UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DANA CORPORATION

Respondent Employer

and

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

Respondent Union

and

GARY L. SMELTZER, JR., an Individual — Cases 7-CA-46965, 7-CB-14083

Charging Party

and

JOSEPH MONTAGUE, an Individual — Cases 7-CA-47078, 7-CB-14119

Charging Party

and

KENNETH A. GRAY, an Individual — Cases 7-CA-47079, 7-CB-14120

Charging Party

BRIEF ON BEHALF OF AMICUS CURIAE
NATIONAL ALLIANCE FOR WORKER AND EMPLOYER RIGHTS

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REQUEST FOR PARTICIPATION AS AMICUS CURIAE

On March 30, 2006, the Board invited the participation of amicus curiae in the consideration of this case, which is pending before the Board on exceptions by the Charging Parties to the administrative law judge's recommended dismissal of the consolidated complaint.

The National Alliance for Worker and Employer Rights (NAWER) is a national advocacy organization made up of employers and employees concerned about the abuse of employee rights by labor organizations, including situations in which the abuse is jointly perpetrated by unions and employers.

The case raises the issue of whether an employer and union may agree upon terms and conditions of employment to be negotiated in a collective-bargaining agreement should the union achieve majority status and recognition as the exclusive bargaining representative of employees in an appropriate bargaining unit, notwithstanding the absence of such majority status at the time of the agreement.

As a consequence, NAWER has a keen interest in the resolution of this issue and respectfully requests that the Board allow its participation in this proceeding as amicus curiae.

STATEMENT OF THE ISSUE

Whether the Respondent Employer violated § 8(a)(2) and (1), and whether Respondent Union violated § 8(b)(1)(A) of the National Labor Relations Act by, at a time the Union lacked majority support among employees in an appropriate unit, entering into and maintaining a Letter of Agreement specifying certain terms and conditions of employment to be negotiated in a collective bargaining agreement if and when the Union achieved an authorization-card based majority and attendant recognition by the Respondent Employer.

PROCEDURAL HISTORY

On September 30, 2004, based upon charges filed by three individuals, the General Counsel issued a consolidated complaint against the Respondent Employer and the Respondent Union alleging each committed violations of the National Labor Relations as summarized in the preceding paragraph.

Following a hearing held February 8, 2005, the judge recommended dismissal of the complaint on the ground that it failed to plead a cause of action, and also on the merits because, in his view (1) Majestic Weaving Co., 147 NLRB 859 (1964), *supplemental decision*, 149 NLRB 1523 (1964), *enforcement denied on other grounds*, 355 F.2d 854 (2d Cir. 1966), did not require a finding of unlawful conduct by the parties, and (2) that, in any case, Kroger Co, 219 NLRB 388 (1975), clearly sanctioned the parties' conduct.

The case is now before the Board on the Charging Parties' exceptions to the judge's decision and recommended order. As noted, on March 30 of this year, the Board invited the participation of amicus curiae.

SUMMARY OF ARGUMENT

The parties have extensively briefed a broad range of issues, including whether the judge properly quashed a subpoena *duces tecum* and excluded certain witness testimony; whether the judge properly rejected Charging Parties' argument that Respondent Employer's conduct violated § 8(a)(1) of the Act as constituting an unlawful promise of benefit or threat of reprisal; whether the judge properly rejected Charging Parties' contention that Respondent's Union's conduct violated § 8(b)(1)(A) by breaching its duty of fair representation; whether Respondent Employer "tacitly" recognized Respondent Union; whether the Board's decision in Kroger Co., *supra*, privileged the conduct of Respondent Employer and Respondent Union; and what should be the nature and scope of any remedy ordered by the Board in the event it were to find Respondents' actions unlawful.

NAWER, however, intends to address in detail just two central issues:

(1) whether the Board's decision in Majestic Weaving Co., *supra*, requires a finding that the Respondents' violated the Act as alleged in the consolidated complaint, and

(2) whether the Board's decision in Kroger Co., *supra*, should be overruled as fundamentally inconsistent with Majestic Weaving.

NAWER believes both questions should be answered affirmatively for reasons to be adduced.

STATEMENT OF FACTS

Dana Corporation manufactures, for non-retail sale, automotive parts and light and heavy duty components for industrial and "off highway" vehicles at some 90 facilities in the United States and Canada and 25 to 30 in foreign countries. Dana's main customers are the "Big Three" American automakers, General Motors, Ford, and Daimler Chrysler, and its principal products are frames, axles, and drive shafts.

The Union is an international union primarily representing employees of automobile and agricultural implement manufacturers in this country and in Canada, as well as employees of firms that supply parts and components to the makers. The Union currently represents approximately 2200-2300 Dana employees in nine bargaining units at eight locations. One collective-bargaining agreement covers three bargaining units at two locations, while separate contracts cover units at six other facilities.

The Union has been seeking without success since early 2002 to organize about 300 unrepresented non-supervisory employees at Dana's St. Johns, Michigan facility. There is no dispute that the Union has never achieved majority status among the St. Johns employees.

This case pivots upon a Letter of Agreement between Respondent Dana and the Union dated August 6, 2003, signed two days later, and lasting until June 8, 2007, concerning ways and means to enable the Union to become the collective-bargaining representative of employees at currently unrepresented facilities, including the St. Johns facility. Evidence adduced at the hearing indicates that the Agreement, 17 pages in length, was reached after three days of secret negotiations between three representatives of each side, including Dana's Vice President of Labor Relations, David C. Warders, and the Union's Vice President, Bob King.

In broad terms, the Letter of Agreement addresses two main subjects with provisions involving (1) procedures for recognizing the UAW based upon a showing of majority status among employees in appropriate bargaining units at unrepresented locations via authorization cards ("card check recognition") and terms requiring neutrality on the part of Dana during Union organizational drives ("neutrality agreement"), and (2) terms and conditions that are to be

negotiated in any collective-bargaining agreement between the parties following recognition of the UAW by Dana.

