Dana Corporation and International Union, United Automobile, Aerospace, and Agricultural–CIO a*nd* Gary L. Smeltzer, Jr. *and* Joseph Montague *and* Kenneth A. Gray. Cases 7–CA–46965, 7–CA–47078, 7–CB–14083, 7–CA–47079, 7–CB–14119, and 7–CB–14120

December 6, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

Respondents Dana Corporation and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), AFL–CIO—two parties with a long history of collective bargaining—entered into a Letter of Agreement (LOA or Agreement) setting forth ground rules for additional union organizing, procedures for voluntary recognition upon proof of majority support, and substantive issues that collective bargaining would address if and when Dana recognized the UAW at an unorganized facility. The issues before us are whether, in entering into and maintaining the LOA, Dana rendered unlawful support to the UAW in violation of Section 8(a)(2) and (1) of the Act, and whether the UAW accepted that support in violation of Section 8(b)(1)(A). We conclude that the Agreement was lawful, and we therefore dismiss the complaint.

I. PROCEDURAL HISTORY

On April 11, 2005, Administrative Law Judge William G. Kocol issued the attached decision. The General Counsel and the Charging Parties filed separate exceptions and supporting briefs, the Respondents filed separate answering briefs, and the General Counsel and the Charging Parties filed separate reply briefs. On March 30, 2006, the National Labor Relations Board issued a notice and invitation to the parties and interested amici curiae to file briefs addressing the issues in this case. In response, several amici curiae filed briefs.[1] The Charging Parties and the Respondents filed briefs in response to the amici.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2] The Board has considered the decision and the record in light of the exceptions and briefs of the parties and amici and has decided to affirm the judge's rulings,[3] findings, and conclusions as explained below.

II. FACTS

Dana manufactures automotive parts at about 90 facilities throughout the United States, Canada, and as many as 30 other countries. Dana and the UAW have a long-standing bargaining relationship: the UAW represents Dana's employees in nine bargaining units at various locations covering 2200 to 2300 employees in total.

[1] Amicus briefs were submitted by: American Federation of Labor and Congress of Industrial Organizations; American Maritime Association; American Rights at Work; Associated Builders and Contractors, Inc.; Certain Members of the U.S. House of Representatives; Cingular Wireless; Employees of Freightliner Corporation; General Motors Corporation, DaimlerChrysler Corporation, and The Ford Motor Company; Liz Claiborne, Inc.; National Alliance for Worker and Employer Rights; and Wackenhut Corporation.

Dana has moved to strike certain documents attached to the amicus brief filed by Employees of Freightliner Corporation. The documents relate to unfair labor practice charges the employees filed concerning card-check agreements between Freightliner and the UAW. The Charging Parties attached some of the same documents to their posthearing brief in order to support their argument that the Respondents had a proclivity to violate the Act and that a nationwide remedy was therefore appropriate. The judge struck the documents from the record, and the Charging Parties except to that ruling. In light of our dismissal of the complaint, which makes the issue of a nationwide remedy moot, we find it unnecessary to pass on whether the judge correctly struck the documents from the record. However, we deny Dana's motion to strike the documents from the Employees of Freightliner's amicus brief. The Board's solicitation of amicus briefs did not impose any limits on the subject matter of the briefs or their attachments. We therefore accept the documents for the limited purpose for which they were submitted, i.e., to chronicle the experience of the Freightliner employees.

[2] Member Becker has recused himself and took no part in the consideration or disposition of this case. See *Pomona Valley Hospital Medical Center*, 355 NLRB No. 40, slip op. at 5 (2010) (Member Becker, ruling on motions).

[3] Before the hearing, the General Counsel and the Charging Parties issued subpoenas seeking documents concerning any negotiations leading to the Letter of Agreement (LOA), the interpretation and "actual or potential use" of the LOA, meetings with employees concerning the LOA, union literature concerning the LOA, and the implementation of the LOA's access and employee-list provisions**.** The Respondents moved to quash the subpoenas. At the hearing, the General Counsel and the Charging Parties asserted that the documents would establish that the LOA was the product of negotiations between the UAW and Dana; that its terms were binding; and that the UAW, in negotiating the LOA, was pursuing its own interests in organizing, rather than the interests of the St. Johns employees. The General Counsel and the Charging Parties except to the judge's quashing of the subpoenas.

We affirm the judge's ruling. The LOA speaks for itself. Moreover, other record evidence already establishes that the LOA was the product of negotiations. David Warders, Dana's vice president of labor relations, testified that the LOA was negotiated during a series of meetings with the UAW over a 2½- to 3-day period. For the purposes of this decision, we accept that the LOA was binding on Dana and the UAW, and we find no relevance to whether the UAW was pursuing its own organizational interests. Therefore, the subpoenaed documents do not relate to any matter in question in this proceeding. See Sec. 102.31(b) of the Board's Rules and Regulations.

This case arose at Dana's St. Johns, Michigan facility, where Dana employs about 305 unrepresented employees and where, in early 2002, the UAW began an organizing campaign. On August 6, 2003, Dana and the UAW entered into the LOA, which set forth a framework to govern their relationship in the future, in the event that a majority of the St. Johns employees chose to designate the UAW as their exclusive collective-bargaining representative.[4] The LOA's introductory statement of purpose recognized "that dramatic changes in the domestic automotive market ha[ve] created new quality, productivity and competitiveness challenges for the automotive component supplier." It further stated that Dana and the UAW believed that "these challenges will be more effectively met through a partnership that is more positive, non-adversarial and with constructive attitudes toward each other." The introductory statement continued:

> Employee[] freedom to choose is a paramount concern of Dana as well as the UAW. We both believe that membership in a union is a matter of personal choice and acknowledge that if a majority of employees wish to be represented by a union, Dana will recognize that choice. The Union and the Company will not allow anyone to be intimidated or coerced into a decision on this important matter. The parties are also committed to an expeditious procedure for determining majority status.

The LOA then set forth ground rules for both parties that would be applicable in any organizing campaign the UAW might undertake at an unorganized Dana facility. Dana agreed to inform employees that it was "totally neutral regarding the issue of representation by the Union" and 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 Dana. Dana agreed to provide the UAW, upon request, with a list of the names and addresses of employees in any facility covered by the agreement and to permit the UAW to meet with employees in nonwork areas. The parties made a no-strike/no-lockout commitment, effective at a given facility when the UAW requested an employee list for the facility and continuing until a first contract was negotiated or any contract-related dispute was resolved.

Dana agreed to recognize and bargain with the UAW upon proof of majority status, to be determined by a card check by a neutral third party. The LOA specified that Dana "may not recognize the Union as the exclusive representative of employees in the absence of a showing" of majority status.

In addition, the LOA set forth certain principles that would inform future bargaining on particular topics, if and when the UAW was recognized. For instance, regarding healthcare, article 4.2.1 of the LOA stated that "the Union commits that in no event will bargaining between the parties erode current solutions and concepts in place or scheduled to be implemented January 1, 2004, at Dana's operations which include premium sharing, deductibles, and out-of-pocket maximums." Article 4.2.2 specified that the minimum duration of any collective-bargaining agreement between Dana and the UAW would be 4 years, and that the parties would discuss contract durations of up to 5 years. Article 4.2.4 provided as follows:

> The parties agree that in labor agreements bargained pursuant to this Letter, the following conditions must be included for the facility to have a reasonable opportunity to succeed and grow.
>
> - Healthcare costs that reflect the competitive reality of the supplier industry and product(s) involved
> - 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 LOA also specified steps that the parties would take if they were unable to reach a final agreement. Article 4.2 provided that, after 5 months, the parties would submit unresolved issues to a joint UAW/Dana committee. If 6 months were to pass without a contract, the parties would submit unresolved issues to a neutral for interest arbitration, and the neutral would select either Dana's final offer or the UAW's.

In an August 13, 2003 press release, Dana announced that it and the UAW had reached a "partnership agreement" that they expected would benefit both parties and would position Dana well in the competitive automotive parts market. The release stated that the LOA "supports

[4] The LOA also applied to other Dana facilities, but the complaint is limited to the St. Johns facility.

the freedom our people have always enjoyed to choose whether or not they wish to be represented by a union."

The record does not permit a finding as to whether and to what extent the press release and LOA were made available to employees. However, according to evidence proffered by the General Counsel (but rejected by the judge as irrelevant to the legality of the LOA), Dana told employees in August 2003 that it had entered into a "neutrality agreement" with the UAW, and that any questions about the agreement should be directed to Dana's legal department.

In early December 2003, the UAW requested a list of the employees working at the St. Johns facility, pursuant to the LOA. Thereafter, the three individual Charging Parties, who are Dana employees at the St. Johns facility, filed unfair labor practice charges. On September 30, 2004, the General Counsel issued a complaint alleging that, by "entering into" and "maintain[ing]" the LOA, Dana rendered unlawful assistance to the UAW in violation of Section 8(a)(2) and (1) of the Act and the UAW restrained and coerced employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A).

