Olin Conductors, Olin Mathieson Chem. Corp., 185 N.L.R.B. 467 (1970) (promised benefits)

Eckerd's Mkt., Inc., 183 N.L.R.B. 337 (1970) (misrepresentation)

Boyer Bros., Inc., 181 N.L.R.B. 401 (1970) (peer pressure)

NLRB v. South Bay Daily Breeze, 415 F.2d 360 (9th Cir. 1969) (misrepresentation)

NLRB v. J. Taylor Mart, Inc. d/b/a Taylor's IGA Foodliner, 407 F.2d 644 (7th Cir. 1969) (misrepresentation)

Dan Howard Mfg. Co. v. NLRB, 390 F.2d 304 (7th Cir. 1969) (misrepresentation, peer pressure)

Kawneer Co., Div. of American Metal Climax, Inc. v. NLRB, 413 F.2d 191 (6th Cir. 1969) (misrepresentation)

G & A Truck Line, Inc. v. NLRB, 407 F.2d 120 (6th Cir. 1969) (misleading statements)

J.M. Machinery Corp. v. NLRB, 410 F.2d 587 (5th Cir. 1969) (misrepresentation)

Schwarzenbach-Huber Co. v. NLRB, 408 F.2d 236 (2d Cir. 1969) (misrepresentation)

Sea Life, Inc., 175 N.L.R.B. 982 (1969) (promised benefits)

Silver Fleet, Inc., 174 N.L.R.B. 873 (1969) (misrepresentation)

Wylie Mfg. Co., 170 N.L.R.B. 991 (1968) (coercion), *enf'd*, 417 F.2d 192 (10th Cir. 1969)

Lenz Co. v. NLRB, 396 F.2d 905 (6th Cir. 1968) (misrepresentation)

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Ben Duthler, Inc. v. NLRB, 395 F.2d 28 (6th Cir. 1968) (pressure, misleading statements)

Pulley v. NLRB, 395 F.2d 870 (6th Cir. 1968) (coercion)

Southland Paint Co. v. NLRB, 394 F.2d 717 (5th Cir. 1968) (misrepresentation)

Lake Butler Apparel Co. v. NLRB, 392 F.2d 76 (5th Cir. 1968) (misrepresentation)

Levi Strauss & Co., 172 N.L.R.B. 732 (1968) (misleading statements)

Eagle-Picher Indus., Inc., 171 N.L.R.B. 293 (1968) (misrepresentation)

D.H. Overmyer Co., 170 N.L.R.B. 658 (1968) (promised benefits)

Swan Super Cleaners, Inc. v. NLRB, 384 F.2d 609 (6th Cir. 1967) (misrepresentation)

Dayco Corp. v. NLRB, 382 F.2d 577 (6th Cir. 1967) (misrepresentation)

Engineers & Fabricators, Inc. v. NLRB, 376 F.2d 482 (5th Cir. 1967) (misrepresentation)

Heck's Inc. v. NLRB, 386 F.2d 317 (4th Cir. 1967) (pressure)

Nichols-Dover, Inc. v. NLRB, 380 F.2d 438 (2d Cir. 1967) (misrepresentation)

NLRB v. Southbridge Sheet Metal Works, Inc., 380 F.2d 851 (1st Cir. 1967) (pressure)

ITT Semi-Conductors Inc., 165 N.L.R.B. 716 (1967) (misrepresentation, misleading statements), *enf'd in part, set aside in part*, 395 F.2d 257 (5th Cir. 1968)

Sandy's Stores, Inc., 163 N.L.R.B. 728 (1967) (misrepresentation)

Cooper-Hewitt Elec. Co., 162 N.L.R.B. 1148 (1967) (pressure)

Nashville Lumber Co., 162 N.L.R.B. 1027 (1967) (coercion, misrepresentation)

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Bauer Welding & Metal Fabricators, Inc. v. NLRB, 358 F.2d 766 (8th Cir. 1966) (misrepresentation)

Freeport Marble & Tile Co. v. NLRB, 367 F.2d 371 (1st Cir. 1966) (misrepresentation)

Mutual Indus., Inc., 159 N.L.R.B. 885 (1966) (misleading statements)

Ed's Foodland of Springfield, Inc., 159 N.L.R.B. 1256 (1966) (misleading statements)

Golub Corp., 159 N.L.R.B. 503 (1966) (misrepresentation), *enf'd denied*, 388 F.2d 921 (2d Cir. 1967)

Merrill Axle & Wheel Serv., 158 N.L.R.B. 1113 (1966) (peer pressure)

John Kinkel & Son, 157 N.L.R.B. 744 (1966) (pressure, misleading statements)

American Can Co., 157 N.L.R.B. 167 (1966) (forgery)

NLRB v. Cumberland Shoe Corp., 351 F.2d 917 (6th Cir. 1965) (misleading statements)

Shapiro Packing Co., 155 N.L.R.B. 777 (1965) (peer pressure, coercion)

Peoples Serv. Drug Stores, Inc., 154 N.L.R.B. 1516 (1965) (peer pressure, promised benefits, misrepresentation), *enf'd in part*, 375 F.2d 551 (6th Cir. 1967)

Trend Mills, Inc., 154 N.L.R.B. 145 (1965) (misrepresentation)

Pizza Prods. Corp., 153 N.L.R.B. 1265 (1965) (peer pressure, misrepresentation)

NLRB v. Koehler, 328 F.2d 770 (7th Cir. 1964) (misrepresentation)

NLRB v. Gorbea, Perez & Morrell, 328 F.2d 679 (1st Cir. 1964) (promised benefits)

Imco Container Co., Div. of Consolidated Thermo-Plastics Co., 148 N.L.R.B. 312 (1964) (forgery)

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Briggs IGA Foodliner, 146 N.L.R.B. 443 (1964) (coercion, misrepresentation)

Ottenheimer & Co., 144 N.L.R.B. 38 (1963) (promised benefits)

Morris & Assoc., Inc., 138 N.L.R.B. 1160 (1962) (misrepresentation)

Suburban Drugs, Inc., 138 N.L.R.B. 787 (1962) (forgery, misrepresentation);

I. Posner, Inc., 133 N.L.R.B. 1573 (1961) (coercion)

Englewood Lumber Co., 130 N.L.R.B.394 (1961) (misrepresentation)

Insuler Chem. Corp., 128 N.L.R.B. 93 (1960) (pressure)

NLRB v. H. Rohtstein & Co., 266 F.2d 407 (1st Cir. 1959) (pressure, misrepresentation)

Columbia Broad. Sys., Inc., 125 N.L.R.B. 1161 (1959) (forgery, fraud)

Potomac Elec. Power Co., 111 N.L.R.B. 553 (1955) (promised benefits)

Puerto Rico Food Prods. Corp., 111 N.L.R.B. 293 (1955) (coercion)

NLRB v. James Thompson & Co., 208 F.2d 743 (2d Cir. 1953) (coercion)

Top Mode Mfg. Co., 97 N.L.R.B. 1273 (1952) (coercion)

Lerner Shops of Ala., Inc., 91 N.L.R.B. 151 (1950) (coercion)

Zellerbach Paper Co., 4 N.L.R.B. 348 (1938) (coercion)