UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DANA CORPORATION Employer, and CLARICE K. ATHERHOLT Petitioner, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO Union, and METALDYNE CORPORATION (METALDYNE SINTERED PRODUCTS) Employer, and ALAN P. KRUG AND JEFFREY A. SAMPLE Petitioners, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO Union.	)	CASE NO. 8-RD-1976 CASE NOS. 6-RD-1518 6-RD-1519

REPLY BRIEF OF EMPLOYER METALDYNE CORPORATION (METALDYNE SINTERED PRODUCTS)

Petitioners' Brief on the Merits in regard to the above-captioned matter ("Dana/Metaldyne") raises several arguments as to why the National Labor Relations Board ("NLRB" or "Board") should either completely abolish or severely alter the Board's "voluntary recognition bar" doctrine. Many of these arguments have been vigorously rebutted by both the parties and the various *amici* that have filed briefs in opposition to the Petitioners. *See* www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/DanaMetaldyneAmicusBriefs.asp. However, Petitioners' Brief on the Merits does raise issues that warrant further response.

I. Pre-negotiated Voluntary Recognition Agreements Do Not Compromise Employees' Section 7 Rights.

Petitioners' Joint Brief on the Merits states, in part, that pre-negotiated voluntary recognition agreements threaten employee rights to free choice. *See* Petitioners' Brief on the Merits at 12. In support of their arguments, Petitioners point to four "reasons" why voluntary recognition agreements threaten employee rights: A) they require "voluntary" recognition without an NLRB authorized election; B) a "binding interest arbitration" procedure imposes a collective bargaining agreement on employees if an agreement is not reached by the parties after six months; C) voluntary recognition agreements allow the union to "gerrymander" the unit to include union supporters and exclude union opponents; and finally D) voluntary recognition agreements preclude the Board from determining whether particular organizing conduct is lawful or not, as most such agreements forbid any post-selection disputes to be brought to the Board. However, these arguments are ultimately unsound and fail to show that there are valid reasons for the Board to find that voluntary recognition should not have "bar" quality to prohibit the filing of petitions for a reasonable period of time.

A. Recognition Without an NLRB Authorized Election.

Petitioners first argue that the provisions of the "secret partnership agreements"[1] operate to preclude the use of the Board's procedures by automatically waiving both the employer's and the union's request to a Board supervised secret-ballot election. *See* Petitioner's Brief on the Merits at 15. Petitioners state that "unless and until the NLRB holds an election to determine whether employees truly support or oppose union representation, the interest of 'encouraging the practice and procedure of collective bargaining' cannot be fulfilled, since the employer-recognized union may in fact lack majority employee support." *See* Petitioners' Brief on the Merits at 33. As has been stated previously by Metaldyne and other parties, a union is not limited to a Board supervised secret-ballot election when seeking recognition. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 596 (1969). The legislative history of the Act demonstrates Congress' clear intent that a bargaining relationship established pursuant to voluntary recognition be afforded the same degree of stability as a relationship established pursuant to Board involvement. *See* Brief Amicus Curiae of Members of the United States House of Representatives at 3.

While Petitioners may believe that a Board supervised secret-ballot election is the only viable option for employees to use when selecting a bargaining representative, the Act specifically allows for voluntary recognition. The rise in use of voluntary recognition by unions does not affect their legality. Nor should the rise in use of voluntary recognition affect the voluntary recognition bar doctrine. Petitioners' back-door attempt to change the law in regard to voluntary recognition (and not simply the "bar-quality" of voluntary recognition) should be directed to Congress and not the Board.

[1] A term Petitioners use synonymously with voluntary recognition agreements. *See* Petitioners' Brief on the Merits at 15.

B. A "Binding Interest Arbitration" procedure.

Petitioners' Brief on the Merits states that "the UAW's 'partnership' agreements establish a 'binding interest arbitration' procedure that imposes a collective bargaining agreement if an agreement is not reached after six months." *See* Petitioners' Brief on the Merits at 15. Petitioners allege that by agreeing to binding interest arbitration in the agreements:

> [T]he UAW sacrificed the rights of Dana and Metaldyne employees to strike or engage in work actions to support bargaining demands. This is a major concession at the expense of employees, as it destroys employee bargaining leverage to obtain favorable terms and conditions of employment.