III. THE JUDGE'S DECISION

The judge dismissed the complaint on procedural grounds and, alternatively, on the merits. Regarding procedure, the administrative law judge observed that the complaint framed the issue as whether the LOA constituted 8(a)(2) assistance (and a correlative 8(b)(1)(A) violation by the UAW). The judge stated, however, that the General Counsel, in his posthearing brief, did not argue the illegality of any of the substantive provisions of the LOA, but rather asserted that the LOA amounted to a grant and acceptance, respectively, of Dana's recognition of the UAW as the employees' exclusive bargaining representative. Because "the General Counsel did not plead the 'act' of unlawful recognition," the judge held that the complaint failed to comply with the due-process guarantee embodied in Section 102.15 of the Board's Rules and Regulations.[5]

In the alternative, the judge dismissed the complaint on the merits. He observed that an employer violates Section 8(a)(2) when it recognizes a minority union as the exclusive bargaining representative, and that a union violates Section 8(b)(1)(A) when it accepts such recognition. *International Ladies' Garment Workers Union v. NLRB (Bernhard-Altmann)*, 366 U.S. 731 (1961). The judge concluded, however, that Dana had not granted recognition here.

The judge rejected the argument that the LOA constituted a collective-bargaining agreement from which recognition could be inferred. He found that the LOA "touch[ed] upon" some terms and conditions of employment, but was "a far cry from a collective-bargaining agreement." The judge reasoned that the lack of recognition and the absence of a collective-bargaining agreement distinguished this case from *Majestic Weaving Co.*, 147 NLRB 859 (1964), enf. denied 355 F.2d 854 (2d Cir. 1966). In that case, the Board held that an employer violated Section 8(a)(2) and (1) by negotiating a complete collective-bargaining agreement, the signing of which was conditioned on the union's achieving majority status.

As an alternative basis for dismissal on the merits, the judge found that the negotiation of the LOA was lawful under Board precedent governing "after-acquired stores" clauses in collective-bargaining agreements. See *Houston Division of the Kroger Co.*, 219 NLRB 388 (1975). Such clauses typically provide that an employer with multiple facilities will recognize the union as the representative of employees in facilities acquired after the execution of the agreement and will apply the collective-bargaining agreement to those employees, upon proof that a majority of them support the union.

Here, the judge found that Dana and the UAW have an existing collective-bargaining relationship at several of Dana's other facilities. Under *Kroger*, the judge reasoned, the Respondents could lawfully have negotiated a clause in their existing agreements that would extend those agreements to cover the St. Johns facility upon proof of majority status there. The judge reasoned that the LOA did far less than extend a full contract to a new facility, and was therefore lawful *a fortiori*.

Accordingly, the judge dismissed the complaint.

IV. CONTENTIONS OF THE PARTIES AND AMICI

The General Counsel, the Charging Parties, and those amici who support them assert that the judge erred in dismissing the complaint. They contend, inter alia, that (1) the complaint provided adequate notice of the alleged violation; (2) the LOA included specific terms and conditions of employment and was negotiated at a time when the UAW did not have majority status, and, therefore, the LOA provided unlawful support to the UAW under *Bernhard-Altmann* and *Majestic Weaving*, supra; and (3) *Kroge*r, supra, is inapplicable, or, alternatively, should be overruled as inconsistent with *Majestic Weaving*.[6]

[5] Sec. 102.15 requires a complaint to contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed."

[6] We do not address two theories asserted by the Charging Parties, but not argued by the General Counsel: (1) that the LOA violates Sec. 8(a)(1) because it promises benefits to employees if they choose the

The Respondents and those amici who support them assert that the judge correctly dismissed the complaint on procedural grounds and on the merits. They contend, among other things, that *Bernhard-Altmann* and *Majestic Weaving* are distinguishable from the present case, because Dana did not recognize the UAW and because the LOA is not a final or complete collective-bargaining agreement. Moreover, they contend, the LOA leaves the St. Johns employees entirely free to reject the agreement by declining to choose the UAW as their representative. Alternatively, they contend, the LOA is lawful under *Kroger*.

V. DISCUSSION

We agree with the judge, for the reasons stated below, that the complaint should be dismissed on the merits.[7] We decline the General Counsel's invitation to extend the Board's decision in *Majestic Weaving* to reach the facts of this case. Neither *Majestic Weaving* nor *Bernhard-Altmann* requires us to find a violation here, and such a finding would contravene fundamental policies embodied in the Act. We leave for another day the adoption of a general standard for regulating prerecognition negotiations between unions and employer. As the Supreme Court has observed, there are issues of labor law where the "'nature of the problem, as revealed by unfolding variant situations,' requires 'an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.'" *Eastex, Inc. v. NLRB*, 477 U.S. 556, 575 (1978), quoting *Electrical Workers v. NLRB*, 366 U.S. 667, 674 (1961).

A.

Section 8(a)(2) of the Act prohibits an employer from "dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribut[ing] financial or other support to it."[8] The primary legislative purpose of Section 8(a)(2) "was to eradicate company unionism, a practice whereby employers would establish and control in-house labor organizations in order to prevent organization by autonomous unions." 1 Higgins, *Developing Labor Law* 418-419 (5th ed. 2006). In the words of the Act's chief sponsor, Senator Robert Wagner:

> Genuine collective bargaining is the only way to attain equality of bargaining power. . . . The greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity. . . .

1 Leg. Hist. 15 (NLRA 1935).[9]

Section 8(a)(2) is grounded in the notion that foisting a union on unconsenting employees and thus impeding employees from pursuing representation by outside unions are incompatible with "genuine collective bargaining." It is in this context that the statutory prohibition on "financial or other support" to unions must be understood.

Although it is clear that an employer may not render unlawful support, "it is also clear—and the Board has so held with court approval—that a certain amount of employer cooperation with the efforts of a union to organize is insufficient to constitute unlawful assistance." *Steak and Brew of Huntington*, 205 NLRB 1025, 1031 (1973). "The quantum of employer cooperation which surpasses the line and becomes unlawful support is not susceptible to precise measurement. Each case must stand or fall on its own particular facts." Id. at 1031.[10]

The Board and courts have long recognized that various types of agreements and understandings between employers and unrecognized unions fall within the framework of permissible cooperation. Notably, employers and unions may enter into "members-only" agreements, which establish terms and conditions of employment only for those employees who are members of the union. See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 237 (1938). In that decision, the Supreme Court reasoned that such agreements could be beneficial to interstate and foreign commerce by protecting against disruptions caused by industrial strife. Id.

An employer is also permitted to express to employees a desire to enter into a bargaining relationship with a particular union and, essentially, to inform employees

---

UAW as their representative; and (2) that the UAW violated its duty of fair representation under Sec. 8(b)(1)(A) by agreeing to concessions on substantive terms and conditions of employment in exchange for organizing assistance from Dana. Those theories were neither alleged nor litigated, and the General Counsel has not excepted to the judge's failure to find violations on those grounds. The General Counsel controls the complaint, and the Charging Parties cannot enlarge upon or change the General Counsel's theory of the case. See, e.g., *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. 325 Fed. Appx. 577 (9th Cir. 2009).

[7] Therefore, we need not pass on the judge's dismissal of the complaint on procedural grounds.

[8] Correspondingly, a union that accepts unlawful support violates Sec. 8(b)(1)(A), which prohibits a union from restraining or coercing employees in the exercise of their Sec. 7 rights.

[9] Company unions proliferated in the years following passage of Sec. 7(a) of the National Industrial Recovery Act (the precursor to Sec. 7 of the National Labor Relations Act), and "a consensus opinion was that the primary motive in many cases was to forestall union organization." Kaufman, *Accomplishments and Shortcomings of Nonunion Employee Representation in the Pre-Wagner Act Years: A Reassessment*, Nonunion Employee Representation 25 (2000).

[10] See also *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630 (9th Cir. 1974), cert. denied 423 U.S. 875 (1975) ("[T]here is a line between cooperation, which the Act encourages, and actual interference or domination ... which the Act condemns.")

that it will enter into a bargaining agreement upon proof of majority support. *Coamo Knitting Mills*, 150 NLRB 579 (1964).[11]

Outside the Section 8(a)(2) context, the Board and courts have also considered and enforced agreements between employers and unrecognized unions. For example, an employer may agree that it will voluntarily recognize a union in the future if the union demonstrates majority support by means other than an election, including signed authorization cards. See, e.g., *Snow & Sons*, 134 NLRB 709, 710 (1961) (employer bound by agreement to honor results of card check), enfd. 308 F.2d 687 (9th Cir. 1962); *Hotel & Restaurant Employees Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993) (enforcing card-check and neutrality agreement pursuant to Sec. 301 of Labor-Management Relations Act).[12] The courts have rejected arguments that card-check/neutrality agreements between unions and employers violate Section 302 of the Taft-Hartley Act, which (with certain exceptions) prohibits employers from providing a "thing of value" to unions.[13] Finally, a multifacility employer and a union may lawfully provide in a collective-bargaining agreement that the employer will recognize the union as the representative of, and apply the collective-bargaining agreement to, employees in facilities the employer acquires in the future. See *Kroger Co.*, supra.[14]

B.

Although the law permits certain forms of cooperation between employers and minority or unrecognized unions, an employer crosses the line between cooperation and support, and violates Section 8(a)(2), when it recognizes a minority union as the exclusive bargaining representative. This is the principle reflected in the Supreme Court's decision in *Bernhard-Altmann*, supra.

There, during an organizing campaign, certain employees engaged in a strike unrelated to the organizing effort. Before the union had obtained majority support, the employer and the union signed a memorandum of understanding (MOU) that ended the strike, recognized the union as the exclusive bargaining representative, called for improving certain terms and conditions of employment, and provided that a "formal agreement containing these terms" would "be promptly drafted . . . and signed. . . ." The union obtained majority support before the parties executed the formal collective-bargaining agreement. Id.