Only the lawfulness of the provisions falling under "(2)" is in issue in this case. Nevertheless, the "card check" and "neutrality" provisions deserve summary because they were evidently negotiated as favors conferred upon the UAW in exchange for future contract concessions benefiting Dana.

The key "organizing" provisions of the Agreement obligate Dana, grouped for convenience by subject below, as follows:[1]

[card check recognition]

- to recognize the Union by means of authorization cards ("Employee Authorization Forms") obtained from a purported majority of employees in agreed-upon appropriate bargaining units and verified by a neutral party.[2] [§§ 3 and 4.1 of the Letter]

[restrictions on speech]

- not to communicate or engage in conduct displaying "directly or indirectly, a negative, derogatory, or demeaning attitude toward . . . the Union . . . or about labor organizations . . . generally." [§ 2.1.2.1]
- not to "engage in any communications or conduct that directly or directly, demonstrates or implies opposition to unionization of its employees." [§ 2.1.2.2]
- to advise employees that it is neutral regarding whether employees select the Union as a collective-bargaining representative, and that it has a "constructive and positive relationship with the UAW" and a National Partnership Agreement committing both parties "to the success and growth of the Corporation." [§ 2.1.2.4]

[1] In addition, there are provisions of less significance committing both parties to recognize employee free speech rights [§ 2.1.2.6]; not to engage in misconduct such as "threats, misrepresentations, or delaying tactics; " [§ 2.1.3.2], and threats, intimidation, discrimination, retaliation, or adverse action against employees based on whether they support the Union [§ 2.1.3.3]; not to take adverse action against one another based on the decision whether to be represented by employees at any facility [§ 2.1.3.3]; and not to commit unfair labor practices interfering with employee rights [§ 2.1.3.4]. The Union also agreed not to "verbally or in any written communication publicly or privately disparage the Company as a whole nor any individual management person." [§ 2.1.2.8].

[2] Under § 3.1.3, the Union is also permitted to select the date upon which the number of employees in the bargaining unit is determined.

- not to "make any statements or representations as to the potential negative effects or results of representation by the Union on the Company, the employees, or any group of employees." [§ 2.1.2.7]

  [restrictions on conduct]
- not to employ any labor consultant to oppose unionization by the Union or otherwise influence employee attitudes about representation by the Union. [§ 2.1.2.3]
- not to "provide any support or assistance of any kind to any person or group that is supporting or opposing the selection of the Union as the bargaining representative of the employees. [§ 2.1.2.5]

  [Union access to employees and premises]
- to provide the Union with an alphabetical list of employees in the bargaining unit at any particular facility within a week of the Union's request, and updated no more than once a month at the Union's request, showing each employee's full name, date of hire, classification, shift, department, and home address with zip code. [§ 2.1.3.1]
- to provide the Union with "access to employees during the workday in non-work areas, including, but not limited to, parking lots, building entrances and exits, break areas, smoking areas, and cafeterias during the workday." [§ 2.1.3.5]
- to provide the Union "with access for a meeting with its employees on the Company's premises during work time as mutually agreed upon at the time of the Union's request'; to 'introduce the Union at the meeting"; "to advise its employees that it has a constructive and positive relationship with the UAW and that a National Partnership Agreement with the UAW exists in which both parties are committed to the success and growth of the facility." [§ 2.1.3.5][3]
- to "permit the distribution of Union literature in Non-Work Areas of its facilities." [§2.1.4.7]
- to "permit its employees to display the UAW insignia and to communicate with fellow employees concerning the Union and workplace issues, including wage rates, disciplinary systems, Company policies, and working conditions." [§ 2.1.3.8]

[3] The record shows Dana and the UAW jointly conducted several such meetings in December 2003 at the St. Johns facility.

- to "permit the Union to post notices on bulletin boards or other locations normally utilized by employees for posting of personal notices provided such notices are not in conflict" with "neutrality" as defined in the Agreement. [§ 2.1.3.8]

With the "organizing" part of the Agreement now impressed in mind, we may now review the "bargaining" terms.

In obvious exchange for those provisions of the Agreement designed to facilitate the Union's organization of unrepresented Dana employees, the company received, at a time the Union lacked majority and representational status among the employees at the St. Johns facility, advance economic concessions in the form of limitations on the Union's freedom to represent employees in any future collective-bargaining negotiations.

Of prime significance is a central provision governing health care cost containment found in § 4.2.1: "[T]he Union commits that in no event will bargaining between the parties erode current solutions and concepts already in place or scheduled to be implemented January 1, 2004 at Dana's operation which include premium sharing, deductibles, and out of pocket premiums." In addition, under § 4.2.4, the parties agree that future labor contracts bargained pursuant to the Agreement must contain health care costs "that reflect the competitive reality of the supplier industry and product(s) involved."

Other mandatory conditions that must be inserted into future labor contracts under § 4.2.4 embrace, in direct quote,

- Minimum classifications
- Team-based approaches
- The importance of attendance to productivity and quality
- Dana's idea program (two ideas per person per month and 80% implementation
- Continuous improvement
- Flexible Compensation
- Mandatory overtime when necessary (after qualified volunteers) to support the customer

The Agreement requires the parties to include in contracts a provision to submit unresolved issues to interest arbitration after six months of collective-bargaining negotiations. [§ 4.2.5]. After submission of each side's final offer on the outstanding issues, the interest arbitrator is required to accept in full one or the other side's final offer based upon reasonableness. [§

4.2.6]. As to economic items, such as "wages, benefits, vacations, etc.," the arbitrator is directed to "approach the issue based on a competitive analysis of total wages and benefits provided by those competitors who compete with the facility in question for the customer's contracts and the total wages and total benefits at the Company's facilities making similar products." [§ 4.2.6]. The arbitrator is also to take account that wage and benefit increases normally ensue from collective bargaining, providing "the economic climate of the automotive industry and/or the financial performance of the facility in question supports such increase." [§ 4.2.6].

The Agreement stipulates the duration of collective-bargaining contracts between the parties to be between four to five years. [§ 4.2.2].