See Petitioners' Brief on the Merits at 21, fn. 15. Petitioners further state that "this provision effectively ensures that a contract will be signed during the period of the period of the voluntary recognition bar." *Id*. Petitioners argue that the signing of a contract would trigger the Board's contract bar and thus "it would be impossible for any party (employee, union or employer) to obtain a secret-ballot election for close to four years." *Id*. at 15-16. [2]

Petitioners have cited no authority for the proposition that Section 7 mandates that employees have access to a secret-ballot election process after a certain number of years. Instead, the Board's "contract bar doctrine" specifically limits employee access to secret-ballot elections for the period of the contract. This doctrine is intended to afford the contracting parties and the employees a reasonable period of stability in their relationship without interruption and at the same time to afford the employees the opportunity, at reasonable times, to change or eliminate their bargaining representative, if they wish to do so. *See* the NLRB's AN OUTLINE OF

[2] The binding interest arbitration issue is not currently pending before the Board. Petitioners did not raise it in their Request for Review and the Board has not asked the parties to address the issue when it granted the Petitioners' Request. Petitioners assertions about being barred from filing for an election during a contract bar or parties agreeing to interest arbitration obviously do not affect the voluntary recognition bar doctrine. It appears to be simply part of a laundry list of reasons as to why Petitioners believe that voluntary recognition agreements are "bad," and thus why the voluntary recognition bard octrine is "bad."

LAW AND PROCEDURE IN REPRESENTATION CASES at 347-4001-2575. An additional period of time under the voluntary recognition bar would not alter this balance.

In addition, Petitioners would be hard-pressed to cite authority for the proposition that employees prefer the ability to strike as opposed to a requirement that an employer reach an initial contract with its employees through binding arbitration. Indeed, several states and many foreign countries have made binding arbitration a requirement in contract negotiations between the parties in the public sector. *See e.g.* Ohio Revised Code §4117.14(D)(1)[3]. Interests arbitration can be considered a benefit to employees, reaching the dual goals of achieving industrial peace and ensuring that both the interests of employees and employers are taken into account in a collective bargaining agreement.

C. Voluntary Recognition Agreements Allow the Union to Gerrymander the Unit.

Petitioners allege that voluntary recognition agreements allow the union to gerrymander the unit to include union supports and exclude union opponents, thereby removing the Board from the unit determination process. *See* Petitioners' Brief on the Merits at 16.

There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be "appropriate," that is, appropriate to insure to employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." *Bartlett Collins Co*., 334 NLRB No. 76 (2001); *Overnite Transportation Co.,* 322 NLRB 723 (1996); *Morand Bros. Beverage Co.,* 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951); *Federal Electric Corp*., 157 NLRB 1130 (1966); *Parsons Investment Co.,* 152 NLRB 192 fn. 1 (1965); *Capital Bakers*, 168 NLRB 904,

[3] Indeed, many foreign countries require parties to submit to binding arbitration on initial contract as well. Labor laws in the Canadian provinces of Manitoba, British Columbia, Ontario, Quebec, Newfoundland, Saskatchewan and the federal jurisdiction all provide for first contract mediation and binding arbitration.

905 (1968); *National Cash Register Co*., 166 NLRB 173 (1967); *NLRB v. Carson Cable TV,* 795 F.2d 879 (9th Cir. 1986); *Dezcon, Inc*., 295 NLRB 109 (1989). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); *Purity Food Stores*, 160 NLRB 651 (1966). Moreover, it is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. *See e.g.*, *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-423 (4th Cir. 1963), cert. denied 375 U.S. 966 (1964); *Mountain Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962).