The Supreme Court held that the employer violated Section 8(a)(2) by recognizing a minority union as the exclusive bargaining representative (even though the employer believed in good faith that the union had majority support) and that the union violated Section 8(b)(1)(A) by accepting recognition. In the Court's view, it was irrelevant that the union had majority support at the time the collective-bargaining agreement was executed, because the employer's prior recognition of the union, when it did not have majority support, was "a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative." 366 U.S. at 736 (quoting the lower court's decision, 280 F.2d 616, 621 (D.C. Cir. 1960)). The Court reasoned that the union's later acquisition of majority status "itself might indicate that the recognition secured by the [MOU] afforded [the union] a deceptive cloak of authority with which to persuasively elicit additional employee support." Id. The Court emphasized:

> [T]he violation which the Board found was the grant by the employer of exclusive representation status to a minority union, as distinguished from an employer's bargaining with a minority union for its members only. Therefore, the exclusive representation provision is the vice in the agreement. . . .

Id. at 736–737 (emphasis added).

Three years after *Bernhard-Altmann*, and relying entirely on the Supreme Court's decision, the Board held in *Majestic Weaving*, supra, that an employer violated Section 8(a)(2) in similar circumstances. 147 NLRB at 860-861. In *Majestic Weaving*, the Teamsters Union, which did not represent employees at any of Majestic's facilities, requested recognition at one facility where Majestic was still in the process of hiring employees. Majestic orally agreed to negotiate a contract, "conditioning the actual signing with [the Teamsters] on the latter achieving a majority at the 'conclusion' of negotiations." Id. at 860. The parties then negotiated a collective-bargaining agreement; prior to signing it, the Teamsters presented

---

[11] In *Coamo*, supra, the employer told employees:

> Although you are under no compulsion, we urge you to join [the Union]. The Company will negotiate a contract with the Union, which we believe will be mutually beneficial. I believe the mill will operate with least friction if there is a union contract and all of the workers are members of the Union.

150 NLRB at 595. See also *Tecumseh Corrugated Box Co.*, 333 NLRB 1, 8 (2001) (no 8(a)(2) violation where employer told employees that he "liked working with unions" before introducing union representatives and allowing them to address employees on company property and during work time).

[12] See also *Adcock v. Freightliner LLC*, 550 F.3d 369, 371 fn. 1 (4th Cir. 2008)(collecting cases). See generally Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819 (2005).

[13] See, e.g., *Adcock v. Freightliner LLC*, supra; *Hotel & Restaurant Employees Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 218–219 (3d Cir. 2004).

[14] Accord `Raley's`, 336 NLRB 374, 378 (2001); *Alpha Beta Co.*, 294 NLRB 228, 229 (1989).

Majestic with authorization cards signed by a majority of the unit employees. Another union, the Textile Workers, then began an organizing campaign at the facility, ultimately securing authorization cards from a majority of the employees and demanding recognition. Majestic refused that demand, asserting that it had already recognized the Teamsters.

The Board found that Majestic had unlawfully assisted the Teamsters by facilitating the solicitation of authorization cards by a company supervisor and had unlawfully recognized the Teamsters. The Board observed that:

> In the *Bernhard-Altmann* case an interim agreement ... was the vehicle for prematurely granting a union exclusive bargaining status which was found objectionable; 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.

147 NLRB at 860 (emphasis added). The Board accordingly ruled that Majestic's recognition of the Teamsters and negotiation of a collective-bargaining agreement with the union before it had achieved majority support violated Section 8(a)(2) of the Act. Id. at 860–861.[15]

C.

The General Counsel and the Charging Parties argue that *Majestic Weaving* creates a per se rule that negotiation with a union "over substantive terms and conditions of employment" is unlawful if it occurs before the union has attained majority support. Such negotiations, they contend, grant the union "privileged" status in the eyes of employees and present the sort of "fait accompli" prohibited by *Majestic Weaving*, because "give and take negotiations" resulting in an agreement like the one involved here amount to "tacit recognition" of the union.

We reject this broad reading of *Majestic Weaving*. Neither *Majestic Weaving*, nor the decision on which it rests, *Bernhard-Altmann*, compels a finding that the conduct at issue here violated Section 8(a)(2). Adopting the prohibition urged by the General Counsel and the Charging Parties, in turn, would not advance the policies of the Act as a whole. Rather, it would create an unnecessary obstacle to legitimate collective bargaining without genuinely promoting employee free choice.

1.

There are obvious and significant distinctions between this case and *Majestic Weaving*. *Majestic Weaving* involved an initial, oral grant of exclusive recognition by the employer to the union. That recognition was followed by the negotiation of a complete collective-bargaining agreement, which was consummated except for the ministerial act of execution by the parties.[16] The union's showing of majority support not only came after the complete agreement was reached, but it depended on the solicitation of authorization cards by a supervisor, as facilitated by the employer itself.

Here, the LOA did no more than create a framework for future collective bargaining, if (as specified in the agreement) the UAW were first able to provide proof of majority status by means of a card-check conducted by a neutral third party. The LOA did not contain an exclusive-representation provision (the "vice" of the agree-

[15] The *Majestic Weaving* Board accordingly overruled the Board's pre-*Bernhard-Altmann* decision in *Julius Resnick, Inc.*, 86 NLRB 38 (1949), insofar as it held—contrary to *Bernhard-Altmann*—"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 fn. 3. This statement must be understood in context.

In *Julius Resnick*, an employer and a union agreed—before any showing of majority support was made—that a preexisting collective-bargaining agreement would be applied to a particular plant, but that before the contract was executed, the employees would be "organized" by the union. 86 NLRB at 46. The Board ultimately adopted a trial examiner's finding that the employer had not unlawfully assisted the union's organizing efforts through the conduct of certain staff who were determined not to be supervisors. In passing, the Board observed that the employer's conduct in agreeing to a contract prematurely was not unlawful, because the union did represent a majority of employees by the time the agreement was executed. 86 NLRB at 39. The conduct in *Julius Resnick*, then, was comparable to the conduct in *Majestic Weaving* and *Bernard-Altmann*: The employer had agreed to recognize the union prematurely, and, after *Bernhard-Altmann*, that unlawful action could not be cured by a later (and necessarily tainted) showing of majority support.

After *Majestic Weaving*, the Board has reaffirmed the rule established there that an employer may not reach a collective-bargaining agreement with a union whose majority support comes after and follows from the agreement itself, and thus is tainted. See *Wickes Corp.*, 197 NLRB 860 (1972). In *Wickes*, the employer and a union coalition, which represented none of the employer's workers, negotiated and reached agreement on a contract. Union-membership applications then were attached to employee time cards. Next, the employer facilitated employees' attendance at a meeting where union representatives informed employees of the contract, conducted a ratification vote, and belatedly secured authorization cards from a majority of employees. 197 NLRB at 861. In distinguishing *Coamo Knitting Mills*, supra,—which the employer characterized as "exactly analogous" and a "complete defense," id. at 862—the *Wickes* Board found it unnecessary to go beyond pointing out that Wickes reached agreement on a contract with the unions before gaining majority support. Id. at 860 fn. 1.

[16] Under the Act, once the parties reach a collective-bargaining agreement, they are legally obligated to execute it; the failure to execute, in other words, does not prevent the agreement from having binding effect. See Sec. 8(d) (statutory duty to bargain includes the "execution of a written agreement incorporating any agreement reached if requested by either party"). See, e.g., *Flying Dutchman Park*, 329 NLRB 414 (1999). Thus, postponing execution of a collective-bargaining agreement that would be unlawful when reached does not avert an unfair labor practice.

ment in *Bernhard-Altmann*). Indeed, the LOA expressly prohibited Dana from recognizing the UAW without a showing of majority support. Only the negotiation of the LOA, and no other conduct, is alleged to be an unfair labor practice interfering with employee free choice.

The crux of the General Counsel's position is that the negotiation of the LOA itself precluded a truly free choice. That position has no real support in *Majestic Weaving* or *Bernhard-Altmann*. In those cases, a premature grant of exclusive recognition by the employer gave the union, in the Supreme Court's words, a "deceptive cloak of authority" as it sought employee support.[17] But neither the negotiation of the LOA nor the Agreement itself can be equated with a grant of exclusive recognition as that concept has been long understood in our law.

That the LOA set forth certain principles that would inform future bargaining on particular topics—bargaining contingent on a showing of majority support, as verified by a neutral third party—is not enough to constitute exclusive recognition. The UAW did not purport to speak for a majority of Dana's employees, nor was it treated as if it did. On the contrary, the LOA unmistakably disclaimed exclusive recognition by setting forth the process by which such status could be achieved. Nothing in the LOA affected employees' existing terms and conditions of employment or obligated Dana to alter them. Any potential effect on employees would have required substantial negotiations, following recognition pursuant to the terms of the Agreement.[18] Nothing in the Agreement, its context, or the parties' conduct 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 General Counsel's position is rooted in the assumption that any employer conduct having the potential to enhance an unrecognized union's status in the employees' eyes is unlawful. But that is contrary to our law. For example, as shown above in Section A, an employer may negotiate nonexclusive "members-only" agreements, may agree to remain neutral in an organizing campaign, may agree to voluntarily recognize the union upon proof of majority support, and may state its preference for unionization. In each of those scenarios, the employer's cooperation with the union could enhance the union's prestige, yet none of them is unlawful.

