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### **STACKING THE DECK: PRIVILEGING “EMPLOYER FREE CHOICE” OVER INDUSTRIAL DEMOCRACY IN THE CARD CHECK DEBATE**

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## STACKING THE DECK: PRIVILEGING “EMPLOYER FREE CHOICE” OVER INDUSTRIAL DEMOCRACY IN THE CARD CHECK DEBATE

Raja Raghunath\*

*Language may serve to enlighten a hearer...but the light it sheds will be in some degree clouded, if the hearer is in his power.*

\* \* \*

*Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used... What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.<sup>1</sup>*

### Abstract

“Card check” organizing is the most controversial issue in labor law today, and this article is the first to analyze *Dana Corp.*, the landmark decision on card check that was issued by the National Labor Relations Board in September 2007. The *Dana Corp.* decision represents a fundamental shift in American labor relations, away from safeguarding the rights of employees to collectively bargain, and towards safeguarding employer choice as to whether to engage in collective bargaining at all. The purpose of this article is to call attention to this shift, and to refocus the card-check debate on the fundamental principle of asymmetrical employer power in the workplace. The importance of this principle in understanding the arguments surrounding card check is heightened by the shift in labor relations signaled by the *Dana Corp.* decision, as well as two significant recent developments in the California and Illinois public sector that also have gone unanalyzed.

This article highlights the sharp contradictions between *Dana Corp.* and settled decisions of the Supreme Court regarding employer power and card authorizations, and argues that the principle of asymmetrical employer power, central to the National Labor Relations Act, has been largely lost in the current debate. This article does not evaluate the validity of the arguments for and against card check, but rather seeks to draw attention to what those arguments reveal about the perspectives the parties making them have regarding the system of labor relations as a whole.

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<sup>1</sup> NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941).

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## I. Introduction: The New Prominence of Employer Choice in the Creation of Industrial Democracy

In the American system of labor relations, unions may only represent employees in collective bargaining if they prove they have the support of a majority of the employees they seek to represent. The representation election process created by the National Labor Relations Act (the “NLRA” or the “Act”)<sup>2</sup> in 1935 is the statutory method of making this showing for most private-sector employees. In the last decade, “card check” organizing has become increasingly popular with unions as an alternative to representation elections.<sup>3</sup>

In contrast to political elections, which occur within the framework of our existing democracy, union representation elections are the starting point for industrial democracy.<sup>4</sup> Thus, the battle over elections and election alternatives in the labor-relations world is at bottom a battle over whether collective bargaining should even occur, and the conditions under which its occurrence would be acceptable. The rise of card check has given new grist to those who ask whether American employers should be made to collectively bargain with their workers, and under what circumstances. This article will discuss how *Dana Corp.*,<sup>5</sup> the recent landmark decision on card check by the National Labor Relations Board (the “NLRB” or the “Board”), illustrates a fundamental shift in the framing of American labor relations, away from safeguarding the rights of employees to collectively bargain over their conditions of employment, and towards safeguarding *employer* choice as to whether to engage in such bargaining to begin with. Parallel events occurring at the state level indicate that the considerations that have driven this shift are not uniquely confined to decision-makers at the federal level. This article will also analyze how the history of the Act reveals this shift to be a rejection of the very basic understandings that drove the creation of the labor-relations system in this country in the 20<sup>th</sup> century.

Card check was a relatively common method of organizing workplaces until it was supplanted by Board-run elections in the 1940’s,<sup>6</sup> and it involves employees and union organizers gathering cards signed by employees asking for a union. These card

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<sup>2</sup> 29 U.S.C. §§ 151–169 (2006).

<sup>3</sup> See Michael M. Oswald, *The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations*, 57 DUKE L.J. 691, 697 (2007) (“In fact, card-check agreements have become the rule rather than the exception in organizing campaigns. In 2005, card-check was the genesis for more than 70 percent of newly unionized workers, compared to just 5 percent in the mid-1980s.”).

<sup>4</sup> Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 580-81 (1993) (“The union election inaugurates – it is constitutive of – the system of labor representation. In contrast, the political election is embedded within an already institutionalized system of representative government . . . The union election vests labor’s representative with no sovereignty in the workplace. . . [and] confers *no* unilateral authority on unions . . .”).

<sup>5</sup> (*Dana II*), 351 N.L.R.B. No. 28, 2007 WL 2891099 (Sept. 29, 2007).

<sup>6</sup> The Act was amended in 1947 to make the election mechanism the only means by which a collective bargaining representative would be certified by the Board. Pub. L. No. 80-114, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 151–163 (2006)). See generally Becker, *supra* note 4 at 507-11 (discussing Board’s certification of unions as exclusive bargaining representative based on non-electoral proof of support of majority of employees from 1935-39).

signatures are “checked” against the employer’s records, and recognition of the union is granted or refused by the employer according to the verified wishes of a majority of its employees. In its modern iteration, card check is most often conducted pursuant to private agreements between a union and an employer. The Board does not need to be involved at any point in the process.<sup>7</sup> Authorization cards are still collected in a Board-run election, but are usually checked only for the purpose of showing sufficient employee support for an election.<sup>8</sup>

Many scholars have examined the merits of the criticisms and arguments in favor of card check.<sup>9</sup> This article does not engage in such an analysis. The arguments for and against card check are examined where they reveal the framework within which the parties making those arguments view the role of card check in American labor relations as a whole. Most of the arguments about card check are ostensibly made in furtherance of employee free choice, and so taken literally, none acknowledge that any other frameworks apply, or should apply. For example, parties on all sides of the debate have cited the Supreme Court’s venerable card-authorization decision *NLRB v. Gissel Packing Co.*<sup>10</sup> in support of their arguments. But missing from the debate is an explanation of how card check should interact with the fundamental principle of labor relations that *Gissel Packing* and other decisions of the Court from that era, such as *NLRB v. Exchange Parts Co.*,<sup>11</sup> embody – namely the principle of asymmetrical employer power in the workplace, and what that power means for the creation of industrial democracy.

The Board implied that its decision in *Dana Corp.* took this principle into consideration when it proclaimed that the decision balanced “two important but often competing interests under the [NLRA]: ‘protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other.’”<sup>12</sup> However, the Board’s focus in *Dana Corp.* on the adequacy of employer information as to employee sentiments reveals a different, overarching interest: that of “*employer* free choice” as to whether or not to recognize a collective bargaining representative, and whether such free choice is adequately safeguarded in the card check context.

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<sup>7</sup> Private card-check agreements are enforceable because the language of the Act after 1947 still contemplated that a collective bargaining representative could be *recognized* (as opposed to certified) by means other than an election, which means that an employer could still be subject to liability under the Act for failing to bargain with such a representative. 29 U.S.C. § 159(a) (referring to “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees . . .”).

<sup>8</sup> See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824-25 (2005) (“If the union has received card support from a majority of employees at the establishment, it ordinarily will request that the employer recognize the union and enter into a collective bargaining relationship. . . . Employers, however, usually decline the union’s request and exercise their right to demand a representation election, in which they will urge their employees to vote against unionization . . .”).

<sup>9</sup> See, e.g., Brudney, *supra* note 8; Alexia M. Kulwiec, “*On the Road Again*” (*To Organizing*): *Dana Corp.*, *Metaldyne Corp.*, and the Board’s Attack on Voluntary Recognition Agreements, 21 LAB. LAW. 37 (2005).  
<sup>10</sup> 395 U.S. 575 (1969).

<sup>11</sup> 375 U.S. 405 (1964).

<sup>12</sup> *Dana II*, 2007 WL 2891099 at \*1 (quoting *MV Transportation*, 337 N.L.R.B. 770 (2002)).