In the event that Petitioners believe that the Union is attempting to gut employees' Section 7 rights by inappropriately manipulating the bargaining unit or discriminate against anti-union employees, they have many options available to them under the Act to seek redress. In addition to filing unfair labor practice charges alleging discrimination or other misconduct[4], employees could seek unit clarification, an accretion or even a deauthorization petition with the Board.

D. Voluntary Recognition Agreements Preclude the Board from Determining Whether Particular Organizing Conduct is Lawful or Not.

Finally, Petitioners argue that voluntary recognition agreements "forbid any post-selection disputes to be brought to the Board. *See* Petitioners' Brief on the Merits at 16. Neither company (Metaldyne or Dana) nor the UAW has argued that a voluntary recognition agreement or the voluntary recognition bar act as a waiver of employee Section 7 rights. If employees are

[4] Although Petitioners' Brief on the Merit cites to the Declaration of Lori Yost ("Yost Declaration") in support of its "factual allegations," Petitioners failed to provide any evidence to either Metaldyne or to Region 6 that the UAW was engaged in inappropriate or illegal gerrymandering of the unit "based upon whether employees supported or did

threatened or coerced by union organizers in regard to signing an authorization card or showing support for a union, they certainly maintain the right to file unfair labor practice charges against the union. As shown by Petitioners citation to *Duane Reed, Inc.*, when a company attempts to inappropriately and illegally assist a union in its organizing activities, employees have the right and ability to seek aid and redress from the Board. 338 NLRB No. 140 (2003).

Petitioners cite to a "model" neutrality agreement which states, in part:

> Any alleged violation of this agreement, including any disputes such as conduct during an organizing campaign, voter eligibility, definition of the appropriate unit, etc., will be resolved by a decision of the arbitrator on an expedited basis rendered not later than twenty-one (21) days after the party's demand for arbitration.
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> *See* Petitioner's Brief on the Merits at 16, fn. 10.

Petitioners have provided no evidence or support for its allegation that rules and practices developed by a company and union in a voluntary recognition agreement for use during an organizing drive (including the use of a neutral arbitrator, usually an experienced labor arbitrator, to resolve disputes that may arise in a drive in interpreting those rules) somehow strips employees of any of their rights under the Act.

Finally, in regard to voluntary-recognition agreements, Petitioner argues that "top-down organizing is repulsive to the central purposes of the Act." *See* Petitioners' Brief on the Merits at 13 quoting *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616. Petitioners conveniently quote this construction proviso case out of context. The actual text in the *Connell* case reads:

> One of the major aims of the 1959 Act was to limit "top-down" organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. Congress accomplished this goal by enacting 8 (b) (7), which restricts primary recognitional picketing, and by further tightening 8 (b) (4) (B), which prohibits the use of most secondary tactics

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not support the union." *See* Yost Declaration at ¶10.

> in organizational campaigns. Construction unions are fully covered by these sections. The only special consideration given them in organizational campaigns is 8 (f), which allows "prehire" agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation. The legislative history accompanying 8 (f) also suggests that Congress may not have intended that strikes or picketing could be used to extract prehire agreements from unwilling employers.

See Connell, 421 U.S. at 632-633 *(internal citations omitted)*. The *Connell* case defines "top-down organizing" in the context of unions forcing employers to enter into illegal prehire agreements. Neither the Board nor any court has found the voluntary-recognition agreement used by the parties in *Metaldyne/Dana* to be an illegal prehire agreement. Voluntary recognition agreements still require the employees to choose whether or not they wish to be represented by the union. Petitioners inherent dislike of voluntary recognition and their attempt to paint all voluntary recognition agreement with such a broad brush ("top-down organizing tactics, such as the pre-negotiation of voluntary recognition agreements, creates the potential for severe abuse of employees' §7 rights[5]) simply does not provide a reason for modifying or changing the Board's voluntary recognition bar doctrine.

II. If the Board Chooses to Alter the "Voluntary-Recognition Bar" Doctrine, it Should Utilize the Reasoned Modification as Advocated by the General Counsel.