All of the decisions relied upon by the General Counsel for the proposition that negotiation of the LOA amounted to "tacit recognition" are easily distinguishable.[19] None involves a situation where recognition is attacked as unlawful under Section 8(a)(2). Rather, they involve employers that reviewed a union's proffered evidence of majority support and either began bargaining or agreed to bargain, but later denied that a legally binding recognition had occurred. Plainly, those circumstances are not present here. The UAW has not claimed majority status, let alone presented proof to Dana, and neither the UAW nor Dana claims that recognition has taken place.

2.

Adopting the General Counsel's position would mean extending existing law in a truly novel way. Card-check/neutrality agreements, long upheld by the Board and the courts, would be categorically prohibited if they also addressed any substantive issue for future bargaining, despite disclaiming exclusive recognition and despite a context free of unfair labor practices. We decline, as a matter of labor policy, to take that step.

The ultimate object of the National Labor Relations Act, as the Supreme Court has repeatedly stated, is "industrial peace."[20] Section 1 of the Act states that the goal of industrial peace is to be achieved by "encouraging the practice and procedure of collective bargaining," as well as by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."

As discussed earlier, it is well settled, consistent with those policies, that an employer may voluntarily recognize a union that has demonstrated majority support by means other than an election, including (as contemplated by the LOA in the present case) authorization cards signed by a majority of the unit employees. Courts have endorsed voluntary recognition and deemed it "a favored element of national labor policy."[21] The Board should hesitate before

[17] The Board's decision in *Wickes*, supra, also falls into this category.

[18] Notably, under existing law, the LOA—even if it had granted exclusive recognition to the UAW—would not be sufficient to bar a petition for a Board election, given its limited scope and general provisions. *Appalachian Shale Products Co.*, 121 NLRB 1160, 1163–1164 (1958) ("[T]o serve as a bar, a contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship; it will not constitute a bar if it is limited to wages only, or to one or several provisions not deemed substantial."). In *Bernhard-Altmann*, in contrast, the Supreme Court pointed out that the agreement at issue would have barred an election petition under the Board's contract-bar doctrine. 366 U.S. at 737 fn. 8.

[19] See *Operating Engineers Local 150 v. NLRB*, 361 F.3d 395, 400 (7th Cir. 2004); *Ednor Home Care*, 276 NLRB 392, 393 (1985); *Lyon & Ryan Ford, Inc.*, 246 NLRB 1, 4 (1979).

[20] *Auciello Iron Works, Inc. v. NLRB,* 517 U.S. 781, 785 (1996); *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 38 (1987), quoting *Brooks v. NLRB,* 348 U.S. 96, 103 (1954).

[21] *NLRB v. Lyon & Ryan Ford.,* 647 F.2d 745, 750 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981); *NLRB v. Broadmoor Lumber Co.,*

creating new obstacles to voluntary recognition, as adopting the General Counsel's position would do.

In practice, an employer's willingness to voluntarily recognize a union may turn on the employer's ability to predict the consequences of doing so.[22] As two attorneys representing management explained more than 20 years ago:

> [A] relationship with the union is one of the most significant business transactions in which an employer can engage. . . . As in any other potential business relationship, the employer should be able to talk to the other side and perhaps even reach some preliminary understandings before it determines whether it wants to avoid such a relationship or not.
>
> . . . .
>
> Meeting with a union early on to ascertain its goals and representation philosophy enables the employer to more realistically assess (1) the potential impact of the union on the employer's operations; and (2) the wisdom of expending company resources to campaign against the union.

Brown & Morris, Pre-recognition Discussions with Unions, in U.S. Labor Law and the Future of Labor-Management Cooperation: Second Interim Report--A Working Document 98, 99 (Bureau of Labor-Mgmt. and Cooperative Programs, U.S. Dep't of Labor 1988). If anything, the importance of permitting employers to engage in at least some preliminary substantive discussions with a union has grown since the passage of the Act in 1935 and even since the Majestic Weaving decision in 1964.[23]

Certainly, the statutory policies of encouraging collective bargaining and voluntary recognition must comport with Section 8(a)(2) and its goals of preserving union independence and protecting employee free choice. In our view, however, the General Counsel's position does little to further the aims of Section 8(a)(2) and much to frustrate legitimate, indeed desirable, forms of union-employer cooperation. Categorically prohibiting prerecognition negotiations over substantive issues would needlessly preclude unions and employers from confronting workplace challenges in a strategic manner that serves the employer's needs, creates a more hospitable environment for collective bargaining, and—because no recognition is granted unless and until the union has majority support—still preserves employee free choice.

In rejecting the General Counsel's position, we do not adopt the opposite view. We do not hold, in other words, that every prerecognition agreement, regardless of the context it in which it was adopted or the conduct that accompanies it, will always be lawful. Each case, rather, will depend upon its own facts.

In this case, the UAW and Dana stayed well within the boundaries of what the Act permits. The LOA was reached at arm's length, in a context free of unfair labor practices. It disclaimed any recognition of the union as exclusive bargaining representative, and it created, on its face, a lawful mechanism for determining if and when the union had achieved majority support. The LOA had no immediate effect on employees' terms and conditions of employment, and even its potential future effect was both limited and contingent on substantial future negotiations. As its statement of purpose makes clear, the LOA was an attempt to directly address certain challenges of the contemporary workplace.[24] Considering the LOA as a whole, we find nothing that presents UAW representation as a fait accompli or that otherwise constitutes unlawful support of the UAW. Indeed, according to the General Counsel, employees here had no difficulty in rejecting the UAW's representation.[25]

---

578 F.2d 238, 241 (9th Cir. 1978). See also *Terracon, Inc.*, 339 NLRB 221, 225 (2003), affd. 361 F.3d 395 (7th Cir. 2004) (noting the Board's "established objective of promoting voluntary recognition").

[22] See, e.g., Babson, *Bargaining Before Recognition in a Global Market: How Much Will It Cost?,* 58 Lab. & Emp. Rel. Ass'n Series 113 (2006), available at http://www.press.uillinois.edu/journals/irra/proceedings2006/babson.html.

[23] In recent decades, domestic and international competition have intensified. As a result, U.S. companies "face a set of choices about how to find a competitive advantage in markets where labor costs not only vary across competitors but where American employers tend to be at or near the high end of the labor-cost distribution." Kochan et al., *The Transformation of American Industrial Relations* 228 (1994). Professor Kochan argues that "for competitive reasons employers need increased trust, commitment, and cooperation at the workplace rather than further institutionalization of adversarial relationships." Id. at 231.

[24] The LOA recites that:

> The Company and the Union recognize that dramatic changes in the domestic automotive market ha[ve] created new quality, productivity, and competitiveness challenges for the automotive component supplier. Both parties believe these challenges will be more effectively met through a partnership that is more positive, non-adversarial and with constructive attitudes toward each other.

Jt. Exh.1, p. 1.

[25] The General Counsel proffered evidence, rejected by the judge, that a majority of the St. Johns employees signed a "Petition Against UAW Representation" between September 9 and 18--the month after Dana and the UAW entered into the LOA--stating that they did not want to be represented by the UAW or "subjected in any way to the 'partnership agreement'" and requesting that "Dana and the UAW should not give any effect to the LOA at the St. Johns facility." The General Counsel excepts to the judge's exclusion of the petition and to his exclusion of evidence that Dana told employees that it had reached a partnership agreement with the UAW but did not fully and freely disclose the specific terms of the LOA. The General Counsel argues

3.

Our dissenting colleague asserts that we "effectively overrule *Majestic Weaving*, at least in substantial part." But this claim, like the General Counsel's position here, is predicated on a sweeping interpretation of *Majestic Weaving*, grounded in a different view of labor relations policy. That policy view is the basis for our colleague's insistence that "[t]here are no meaningful factual or legal distinctions between" this case and *Majestic Weaving.* We have read *Majestic Weaving* carefully, and we have explained why we regard that case as, indeed, distinct both factually and legally from this one. It is appropriate, of course, for the Board both to interpret its own decisions and, where the language of the Act itself does not settle a question of labor law, to apply its own policy views.[26]

The dissent's reading of *Majestic Weaving* rests on two aspects of that decision: a provision in the Board's order and the overruling of an earlier Board decision, *Julius Resnick*, supra. Neither point compels the conclusion that the dissent reaches. The order in *Majestic Weaving* prohibited the employer from, among other things, "negotiating a contract with any labor organization which does not represent a majority of its employees in the appropriate unit." 147 NLRB at 862. That remedial provision was tailored to the violations found, which involved the oral recognition of a minority union, followed by the negotiation of a complete collective-bargaining agreement—the type of "contract" to which the order refers. The overruling of *Julius Resnick*, in turn, did not somehow broaden the holding of *Majestic Weaving* itself. As we have explained (supra, fn. 15), the conduct in *Julius Resnick* was comparable to the conduct found unlawful in *Bernhard-Altmann* and *Majestic Weaving* itself, and distinct from what is involved here.