The Board's preoccupation with this issue can be seen in the contradictory decisions *Shaw's Supermarkets*<sup>13</sup> and *Wurtland Nursing & Rehabilitation Center*,<sup>14</sup> respectively issued a few months prior to and on the same day as *Dana Corp.* Both of these decisions allowed an employer to withdraw recognition from a bargaining representative and refuse to bargain on the basis of employee-signed slips and a petition, proof falling far short of the authorization cards at issue in *Dana Corp.*<sup>15</sup> The timing of the issuance of these decisions in relation to *Dana Corp.* makes clear that the position of the Board is that employers in this country should not be made to participate in the system of collective bargaining where there is any reason whatsoever for those employers to doubt whether a majority of their employees actually wish for such bargaining to occur.<sup>16</sup> In this way, the Board has come to openly doubt the first principles of American labor relations.<sup>17</sup>

In its many forms, the main argument made against card check is that "union organizers will bully workers into signing pro-union cards."<sup>18</sup> Indeed, it was just such concerns about union coercion, fraud, and misrepresentation that ultimately dominated the reasoning of the Board's *Dana Corp.* opinion.<sup>19</sup> The AFL-CIO protested that such concerns are based "on inaccurate stereotypes from a bygone era"<sup>20</sup> of labor union power, and do not accurately reflect the greatly-diminished modern-day role of unions in our society, as well as the real legal restrictions on their access to unorganized employees.<sup>21</sup> Yet it is precisely the diminished presence of labor in American society that has allowed the criticisms of card check, whatever their degree of accuracy, to resonate with courts

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<sup>13</sup> 350 N.L.R.B. No. 55, 2007 WL 2322536 (Aug. 10, 2007).

<sup>14</sup> 351 N.L.R.B. No. 50, 2007 WL 2963268 (Sept. 29, 2007).

<sup>15</sup> One outraged columnist referred to the date of the *Dana Corp.* and *Wurtland Nursing* decisions as "a date that will live in the Double Standard Hall of Fame." Harold Meyerson, Editorial, *The National Labor Ruination Board*, WASH. POST, Nov. 21, 2007, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/20/AR2007112001646.html>.

<sup>16</sup> See, e.g., Henry H. Drummonds, *The Union Authorization Card Majority Debate*, 58 LAB. L.J. 216, 218 (2007) ("The 'card majority' debate reveals a major cleavage about a fundamental issue in any system of labor relations: how unions should 'win' the right to speak for American workers.").

<sup>17</sup> The former Chairman of the Board, Robert Battista, who was a member of the *Dana Corp.*, *Shaw's Supermarkets*, and *Wurtland Nursing* majorities, has expressed the view that it is appropriate for "different Boards [to] act in different ways" over time, "so long as the Board does not stray from fundamental principles and explains itself." Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 754 (2006). As argued *infra*, no such explanation for the shift represented in *Dana Corp.* was ever given, which has implications for the legitimacy of the Board's decision-making process. See, e.g., *id.* at 759-60 ("If ideology is the explanation for the disregard of precedent, the suspicion that bias and partiality are affecting, if not driving, decisional outcomes grows even stronger.").

<sup>18</sup> Steven Greenhouse, *Labor Seeks Boost from Pro-Union Measure*, N.Y. TIMES, Feb. 23, 2007, at A18, [hereinafter Greenhouse I], available at <http://www.nytimes.com/2007/02/23/us/23labor.html>.

<sup>19</sup> See discussion *infra* Section III(A).

<sup>20</sup> Brief on Review of Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., AFL-CIO, et al. as Amici Curiae at 25, *Dana II*, 2007 WL 2891099.

<sup>21</sup> See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (holding non-employee union organizers validly barred from distributing handbills in employer's parking lot at shopping center). See also Randall J. White, Note, *Union Representation Election Reform: Equal Access and the Excelsior Rule*, 67 IND. L.J. 129 (1991) (discussing standards for union access in organizing campaigns).

and public policy-makers,<sup>22</sup> and has limited the argument over card check to the still-unanswered question of whether or not to even *engage* in the system of collective-bargaining. The American labor movement will never be able to move beyond the Sisyphean task of arguing this point – rather than arguing the merits of its record of representation to specific employees in specific workplaces – so long as the principle of asymmetrical employer power is left out of the card-check debate. This article seeks to refocus the card-check debate on this fundamental principle, and its importance in understanding how the arguments for and against card check should be considered.

## **II. The Debate Over Card Check Organizing**

### **A. The Increasing Preference for Card Check Over Elections**

The American labor movement has made no secret of its serious concerns with the ways in which the Board and the federal courts have shaped the union representation election since passage of the Act during the Great Depression:

If general political elections were run like NLRB elections, only the incumbent office holder, and not the challenger . . . would be able to talk to voters, in person, every single day. The challenger, meanwhile, would have to remain outside the boundaries of the state or district involved and try to meet voters by flagging them down as they drive past. . . . [T]he incumbent, but not the challenger, would have the sole authority and ability to electioneer among the voters at their place of employment, during the entire time they are working. . . . the incumbent could pull them off their jobs and make them attend one-sided electioneering meetings whenever it wanted. The challenger could never, ever make voters come to a meeting, anywhere or anyplace. And the incumbent could fire voters who refused to attend mandatory meetings, or if they tried to leave the meeting, or even if they objected to or questioned what was being said.<sup>23</sup>

Studies have confirmed the popular understanding of labor organizers that the level of employee support for unionization consistently declines between the end of an organizing campaign and the day of a representation election.<sup>24</sup> One study found that, even where 70% or more of employees signed authorization cards asking for a Board-run

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<sup>22</sup> *But see* Jonathan E. Booth, John W. Budd, & Kristen M. Munday, IS THIS YOUR FIRST TIME? ANALYZING U.S. WORKERS' FIRST EXPERIENCES WITH UNIONIZATION 20 (Oct. 25, 2007), <http://ssrn.com/abstract=1025435> (This study of American workers with exposure to unions early in their working life provided “evidence that the nature of a workers’ first exposure to unionization helps predict future unionization, but only modestly.”).

<sup>23</sup> *Strengthening America’s Middle Class Through Employee Free Choice Act: Hearing on H.R. 800 Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education and Labor, 110th Cong. (2007)* [hereinafter *Strengthening America’s Middle Class*] (testimony of Nancy Schiffer, Associate General Counsel, AFL-CIO).

<sup>24</sup> *See, e.g.,* Laura Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court’s Gissel Decision*, 79 NW. U. L. REV. 87, 115 (1984) (discussing a study of elections from 1978-80 in NLRB Region 18 that found that “unions, on the whole, lost 13.3% of their support from the time of card signing to the election”).

representation election, the union won less than two-thirds of those elections.<sup>25</sup> Labor ascribes this decline to employer anti-union campaigning and unfair labor practices; employers offer the contrary interpretation that more employees have simply been informed of the pros and cons of unionization.

Out of an abiding dissatisfaction with this state of affairs, the perceived pro-employer bias of the Board, and frustration with the delays inherent in the adversarial election process,<sup>26</sup> labor in the 1990's returned to card check as its preferred means of organizing, and has as a result experienced modest success in organizing new workplaces.<sup>27</sup> Most card-check organizing campaigns to date have been conducted in the private sector, as "voluntary recognition" campaigns pursuant to private agreements between unions and employers, and do not require the involvement of the Board at any point.<sup>28</sup> In the public sector, beginning in 2001, a number of states have enacted card-check laws for their employees, which for the most part has brought this organizing procedure under the regulatory auspices of the labor relations agencies of those states.

The trend toward card-check recognition has not gone unnoticed, and it has raised a different set of concerns among employers and advocates of management:

The goal of the organizer is to quickly establish a trust relationship with the worker, move from talking about what their job entails to what they would like to change about their job, agitate them by insisting that management won't fix their workplace problems without a union and finally convincing the worker to sign a card.