The Union also agrees that it "will not engage in a strike or work stoppage" from the time the Union requests an employee list for organizational purposes "through the resolution of the first contract at each facility." [§ 6.1]. This means that the Union has waived in advance not only its own right to strike from the list request date, but also the employees' right to strike from the time of recognition to the execution of the initial contract, the period when it is most useful.

To resolve disputes under the Agreement, other those involving interest arbitration, as previously described, the parties have agreed to the designation of a Neutral under Article 5, who is given "complete authority to remedy any violation of th[e] Agreement." [§ 5.1.2.4]. The Neutral's decision is to be final and binding and not subject to challenge in any other forum. [§ 5.1.2.4].

Finally, each party bound itself not to disclose the Agreement or its terms without the consent of the other. [§ 12.1].

In any case, Dana issued a news release on August 13, 2003, announcing the Agreement but not providing details as per the confidentiality accord by the parties. The judge, however, found that, "By now all employees who are interested will know of the specific terms of the letter of agreement." ALJD 9: 38-39.

ARGUMENT: POINT I

THE BOARD'S DECISION IN MAJESTIC WEAVING CO., 147 NLRB 859, REQUIRES A FINDING THAT RESPONDENT EMPLOYER VIOLATED § 8(a) (2) and (1), AND THAT RESPONDENT UNION VIOLATED § 8(b) (1) (A), OF THE NATIONAL LABOR RELATIONS ACT.

NAWER believes the Board's decision in Majestic Weaving Co., 147 NLRB 859 (1964), *supplemental decision*, 149 NLRB 1523 (1964), *enforcement denied on other grounds*, 355 F.2d 854 (2d Cir. 1966) dispositively controls the facts present in this case, contrary to the administrative law judge's finding that Majestic Weaving is distinguishable. Therefore, we find it imperative to analyze carefully both the facts of Majestic Weaving, as compared to those here, and the Board's legal reasoning. Likewise we must consider closely Board and court cases that throw light on the intent and meaning of the Majestic Weaving decision. Finally, this brief will demonstrate the errors apparent in the judge's finding that Majestic Weaving is inapplicable, as well as arguments raised in support of the judge by Respondent Employer and Respondent Union.

The place to begin is with the complaint, which makes the following allegations in plain and simple terms:

> 9. On about August 6, 2003, Respondent Employer entered into and has maintained a Letter of Agreement with Respondent Union that sets forth terms and conditions of employment to be negotiated in a collective bargaining agreement should Respondent Union obtain majority status as the exclusive bargaining representative of certain of Respondent Employer's employees. The Letter of Agreement pertained to approximately 70 facilities operated by Respondent Employer, including the St. Johns facility.
> 10. Respondent Union and Respondent Employer entered into the Letter of Agreement at a time when Respondent Union did not represent a majority of the employees employed by Respondent Employer at the St. Johns facility.
> 11. By the conduct described in paragraphs 9 and 10, Respondent Employer has been rendering unlawful assistance to a labor organization, in violation of Section 8(a) (1) and (2) of the Act.
> 12. By the conduct described in paragraphs 9 and 10, Respondent Union has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(b)(1)(A) of the Act.

Section 8(a) (2) of the National Labor Relations Act makes it illegal for an employer "to dominate or interfere with the formation or administration of any labor organization or *contribute financial or other support to it.* [emphasis supplied]. Section 8(a) (1) states that an employer may

not “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”

Section 8(b) (1) (A) of the Act declares that a union may not “restrain or coerce employees in the exercise of the rights guaranteed in section 7.

Section 7, in relevant part, gives employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” and also grants employees “the right to refrain from any or all such activities.”

The predicate for the complaint, and for Majestic Weaving, runs back to the Supreme Court’s 1961 decision in International Ladies’ Garment Workers’ Union (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731. There, the Court upheld the Board’s finding, affirmed by the court of appeals, that the employer violated § 8(a) (2) and (1) of the Act, by conferring recognition upon a union as the exclusive bargaining representative of certain employees at a time that the union lacked majority status, as well as the Board’s corresponding finding that the union violated § 8(b) (1) (A) by accepting such recognition. The facts showed that the employer and union entered into a written recognition agreement at a time when majority support for the union was absent; five weeks later, a formal contract was executed, by which time there was evidence of such majority support.

The Court agreed the actions of the employer and the union were unlawful even though the employer had a good faith belief that the union represented a majority of employees in an appropriate unit at the time it extended recognition, and even though the union in fact represented a majority when the parties signed a collective-bargaining agreement weeks later. On the first point, the Court stated, “The act made unlawful by § 8(a) (2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for, even if mistakenly, the employees’ rights have been invaded.” 366 U.S. at 739. On the second, the Court observed that, “[S]uch acquisition of majority status itself might indicate that the recognition

secured by the [recognition] agreement afforded petitioner a deceptive cloak of authority with which to persuasively elicit additional employee support." Id. at 736.

The Court decided that "impressing" a union upon "the nonconsenting majority" clearly abridged the right of employees set forth in § 7 "'to bargain collectively through representatives of their own choosing' or 'to refrain from such activity.'" 366 U.S. at 737. The Court explained the precise basis for the finding of statutory violations:

> It follows, without need of further demonstration, that the employer activity found present here violated § 8(a) (1) of the Act which prohibits employer interference with, and restraint of, employee exercise of § 7 rights. Section 8(a) (2) of the Act makes it an unfair labor practice for an employer to 'contribute . . . support' to a labor organization. The law has long been settled that a grant of exclusive recognition to a minority union constitutes unlawful support in violation of that section, because the union so favored is given 'a marked advantage over any other in securing the adherence of employees.' In the Taft-Hartley Law, Congress added § 8(b) (1) (A) to the Wagner Act, prohibiting, as the Court of appeals held, 'unions from invading the rights of employees under § 7 in a fashion comparable to the activities of employers prohibited under § 8(a) (1).' It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights. [internal and footnote citations omitted].

Id. at 737-38.