Nor does a single sentence in the Board's footnote in *Wickes*, supra, somehow "put . . . to rest" the "scope of proscribed assistance," as our colleague asserts. There, as explained (supra, fn. 15), prior to any showing of majority support, the employer and the union reached agreement on a complete collective-bargaining agreement, which was presented to employees for "ratification," followed by the submission of union-authorization cards to the employer. 197 NLRB at 861. The *Wickes* Board understandably had no difficulty distinguishing *Coamo Knitting Mills*, supra, in which an employer lawfully had told employees that the "Company *will* negotiate a contract with the Union, which we believe will be mutually beneficial." 150 NLRB at 595 (emphasis added). The Board's decision in *Wickes*, notably, did not even cite *Majestic Weaving*.

In short, the Board's precedent does not–despite our colleague's claim–compel the categorical conclusion that an employer violates Section 8(a)(2) whenever it "negotiates terms and conditions of employment with a union before a majority of unit employees affected by these actions has designated the union as their bargaining representative." That broad legal rule is stated nowhere in our case law. Nor does the dissent offer persuasive policy reasons for adopting such a rule today.

The essential premise of the dissent is that employees, made aware of an agreement like the one at issue here, "could reasonably believe they had no choice but to agree to [union] representation." Our colleague offers no evidence in support of this hypothesis—and the evidence here certainly tends to refute it: a majority of the employees subsequently rejected the UAW. Where, as in this case, an agreement expressly requires a showing of majority support, as determined by a neutral third party, before the union can be recognized,[27] and where no unfair labor practices have been committed, it is hard to believe that a reasonable employee—a rational actor presumed by federal labor law to be capable of exercising free choice—would feel compelled to sign a union-authorization card simply because the agreement prospectively addresses some substantive terms and conditions of employment. If anything, such an agreement tends to promote an informed choice by employees. They presumably will reject the union if they conclude (or suspect) that it has agreed to a bad deal or that it is otherwise compromised by the agreement from representing them effectively.[28]

VI. CONCLUSION

Accordingly, we find that Dana, by entering into the LOA, did not cross the line from lawful cooperation with

that Dana's actions gave employees the impression that Dana and the UAW had a "special insider relationship."

According to the General Counsel's own proffer, however, employees reacted to the news of the agreement and the lack of detail provided about it by circulating an antiunion petition. Thus, far from giving the UAW a "deceptive cloak of authority," the announcement of the agreement appears to have mobilized employees against the UAW. Therefore, we find that the excluded evidence would not affect our decision that the LOA was lawful. At most, the exclusion was harmless error.

[26] See, e.g., *Ceridian Corp. v. NLRB*, 435 F.3d 352, 355–357 (D.C. Cir. 2006) (Board's interpretation of own precedent and Board's policy judgments are entitled to judicial deference).

[27] To argue that such an agreement provides the union with a "deceptive cloak of authority," as our colleague does (quoting the Supreme Court's decision in *Bernhard-Altman*, supra), neglects what the agreement actually says.

[28] Because we do not rely on the Board's decision in *Kroger*, supra, as a basis for finding no unfair labor practices here, we need not address the dissent's discussion of the case.

the UAW to unlawful support of it. Likewise, the UAW has not accepted unlawful support from Dana.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 6, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

In *Majestic Weaving Co*., 147 NLRB 859 (1964), enf. denied 355 F.2d 854 (2d Cir. 1966), the Board found that an employer violated the Act when it negotiated a complete collective-bargaining agreement with a minority union. In the present case, the Respondent Dana negotiated substantive contract provisions in a Letter of Agreement (LOA) with minority union Respondent UAW. There are no meaningful factual or legal distinctions between the two cases. By dismissing the complaint, my colleagues effectively overrule *Majestic Weaving*, at least in substantial part, an action they have recently conceded cannot be taken by less than a three-member Board majority.[1] Unlike them, I would reaffirm the sound holding and underlying principles of *Majestic Weaving* in finding the alleged violations of Section 8(a)(2) and (1) and 8(b) (1)(a) of the Act.[2] My colleagues' approach threatens to reinstate the very practice that those statutory provisions were meant to prohibit, i.e., the establishment of collective-bargaining relationships based on self-interested union-employer agreements that preempt employee choice and input as to their representation and desired terms and conditions of employment. By statutory definition, this practice does not further genuine industrial peace.

An employer violates Section 8(a)(2) by providing impermissible support to a minority union in organizing the employer's unrepresented work force.[3] Such unlawful assistance also violates Section 8(a)(1) because it interferes with and restrains employees in the exercise of their Section 7 right "to bargain collectively through representatives of their own choosing" or "to refrain from" such activity. Further, a union's acceptance of such assistance violates Section 8(b)(1)(A) because it has a reasonable tendency to restrain or coerce employees in the exercise of their Section 7 rights. The issue thus presented in this case is whether Dana unlawfully supported the UAW, and the UAW unlawfully accepted such support, by negotiating and agreeing to the substantive contract provisions of the LOA at a time when the UAW did not have majority status as the exclusive representative for the St. Johns employees unit.

We do not write on a clean slate here. It is well established that an employer unlawfully supports a union by recognizing it as the exclusive bargaining representative of employees among whom it does not have majority support. *Bernhard-Altmann*, 366 U.S. at 738. A bargaining agreement executed between the parties after premature recognition is unenforceable even if the union has achieved majority support in the interim. Id. at 736–737. This is so because "such acquisition of majority status itself might indicate that the recognition secured by the . . . agreement afforded [the union] a deceptive cloak of authority with which to persuasively elicit additional employee support." Id. at 736.

However, premature recognition is *not* a prerequisite for finding unlawful support in dealings between an employer and a minority union. In *Majestic Weaving*, 147 NLRB at 860, the Board held that an employer unlawfully assisted a union by negotiating a bargaining agreement with it even though the parties did not execute the agreement until after the union had secured majority support. The Board in *Majestic Weaving* also found implied oral recognition of the Teamsters local, 147 NLRB at 860, in spite of the facts recited in the trial examiner's decision showing that the employer never stated that it was recognizing the union, id. at 866–867. However, the Board's order in *Majestic Weaving* contains separate

[1] See *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154 at slip op. 2 (2010)(concurring opinion of Chairman Liebman and Member Pearce).

[2] I disagree with the judge's finding that the complaint should be dismissed on procedural grounds because, as pled and litigated, it requires proof that Dana recognized UAW as representative of employees at the St. John, Michigan plant. The complaint alleges that Dana rendered "unlawful assistance to a labor organization" in violation of Sec. 8(a)(2) and (1), and that the UAW restrained and coerced employees in violation of Sec. 8(b)(1)(A). The complaint specifies that certain facts—i.e., the execution of the LOA as it pertained to the St. Johns facility, the maintenance of the LOA at the St. Johns facility, and the UAW's lack of majority representative status among the St. Johns plant employees—establish the unlawful assistance and coercive conduct prohibited by Secs. 8(a)(2) and (1) and 8(b)(1)(A), respectively. This pleading states a claim for a violation of the Act irrespective of whether Dana recognized the UAW as the employees' representative.

[3] See *Ladies Garment Workers v. NLRB (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731, 739 (1961) ("The act made unlawful by § 8(a)(2) is employer support of a minority union.").

injunctive paragraphs, one requiring the employer to cease and desist from recognizing a minority union and the other requiring the employer to cease and desist from giving assistance and support to the Teamsters, "and *negotiating a contract* with any labor organization which does not represent a majority of its employees in the appropriate unit." (Emphasis added.) Most significantly, the Board overruled a prior case, *Julius Resnick*, 86 NLRB 38 (1949), "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." Id. at 864 fn. 4. There was no need to overrule this case if the finding of unlawful assistance in *Majestic Weaving* turned on the fact of recognition of a minority union, as opposed to negotiating a contract with one.

Should there be any doubt about the scope of proscribed assistance, the Board put it to rest in *Wickes Corp.,* 197 NLRB 860 (1972). There, a trial examiner found 8(a)(2) assistance based on three factors: the employer's distribution of authorization cards for the Tri-Trades unions, reaching an agreement with them before employees designated them as their representative, and the contemporaneous interest of another union in organizing the employees. In affirming the 8(a)(2) finding and distinguishing the conduct at issue from that found lawful in another case,[4] the Board found it "unnecessary to go beyond" the second factor, i.e., reaching an agreement with a minority union. In the present case, Dana has undisputedly reached an agreement with the UAW before employees at the St. Johns plant designated it as their representative.

Thus, our precedent supports the proposition, which I would reaffirm and apply here, that premature recognition is not a prerequisite to finding unlawful employer assistance of a minority union. In sum, it is clear that an employer violates Section 8(a)(2) and (1) if it either recognizes a union or negotiates terms and conditions of employment with a union before a majority of unit employees affected by these actions has designated the union as their bargaining representative, and a union violates Section 8(b)(1)(A) by accepting recognition or entering into such an agreement. This is so even when the recognition or the negotiations are conditioned on the union's subsequently obtaining majority employee support. In either instance, the employer has provided the minority union with "a deceptive cloak of authority with which to persuasively elicit additional employee support," thereby interfering with employee free choice.

In the LOA, the Respondents agreed to neutrality and access procedures and to provisions for recognition based on a third party card check to verify the UAW's claim of majority support in a newly organized bargaining unit. The legality of the neutrality and card-check aspects of the LOA is not in dispute here. However, Dana's support for the UAW in the LOA went further. The Respondents agreed to substantive terms and conditions of employment for unrepresented employees covering important bargaining subjects, such as those set forth in article 4.2.4: attendance, classifications, compensation, healthcare, mandatory overtime, team-based work schemes, and work incentives. Furthermore, in advance of any card majority authorizing the UAW to act on behalf of the St. Johns employees, the Respondents mutually agreed that the items of article 4.2.4 *had to be included* in any prospective future collective-bargaining agreement covering these employees.