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As an organizer working under a "card check" system versus an election system, I knew that "card check" gave me the ability to quickly agitate a set of workers into signing cards. I did not have to prove the union's case, answer more informed questions from workers or be held accountable for the service record of my union.<sup>29</sup>

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<sup>25</sup> *Id.* at 118 tbl.9.

<sup>26</sup> See, e.g., *The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights: Joint Hearing Before the Subcomm. on Health, Education, Labor and Pensions of the H. Comm. on Education and Labor and Before the Subcomm. on Employment and Workplace Safety of the S. Comm. on Health, Education, Labor and Pensions, 110th Cong.* (2007) [hereinafter *NRLB: Recent Decisions*] (testimony of Jonathan P. Hiatt, General Counsel, AFL-CIO) ("As a direct result of this Board's failure to protect workers' participation in its representation process, unions have moved away from the NLRA's delay-ridden procedures, with its endless opportunities for employer coercion and interference, in favor of voluntary recognition by employers.").

<sup>27</sup> Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 *INDUS. & LAB. REL. REV.* 42, 51-52 (2001) (discussing a survey of 100 card-check organizing campaigns that found 67.7% overall win rate for unions, as opposed to 45.64% overall win rate in NLRB elections for the period 1983-98).

<sup>28</sup> See Richard M. Reice & Christopher Berner, *Unions Favor Card Check Recognition in Organizing but the NLRB May Rule, or Congress May Legislate, to Restrict This Strategy*, 1/10/2005 *NAT'L L.J.* 17 (2005).

<sup>29</sup> *Strengthening America's Middle Class*, *supra* note 23, at 2 (testimony of Jennifer Jason, former UNITE HERE organizer).



More recently, proponents of card check have attempted to move beyond the passage of state legislation for public-sector employees, and the use of private card check and neutrality agreements for private-sector employees, and have sought to amend the Act itself to allow for this method of organizing.

## **B. The Employee Free Choice Act**

After the 2006 mid-term elections, legislation was introduced by the new Congressional Democratic majorities that seeks to enshrine card check at the federal level. The proposed Employee Free Choice Act (the “EFCA”)<sup>30</sup> would, among other things, amend section 9(c) of the NLRA<sup>31</sup> to allow for the certification of bargaining representatives based on a majority showing of authorization cards, in lieu of a Board-run secret-ballot election.<sup>32</sup> The current version of the EFCA was introduced in both the House of Representatives and Senate on February 5, 2007,<sup>33</sup> and passed by the House by a 241-185 vote on March 1, 2007.<sup>34</sup> The Senate first considered the bill on March 26, 2007,<sup>35</sup> but ultimately rejected cloture on a motion to proceed to consideration of the bill,<sup>36</sup> which means that the EFCA cannot be considered again by the Senate before 2009.<sup>37</sup> Vice President Cheney had in any case indicated that the bill would have been vetoed if it had come before the President,<sup>38</sup> so the EFCA would not have been enacted into law, at minimum, until after the inauguration of a new president in January 2009.

The EFCA was hailed as among “the most important recent developments in the area of union organizing,” and, if passed, as something that could “revolutionize the labor movement in the United States.”<sup>39</sup> One proponent of the EFCA offered a succinct

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<sup>30</sup> H.R. 800, 110th Cong. (2007); S. 1041, 110th Cong. (2007).

<sup>31</sup> 29 U.S.C. § 159(c).

<sup>32</sup> H.R. 800 at § 2(a) (adding section 9(c)(6) to the Act, which states in part that, “[i]f the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating” a particular representative, and no other representative is already certified or recognized, “the Board shall not direct an election but shall certify the individual or labor organization as the representative”).

<sup>33</sup> Employee Free Choice Act, S. 1041, 110th Cong., H.R. 800 (2007). Previous unsuccessful attempts to introduce the bill had occurred in 2003, S. 1925, 108th Cong., H.R. 3619 (2003), in 2005, S. 842, 109th Cong., H.R. 1696 (2005), and in 2006, Right Time to Reinvest in America’s Competitiveness and Knowledge Act, S. 2357, 109th Cong. (2006). Republicans in the House have also attempted on several occasions to introduce an alternative bill to enshrine secret-ballot elections as the sole basis for recognition of a bargaining representative. See Secret Ballot Protection Act, H.R. 4343, 108th Cong. (2004); Employee Free Choice Act, 110th Cong., H2082 (2007) (motion to strike entire EFCA and replace it with Secret Ballot Protection Act).

<sup>34</sup> H.R. H2091.

<sup>35</sup> Employee Free Choice Act, 110th Cong., S3729 (2007).

<sup>36</sup> Employee Free Choice Act, Motion to Proceed, 110th Cong., S8378, S8398 (2007).

<sup>37</sup> Steven Greenhouse, *Clash Nears in the Senate on Legislation Helping Unions Organize*, N.Y. TIMES, June 20, 2007, at A16, available at <http://www.nytimes.com/2007/06/20/washington/20labor.html> (“But Randel K. Johnson, a vice president of the United States Chamber of Commerce, said: ‘The cloture petition will not succeed, and the bill will be pulled. That will be the end of that for two years.’”).

<sup>38</sup> Francine Knowles, *Bill Would Make it Easier for Unions to Organize Workplace*, CHICAGO SUN-TIMES, Mar. 1, 2007, at 48.

<sup>39</sup> William J. Bux & Miranda Tolar, *Houston Janitors and the Evolution of Union Organizing*, 70 TEX. B.J. 426, 428 (2007).

description of the depth of dissatisfaction in organized labor with the Board election process that was motivating the legislation:

The secret ballot is appropriately considered sacred in a democracy, but it requires a democratic context to be meaningful. Today, NLRB-supervised elections often take place in highly coercive environments. As a result, they approximate plebiscites in a dictatorship rather than a functioning democracy. The votes may be counted honestly, but the outcome ratifies the inequitable atmosphere in which the vote occurs.<sup>40</sup>

A former Chairman of the NLRB, on the other hand, warned that, “it would be unwise public policy to abandon government-supervised secret ballot elections in favor of mandatory card check,” and noted the Board and court preference for such elections to determine representation.<sup>41</sup>

Criticism in the media noted the danger of union misconduct and the lack of opportunity for employers to present their case in the card-check process, with warnings from one House Republican that, “union thugs had used physical force to have workers sign pro-union cards,” and from unnamed opponents that “card checks...are conducted so quickly that companies do not have a chance to explain to workers why they should not join unions.”<sup>42</sup> The Vice President for labor policy at the U.S. Chamber of Commerce was quoted as saying that the EFCA was “our No. 1 or No. 2 priority to defeat.”<sup>43</sup>

### **III. Recent Dissatisfaction at the Federal and State Level with Card Check**

The concern that unorganized employees may fall victim, against their better wishes, to union “pressure”<sup>44</sup> has animated a number of different attempts to limit the extent to which unions in the public and private sector may utilize card-check organizing. The most widely-noticed action occurred on September 29, 2007, when the Board issued its decision in *Dana Corp.* In that decision, the Board reversed a 41-year old policy of according unions voluntarily recognized by card check similar protection from decertification<sup>45</sup> to that granted to unions newly-elected under the Act.<sup>46</sup> The Board

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<sup>40</sup> *Strengthening America’s Middle Class*, *supra* note 23, at 2 (testimony of Harley Shaiken, Professor, University of California-Berkeley).

<sup>41</sup> *The Employee Free Choice Act: Restoring Economic Opportunity for Working Families: Hearing on S. 1041 Before the S. Comm. on Health, Education, Labor and Pensions, 110th Cong.* (2007) (testimony of Peter J. Hurtgen, Morgan Lewis & Bockius LLP) (citing, *inter alia*, *Gissel Packing*, 395 U.S. 575, 602 (1969)).

<sup>42</sup> Steven Greenhouse, *Labor Presses for Measure to Ease Unionizing*, N.Y. TIMES, Dec. 8, 2006, at A28 (quoting, respectively, Rep. Charlie Norwood (R-Ga.) and unspecified “[o]pponents of card checks”).