Thus, under Bernhard-Altmann, an employer and a union commit *per se* violations, respectively, of § 8(a) (2) and (1) and § 8(b) (1) (A) of the Act by entering into a recognition agreement at a time the union fails to command majority support. Such conduct is not saved from illegality by the union's subsequent acquisition of majority status, because the very act of recognition constitutes unlawful support, providing the union with a "marked advantage" or a "deceptive cloak of authority" in its organizing activities.

In Majestic Weaving, the Board sensibly carried the principles of Bernhard-Atlmann an additional step forward. Close attention must be given to the details of Majestic Weaving. Of supreme importance is the need to distinguish the actual facts and conduct involved from words sometimes used imprecisely to describe the facts and conduct.

The relevant facts, found by the judge and adopted by the Board, show that two representatives of Teamsters Local 815, Sanderman and Friedman, approached the manager of the employer's Cornwall, New York, plant, Thomasis, on or about February 13, 1963. Sanderman told Thomasis he represented some of his employees. Thomasis referred the two

union agents to his labor consultant, Hardy, who met with them the same day. Sanderman told Hardy the union represented some employees at the facility, and that the union desired recognition and contract negotiations. As the judge found, "Hardy then informed Sanderman that the Respondent was starting to rebuild [,] that they only had a dozen employees, that this was not going to be their total work force, but that Hardy had no objections in beginning to negotiate and discuss a proposed contract provided Local 815 could show at the 'conclusion' that they represented a majority of the employees." 147 NLRB at 866. Three negotiating sessions followed between the parties, one in February, one in March, and one in April. At the last conference, terms for a collective-bargaining contract were agreed upon. The contract was executed on April 26, a date when the union had achieved a majority, and made effective from February 14. 1963, to the ending date, December 1, 1965.

In Majestic Weaving, the employer was charged with violating § 8(a) (2) and (1) of the Act by unlawfully assisting the union.[4] The General Counsel alleged that the contract was unlawful because it was entered into on February 14 when the union lacked majority support. But, as related by the judge, a further allegation was made: "The General Counsel also maintains that aside from actually signing and executing the agreement, Respondent also prematurely recognized Local 815 by negotiating and discussing terms of the agreement at a time when Local 815 lacked a majority status, and prior to a substantial increase in Respondent's personnel." 147 NLRB at 872. The judge rejected the first contention because he found the contract was actually entered into on April 26, when the union had a majority. He rejected the second contention because, ""[T]he record is completely barren of any evidence that Local 815 was granted exclusive recognition prior to April 26, but the fact that the Company agreed to start negotiating a tentative agreement beforehand is no evidence of such unlawful exclusive recognition." Id. at 873. The judge distinguished Bernhard-Altmann, relied upon by the General Counsel, on the basis that there an explicit written agreement conferred recognition upon the union though it did not yet have majority status. The judge further opined:

[4] For whatever reason, the union was not charged with a corresponding violation of § 8(b) (1) (A).

> In the final analysis . . . I am unable to see how the Respondent's mere willingness to discuss tentative contract proposals with Local 815 under these particular circumstances, destroyed any exercise of employees' rights to choose their own bargaining agent, nor am I able to see how the Company thereby unlawfully assisted. Certainly no one responsible to management ever granted any official recognition, as such, until April 26 when Local 815 proved their majority. [footnote omitted].

Id.

The Board reversed the judge and concluded that the employer had indeed violated § 8(a) (2) and (1), relying upon Bernhard-Altmann.[5] In so doing, the Board's fundamental reasoning and intent are plain, although at places it recited legal terms that did not accurately describe the undisputed conduct involved. For this reason, it is necessary to quote the Board's reasoning at length. Significant words and phrases are highlighted in italics in the ensuing quotations.

> [T]he Respondent . . . *negotiated with Local 815, despite its minority status, as the exclusive representative of its employees* in a production and maintenance unit. As stated by the Supreme Court in the Bernhard-Altmann case, Section 9(a) of the Act 'guarantees freedom of choice and majority rule.' The Court also observed that there 'could be no clearer abridgment' of the Section 7 rights of employees than *impressing upon a nonconsenting majority an agent granted exclusive bargaining status*. That is precisely what the Respondent did here, and the fact that it conditioned the actual signing of a contract with Local 815 on the latter achieving a majority at the 'conclusion' of negotiations is immaterial. In the Bernhard-Altmann case an interim agreement without union-security provisions was the vehicle for prematurely granting a union exclusive bargaining status which was found objectionable by the Board and the courts; in this case *contract negotiation following an oral recognition agreement* was the method. We see no difference between the two in the effect upon employee rights. Accordingly, we hold that the *Respondent's contract negotiation with a nonmajority union constituted unlawful support* within the meaning of Section 8(a) (2) of the Act. [footnotes omitted].

147 NLRB at 860. Elsewhere, the Board stated that, "[W]e have found that the Respondent violated Section 8(a) (2) by *assisting the Local 815 in obtaining its majority and by negotiating with Local 815 for a contract while it was a minority union.*" Id. at 861.

The Board also declared in a significant footnote:

> We hereby overrule our decision in Julius Resnick, Inc., 86 NLRB 38, relied upon by the Trial Examiner, *to the extent that it holds that an employer and a union may agree to terms of a contract before the union has organized the employees concerned*, so long as the union has majority representation when the contract is executed. We find no merit in the argument of Local 815, Party to the Contract, in its answering brief, that this issue should not be reached because

[5] The Board separately found that Respondent violated § 8(a) (2) and (1) by executing a collective-bargaining agreement with an invalid union-security agreement in light of the union's assisted majority.

> not specifically alleged in the complaint. This *additional 8(a) (2) finding* is directed to the Respondent, which has made no such contention. Moreover, the issue is strictly a legal conclusion flowing from facts fully litigated at the hearing, was set out in the Trial Examiner's Decision, and the parties have now had an opportunity to litigate it before the Board.