The extensive assistance rendered by Dana and accepted by the UAW through the LOA exceeded permissible legal limits. The fact that the parties here, unlike those in *Majestic Weaving* and *Wickes,* did not conclude a comprehensive collective-bargaining agreement for unrepresented employees is not dispositive of the legality of the conduct at issue; nor is the fact that their agreement for substantive terms and conditions of employment contemplated further negotiation of final terms. The LOA was a contract. It did more than establish a purely procedural framework for potential future bargaining. By virtue of the LOA, the parties significantly limited the parameters for negotiation of a number of substantive issues. The LOA mandated a contract term of 4-5 years, foreclosed erosion of Dana's current healthcare cost initiatives, and included contract provisions for 8 bargaining subjects, interest arbitration after 6 months of negotiations, and a waiver of strike rights in advance of any final contract. Whether or not there would have to be more bargaining, the Respondents' conclusion of the LOA impermissibly signaled that the UAW already had a say in the determination of substantive terms and conditions of employment for Dana's St. Johns employees, among whom the UAW did not yet have majority support, giving the UAW "'a marked advantage over any other in securing the adherence of employees.'"[5]

[4] *Coamo Knitting Mills*, 150 NLRB 579 (1964).

[5] *Bernhard-Altmann*, 366 U.S. at 738 (quoting *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938)). The Respondents contend that absent formal recognition of the UAW as the exclusive bargaining representative, employees could still choose not to be represented by the UAW and thereby preclude coverage under the LOA. They note that the St. Johns employees in fact made that choice. Of course, the legal question before the Board is not whether employees still had a choice concerning collective-bargaining representation. It is

Apart from an unpersuasive attempt to distinguish *Majestic Weaving* and *Wickes* on factual grounds, my colleagues assert certain policy reasons to support their position. They refer to precedent holding that an employer can lawfully enter into members-only agreements. That precedent can hardly be extended to validate the negotiation of the LOA provisions at issue here, which clearly apply to St. Johns employees regardless of whether they are union members. My colleagues also observe that an employer can lawfully express a preference for a particular union and state that it will bargain if employees choose it as their representative. To hold otherwise would be inconsistent with an employer's rights under Section 8(c) of the Act, but this case involves conduct beyond the scope of protected noncoercive free speech.

There is likewise no merit in my colleagues' argument that applying *Majestic Weaving* to find violations here contradicts or even requires overruling precedent holding that parties may enter into voluntary recognition and neutrality agreements. If the alleged violations were found, the appropriate remedy would be to order the parties to cease and desist from maintaining and applying the provisions of the LOA relating to the terms and conditions of employment for St. Johns employees, leaving intact the procedural voluntary recognition provisions. The General Counsel does not challenge the legality of such provisions in the LOA, which relate exclusively to the alternative private procedure by which a union may legitimately attain majority support and an employer may recognize and bargain with a union after it demonstrates such support. When a union and an employer negotiate over such procedural matters, they are not preemptively determining employees' terms and conditions of employment. In that posture, they have greater freedom to pursue their own self-interests without concern for the statutory rights of employees.

On the other hand, it is worth noting that voluntary recognition agreements typically include access and neutrality provisions, as did the LOA here. A union beneficiary of such an agreement can hardly be viewed as a disadvantaged "stranger" or "outsider" during the organizational process simply because it cannot negotiate substantive terms and conditions for employees before it gains majority support among them and recognition on that basis from the employer.

My colleagues also emphasize that unions and employers might further benefit from knowing in advance of executing a voluntary recognition agreement what the substantive terms of a contract between them would be. I agree. However, the legality of negotiating such terms must turn on the statutory rights of employees, not on the commercial interests of unions and employers. To hold otherwise is to encourage the escalation of top-down organizing, by which unions organize employers first and employees last. Employers already enter into voluntary recognition agreements for a variety of reasons, including the financial savings from avoiding economic warfare and the potential benefits of support from the union when dealing with governmental entities or seeking to enter new markets. They are not likely to be deterred from acting on these self-interests simply because they cannot also determine in advance the precise labor costs of operating with a unionized work force.

By contrast, employees who are aware that their employer has already agreed with a union on contract terms applicable to them may be substantially deterred from exercising their right to decide whether they want to be represented by that union, by another union, or by no union. They would reasonably view the determination of the representation question as a fait accompli. The situation is arguably even worse in the context of the LOA here, whose substantive terms were not disclosed to employees. In such circumstances, employees could reasonably believe they had no choice but to agree to representation by the UAW without even knowing whether they approved or disapproved of the contract terms that union had negotiated for them.

My colleagues emphasize the statutory purpose of achieving industrial peace to justify overruling (or what they characterize as distinguishing) Majestic Weaving. They essentially reason that (a) the process of voluntary recognition of a "legitimate" union always serves that purpose and (b) the process cannot be fully effective unless parties are permitted to negotiate substantive terms and conditions of employment in advance of majority-based recognition. Of course, they readily admit that employer recognition of dominated company unions does not serve industrial peace. It was to prevent such a practice that Section 8(a)(2) was enacted. Ironically, their opinion that prerecognition negotiation of substantive contract terms must be permitted serves to revive that practice in a modern form.[6] One need look no further than dissident criticisms of SEIU "template" agreements with health care and food industry employees to find evidence that the quid pro quo exchange of union

whether the Respondents' execution and maintenance of the LOA assisted a minority union and thereby interfered with and restrained employees in making their choice. Extant precedent clearly supports the conclusion that it did.

[6] My colleagues' opinion also suggests, without so stating, that an employer would violate Sec. 8(a)(5) by refusal to abide by the predetermined contract terms in subsequent bargaining with a union that secures majority support.

concessions on substantive bargaining rights for employer neutrality in organizing campaigns is not universally regarded, even among union advocates, either as furthering industrial stability or as protecting employee choice.[7]

Finally, contrary to arguments made by the judge and the Respondents, I find that the Board's decision in *Kroger* pertaining to the lawfulness of an "additional stores" provision is inapposite. Unlike the clause at issue in *Kroger*, the LOA was not part of any master contract or collective-bargaining agreement in place at any of Dana's represented facilities. Thus, it was not the product of arm's-length bargaining between an employer and the duly designated majority representative of unit employees.

The Respondents argue that under *Kroger* they could have included a provision in their extant master agreement providing for the extension of its terms to unrepresented employees at other facilities, including the St. Johns plant, upon a showing of majority support for the UAW at those facilities.[8] The point is, however, that they did not do so. There is a meaningful difference between the execution and maintenance of the LOA, covering unrepresented employees, by Dana and a minority UAW and the execution of a collective-bargaining agreement between Dana and the UAW as the majority representative of employees covered by that contract. *Kroger,* therefore, offers the Respondents no support.[9]

For all the above reasons, I find that the Respondents' execution and maintenance of the LOA was unlawful. My colleagues' decision to permit substantive contract negotiations as long as the union is not formally recognized as a bargaining representative is contrary to the holding and rationale of *Majestic Weaving* and *Wilkes*, which they lack the power to overrule. It is also completely unnecessary to facilitate the process of establishing collective-bargaining relationships in voluntary recognition situations. Instead, my colleagues facilitate the preemptive practice of top-down organizing of employers by unions, thereby subordinating the statutory rights of employees to the commercial self-interests of the contracting parties. This is a practice that Section 8(a)(2) and (1) and Section 8(b)(1)(A) of the Act were designed to prohibit in the interests of industrial peace. Accordingly, I would reverse the judge and find violations as alleged.

Dated, Washington, D.C. December 6, 2010

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

Sarah Pring Karpinen, Esq., for the General Counsel.
Stanley J. Brown and *Emily J. Christiansen, Esqs. (Hogan & Hartson, LLP),* of McLean, Virginia, for Respondent Dana.
Betsey A. Engel and *Blair Simmons, Esqs.,* of Detroit, Michigan, for Respondent UAW.
William A. Messenger, Esqs. (National Right to Work Legal Defense Foundation), of Springfield, Virginia, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Detroit, Michigan, on February 8, 2005. The charges were filed against Dana Corporation (Dana) and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the UAW) by Gary L. Smeltzer Jr., Joseph Montague, and Kenneth A. Gray (the Charging Parties) on December 16, 2003, January 22, 2004, and January 22, 2004 respectively. The complaint that issued on September 30, 2004, alleges that on August 6, 2003,[1] Dana and the UAW entered into and maintained a Letter of Agreement that set forth the terms and conditions of employment to be negotiated in a collective-bargaining agreement should the UAW obtain majority status as the exclusive collective-bargaining representative of certain of Dana's employees, including those at its facility located in St. Johns, Michigan. The complaint further alleges that the Respondents entered into the Letter of Agreement at a time when the UAW was not the majority collective-bargaining representative at the St. Johns facility. By such conduct, the complaint alleges, Dana violated Section 8(a)(2) and (1) of the National Labor Relations Act (the Act) and the UAW violated Section 8(b)(1)(A). It is noteworthy that the complaint does NOT allege that Dana recognized the UAW as the exclusive collective-bargaining representative for the employees at the St. John facility.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Parties, Dana, and the UAW,[2] I make the following

[7] See, e.g., Kaplan, Esther. "Labor's Growing Pains." *The Nation*. (June 16, 2008); Greenhouse, Steven. "Union Grows, but Leader Faces Criticism." *The New York Times*. (Feb. 29, 2008)

[8] See *Raley's, Inc.,* 336 NLRB 374 (2001), applying *Kroger* to allow agreements covering future organization of currently unrepresented employees at existing stores. I express no opinion whether *Raley's* was correctly decided, but I recognize it as extant law.