<sup>43</sup> Greenhouse I, *supra* note 18, at A18.

<sup>44</sup> See, e.g., George F. Will, Editorial, *The Gift Of Doing Very Little*, WASHINGTON POST, Dec. 23, 2007, at B07 (“Under [card check], once a majority of workers, pressured one at a time by labor organizers, sign a card, the union is automatically certified as the bargaining agent for all the workers.”).

<sup>45</sup> *Keller Plastics E., Inc.*, 157 N.L.R.B. 583, 587 (1966).

<sup>46</sup> *Brooks v. NLRB*, 348 U.S. 96, 104 (1954); 29 U.S.C. § 159(c)(3) (“No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve month period, a valid election shall have been held.”).

instead created a 45-day window period after recognition, during which employees would be allowed to file a petition for a decertification election against a newly-recognized union, based on a showing of support for such an election of at least 30 percent of employees.<sup>47</sup>

At the state level, opposition to card check came in the particular context of the statutes that gave public employees in certain states the right to organize in this manner. California enacted card-check laws governing many of its public employees in 2002 and 2004. In February 2006, the judicial branch of the state's Public Employment Relations Board ("PERB") issued a decision in *Antelope Valley Health Care District*,<sup>48</sup> in which a significant number of employee cards reading "No Union" were disallowed from a count of card-check authorizations. In response to this decision,<sup>49</sup> the rulemaking branch of the agency attempted in February 2007 to promulgate new regulations designed to give employees a window period after a union requested recognition to revoke their authorization cards. After a wave of comments protesting these proposed regulations, including from the state legislators who had authored the original card-check legislation, PERB modified its proposed amendments in June 2007 to remove the revocation period. More recently, PERB's judicial branch issued an order in *State of California (Department of Personnel Administration)*,<sup>50</sup> where it sharply limited the precedential value of the *Antelope Valley* decision, thereby setting the stage for a future re-litigation of the revocation issue.

Illinois has had a card-check statute for most of its public employees since 2003. In August 2007, the Appellate Court of the state, in *County of DuPage v. Illinois Labor Relations Board*,<sup>51</sup> construed the plain language of one of Illinois' card-check statutes to require a higher level of proof of employee authorization than the state labor relations board's regulations required, and struck the regulations in question.<sup>52</sup> While the decision on its face is nothing more than an exercise in statutory interpretation, in its focus on the appropriate level of proof that must be presented to trigger an obligation on the part of the employer to recognize a showing of majority support for union representation, it echoes the ultimate concerns of both the Board in *Dana Corp.*, and PERB in the promulgation of its ill-fated revocation regulations. The events in these three very different regulatory environments illustrate the extent to which the foundational principles of labor relations have shifted in response to such concerns.

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<sup>47</sup> *Dana II*, 351 N.L.R.B. No. 28, 2007 WL 2891099 at \*2 (Sept. 29, 2007).

<sup>48</sup> PERB Decision No. 1816-M, 30 P.E.R.C. ¶ 60 (Feb. 10, 2006).

<sup>49</sup> Initial Statement of Reasons, Public Employment Relations Board (Feb. 16, 2007), *available at* <http://www.perb.ca.gov/news/docs/14/Initial%20Statement%20of%20Reasons.pdf> (last visited Mar. 6, 2008).

<sup>50</sup> PERB Order No. Ad-367-S (Nov. 6, 2007).

<sup>51</sup> 874 N.E.2d 319 (Ill. App. Ct. 2007), *appeal allowed*, *County of DuPage v. Ill. Labor Relations Bd.*, State Panel (*County of DuPage II*), 879 N.E.2d 930 (Ill. 2007).

<sup>52</sup> *County of DuPage*, 874 N.E.2d at 330.

### A. *Dana Corp.* and the Ephemeral Threat of Union Coercion.

The *Dana Corp.* decision was a long-awaited one. The Board granted consolidated review of the three separate administrative dismissals that comprised the case on June 7, 2004.<sup>53</sup> In each case, the petitioner was an individual employee of either Dana Corporation or Metaldyne Corporation, companies that had separately entered into card check and neutrality agreements with the United Auto Workers union (the “UAW”), pursuant to which they remained neutral during the UAW’s gathering of cards and voluntarily recognized the union as collective bargaining representative upon the UAW’s presentation of a majority of employees’ signed authorization cards.<sup>54</sup>

Twenty-two days after Metaldyne recognized the UAW, and 34 days after Dana Corp. did so, the petitioners, represented by the National Right to Work Legal Defense Foundation, filed petitions for an election to decertify the union, all of which were administratively barred by their respective NLRB regions on the basis of the “recognition bar,”<sup>55</sup> a Board policy that allows voluntarily-recognized unions “a reasonable time to bargain” before a decertification election would be permitted to proceed.<sup>56</sup> The recognition bar period is factually determined and unique to each case,<sup>57</sup> unlike the hard statutory one-year “certification bar” granted to unions certified by a Board-run election,<sup>58</sup> although in practice the periods can be similar.<sup>59</sup>

In a 3-2 decision in 2004, the Board granted review of (but did not rule upon) the petitioners’ challenges to the recognition bar doctrine. The majority granting review stated that the increasing popularity of voluntary recognition, “the varying contexts in which a recognition agreement can be reached,” the Board’s preference for its election process, and the importance of employee rights under the Act “are all factors which warrant a critical look at the issues raised herein.”<sup>60</sup> This sweeping language led many in the labor movement to fear that an absolute abolishment of the recognition bar was forthcoming, a fear that at least some commentators dismissed as grandiose.<sup>61</sup> Nevertheless, this was a fear that was visibly shared by the members of the Board who dissented from the grant of review, warning that abolishment of the recognition bar “would make voluntary recognition meaningless,” as employers would “have no

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<sup>53</sup> *Dana Corp. (Dana I)*, 341 N.L.R.B. 1283 (2004).

<sup>54</sup> *Dana II*, 2007 WL 2891099 at \*1.

<sup>55</sup> *Id.*

<sup>56</sup> *Keller Plastics*, 157 N.L.R.B. at 587.

<sup>57</sup> *See, e.g.*, *MGM Grand Hotel*, 329 N.L.R.B. 464, 465, 467 (1999) (decertification petitions respectively filed 5 months, 10 months, and almost a year after recognition barred because reasonable period had not elapsed for bargaining from scratch of novel contract covering thousands of workers in bargaining unit).

<sup>58</sup> *Brooks*, 348 U.S. at 101, (citing 29 U.S.C. § 159(c)(3)).

<sup>59</sup> *See, e.g.*, *MGM Grand Hotel*, 329 N.L.R.B. at 465, 467.

<sup>60</sup> *Dana I*, 341 N.L.R.B. at 1283.