147 NLRB at 860 n. 3.

Also pertinent is the Board's Conclusion of Law 7, stating that, "the *Respondent has rendered unlawful assistance and support* to Local 815 . . ., and thereby has engaged in and is engaged in unfair labor practices within the meaning of Section 8(a)(2) of the Act." 147 NLRB at 862. Finally not to be overlooked is par. 1(a) of its Order, which requires the Respondent to cease and desist from *"[g]iving assistance or support to Local 815 . . .,* or to any other labor organization*, and negotiating for a contract with any labor organization which does not represent a majority of its employees in the appropriate unit*." Id. Par. 1 (b) separately requires the Respondent to cease and desist from recognizing Local 815, and par. 1 (c) forbids the Respondent from giving force or effect to the contract executed on April 26.

1. *Majestic Weaving* is not distinguishable based upon the absence of recognition of Respondent Union by Respondent Employer.

This brings us to a discussion of the first of two reasons given by the judge here to distinguish Majestic Weaving: "[T]he Board there concluded that the employer had recognized the union apart from negotiating a contract, hat is the very element missing in this case." ALJD 8: 9-11. Following this line, Respondent Dana stresses the language in Majestic Weaving, highlighted above, referring to "contract negotiation *following an oral recognition agreement*," 147 NLRB at 860, as well as the language describing the employer's misconduct there as "negotiat[ing] with Local 815, despite its minority status, as the *exclusive representative* of its employees in a production and maintenance unit." {emphases supplied by Respondent Dana, brief, p. 25]. Id. Respondent Dana further argues that the judge's finding in Majestic Weaving that there was no evidence of recognition of the union by the employer before the contract was executed was "expressly overruled by the Board" as shown by the emphasized phrases quoted above. Respondent Dana's brief, p. 26. Respondent Union takes a similar position, and argues the "premature recognition" in Majestic Weaving brings that case within the frame of Bernhard-Altmann but not this one. Respondent Union's brief, pp. 9-11.

The judge, Respondent Dana, and Respondent Union, however, have misinterpreted Majestic Weaving. The difficulty stems from a failure to separate the *conduct* indisputably engaged in by the employer in *Majestic Weaving* and the sometimes imprecise *words* used by the Board to describe that conduct. First, contrary to Respondent Dana, although the Board reached a different legal conclusion from the judge in Majestic Weaving, it did not overturn explicitly or implicitly his finding that there was no evidence of recognition (" [T]he record is completely barren of any evidence that Local 815 was granted exclusive recognition prior to April 26, but the fact that the Company agreed to start negotiating a tentative agreement beforehand is no evidence of such unlawful exclusive recognition." 147 NLRB at 873). Indeed, there would have been no possible basis for the Board to have done so because the facts were simple and undisputed. The sum total of the facts amounted merely to that Hardy, the employer's labor consultant told the union representatives in February that he would be willing to enter into contract negotiations, contingent upon a showing of majority status by the union at the end of the negotiations, and that several such bargaining sessions were held before a final contract was executed in April. At most, Hardy promised to recognize the union at a later point in time - when a contract had been agreed upon - if the union could show majority support at that time. Any doubt on the point is removed by the Board's observation that, "[T]he issue is strictly a legal conclusion flowing from facts fully litigated at the hearing," Id. at 860 n. 3.

While it cannot be gainsaid that language crept into the Board's decision referring to "negotiat[ions] with Local 815, despite its minority status, as the *exclusive representative* of its employees; to "impressing upon a nonconsenting majority an agent granted *exclusive bargaining status*"; and "contract negotiation following an *oral recognition agreement*," id. at 860, the facts do not accord with the use of such phrases. The dispositive point is that the facts in our case are not materially different from those in Majestic Weaving. As will be discussed more fully later, Dana and the Union negotiated over substantive terms and conditions of employment to be included in a future labor contract at a time the union did not possess majority status among unit employees. These negotiations took place over three days and resulted in a 17-page agreement, the terms of which, as the judge found, subsequently became known to the employees. In other words, there

is no reason more or less to find "oral recognition" or a grant of "exclusive bargaining status" to the Respondent Union in this case than to the union in Majestic Weaving. In whatever terms the conduct is characterized, since it is essentially the same in each case, the result must be consistent.

When we examine Majestic Weaving searching for substance rather than semantics, there is abundant evidence of the Board's meaning and intent to condemn certain conduct. The Board stated its *holding* in these words, "[W]e hold that the Respondent's contract negotiation with a nonmajority union constituted unlawful support within the meaning of Section 8(a) (2) of the Act." 147 NLRB at 860. The Board also described its finding of a violation of § 8(a) (2) as "assisting Local 815 in obtaining its majority and . . . negotiating with Local 815 for a contract while it was a minority union." Id. at 861. The Board also explicitly overruled its decision in Julius Resnick, Inc., 86 NLRB 38 (1949), "to the extent it holds that an employer and a union may agree to terms of a contract before the union has organized the employees concerned, so long as the union has majority representation when the contract is executed." 147 NLRB at 860 n. 3. Finally, the Board's Conclusion of Law 7, id. at 862, declared that the employer had "rendered unlawful assistance and support," to the union, and the corresponding portion of the cease and desist order forbade the employer from "negotiating for a contract" with any minority labor organization. Id.

The decision of the U.S. Court of Appeals for the Second Circuit, denying enforcement of the Majestic Weaving decision on procedural grounds is also illuminating. NLRB v. Majestic Weaving, Inc., 355 U.S. 854 (1966). The court ruled that the Respondent had not received proper notice of the conduct that the Board found unlawful. "The complaint issued by the General Counsel gave no notice that the *mere fact of negotiation with Local 815 was claimed to constitute unlawful assistance*. . . . The complaint cannot fairly be read as tendering the *issue that the union lacked majority status at the time of negotiation, with consequent illegal assistance* even though majority status had been achieved by the time of execution." Id. at 861. [Emphases supplied]. The court also observed that "the evidence concerning the negotiations was at most incidental." Id. at 862.

Furthermore, in American Bakeries Co., 280 NLRB 1373, 1374 n. 5 (1986), enforced, 827 F .2d 770 (6th Cir. 1987). the Board adopted the judge's comment that, "The Board has even held that bargaining prior to achievement of the union's majority status is violative despite the fact that the contract is not enforced or is conditioned upon the union's ability to demonstrate majority status at some later time," citing, *inter alia*, Majestic Weaving.

