

## **NLRB Approves Prerecognition Employer-Union Bargaining**

**December 9, 2010**

On December 6, the National Labor Relations Board (NLRB or the Board) in *Dana Corp.*, 356 N.L.R.B. No. 49 (Dec. 6, 2010), upheld the ability of employers and unions to negotiate substantive terms and conditions of employment *before* a union is recognized as a group of employees' bargaining representative. In doing so, the Board distinguished long-standing precedent prohibiting such prerecognition bargaining. This decision facilitates nontraditional union organizing (i.e., organizing through neutrality and card check agreements) by giving unions the ability to offer substantive concessions in exchange for an employer's agreement not to oppose the union's organizing efforts. For employers that are under pressure to enter into a neutrality and card check agreement, this decision provides an opportunity to define the parameters of the collective bargaining agreement that will be negotiated if and when the union succeeds in organizing the employees at issue.

### **Background**

In 2003, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), AFL-CIO, represented approximately 2,000 Dana Corporation employees at various locations, but did not represent any of the 305 employees at Dana's St. Johns, Michigan facility. On August 6, 2003, Dana and the UAW entered into a "letter of agreement" (LOA). The LOA stated that if the UAW attempted to organize the St. Johns employees, Dana would be "totally neutral" regarding the issue of union representation. Dana also agreed (i) to tell employees it had a "constructive and positive relationship" with the UAW, (ii) to provide the UAW with the names and addresses of its employees and permit the UAW to meet with the employees in nonwork areas, and (iii) to recognize and bargain with the UAW without an election if a majority of employees signed union authorization cards (with a neutral third party determining whether the union had obtained majority status).

The LOA also contained various provisions relating to several key terms and conditions of employment, including that any collective bargaining agreement reached between the parties would (a) be at least four years in duration, (b) include health insurance cost-sharing, (c) address the importance of attendance to productivity and quality, (d) include a minimum number of classifications, (e) incorporate team-based approaches and continuous improvement, (f) have flexible compensation policies, and (g) provide for mandatory overtime when necessary. Finally, the LOA provided that if the UAW obtained majority support and the parties were unable to reach a collective bargaining agreement, they would submit unresolved issues to interest arbitration (i.e., an arbitrator would establish the substantive terms of the collective bargaining agreement).

After signing the LOA, Dana announced that it and the UAW had reached a “partnership agreement” they expected would benefit both parties. Although the St. Johns employees were told that Dana had entered into a “neutrality agreement,” employees were not informed of the terms of the LOA. Shortly thereafter, three of the St. Johns employees filed charges with the Board. The charges alleged that by entering into and maintaining the LOA, Dana and the UAW had violated Sections 8(a)(2) and 8(b)(1)(A) of the National Labor Relations Act (Act), which prohibit employers from rendering unlawful assistance to unions and unions from accepting such support.

The NLRB’s General Counsel later issued a complaint, alleging that because the LOA included specific terms and conditions of employment and was negotiated at a time when the UAW did not have majority status, it resulted in unlawful assistance to the UAW. The General Counsel relied on *Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964), in which the Board ruled that an employer may not lawfully reach a collective bargaining agreement with a union whose majority support comes after, and follows from, the agreement itself. *Majestic Weaving* was based on the theory that prerecognition bargaining interfered with employee free choice by granting the union “privileged” status in the eyes of employees, and amounted to “tacit recognition” of a union that did not have majority status.

### **The Board’s Decision**

In a 2-1 decision written by Chairman Wilma Liebman and Member Mark Pearce (with Member Brian Hayes dissenting), the Board held that the prerecognition negotiation of the LOA did not violate the Act because it “did no more than create a framework for future collective bargaining, if . . . the UAW were first able to provide proof of majority status.”

Rejecting the argument that prerecognition bargaining interfered with employee free choice by granting the union privileged status, the Board majority held that in this situation, where the LOA was reached at arm’s length in a context free of unfair labor practices, disclaimed any recognition of the union, included a lawful mechanism for determining whether the union had majority support, had no immediate effect on employees’ terms and conditions of employment, and its potential future effect was limited and contingent on future negotiations, “[n]othing in the [LOA] . . . would reasonably have led employees to believe that recognition of the UAW was a foregone conclusion or, by the same token, that rejection of UAW representation by employees was futile.” The Board majority distinguished *Majestic Weaving* on the grounds that the employer in that case had granted the union oral recognition prior to negotiations, whereas in *Dana*, the LOA specifically disclaimed representation without a showing of majority support.

The *Dana* decision is limited in two potentially important ways. First, the majority stated that it was not holding that every prerecognition agreement is lawful; rather, each case will depend on the context in which such an agreement is adopted and the conduct that accompanies it. Second, the Board, for procedural reasons, did not address two other theories for invalidating the LOA: (i) that it constituted an unlawful promise of benefits to employees if they chose the UAW as their representative, and (ii) that the UAW violated its duty of fair representation by agreeing to concessions on substantive terms and conditions of employment in exchange for organizing assistance from Dana. Those issues may be addressed by the Board in another case at a later date.

In dissent, Member Hayes stated that because the employer and the union “negotiated substantive contract provisions . . . with [a] minority union,” there was “no meaningful factual or legal distinctions” between this case and *Majestic Weaving*. Rejecting the majority’s attempt to distinguish *Majestic Weaving*, Member Hayes stated that “premature recognition is *not* a prerequisite for finding unlawful



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