<sup>61</sup> *See, e.g.*, Charles I. Cohen, Joseph E. Santucci Jr., & Jonathan C. Fritts, *Resisting Its Own Obsolescence: How the National Labor Relations Board is Questioning the Existing Law of Neutrality Agreements*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 521, 530 (2006) (“Perhaps because of this seemingly broad pronouncement, *Dana/Metaldyne Corp.* has been widely misconstrued as calling for a referendum on the legality or enforceability of neutrality and card check agreements in general. The potential impact of this case is not nearly that great.”).

incentive” to recognize or bargain with a union with a card majority “if they know recognition may be subject to immediate second-guessing through a decertification petition.”<sup>62</sup>

As is often the case, no one was completely right but neither were they completely wrong. At the end of a flurry of unfavorable decisions in September 2007 that the AFL-CIO now refers as the “September Massacre,”<sup>63</sup> the Board ruled on the 29<sup>th</sup> of that month (along the same 3-2 lines as its original grant of review) that, while it declined to overrule the recognition bar entirely, it carved out an exception to it that may result in the bar being rendered meaningless, as the dissenting Members of the Board feared. Specifically, the Board ruled that “no election bar will be imposed” until a notice has been posted informing employees of the recognition of a bargaining representative, “and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union,” and the 45-day period actually elapses without any such petition being filed.<sup>64</sup> The decertification petition would need to be supported by only 30 percent of employees in the bargaining unit, the traditional showing of support required for a Board election.<sup>65</sup> Although this had not been the primary relief sought by petitioners, it was their maximum alternative request.<sup>66</sup> In contrast, the General Counsel of the NLRB had asked that the Board create a window period for decertification of no more than 21 days, and that the proof of support threshold be raised to 50 percent, on the reasoning that a longer period, “such as 30 or 60 days,” could provide time for the “active undermining of a union’s valid majority support,” and “essentially continu[e] the organizing campaign.”<sup>67</sup>

The Board explained its holding by stating that “both the Board and courts have long recognized that the freedom of choice guaranteed employees by Section 7 is better realized by a secret election than a card check.”<sup>68</sup> The Board then listed four reasons why it believed that secret ballot elections were superior to card check. Three of these reasons related to the potential for union-related misconduct in the process, namely: 1) “card signings are public actions, susceptible to group pressure exerted at the moment of choice;” 2) “union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees’ representational options;” and 3) “[t]here are no guarantees of comparable safeguards in the voluntary recognition process” to the Board’s power to “invalidate elections affected by improper electioneering tactics.”<sup>69</sup> The fourth reason was that unlike a Board election, which

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<sup>62</sup> *Dana I*, 341 N.L.R.B. at 1287 (Liebman & Walsh, Members, dissenting).

<sup>63</sup> *NRLB: Recent Decisions*, *supra* note 26 (testimony of Jonathan P. Hiatt, General Counsel, AFL-CIO).

<sup>64</sup> *Dana II*, 2007 WL 2891099 at \*2.

<sup>65</sup> *Id.* at \*14. See also NLRB CASEHANDLING MANUAL § 11030.1.

<sup>66</sup> See *Dana I*, 341 N.L.R.B. at 1287 (Liebman & Walsh, Members, dissenting) (“The Petitioners’ alternative argument – that a petition should be allowed within a 30- or 45-day window after recognition – fares no better. Even if petitions are allowed only within the first weeks after recognition, the Employer’s incentive for voluntary recognition is nevertheless destroyed.”).

<sup>67</sup> Brief of the General Counsel as Amici Curiae Supporting Petitioners, at 13-14, *Dana II*, 2007 WL 2891099.

<sup>68</sup> *Dana II*, 2007 WL 2891099 at \*6.

<sup>69</sup> *Id.* at \*7-\*8.

“presents a clear picture of employee voter preference at a single moment,” the card-check process “take[s] place over a protracted period of time, and “[d]uring such an extended period, employees can and do change their minds about union representation.”<sup>70</sup>

It is worth mention that no formal allegations of improper conduct by union organizers or employee adherents were ever made in either the Dana Corp. or Metaldyne situations. In private card check and neutrality agreements, such as the two in this case, the Board has no role in supervising or implementing the agreement. Nevertheless, the petitioners or any other party could have sought relief for the improper use of coercion, misrepresentation, or fraud in the acquisition of signed employee authorization cards by filing an Unfair Labor Practice (a “ULP”) charge with the NLRB, alleging that such conduct had occurred.<sup>71</sup> Petitioners admitted that they “[c]learly...could have filed unfair labor practice charges, but chose not to...They want a quick election, not a lengthy ULP prosecution.”<sup>72</sup> Nor was any evidence of such conduct attested to in any of the declarations submitted in support of Petitioners’ briefs, which made nearly identical boilerplate assertions.<sup>73</sup> This means that the issue of coercive or fraudulent conduct in the acquisition of cards at Dana and Metaldyne was never in the record before the Board.

The dissenting Members of the Board had pointed out in the original order granting review that the petitioners had recourse to, *inter alia*, ULPs under Section 8(a)(2) of the Act, if they believed that their employers had unlawfully recognized a union with minority support.<sup>74</sup> Subsequently, precisely such a charge was filed and dismissed in 2005 on procedural grounds.<sup>75</sup> Nevertheless, the Board in 2007 credited that such conduct could occur (and, impliedly, had occurred), and expressly mentioned the danger of this type of conduct as the basis for providing a 45-day decertification window.

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<sup>70</sup> *Id.* at \*8.

<sup>71</sup> *See, e.g.,* Dale’s Super Valu, Inc., 181 N.L.R.B. 698, 698-99 (1970) (“The Board normally refuses to receive evidence in representation cases that signatures on cards were unlawfully obtained or were otherwise invalid or fraudulent. Such issues may be litigated, however, upon appropriate charges and a complaint in an unfair labor practice proceeding.”) (citation omitted). *See also* NLRB CASEHANDLING MANUAL § 11021.

<sup>72</sup> Joint Brief of Petitioners on the Merits, at 41, *Dana II*, 2007 WL 2891099.

<sup>73</sup> The petitioners’ declarations recited parallel allegations that for the most part lacked any indication that such recitations were based on the personal knowledge of the petitioners. *See* Declaration of Lori Yost at ¶ 7 (“UAW organizers did everything they could to make people sign cards. The UAW put constant pressure on some employees to sign cards by having union organizers bother them at work, visit them repeatedly at their homes, and call them at home. I believe that the UAW organizers also misled many employees as to the purpose and finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back.”); and Declaration of Clarice K. Atherholt in Support of Her Decertification Petition at ¶ 5 (similar text), *Dana II*, attached to *id.*

<sup>74</sup> *Dana I*, 341 N.L.R.B. at 1286.

<sup>75</sup> *Dana Corp. (Dana III)*, 2005 WL 857114, ¶ 14 (N.L.R.B. Div. of Judges, Apr. 11, 2005). At least one party on the other side of the issue saw an improper motive in the petitioners’ failure to file such charges prior to litigating the validity of the recognition bar. *See* Reply Brief of Dana Corporation at 2, *Dana II*, 2007 WL 2891099 (“Doubtless, they choose not to file unfair labor practice charges for the simple reason that no unfair labor practices had occurred. The dismissal of the charges would have totally undermined the entire premise of their argument for abolition of the voluntary recognition bar rule.”).

The majority decision in *Dana Corp.* provoked a strong dissent from the same minority that had dissented from the original grant of review. Noting that, “[i]n any successful organizing campaign, there will likely be a minority of employees who opposed the union,”<sup>76</sup> the dissenters pointed to the majority’s expressed dual goals of honoring employee free choice and promoting stable bargaining relationships and argued that “the majority’s decision subverts both interests: it subjects the will of the majority to that of a 30 percent minority, and destabilizes nascent bargaining relationships.”<sup>77</sup> In ignoring the established principles and policy judgments of the Board that were embodied in the recognition bar, the dissenters lamented that “today’s decision will surely do nothing to dissuade those who are convinced that the Act’s representation process is broken – just the opposite.”<sup>78</sup>

The decision also prompted Democratic members of Congress to hold a joint committee hearing on December 13, 2007, where Senators and Congressmen grilled outgoing Board Chairman Robert Battista on *Dana Corp.* and other controversial recent decisions.<sup>79</sup> Testifying at the hearing, Board Member Liebman, one of the *Dana Corp.* dissenters, noted the stark contradiction between that decision and *Wurtland Nursing & Rehabilitation Center*,<sup>80</sup> issued on the same day:

In *Dana*...employee-signed cards are treated as suspect when they are used to establish union representation. But in *Wurtland*, the Board had no trouble in relying on an employee signed petition to end union representation, without an election, even though employees seemed to be asking precisely for an election.<sup>81</sup>

Liebman remarked that “[t]hat contrast understandably raised questions about the Board’s fairness,”<sup>82</sup> and, in conjunction with another aspect of the *Dana Corp.* holding, “at least suggests a double-standard.”<sup>83</sup>

## **B. The Failure of California’s Proposed Revocation Regulations**

A different debate was meanwhile unfolding in California, in a very different regulatory environment. The state legislature first passed a bill allowing card check recognition for public employees under the jurisdiction of the Meyers-Milias-Brown Act (the “MMBA”),<sup>84</sup> which became effective January 1, 2002.<sup>85</sup> Then, effective January 1,

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<sup>76</sup> *Dana II*, 2007 WL 2891099 at \*20 (Liebman & Walsh, Members, dissenting in part) (citation omitted).