In short, § 8(a)(2) forbids employer "support" of a labor organization, granting exclusive recognition to a minority union is one form of such support (Bernhard-Altmann), and negotiating about terms and conditions of employment with such a union in advance of recognition is another form of unlawful support (Majestic Weaving). Arguments that seek to avoid Majestic Weaving's extension of Bernhard-Altmann to premature substantive negotiations between the parties are unavailing. And if substantive negotiations with a nonmajority union are proscribed under § 8(a) (2) and (1) and § 8(b) (1) (A), so much more so must actual agreement be.

2. *Majestic Weaving* is not distinguishable based upon the nature and number of the substantive terms addressed in the Letter of Agreement.

We thus arrive at the judge's second basis for distinguishing Majestic Weaving. "[T]he collective-bargaining contract there was complete and whole, the letter of agreement in this case is a far cry from a collective-bargaining agreement." ALJD 8:11-13. The Respondent parties echo this contention as well.

Thus, Respondent Dana declares that "there are no wages, benefits, or other specific terms and conditions of employment contained in the Letter of Agreement," unlike the Majestic Weaving contract, which "spelled out terms such as holidays, breaks, vacations, rates of pay, pension and welfare and dues check-off clauses." Respondent Dana's brief, p. 30. Again splitting semantic hairs, Respondent Dana argues that Majestic Weaving only forbids *contract* negotiation with a majority union, not all negotiations and suggests any other interpretation would outlaw "all neutrality and voluntary recognition agreements because, as a matter of course, they are negotiated prior to the recognition of the union." Respondent Dana's brief, p. 31. Finally, Dana claims that the complaint does not allege there were unlawful pre-contract *negotiations*

between the parties, and therefore no violation may be found under the Second Circuit's reasoning in Majestic Weaving. Respondent Dana's brief, pp. 31-32.

Likewise, Respondent Union contends, *inter alia*, that in the Letter (1) no enforceable or complete agreement was reached on terms and conditions of employment; (2) seven of the eight conditions listed for inclusion in future labor contracts under § 4.2.4 are "vague, aspirational goals," and there is no meeting of the minds on the eighth, mandatory overtime; (3) the few matters addressed in the Letter are insufficient to lead employees to believe a *fait accompli* had taken place or to drape the Union in "a cloak of deceptive authority"; and (4) the no-strike provision cannot violate § 8(a)(2) and (1) and § 8(b)(1)(A) because the waiver expired with agreement upon the initial contract.. See Respondent Union's brief, pp. 19-25.

In considering whether Majestic Weaving is distinguishable because the parties there agreed upon a full contract in contrast to the fewer number of terms Respondent Dana and Respondent Union mutually decided to include in future contracts per the Letter of Agreement, it is important bear in mind that § 8(a)(2) bans employer "financial *or other support*" of a labor organization. [emphasis supplied]. Recall the language of Bernhard-Altmann, 366 U.S. at 739, upon which Majestic Weaving depended: "The act made unlawful by § 8(a) (2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for, even if mistakenly, the employees' rights have been invaded." Thus, although perhaps subject to the rule of *de minimis*, any employer "support" of a labor organization *per se* violates § 8(a) (2) and (1) and correspondingly § 8(b) (1) (A).

The Letter of Agreement, while not itself a collective-bargaining contract nor perhaps reflective of terms that could be included without modification in such a contract, contains abundant evidence of "support" by Respondent Dana of Respondent Union by displaying to employees major substantive agreement between them about the content of a future collective-bargaining agreement. Importantly, the amount of money that would otherwise be on the table to satisfy employees' economic desires is sharply limited because bargaining may not "erode" Respondent's Dana's existing or scheduled (as of January 1, 2004) health care cost containment measures, including "premium sharing, deductibles, and out of pocket premiums." § 4.2.1.

Likewise, health care costs are subject to § 4.2.4, requiring that such costs "reflect the competitive reality of the supplier industry and product(s) involved." The contours of collective-bargaining are also curtailed by the parties' agreement to include terms in future labor contracts involving minimum classifications, team-based approaches, attendance tied to productivity and quality, an idea program, continuous improvement, flexible compensation, and mandatory overtime, all of which involve significant economic or other terms and conditions of employment. The potential for economic gains is also confined by the interest arbitration provisions, which direct the arbitrator, where "wages, benefits, vacations, etc." are unresolved to consider factors such as total wages and benefits paid by direct competitors and paid at other Dana facilities making similar products, the economic climate of the industry, and the financial performance of the covered facility. § 4.2.6. The employees' right to strike is also surrendered in advance from the time of recognition to the conclusion of the first contract, when it is most precious, and the Union's right to strike from the time it requests an organizing list. § 6.1. The duration of an agreed-upon labor contract is fixed at between four to five years. § 4.2.2.

There is no room for serious doubt that such sweeping advance agreement between the parties about the shape of a future collective-bargaining agreement, including severe restrictions upon the ability to make economic gains and loss of the basic right to strike, represent substantial unlawful "support" rendered by Respondent Dana to Respondent Union. The only logical inference that employees may draw is that the company favors the union's entry into the facility as a means of acquiring economic and other advantages, thus giving the union "a marked advantage" and "a deceptive cloak of authority with which to persuasively elicit additional employee support." Bernhard-Altmann, 366 U.S. at 738, 736, respectively.

The judge's and Respondents' comparisons of the Letter of Agreement with the contract ultimately reached in Majestic Weaving also must not be allowed to obscure the point, explained above, that the violation in Majestic Weaving did not involve the contract. The Board there found premature *contract negotiation* unlawful, 147 NLRB at 860, 861, not the execution of the contract, which occurred at a time when the union had attained majority status. This is underlined by the Second Circuit's denial of enforcement on the basis that "the mere fact of negotiation" had not

been alleged in the complaint. NLRB v. Majestic Weaving, Inc., 355 U.S. 854, 861. The facts here are even stronger than those in Majestic Weaving for finding unlawful support, because Dana and the Union actually reached and signed an agreement involving significant economic and other terms, rather than "merely" negotiating.