[9] There is as well a meaningful difference between this case and a situation involving a potential successor employer's negotiation of terms and conditions of employment with the incumbent bargaining representative of a predecessor's employers prior to the successor's actual commencement of operations. I do not address here whether and to what extent such negotiations are limited by Sec. 8(a)(2).

[1] All dates are in 2003, unless otherwise indicated.

[2] Dana and the UAW each filed a motion to strike Exhs. 1 and 2 that are attached to the Charging Parties' brief. The Charging Parties filed a

FINDING OF FACT

I. JURISDICTION

Dana, a corporation, with several facilities located throughout the United States, including a facility located in St. Johns, Michigan, is engaged in the manufacture and nonretail sale for the automobile industry. During the calendar year 2003 Dana, in conducting its operations described above, purchased and received goods and supplies at its Michigan facility valued in excess of $50,000 from points located outside the State of Michigan. Respondents admit and I find that Dana is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and the UAW is a labor organization within the meaning of Section 2(5).

II. ALLEGED UNFAIR LABOR PRACTICES

Dana makes automotive parts and light- and heavy-duty components for industrial and off highway vehicles. Its three biggest products are frames, axles, and drive shafts. It has about 90 facilities located throughout the United States and Canada and 25–30 in foreign countries. About 300 nonsupervisory employees work at the St. John facility. The UAW has been conducting an organizing campaign there since early 2002, but as of the date of the hearing it had not yet claimed to represent a majority of the employees.

Dana and the UAW have a longstanding collective-bargaining relationship that has resulted in a master agreement that covers three units at two locations and six other contracts covering about 2200–2300 employees. Dana has not and does not recognize the UAW as the collective-bargaining representative for any of the employees at the St. John facility.

On August 6, Dana and the UAW entered into a Letter of Agreement (the Agreement). The agreement is 17 pages plus attachments. It sets forth its purpose as:

> The Company and the Union recognize that dramatic changes in the domestic automotive market has [sic] created new quality, productivity, and competitiveness challenges for the automotive component supplier. Both parties believe these challenges will be more effectively met through a partnership that is more positive, nonadversarial and with constructive attitudes towards each other. The Company and the Union also recognize the significant contribution of the skills and loyalty of the workforce to the success of the Company and the importance of the investment in the skills of the workers. The parties believe that job flexibility is a positive learning experience not a negative assignment. Each recognizes the significant role that the other must play in the success of the Company. To these ends, the Company and the Union hereby pledge renewed energies and commitment to increase productivity, efficiency, and quality of operations and to maximize the competitive capability of the Company achieving a desirable balance of a fair day's work for a fair day's pay.
>
> The Union, the Company and its employees will work together in a spirit of teamwork, cooperation and mutual understanding to improve product quality, productivity, improve working conditions, enhance the opportunities of the work force; and grow the business to increase job security and shareholder value. Both the Company and the Union are committed to increase investment opportunities, increase return on investment and grow the facilities that are competitive and profitable. The Company and the Union believe in the interdependent relationship of quality, operating efficiency and empowerment of people to job security. The Dana Style of management has for many years adhered to these axioms. They are essential to the future of Dana and our workforce.
>
> The Company's recognition of the changing automotive component industry prompted a change in our approach to UAW representation. The Company is optimistic that a partnership with the UAW may assist Dana in achieving new business with our Big 3 customers, which would benefit Dana and its employees.
>
> Employee's freedom of choice is a paramount concern of Dana as well as the UAW. We both believe that membership in a union is a matter of personal choice and acknowledge that if a majority of employees wish to be represented by a union, Dana will recognize that choice. The Union and the Company will not allow anyone to be intimidated or coerced into a decision on this important matter. The parties are also committed to an expeditious procedure for determining majority status.
>
> If a Dana employee chooses to be or not to be represented by the UAW, there will be no reprisals by the UAW or the Company due to their choice.
>
> These mutually beneficial commitments are the basis for a renewed partnership between the Company and the Union. The Company and the Union are individually and collectively committed to the implementation of these fundamentally sound principles and if achieved, the Company, the Union and the employees will benefit.

The Letter of Agreement provides that Dana will adopt a position of neutrality in the event that the UAW sought to represent employees at the facilities covered by the agreement. Respondents pledged not to say anything negative about each other. Among other things, Dana pledged not to do or say anything that implied opposition to unionization. It promised to inform employees, among other things, that it is neutral on the issue of representation by the UAW and that it has a constructive relationship with the UAW

In the Letter of Agreement, Dana also indicated that it would provide the UAW, upon request, with a list of employees and home addresses, among other things. Dana promised to provide access to the UAW to employees during the workday in nonwork areas and to meet with employees on the premises during worktime.

The Letter of Agreement spelled out a procedure for determining the majority status of the UAW. Once the UAW's ma-

---

response defending the attachment of a complaint to its brief. The Charging Parties correctly argue that they are free to cite precedent in their brief and to attach copies as a courtesy to the judge. But a complaint has no precedential value and I therefore grant the motion to strike.

jority status was established, Dana agreed to recognize it and bargain on an expedited schedule. The Letter of Agreement also provides:

> The Union and the Company recognize that the cost of quality healthcare for employees has become a national crisis that jeopardizes the Company's ability to compete in the global markets that Dana serves. Until a national solution to this problem is achieved, the Union and the Company agree that the current situation demands affirmative actions to mitigate the dire affects that the cost of healthcare for the Company's employees and the Union's members has on the Company's ability to compete and make a reasonable return on its investment. Therefore the 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 maximums. The parties are further committed to finding workable solutions to reduce these ever-increasing healthcare costs and mutually agree to further explore other avenues, including legislative initiatives, in the healthcare care arena that could lead to a reduction of these costs for the Company and its employees.

The parties agreed that any collective-bargaining agreements would last for at least 4 years. The Letter of Agreement contained procedures for the parties to use if they were unable to reach a contract on their own; it culminates in interest arbitration.

They agreed:

> [T]hat in labor agreements bargained pursuant to this Letter, the following conditions must be included for the facility to have a reasonable chance to succeed and grow.
>
> Healthcare costs that reflect the competitive reality of the supplier industry and products(s) involved.
>
> 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 Letter of Agreement provides for a procedure to alleged violations of the agreement. It contains no strike—no lockout commitments by the UAW and Dana that are triggered when the UAW requests the list of employees described above.

The Letter of Agreement call for the creation of a national partnership steering committee composed of three members from both parties. The committee is to meet as needed:

> [T]o review and discuss the labor agreements being bargained by the parties with the goal of ensuring that the labor costs of those agreements are not materially harming the financial performance of the facilities that they cover.

It provided that when the phase 1, level 1[3] facilities were organized the committee would meet to review and discuss the overall impact of the labor agreements on these facilities. In order for the UAW to commence organizing the phase 2, level 1 facilities a majority of the committee had to concur that the overall impact of the labor agreements must not have materially harmed the financial performance of those labor agreements; if the committee deadlocks the matter is sent to a neutral third arty for resolution. The Union also agreed not to conduct organizing campaigns at more than seven level 1 facilities at any one time absent mutual agreement.

On August 13, Dana issued a press release announcing the Agreement with the UAW. The release, however, did not describe the details of the Agreement as it noted that the terms of the Agreement were not disclosed by agreement of the parties. In December 2003, the UAW requested a list of employees for the St. John facility, thereby triggering its no-strike obligations in the letter of agreement as described above.

III. ANALYSIS

A. Procedural Dismissal

As indicated above, the complaint does NOT allege that Dana has unlawfully recognized the UAW. Dana, in its brief, states:

> [T]he narrow issue presented in this case is whether the Letter of Agreement entered into by Dana and the [UAW] on August 6, 2003 constitutes an unlawful *pre-recognition* contract in violation of the [Act] [emphasis added].

I agree that the complaint raises only that narrow issue. Yet in his brief, the General Counsel apparently recognizing the need in this case to establish unlawful recognition in order to prevail, argues that Dana's actions amounted to recognition of the UAW. It is important to note that the General Counsel does not argue that the neutrality and assistance provisions of the letter of agreement violate the Act. Rather, the General Counsel argues that Dana and the UAW:

> [N]egotiated substantive terms and conditions of employment, most of which were concessionary in nature, in exchange for card check and neutrality provisions that would expedite the recognition process at the plant. Dana's *granting of exclusive bargaining status* to the UAW when it did not represent a majority of employees at the St. Johns plant constituted interference with its employees' Section 7 rights and unlawful support of the union in violation of Section 8(a)(1) and (2) of the

[3] The Letter of Agreement places Dana's facilities into three levels. Level 1 facilities are generally those which manufactured products for the big 3 automobile manufacturers; 27 facilities are placed at this level. Level 2 are generally those facilities that did not manufacture products for the big 3; 39 facilities are listed at this level. Finally, level 3 were generally those facilities that manufactured or assembled products sold to nonunion foreign owned assembly facilities; four facilities are in this category. Level 1 facilities were further divided into two phases. Fourteen facilities were placed in phase 1 and the rest were left for phase 2. The Letter of Agreement, for the most part, applies only to level 1 facilities.