<sup>77</sup> *Id.* at \*16.

<sup>78</sup> *Id.*

<sup>79</sup> Sholnn Freeman, *Labor Board Under Attack: Democratic Critics Allege Anti-Worker Stance*, WASHINGTON POST, Dec. 14, 2007, at D01.

<sup>80</sup> 351 N.L.R.B. No. 50, 2007 WL 2963268 (Sept. 29, 2007).

<sup>81</sup> *NLRB: Recent Decisions*, *supra* note 24, at 11 (statement of Wilma Liebman, Member, NLRB) (emphasis omitted).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 10.

<sup>84</sup> 2001 Cal. Legis. Serv. 790 (A.B. 1281) (West) (amending CAL. GOV’T CODE § 3507.1 (West 2001) to add subsection (c)).

2004, card check recognition was also codified in statute for the state's K-12 and secondary educational employees.<sup>86</sup> None of these bills attracted any significant opposition in the Democratic-dominated state legislature, with only the University of California formally opposing the passage of the secondary-education card check bill.<sup>87</sup>

Regulatory jurisdiction over the processing of elections and the litigation of Unfair Labor Practice charges (“ULPs”) for these educational employees was vested in the state Public Employment Relations Board (“PERB”).<sup>88</sup> PERB had also recently been vested with jurisdiction over any ULPs filed by employees or employers under the MMBA,<sup>89</sup> and this is the mechanism by which the issue of card check ultimately came into its purview in the *Antelope Valley Health Care District*<sup>90</sup> case.

In 2003, Local 399 of the Service Employees International Union (the “SEIU”) was competing with another union to organize a large unit of non-professional employees of a public hospital in the high desert northeast of Los Angeles. The second union withdrew in December 2003, but SEIU continued to collect authorization cards.<sup>91</sup> Concurrently with these two organizing campaigns, a number of employees were soliciting and collecting cards from co-workers with the words “No Union.”<sup>92</sup> In January 2004, the employer sent an email to its employees with instructions on how they could revoke authorization cards they had previously signed. By March 2004, when SEIU formally requested recognition under the MMBA card-check statute, only five employees had followed these revocation procedures.<sup>93</sup>

The cards were tallied by a mediator from the State Mediation and Conciliation Service (the “SMCS”). Out of a total of 1100 eligible employees, the SMCS mediator counted 569 SEIU authorizations, 5 revocations, and 280 “No Union” cards. Of these “No Union” cards, the mediator was able to match 84 of them with employees who had signed SEIU authorization cards.<sup>94</sup> In September 2004, the employer's Board of

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<sup>85</sup> See CAL. GOV'T CODE § 3507.1(c) (stating that a “public agency shall grant exclusive or majority recognition to an employee organization based on a signed petition, authorization cards, or union membership cards showing that a majority of the employees in an appropriate bargaining unit desire the representation,” provided that another representative is not already recognized).

<sup>86</sup> 2003 Cal. Legis. Serv. 190 (S.B. 253) (West) (amending, *inter alia*, CAL. GOV'T CODE §§ 3544.1, .7, which already provided for voluntary recognition); 2003 Cal. Legis. Serv. 216 (A.B. 1230) (West) (amending CAL. GOV'T CODE §§ 3574, 3577).

<sup>87</sup> 2003 Cal. Legis. Serv. 1230 (A.B. 1230) (West). See also Rachel Makabi, Column, *Card Check Bill Could Affect UC, Union Dealings*, DAILY BRUIN, May 15, 2002, available at <http://dailybruin.com/archives/id/19492/> (“Many Republican legislators, in addition to the UC, are against the bill. According to Peter DeMarco, press secretary of the Assembly Republican Caucus, card checks have historically not reflected the real opinions of workers. Card checks make it easier for workers to be intimidated into making a decision, he said.”).

<sup>88</sup> CAL. GOV'T CODE §§ 3541.3, 3563.

<sup>89</sup> 2000 Cal. Legis. Serv. 901 (S.B. 739) (West) (adding CAL. GOV'T CODE § 3509, vesting jurisdiction in PERB to process unfair labor practice charges).

<sup>90</sup> PERB Decision No. 1816-M, 30 P.E.R.C. ¶ 60 (February 10, 2006)

<sup>91</sup> *Id.* at 2.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 3.



Directors voted not to recognize SEIU, on the basis that the 84 “No Union” cards subtracted from the 569 authorizations gave the union less than majority support.<sup>95</sup>

The issue came before an Administrative Law Judge, and ultimately a three-member panel of PERB, on ULPs filed by the union over the employer’s refusal to recognize it and commence bargaining. The panel first expressed frustration that the SMCS mediator had not attempted to determine whether the 84 “No Union” cards were valid revocations, thereby leaving PERB to resolve the ensuing unfair practice charge.<sup>96</sup> It then held, as an issue of first impression, that employees had “the right to revoke” their authorization cards, if such a revocation “clearly demonstrate[d]” their desire not to be represented in collective bargaining.<sup>97</sup> In reaching this standard, the panel relied in part on longstanding NLRB precedent on the issue of revocations, which required that employees “evidence [a] specific intent...to revoke previously signed authorization cards.”<sup>98</sup>

The panel then applied the new standard to hold that the employer had unreasonably withheld recognition from the SEIU, because “the ‘No Union’ slips did not include any specific statement of intent to revoke the SEIU authorization cards,” particularly in light of the facts that the slips were gathered over an extended period of time which included a separate organizing campaign by a competing union,<sup>99</sup> and “the District sanctioned a method for employees to show their intent to no longer be represented by SEIU,” which only five employees had followed.<sup>100</sup>

In the wake of this decision, PERB decided to promulgate regulations in the event that it was required to confront the revocation issue again in the representation matters over which it had jurisdiction.<sup>101</sup> In its Initial Statement of Reasons for the proposed rulemaking, the agency noted that passage of the card check bills

mean that, in many cases, the review of the proof of support constitutes the “election.” This has led to heightened concerns and interest regarding employee awareness of the significance and consequences of the documents that they are asked to sign.<sup>102</sup>

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<sup>95</sup> *Id.* at 4.

<sup>96</sup> *Id.* at 10 (“under Section 3507.1(c), the neutral third party, in this case the SMCS, has the responsibility to verify SEIU’s majority status. It is therefore up to the SMCS to determine whether the 84 ‘No Union’ slips in fact have served to negate the majority formed by the 569 SEIU authorization cards. However, in this matter the SMCS has only provided the parties a tally and apparently has relinquished this responsibility in this matter”).

<sup>97</sup> *Id.* at 11.

<sup>98</sup> *Id.* at 13, *citing* Blue Grass Industries, Inc., 287 N.L.R.B. 274, 290-91 (1987).

<sup>99</sup> The employee who coordinated the collection of the slips testified as to his specific intent to revoke SEIU authorization; however, the panel noted that “[h]is testimony regarding the other 83 employees comprises uncorroborated hearsay.” *Id.* at 12 n.7.

<sup>100</sup> *Id.* at 12.

<sup>101</sup> Initial Statement of Reasons, *supra* note 49.

