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Amicus

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DANA CORPORATION, and CLARICE K. ATHERHOLT, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO.	CASE NO. 8-RD-1976 **AMICUS BRIEF ON REVIEW OF ADMINISTRATIVE DISMISSALS**
METALDYNE CORPORATION (METALDYNE SINTERED PRODUCTS), and ALAN P. KRUG AND JEFFREY A. SAMPLE, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO.	CASE NOS. 6-RD-1518 6-RD-1519

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Pursuant to the Board's June 15, 2004 press release (R-2528) and the Board's June 14, 2004 Notice, this is an amicus brief filed by Thomas A. Lenz, former NLRB attorney at Region 21 (Los Angeles) and counsel to numerous employers in NLRB proceedings and related matters through the law firm of Atkinson, Andelson, Loya, Ruud & Romo, of Cerritos, California.

This office recently represented Nova Plumbing, Inc. in a matter which wound its way through NLRB proceedings (see 336 NLRB 633 (2001)), to the District of Columbia Circuit Court of Appeals for review, and led to said Court's reversal of an NLRB ruling and denial of the NLRB's request for enforcement (330 F.3d 531 (D.C. Cir. 2003)). Indeed, the Court made an EAJA Award of fees to Nova Plumbing in an unpublished order dated March 31, 2004.

Nova Plumbing arose in a construction industry context. However, the lessons from Nova Plumbing are instructive here. In Nova Plumbing, the employer signed a document which incorporated by reference a master labor agreement. The master labor agreement contained boilerplate recognition language which declared employees' majority support for a union. This language alone, in the Union's and the General Counsel's view, allegedly converted a Section 8(f) bargaining relationship into a majority bargaining relationship under Section 9(a) of the Act.

Nova hotly contested the Union's and General Counsel's position. The boilerplate recognition language statement was patently false in that employees vociferously opposed union representation. Indeed, there was never an election to test majority support. After a hearing the Administrative Law Judge agreed with Nova. However, the Board did not. The Court reversed the Board, leading to the EAJA award.

The Court's ruling on the merits in Nova Plumbing relied on Supreme Court authority confirming that real employee choice is paramount in questions of representation. International Ladies' Garment Workers Union v. NLRB, 366 U.S. 739 (1961). In essence, the Nova Plumbing decision confirmed that fictional constructs, such as false statements in contracts entered into by an employer and a union, cannot trump, waive, or mitigate the employees' rights to choose, or not to choose, union representation.

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The issue presented in the instant matter is whether there should be a bar to a decertification election where a neutrality agreement is signed which foreshadows, but does not confirm, the possibility that majority support and Section 9(a) recognition would follow. Here, decertification petitions did not result in elections because of the constructs of neutrality agreements.

Nova Plumbing is a construction case. Construction is a unique industry in which voluntary recognition can be achieved lawfully without majority support because of Section 8(f) of the Act. No other industry has such a protection like Section 8(f) or a legal presumption of same (see John Deklewa & Sons, 282 NLRB 1375 (1987)). Indeed, in Staunton Fuel d/b/a Central Illinois, (335 NLRB No. 717 (2001)), a ruling whose reasoning on recognition issues is highly suspect after the Court's ruling in Nova Plumbing, the Board interestingly spoke to what is essentially a mutual exclusivity between Section 8(f) and Section 8(a)(2) of the Act in the construction industry. Thus, in any other industry, an effort to recognize a union without predicate majority support risks a violation of Section 8(a)(2) by supporting and/or encouraging support for a union, as the ultimate purpose is to make it easier for a chosen union to organize and, ostensibly, to mute the employer and avoid legal proceedings in the process.

In this context, the neutrality agreement concept at issue does not warrant the protection of a recognition bar as it ultimately harms the integrity of the Act by eroding Section 8(a)(2) prohibitions. Section 8(a)(2) exists to protect Section 7 rights of real choice.

The Board is the safeguard of the right of choice in Section 7, the Board's processes, and the integrity of the Act. The Board and the Courts in Nova Plumbing and Ladies' Garment Workers Union have made clear that the Section 7 right to a real choice must be protected and given favor in the context of removing an incumbent union (see Levitz Furniture, 333 NLRB 717 (2000)). The right to vote in a Board election, so expressly touted in Levitz, is itself a fiction if employees have no real opportunity to cast a secret ballot vote. Unfortunately, a recognition bar (not to mention easily invoked "blocking charge" rules) renders the Levitz rationale itself highly suspect by enabling an unpopular but procedurally savvy union to easily circumvent the election process.

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The Court's ruling in Nova Plumbing sends the strong message, premised in Section 7 rights and the Ladies Garment Workers Union ruling that industrial democracy must provide employees with a real and meaningful choice. There exists no control equivalent to that of the Board in a neutrality agreement context. There exists no laboratory conditions standard so intrinsic to the validity of a Board election. See General Shoe, 77 NLRB 124 (1948). Rather, the rules with a neutrality agreement are that the employer stand mute while a union collects signatures on cards or petitions as a condition of prospective recognition, and whatever is done to achieve majority support and recognition transforms into a legally binding bargaining relationship.

Neither management nor a union can make the employees' choice or feasibly undertake steps to force each employee's very individual and personal choice. No legal constructs, agreements, or doctrines can viably allow non-employee parties to waive or mitigate that right of choice vested in each and every employee protected by the Act.

To say otherwise runs afoul of Nova Plumbing and Ladies Garment Workers Union. It also risks being an unsustainable delegation of the Board's own unique and exclusive authority to private parties.

In light of these principles there should be no recognition bar where there is merely a prospective agreement to recognize, as a Section 9(a) representative, a union which has failed to achieve real and tangible majority support and seeks to circumvent the Board's election processes.

The petitions here should proceed to election to protect employee choice, the election process, and ultimately the integrity of the rights set forth in the National Labor Relations Act.

DATED: June ___, 2004

Respectfully submitted,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

By: _____
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PROOF OF SERVICE

(Code Civ. Proc. § 1013a(3))

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 17871 Park Plaza Drive, Suite 200, Cerritos, CA 90703-8597.

On July 26, 2004, I served the following document(s) described as**:**

AMICUS BRIEF ON REVIEW OF ADMINISTRATIVE DISMISSALS

on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

See Attached Mailing List

☐ **BY MAIL:** I deposited such envelope in the mail at Cerritos, California. The envelope(s) was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY OVERNIGHT COURIER:** I sent such document(s) on July 26, 2004, by with postage thereon fully prepaid at Cerritos, California.

☐ **BY FAX**: I sent such document by use of facsimile machine telephone number (562) 653-3333. Facsimile cover sheet and confirmation is attached hereto indicating the recipients' facsimile number and time of transmission pursuant to California Rules of Court Rule 2008(e). The facsimile machine I used complied with California Rules of Court Rule 2003(3) and no error was reported by the machine.

☐ **BY PERSONAL SERVICE:** I delivered such envelope by hand to the offices of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 26, 2004, at Cerritos, California.

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