The General Counsel's amicus brief states, in part:

> In light of the important differences between Board elections and voluntary recognition based on a card check, the Board should create a limited exception to the voluntary recognition bar where at least 50 percent of unit employees express their opposition to union representation at the time of or shortly after the announcement of voluntary recognition. In that situation, the employees' actions indicate that a recognition bar would not serve the purpose of promoting employee free choice.
>
> We submit that an appropriate formulation of such an exception would be:

[5] Petitioners' Brief on the Merits at 13.

> **Where a document expressing opposition to union representation is signed by at lest 50 percent of unit employees at the time of formal written notice of employees of voluntary recognition or no later than 21 days thereafter, and where a decertification petition is filed no later than 30 days after that formal written notice of voluntary recognition, the recognition shall not operate as a bar to an election.**
>
> Any showing of less than 50 percent opposition would not support an inference that a majority of employees likely did not actually support the union. In any organizing drive that culminates in certification or voluntary recognition of a union based on a card check agreement, there will usually be a minority of employees who do not want the union.
>
> Limiting the window for obtaining a 50 percent showing of interest to a short period such as 21 days, closely contemporaneous with the recognition, will maximize the likelihood that a petition calls into question the union's majority support at or about the time of recognition. By contract, a showing made at some significantly alter time likely would reflect only the natural fluctuation of support for the union as it undertakes its representative responsibilities and would inhibit effective bargaining. It is appropriate to expect that employees who are genuinely disturbed by a voluntary recognition will promptly make known their concerns, and if 50 percent so indicate, a Board election is the best way of resolving what must be considered a question concerning representation. The Board should therefore require that the showing of interest be obtained as soon as reasonably possible after recognition. A more extended period (such as 30 or 60 days) could allow time for active undermining of a union's valid majority support, essentially continuing the organizing campaign and contributing to the very instability a bar is meant to prevent.

See Amicus Brief of the General Counsel at 11-15.

While Metaldyne does not believe that the Board should make any change to the voluntary recognition bar doctrine (as stated in the reasons set forth in Metaldyne's Brief on the Merits), the Company also recognizes that the modification advocated by the General Counsel is a less radical revision of the doctrine that should be considered by the Board if it insists on modifying the voluntary recognition bar.

Petitioner's argument to completely abolish the voluntary recognition bar would destroy any opportunity for the company and the union to work together to try ad develop a bargaining relationship. In addition, the 45-day window period that Petitioner's argue in the alternative

would, as stated by the General Counsel, simply undermine the union's valid majority support by essentially continuing the organizing campaign for this contended period.

Collective bargaining is an inherently difficult and political process. Both unions and employers are subject to conflicting pressures from various parties during that process. Placing the union under a constant threat of decertification during this process would force the union in many cases to adopt more radical positions in order to placate those employees dissatisfied with the pace of the negotiations or the give and take that is a part of the process. Similarly, a decertification campaign during the main part of the collective bargaining process would inherently distract all parties from achieving a workable collective bargaining agreement.

Allowing such decertification campaigns to take place months into the contract negotiation period would be destructive to success in the collective bargaining process. From the employer's perspective, abandoning all aspects of the voluntary recognition bar, as proposed by Petitioners, would be disastrous for labor relations. Such a decision would lead to instability, disrupt labor peace, create the possibility of more strikes or work stoppages and ultimately make it harder for all parties to achieve effective labor contracts. Thus Metaldyne strongly urges the Board, if it determines that it will make a change to the voluntary recognition bar, to adopt the General Counsel's compromise position.

III. CONCLUSION

In their Brief on the Merits, Petitioners fail to show that a pre-negotiated voluntary recognition agreement changes the analysis as to whether the Board should abolish the voluntary recognition bar. For all of the reasons set forth in Metaldyne's Brief on the Merits, the Board, after completing its critical look at the issues raised in this matter, should decline to eliminate the bar quality of an employer's voluntary recognition. In the event that the Board determines that it will modify the voluntary recognition bar doctrine, Metaldyne urges the Board to adopt the formulation set forth in the Amicus Brief of the General Counsel.

Respectfully submitted,

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