<sup>102</sup> *Id.*

The most notable new regulation proposed created a window period of 15 days after notice that a petition for recognition had been filed for a bargaining unit of educational employees<sup>103</sup> for employees to file revocations of their previously-signed authorization cards, substantially similar in form to what the panel in *Antelope Valley* had required.<sup>104</sup> The agency also proposed altering its proof of support requirements for card-check recognition petitions to require the petitioner to “clearly demonstrate that the employee understands that an election may not be conducted.”<sup>105</sup>

These proposals elicited a strong reaction. The proportion of opinions on each side of the debate, as represented in these submissions, was distinctly different from the submissions in *Dana Corp.* After the NLRB granted review of that case, twelve “[a]mici briefs or letters opposing the current voluntary recognition bar were submitted,”<sup>106</sup> while ten “[a]mici briefs or letters supporting the current voluntary recognition bar were submitted,”<sup>107</sup> a relatively even split. A total of eighteen separate comments were submitted to PERB in response to its proposed rulemaking, fifteen of which opposed the changes, two of which supported them, and one which did not take a position.<sup>108</sup>

Among the commentators opposing the change were the authors of the state Senate and Assembly bills that respectively established card-check recognition for K-12 and higher education employees. The legislators wrote that they had “never contemplated a revocation process that would permit an employee to revoke an authorization card at any time,”<sup>109</sup> and warned that PERB’s proposed modifications “could result in employers engaging in campaigns to encourage employees to revoke, with just as much pressure, conflict and delay as previously existed during pre-election periods.”<sup>110</sup> The state Senator also opposed the addition of language to cards indicating

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<sup>103</sup> See PERB Regulations 33060(c) and 51035(c) (2007) (parallel provisions setting 15-day period for posting of notice of petition for recognition).

<sup>104</sup> Title 8, Public Employment Relations Board, Text of Proposed Regulations, Proposed Regulations 32705, 61025, 81025, and 91025 (February 16, 2007), available at <http://www.perb.ca.gov/news/docs/14/Proposed%20Text.pdf> (last visited Mar. 6, 2008). The agency gave as its reason that “the employee may not have an opportunity, without the revocation process, to effectuate a change in his or her intent to support the petitioner.” Initial Statement of Reasons, *supra* note 49.

<sup>105</sup> *Id.* at Proposed Regulations 32700(a)(1), 61020(a)(1), 81020(a)(1), and 91020(a)(1). PERB also proposed to eliminate its “prima facie evidence” threshold for allegations of fraud or coercion in the obtaining of authorization cards that would trigger a PERB investigation into such allegations. *Id.* at Proposed Regulations 32700(g), 61020(f), 81020(f), and 91020(f). The agency stated that the revision “intended to make it clear that any such allegations, if supported by evidence, will be investigated and addressed in the support determination finding.” Initial Statement of Reasons, *supra* note 49.

<sup>106</sup> *Dana II*, 351 N.L.R.B. No. 28, 2007 WL 2891099 at \*3 n.8 (Sept. 29, 2007).

<sup>107</sup> *Id.* at \*4 n.9.

<sup>108</sup> Complete list of comments on file with the author.

<sup>109</sup> Letter from Sen. Gilbert Cedillo to Tami R. Bogert, Gen. Counsel, Pub. Empl. Relations Bd. (Apr. 10, 2007), available at <http://www.perb.ca.gov/news/docs/14/State%20Senator%20Cedillo%204-10-07.pdf> (last visited Mar. 6, 2008).

<sup>110</sup> Letter from Assemb. Loni Hancock to Tami R. Bogert, Gen. Counsel, Pub. Empl. Relations Bd. (Apr. 11, 2007), available at <http://www.perb.ca.gov/news/docs/14/Assemblywoman%20Hancock%204-11-07.pdf> (last visited Mar. 6, 2008).

that the signer understood there would be no election, as it “suggests that a card check process is somehow invalid or is inferior to a traditional election.”<sup>111</sup>

These arguments were echoed by other commentators, who argued that a “central aim of the card check laws is the elimination of employer coercion,”<sup>112</sup> but that the proposed revocation period “would give employers a new window of opportunity in which to pressure workers to revoke their support.”<sup>113</sup> It was also noted that the proposed regulations would conflict with settled NLRB<sup>114</sup> precedents requiring that a petitioner demonstrate proof of majority “on a snapshot basis,” rather than make such a showing “over a given period of time, which is what the proposed [revocation] regulations would effectively require.”<sup>115</sup>

Of the two comments submitted in support of the proposed changes, only one spoke to the issues at hand.<sup>116</sup> This comment noted that, “[d]espite the continuing national debate over the desirability of the card-check process, California did not wait for greater consensus to emerge.”<sup>117</sup> It then warned that, “[w]ithout the ability to revoke an authorization card, an employee would have no opportunity, as he or she would in an election, to manifest a change of heart over union support.”<sup>118</sup> Accordingly, the revocation period would allow for “a true picture of union support” before recognition is granted, “and serves as an effective and efficient means of checking union misconduct during an organizing campaign.”<sup>119</sup>

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<sup>111</sup> Letter from Sen. Cedillo, *supra* note 109.

<sup>112</sup> Letter from Rebekah B. Evenson, Altshuler Berzon LLP, on behalf of SEIU Cal. State Council, to Tami R. Bogert, Gen. Counsel (Apr. 6, 2007), *available at* <http://www.perb.ca.gov/news/docs/14/SEIU%20State%20Council%204-6-07.pdf> (last visited Mar. 6, 2008).

<sup>113</sup> Letter from Caitlin Vega, Cal. Labor Fed’n, to Tami R. Bogert, Gen. Counsel (Apr. 9, 2007), *available at* <http://www.perb.ca.gov/news/docs/14/California%20Labor%20Federation%204-9-07.pdf> (last visited Mar. 6, 2008).

<sup>114</sup> The state labor relations agencies in both California and Illinois take cognizance of NLRB doctrines where they construe provisions of the NLRA that are similar to state labor law. *See, e.g.*, County of Imperial, PERB Decision No. 1916-M, 31 P.E.R.C. ¶ 120, at 18 n.10 (June 28, 2007); and *Am. Fed’n of State, County & Mun. Employees, AFL-CIO v. State Labor Relations Bd.*, 546 N.E.2d 687, 690-91 (Ill. App. Ct. 1989).

<sup>115</sup> Letter from Ari Krantz, Leonard Carder LLP, on behalf of various union locals, to Tami R. Bogert, Gen. Counsel (Apr. 5, 2007), *available at* <http://www.perb.ca.gov/news/docs/14/AFSCME,%20IFPTE,%20Local%201%20&%20UPTE%204-4-2007.pdf> (last visited Mar. 6, 2008). This is ironically one of the arguments commonly made against card check and in favor of elections. *See, e.g., Dana II*, 2007 WL 2891099 at \*8 (“[A] Board election presents a clear picture of employee voter preference at a single moment. On the other hand, card signings take place over a protracted period of time.”).

<sup>116</sup> The other comment, from a unionized state employee, discussed the “pressure tactics” of incumbent unions in decertification situations. Statement of Ira Eisenberg in Support of Proposed Rules Changes (Apr. 12, 2007), *available at* <http://www.perb.ca.gov/news/docs/14/Eisenberg%204-6-07.pdf> (last visited Mar. 6, 2008).

<sup>117</sup> Letter from Renne Sloan Holtzman Sakai LLP at 1 (Aug. 10, 2007), *available at* <http://www.perb.ca.gov/news/docs/14/Renne%20Sloan%20-%20208-10-2007.pdf> (last visited Mar. 6, 2008).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

PERB ultimately decided to withdraw its proposed regulations establishing a revocation period and requiring a showing of employee understanding that there may not be an election,<sup>120</sup> explaining that it needed “to continue to discuss and explore possible changes in the area of proof of support,” and “further research questions raised relative to the adoption of regulations concerning revocation of proof of support.”<sup>121</sup>

More recently, the issue of revocations again came before a PERB panel, in the decertification context and under an entirely different statute than the MMBA and the educational employment statutes, in the *State of California (Department of Personnel Administration)* case.<sup>122</sup> The panel took this opportunity to narrowly construe *Antelope Valley*'s holding that employees had the right to revoke authorization cards, limiting the precedential value of the decision to “MMBA card checks in which the interested parties do not dispute the right to revoke or in effect by their acts acquiesce to such a right.”<sup>123</sup> The question of whether most California employees even have the right to revoke card check authorizations therefore remains entirely unsettled.