> Act. The UAW's conduct *in accepting recognition* violated Section 8(b)(1)(A) [emphasis added].

Section 102.15 of the Board's Rules and Regulations requires that the General Counsel issue a complaint that contains "a clear and concise description of the acts which are claimed to constitute unfair labor practices . . . ." The General Counsel did not plead the "act" of recognition as unlawful. The General Counsel has failed to comply with the Board's Rules by failing to plead unlawful recognition in the complaint. It follows that the complaint be dismissed because the General Counsel makes no argument that a violation of the Act has occurred in the absence of unlawful recognition.

B. Dismissal on the merits

In the alternative, I shall address the contentions made the General Counsel in his brief in the event that the Board might find that useful. As the General Counsel correctly points out, it is well settled that an employer violates Section 8(a)(2) and (1) of the Act when it grants recognition to a union at a time when the union does not represent a majority of employees in the recognized unit and a union violates Section 8(b)(1)(A) when it accepts recognition under those circumstances. *Ladies Garment Workers v. NLRB,* 366 U.S. 731 (1961). There is no evidence in this case that Dana verbally or in writing recognized the UAW as the bargaining representative for the St. Johns employees; to the contrary the Letter of Agreement explicitly states that recognition has not been granted and the Respondents have confirmed that throughout these proceedings.

The General Counsel and the Charging Parties argue that the UAW and Dana went beyond discussing tentative contract proposals in the Letter of Agreement and made substantive agreements on the terms and conditions of employment of employees. The General Counsel argues that by virtue of this conduct Dana recognized and bargained with the UAW. Thus, the question becomes whether Dana granted recognition to the UAW by entering into the letter of agreement notwithstanding the disclaimers to the contrary. The letter of agreement does indeed touch upon terms and conditions of employment. In some ways the letter of agreement is quite specific. For example, as set forth above in more detail, the Letter of Agreement commits the parties to negotiate a 4-year collective-bargaining agreement and to use interest arbitration to reach a contract if they are unable to do so.[4] The General Counsel and the Charging Parties argue that the Letter of Agreement also limits the employees' right to strike from the date the UAW requests a list of employees at the plant. But this provision by its terms waives only the UAW's right to call a strike; the employees' Section 7 right to concertedly strike remains intact. Moreover, because I conclude below that the UAW has not been recognized and is not the bargaining representative of the employees it cannot by operation of law waive any rights of the employees. In other ways the Letter of Agreement sets forth general principles that the parties recognize, such as the UAW's commitment that bargaining would not "erode current solutions and concepts" concerning health insurance such as premium sharing, deductibles, and out of pocket expenses and that labor agreements bargained pursuant to the Letter of Agreement must include healthcare costs that reflect the competitive reality of the supplier industry and products(s) involved, 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-percent implementation, continuous improvement, flexible compensation, and mandatory overtime when necessary (after qualified volunteers) to support the customer for the facility to have a reasonable chance to succeed and grow.

But other typical and essential elements of recognition are entirely absent from the Letter of Agreement and the facts of this case. There is no evidence that Dana deals with the UAW concerning employee grievances. Importantly, Dana remains free to make changes in terms and conditions of employees without first notifying and on request bargaining with the UAW. This is utterly at odds with the notion that Dana has recognized the UAW. There is no concept of partial recognition in labor law; there is either recognition or there is not. Nor can it be said that the Letter of Agreement constitutes a collective-bargaining agreement from which recognition can be inferred. The Letter of Agreement does not deal with significant matters such as wages, pensions, grievances and arbitration, vacations, union security, etc. Moreover, in the complaint the General Counsel describes the Letter of Agreement as setting forth terms and conditions "to be negotiated in a collective-bargaining agreement. . . ."

The General Counsel and the Charging Parties rely heavily on *Majestic Weaving Co.,* 147 NLRB 859 (1964), enforcement denied on other grounds 355 F.2d 854 (2d Cir. 1966). In that case, the Board held that the employer violated the Act by recognizing and negotiating a tentative contract with a union when the union did not have majority support of the employees. The contract was conditioned upon the union there gaining majority support from the employees. But I conclude that *Majestic Weaving* is not controlling for at least two reasons. First, the Board there concluded that the employer had recognized the union apart from negotiating a contract; that is the very element missing in this case. Second, the collective-bargaining contract there was complete and whole; the Letter of Agreement in this case is a far cry from a collective-bargaining agreement. The General Counsel notes that in *American Bakeries Co.,* 280 NLRB 1373 1374 fn. 5 (1986), the Board affirmed the judge's decision that included a footnote stating that in *Majestic Weaving*:

> The Board has even held that bargaining prior to the 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 standing at some later time.

But *American Bakeries* involved allegations of unlawful recognition and bargaining and the judge's remarks are classic dicta. Likewise in *SMI of Worcester, Inc.,* 271 NLRB 1508 (1984), the Board found violations based upon recognition and negotiation of a complete collective-bargaining agreement at a time

[4] AS the UAW points out, interest arbitration is not considered a mandatory subject of bargaining. *Sheet Metal Workers Local 59 (Employer Assn.),* 227 NLRB 520 (1976).

when the union did not represent a majority of the employees. The Board specifically found it unnecessary to consider the judge's analysis of any prerecognition bargaining, an analysis that included reference to *Majestic Weaving,* because no such violation was alleged in the complaint. Thus, *SMI* contributes little to the resolution of the issues in this case.

The General Counsel argues that the confidentiality provision in the letter of agreement "would have a tendency to further magnify the impression in the minds of employees that the UAW and Dana had a special insider relationship" and "would necessarily impress upon employees the idea that the UAW had already been recognized by Dana." However, the complaint does not allege that Dana and the UAW independently violated the Act by conveying the impression to employees of unlawful recognition so to that extent I need not resolve that matter. I do note, however, that it is not unlawful for an employer to indicate its preference for a union. *Coamo Knitting Mills,* 150 NLRB 579, 581,595 (1964).

Finally, the General Counsel and the Charging Parties rely on offers of proof made at the hearing. I have again considered the offers and again conclude that proffered evidence is not relevant to the allegations of the complaint.

Because the evidence fails to show that Dana has recognized the UAW for employees at the St. Johns facility, I shall dismiss the complaint.

C. Alternative Dismissal

Dana and the UAW rely on *Kroger Co.,* 219 NLRB 388 (1975), to argue that even if they bargained with each other in reaching the letter of agreement that conduct was lawful. In *Kroger* the Board found lawful provisions in a collective-bargaining contract 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. The Board made clear that the application of the contract was conditioned upon the union receiving majority support at the new facility. Citing *Pall Biomedical Products Corp.,* 331 NLRB 1674, 1675–1676 (2000), enforcement denied on other grounds 275 F. 3d 116 (D.C. Cir. 2002), the General Counsel seeks to distinguish *Kroger* by limiting its holding to instances where an entire existing collective-bargaining agreement is extended to a new unit of employees. There the Board found, among other things, that the employer violated Section 8(a)(5) by failing to adhere to a letter of agreement whereby the employer agreed to recognize the union under certain circumstances at another facility. That case has little bearing on this issue in this case. Here, the UAW and Dana have an existing collective-bargaining relationship with several contracts covering over 2000 employees. The General Counsel concedes:

> If the UAW had turned instead to its represented Dana facilities and bargained with the employer to extend its master or other agreements to the St. Johns employees, its actions would have been lawful.

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. I therefore conclude, in the alternative, that if the Letter of Agreement was the result of bargaining, then such bargaining was lawful under *Kroger* and this case should be dismissed.[5]

Finally, the General Counsel argues that if the letter of agreement is found lawful under *Kroger*:

> unions could just go to employers and offer up concessions at the expense of employees they do not and may never represent. Those negotiations could take place without the employees even knowing about it, and the agreements, as in this case, could be kept confidential. An employee might never know that the union made these concessions in order to win an expedited election or card check.

This, however, is not such a case. Dana and the UAW publicly announced the existence of the Letter of Agreement even if they did not reveal its precise terms. By now all employees who are interested will know of the specific terms of the Letter of Agreement. Employees are free make what they will of the Letter of Agreement in deciding whether or not to support union representation. And what the General Counsel calls concessions might be viewed by some employees as a mature recognition of existing economic realities in the automotive parts industry.

The Charging Parties make a number of arguments not encompassed by the complaint. For example, they argue that a prerecognition agreement violates Section 7 because it "inherently constitutes a threat of reprisal or promise of benefit based on employee exercise of protected rights." They also argue that the UAW will violate its duty of fair representation if and when it is recognized by Dana. The General Counsel controls the complaint and he has made no such allegations. The Charging Parties also argue that "the UAW did not obtain, or even attempt to obtain, *any* benefits or improvement to employees' working conditions in the Letter of Agreement" (emphasis in original). But this argument is beside the point; the employees will decide whether they desire union representation and they will be free to assess letter of agreement in that process.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed.

Dated, Washington D.C., April 8, 2005.

---

[5] The Charging Parties argue that if *Kroger* supersedes *Majestic Weaving* as it interprets the latter case, then *Kroger* should be overruled. I am without authority, of course, to overrule existing precedent.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulation, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.