The other arguments raised in connection with this issue by Respondent Dana and Respondent Union can be dealt with more briefly. Dana asserts that Majestic Weaving barred only *contract* negotiations not all negotiations and that finding unlawful the Letter of Agreement would condemn "all neutrality and voluntary recognition agreements because, as a matter of course, they are negotiated prior to the recognition of the union." Respondent Dana is well aware that the "card check recognition" and "neutrality" provisions of the Letter are not in issue, and there is no need to weary the Board with citations to numerous cases upholding agreements limited to such matters. All that Majestic Weaving does is prevent an employer from securing advance concessions from a union, at its employees' expense, in exchange for such provisions.

Dana's argument, based on the court of appeals decision in Majestic Weaving, that the complaint in this case did not allege "unlawful pre-contract *negotiations*" borders on the frivolous. The complaint placed in issue the lawfulness of the parties' entry into, and maintenance of, the Letter of Agreement, which, as already explained, went beyond mere negotiation. If simple negotiations with a minority union are sufficient to violate the Act, an actual agreement that shapes substantive economic and other terms in a future contract must, *ipso facto*, likewise violate the law.

There are two arguments raised by Respondent Union that have not been addressed. First, the Union's contention that the Letter of Agreement is unenforceable is contradicted by Article V, which gives a Neutral "complete authority to remedy any violation of th[e] Agreement." § 5.1.2.4. Second, the Union's assertion that agreement upon the no-strike provision cannot be illegal under §8(a) (2) and (1) and § 8(b) (1) (A) makes no sense because a premature agreement between an employer and a union about such a significant term is clear evidence of unlawful support. From the employees' perspective, an agreement between the parties that eliminates in advance their right to strike between recognition and conclusion of the first contract,

when it is the most valuable, can only foster the impression that the Union is the company's preferred partner.

ARGUMENT: POINT II

THE BOARD'S DECISION IN KROGER CO., 219 NLRB 388 SHOULD BE OVERRULED AS FUNDAMENTLLY INCONSISTENT WITH MAJESTIC WEAVING, 147 NLRB 859.

The judge also recommended dismissal of the complaint for a second reason. The judge reasoned as follows:

> In Kroger the Board found lawful provisions in a collective-bargaining agreement requiring an employer to recognize the union as the bargaining representative of employees at additional, future facilities, and apply the collective-bargaining agreement to those employees . . . It seems to me that if Dana and the UAW are free to extend their existing agreements to cover the St. Johns employees they should be free to bargain for less than a full extension so as to allow greater employee participation in the terms and conditions of employment at the new facilities.

ALJD 9: 4-7, 23-26.

Kroger Co. itself involved a different issue than that presented in Majestic Weaving, but Kroger's reasoning has ramifications that spread into conflict with the latter case. In Kroger, the employer grocery store chain transferred two stores from its Dallas to its Houston division. Separate contracts with two unions representing non-meat department employees and meat department employees committed the employer to recognize the unions as the representative of appropriate employee complements at stores within the Houston division. In the past, newly-added stores had been treated as accretions to the contract units. But this time the employer declined to recognize the unions at the new stores and refused the unions' offers to establish majority status based upon authorization cards. The unions concededly had valid card majorities at the time of they made the recognition requests. Although the contractual clauses in question did not specify that the unions had to prove majority status at new stores, or describe a method for determining such status, the Board read into them a requirement that majority status be established "as a matter of law." 219 NLRB at 389. In other words, the Board decided that the employer had waived "its right to resort to the use of the Board's election process determining the Unions' representation status in these new stores," id., and was bound to grant recognition when

presented with authorization cards showing majority union support in the appropriate units. The Board therefore found the employer refused to bargain with the unions under § 8(a) (5).

The inconsistency between Kroger and Majestic Weaving is apparent. In fact, had the employer in Kroger recognized the unions as the bargaining agents of employees in the appropriate units at the two stores and had it been charged with a violation of § 8(a) (2) and (1), the facts would have formed an equal or stronger basis for finding a violation than in Majestic Weaving. First, in Majestic Weaving, the employer agreed to recognize the union at a future date – the end of contract negotiations – if the union could establish majority status at that time. In Kroger, there was a likewise an agreement to recognize the unions at a later time – when new stores were added to the Houston Division – with the majority status requirement implied by the Board. Second, in Majestic Weaving, the Board found mere contract *negotiations* sufficient to constitute unlawful assistance. In Kroger, the parties agreed in advance to the application of an entire *collective-bargaining agreement*, unquestionably providing even greater assistance to the unions.

The problem that the Board faces today is reconciling two lines of precedent that present on their face different issues, but whose rationales collide. The fault lies not with Board so much as with the limitations inherent in any system in which legal principles are established through case-by-case adjudication and issues are framed by the parties. In Kroger, the narrow question presented to the Board was whether the employer had violated § 8(a) (5) of the Act by declining to recognize the unions on the basis of the "additional stores" clauses in its contracts. No issue was presented concerning whether the clause violated § 8(a) (2), nor did the employer defend its refusals of recognition on the ground that so doing would have violated that section of the Act. Rather, the question became whether the clauses were illegal because they did not contain a requirement that majority status be established, and thus whether an election under the Supreme Court's decision in Linden Lumber Div. v. NLRB. 419 U.S. 301 (1974), was required. Therefore, as the case was litigated, the Board was only called upon to decide whether the recognition clauses waived the employer's right to a Board election.

Assuming *arguendo* that the Board's interpretation of the clauses in Kroger was correct and that the recognition clauses waived the *employer's right* to an election in the appropriate units, that rationale does not address whether the *rights of the unrepresented employees* were invaded because the clauses provided unlawful assistance to the union in organizing. In other words, it is axiomatic that finding conduct lawful under one section of the Act does not mean the conduct is thereby rendered lawful under a different section of the Act, aimed at effectuating other purposes and policies. Therefore, Kroger must be overruled.

