NLRB Allows Secret-Ballot Decertification Elections Where Employers Recognize Unions Based on "Neutrality and Card-Check" Agreements: *Atherholt v. Dana Corp.* and *Krug v. Metaldyne Corp*., (NLRB)—Staff Attorneys Glenn Taubman and William Messenger.

Two auto parts suppliers, Dana Corporation and Metaldyne Corporation, entered into "neutrality and card-check" agreements with the United Auto Workers (UAW). Under these agreements, the employers promised not to oppose the union, to allow union agents access to the employers' facilities to solicit employee support, to give the union their employees' names and home addresses, to conduct "captive audience speeches" at which union and management personnel urged employees to sign union authorization cards, and to recognize the union as the exclusive bargaining agent without a secret-ballot election conducted by the National Labor Relations Board (NLRB) if a majority of the workers signed such cards. Later, based on card checks, Dana declared the UAW to be the exclusive bargaining agent for its employees in a plant in Upper Sandusky, Ohio, and Metaldyne did so at a plant in St. Marys, Pennsylvania. Employees at those plants promptly circulated petitions for decertification elections and filed them with the NLRB. The Dana petition was signed by 35% of the workforce (only 30% is needed to get an election), and that at Metaldyne was signed by a majority.

NLRB Regional Directors dismissed both petitions without a hearing, applying a Board-created policy barring a decertification election after an employer voluntarily recognizes a union, based on a good faith belief that majority union support exists, until a "reasonable time" to negotiate a collective bargaining agreement has elapsed.

Glenn Taubman and Bill Messenger filed Requests for Review for the employee petitioners, Clarice Atherholt at Dana and Alan Krug and Jeffrey Sample at Metaldyne. These Requests asked the Board to eliminate its "voluntary recognition bar" where recognition is obtained through a neutrality and card-check agreement. On June 7, 2004, a three-member Board majority granted review and solicited *amicus* briefs, over the strenuous dissent of the two Clinton members. In July 2004, the parties' briefs and twenty-five *amicus* briefs were filed. Twelve of the *amicus* briefs supported the employees' position, twelve opposed it, and the NLRB General Counsel's brief urged that the Board adopt only a limited exception to the voluntary recognition bar in card check cases.

On November 5, 2004, Board Chairman Robert Battista told a labor law conference that a decision in these cases was "probably not" likely before spring, because two Members' terms would expire in December 2004. "*Dana* and *Metaldyne* are important cases. I made a decision early on that being important cases, they should be treated by the full board," Battista said. The President did not fill the two vacancies until January 2006.

The Board finally issued a decision in these cases on September 27, 2007. A three-Member majority of the five-Member Board modified the recognition-bar doctrine, overruling several prior precedents. The majority held that decertification elections will be conducted where an employer recognizes a union by card check, if 30 percent or more of the unit employees file a valid petition requesting an election within 45 days of the employer's posting in the workplace of a notice prepared by the Board's Regional Office that the union has been recognized and that the

workers have a right to an election. Moreover, the majority modified current "contract-bar rules" so that a collective-bargaining agreement executed on or after voluntary recognition will not bar a decertification petition "unless notice of recognition has been given and 45 days have passed without a valid petition being filed." The prior rule was that any agreement reached after voluntary recognition would bar decertification for up to three years of the contract's term.

The majority ruled as it did, because "the immediate post-recognition imposition of an election bar does not give sufficient weight to the protection of the statutory rights of affected employees to exercise their choice on collective-bargaining representation," which "is better realized by a secret election than a card check." The majority noted that "card signings are public actions, susceptible to group pressure exerted at the moment of choice," and that "union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options."

Unfortunately, the majority held that these recognition-bar modifications would apply prospectively only, because, it said, "although retroactive application would further employee free choice, it would also destabilize established bargaining relationships." The Board, therefore, affirmed the Regional Directors's dismissals of the petitions in these cases. Because these were representation cases, there was no further appeal for either side.