It is also quite true that the Board has decided a number of cases along lines similar to Kroger, both before[6] and after[7] that case. However, as Respondent Dana and Respondent Union point out, there is apparently only one case n which an employer defended its refusal to bargain for the reason that extending a national agreement, under an additional facilities clause, to a separate facility would violate § 8(a)(2) and (1), and that discusses both Majestic Weaving and Kroger. Respondent Dana's brief, pp. 34-35, Respondent Unions brief, pp. 12-13. That case is Eltra Corp., 205 NLRB 1035 (1973), in which the Board summarily adopted an administrative law judge's decision. The judge concluded that, as a factual matter, the clause in question did not require the employer to extend the national agreement to the additional facility, in which *the union had been properly certified by the Board as the majority representative of the employees*. In *dicta*, however, the judge correctly rejected the employer's defense based upon § 8(a) (2) for the obvious reason that the union had gained representative status through a Board conducted election at the new facility. In the words of the judge, id. at 1039:

> In my view, the Majestic Weaving case is clearly distinguishable from the instant situation. There, the employer granted recognition to a minority union. Here, the Respondent recognized the International Union as the representative of the Visalia employees only after the Union had demonstrated its majority status in a Board-conducted election.

Elsewhere, the judge framed the question, as follows, id. at 1040:

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[6] See Frazier's' Market, 197 NLRB 1156 (1972) (employer guilty under § (8a)(5) of refusing to sign an agreed-upon contract containing a clause recognizing the union as bargaining agent at "present and future retail food stores," id); White Front Stores, Inc., 192 NLRB 240 (1971) (picketing to enforce a contract with a clause purporting to "accrete" additional stores to the bargaining unit did not violate § 8(b)(2), at least where union had a card majority at the additional store.).

[7] See, e.g., Raley's, 336 NLRB 374 (2001) (employer bound to recognize union based upon additional stores clause contingent upon proof of majority status); (Alpha Beta Co., 294 NLRB 228 (1989) (employer violated § 8(a) (5) by refusing to recognize union, under additional stores clause, that offered to prove card majority); Jerry's United Super, 289 NLRB 125 (1988) (same).

> Is it unlawful under the Act for an employer to agree that a collective-bargaining agreement covering employees of the employer who are already represented by a union shall be applied in a different unit, to employees not represented by this union, provided those employees designate the union as their bargaining representative in a secret ballot election conducted by the Board?

Although for reasons explained in our previous discussion of that case, the judge mischaracterized Majestic Weaving as involving "grant[ing] *recognition* to a minority union," the judge properly answered the question in the negative. Indisputably, Eltra cannot assist Respondent Dana because the issue involved (1) extension of a national agreement to a new facility, not recognition or contract negotiations, coupled with, much more importantly, (2) actual Board certification of the union as majority representative in the additional unit!

NAWER would also like to point out that AFL-CIO General Counsel Jonathan P. Hiatt, himself has recognized the conflict between Majestic Weaving and Kroger, though he obviously desires to see the demise of the former rather than the latter, and implicitly confirmed our own reading of Majestic Weaving. In 1996, he wrote:[8]

> [A]s workers seek to use strategic campaigns to secure recognition for their designated representative outside the traditional representation processes, the Board's holding in Majestic Weaving Co., inc. of New York [fn. citation omitted] will come under increasing scrutiny. Negotiations over non-Board recognition procedure often spill over to discussing the terms of a future collective bargaining agreement, should the union demonstrate majority support. Under Majestic Weaving, however, this is an unfair labor practice. It is illogical to allow such discussions if the union already represents some employees of the employer, for example in an 'additional store' clause, but not if the union has no foothold with the employer. [fn. Compare Houston Div of Kroger Co., 219 NLRB 388 (1975) with Majestic Weaving.]

NAWER respectfully urges the Board to seize this opportunity to end the inconsistency present between the rationales of Majestic Weaving and Kroger, and to effectuate the purposes and policies of the Act banning employer "support" of labor organizations by overruling its decision in Kroger. Between the two, Kroger must yield to Majestic Weaving because Kroger merely sanctions conduct under one section of the Act and does not take account of the fact that the same conduct transgresses a separate section, as Majestic Weaving rightly holds.

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[8] Jonathan P. Hiatt and Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176-77.

CONCLUSION

The Board should reverse the administrative law judge's decision, and find that Respondent Dana and Respondent Union violated the Act as alleged in the consolidated complaint for the reasons set forth in both Points I and II of the Argument, and issue an appropriate remedial order.

Respectfully submitted:

Will Fine
Executive Director
National Alliance for
Worker and Employer Rights
122 C Street, N.W., Suite 220
Washington, D.C. 20001

Telephone: 202-393-1185

CERTIFICATE OF SERVICE

Upon penalty of perjury, I declare that a true and correct copy of this brief has been filed electronically with the Executive Secretary of the National Labor Relations Board, and that such copies have been filed with the Executive Secretary and served on the parties by overnight mail as follows:

Lester A. Heltzer. Esq.
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(eight copies)

Sarah Pring Karpinen, Esq.
Counsel for the
General Counsel
Region 7
National Labor Relations Board
477 Michigan Avenue, Room 300
Detroit, MI 48266

Stanley Brown, Esq.
and Emily J. Christensen, Esq.
Hogan & Hartson LLP
8300 Greensboro Drive, Suite 1100
McLean, VA 22102

William A. Messenger, Esq.
National Right to Work
Legal Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160

Betsey A. Engel, Esq.
and Blair Simmons, Esq.
Legal Department
International Union, United Automobile and
Agricultural Implement Workers of America,
AFL-CIO
8000 East Jefferson Avenue
Detroit, MI 48214

Dana Corporation
Attn. Barbara Peterson
916 West State Street
Saint Johns, MI 48879

Gary L. Smeltzer, Jr.
15814 Florence Street
Lansing, MI 48906

Joseph Montague
5612 Wildcat Road
St. Johns, MI 48879

Kenneth A. Gray
330 North Chandler
Saint Johns, MI 48879

_____
Will Fine
Dated, April 26, 2006