### C. The Presumed Intent of the Illinois Card-Check Law.

Around the same time, in Illinois, the question of the reliability of card check was introduced by an appellate court into its review of the regulations of one of the state's labor relations agencies. Illinois amended its Public Labor Relations Act and Educational Labor Relations Act in 2003 to allow for card-check recognition,<sup>124</sup> again, like California, without significant legislative opposition.<sup>125</sup> However, many of the same concerns that have been expressed in other contexts about card check were raised in regard to this bill on the state House and Senate floors, including: whether “the company may be able to present their side of the collective bargaining issue;” the fact that “some people have been known to change their mind;”<sup>126</sup> that the bill detracted from “the sanctity of a secret

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<sup>120</sup> The agency also retained the “prima facie” evidence standard for allegations of misconduct in acquiring authorization cards. Notice of Proposed Modifications, Public Employment Relations Board (June 12, 2007), available at <http://www.perb.ca.gov/news/docs/14/Notice%20of%20Proposed%20Modifications.pdf> (last visited Mar. 6, 2008).

<sup>121</sup> Final Statement of Reasons, *supra* note 120.

<sup>122</sup> PERB Order No. Ad-367-S (Nov. 6, 2007).

<sup>123</sup> *Id.* at 11.

<sup>124</sup> 2003 Ill. Legis. Serv. 93-444 (H.B. 3396) (West) (adding, *inter alia*, new subsection (a-5) to 5 ILL. COMP. STAT. § 315/9 and new subsection (c-5) to 115 ILL. COMP. STAT. § 5/7).

<sup>125</sup> See, e.g., T. Shawn Taylor, *Labor's Springfield Friends Come Through; Blagojevich Leads Legislative Charge*, CHICAGO TRIBUNE, Aug. 31, 2003, at C1 (“Among the legislative victories for unions is a law that allows public and education employees to form unions if a majority sign cards giving their consent. The so-called ‘card check’ law will help unions forgo the long election process that union leaders have argued gives employers time to thwart organizing efforts with intimidation tactics.”).

<sup>126</sup> Transcript, 93rd General Assembly, Regular Session, 38th Legislative Day, Illinois House of Representatives (March 31, 2003), reprinted at II. H.R. Tran. 2003 Reg. Sess. No. 38 (comments of Rep. Black).

ballot;”<sup>127</sup> and that it “[took] away the right of the person to make a vote whether or not they want to organize...free of pressure.”<sup>128</sup>

On August 24, 2007, the Appellate Court of Illinois for the Second District issued a decision in *County of DuPage v. Illinois Labor Relations Board*,<sup>129</sup> wherein it construed the language of the card-check statute, specifically the portion of it that directs the Illinois Labor Relations Board (the “ILRB”) to designate a bargaining representative “on the basis of dues deduction authorization and other evidence.”<sup>130</sup> In *County of DuPage*, the Metropolitan Alliance of Police (the “MAP”), a union which had twice before been rejected in a secret-ballot vote to represent a unit of county sheriff’s deputies,<sup>131</sup> filed a card-check representation petition for these employees after passage of Illinois’s card-check statute. The MAP won this card-check count, but its certification as bargaining representative was overturned on appeal.<sup>132</sup> Another petition was filed by the union, the MAP once again won the card-check count, and the ILRB’s certification of the union was again appealed.<sup>133</sup> One of the bases for the county’s appeal was that the MAP had submitted only authorization cards as evidence of its majority support, pursuant to the ILRB’s regulations, which allowed that proof of support could “consist of authorization cards, petitions, or any other evidence.”<sup>134</sup> The court struck the ILRB regulation in question because of its “conflict with the plain requirements of section 9(a-5),” namely that there must be additional “other evidence” in addition to the authorization cards that the union had submitted.<sup>135</sup>

The ILRB and the union argued that the “and” in question was disjunctive, not conjunctive, and made a number of textual arguments in support of this position. They pointed out that the usage of “and” in the subsequent sentence of the statute (relating to such evidence being obtained by fraud or coercion) was clearly disjunctive. The court disagreed, although it conceded that “[b]oth parties’ constructions of section 9(a-5) are reasonable.”<sup>136</sup> It then distinguished the fraud-or-coercion sentence based on the placement of a comma before the “and,” which it held made the usage disjunctive.<sup>137</sup> The court then contrasted the required showing of interest for a secret-ballot election (a

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<sup>127</sup> Transcript, 93rd General Assembly, Regular Session, 38th Legislative Day, Illinois Senate (May 13, 2003), *reprinted at* Il. S. Tran. 2003 Reg. Sess. No. 44 (comments of Sen. Roskam).

<sup>128</sup> Transcript, 93rd General Assembly, Regular Session, 50th Legislative Day, Illinois Senate (May 21, 2003), *reprinted at* Il. S. Tran. 2003 Reg. Sess. No. 50 (comments of Sen. Righter).

<sup>129</sup> 874 N.E.2d 319.

<sup>130</sup> 5 ILL. COMP. STAT. § 315/9(a-5) (2007) (emphasis added). The card-check amendment to the Illinois Educational Labor Relations Act contains identical language. *See* 115 ILL. COMP. STAT. § 5/7(c-5). This language was apparently taken verbatim from a similar New York statute. Transcript, 38<sup>th</sup> Legislative Day, Illinois House of Representatives, *supra* note 126 (comments of Rep. McKeon). *See also* 4 N.Y. COMP. CODES R. & REGS. § 201.9(g)(1) (choice of employees as to bargaining representative “may be ascertained...on the basis of dues deduction authorizations and other evidence instead of by an election”). However, it does not appear that this question of statutory interpretation has ever been litigated in that state.

<sup>131</sup> *County of DuPage*, 874 N.E.2d 319, 322 (Ill. App. Ct. 2007).

<sup>132</sup> *Id.* at 323.

<sup>133</sup> *Id.* at 323-24.

<sup>134</sup> 80 ILL. ADMIN. CODE § 1210.80(d)(2)(A) (2004) (emphasis added).

<sup>135</sup> *County of DuPage*, 874 N.E.2d at 330.

<sup>136</sup> *Id.* at 326-27.

<sup>137</sup> *Id.* at 327-28.

“petition”)<sup>138</sup> with the language of the card check statute, looking at the legislative history to conclude that

the legislature intended and understood that the showing of majority interest pursuant to section 9(a-5) would be an equivalent to the election process. It makes sense, then, that the majority interest showing requires a specific evidentiary burden while the showing of interest in the election provision, which has been held to be preliminary and not subject to judicial review, does not specify an evidentiary burden.<sup>139</sup>

The decision is now on appeal to the Supreme Court of Illinois.<sup>140</sup> Here, once again, the concerns expressed by the Board and PERB can be seen in the appellate court’s approach to this relatively narrow question of statutory construction. Its reading of the legislative history of the card-check statute led the Appellate Court of Illinois to impute to the legislature an intent to require a higher evidentiary burden for showing employee support through card check, based most notably on the fact that such a showing would not be corroborated by a secret-ballot election.

#### **IV. The Asymmetry of Workplace Power: A Founding Principle of the NLRA**

The common thread running through the federal, California, and Illinois situations is a lack of comfort with the reliability and accuracy of authorization cards in demonstrating employee support to an employer. Implicit, and oftentimes explicit, in this concern is the specter of union coercion, misconduct, intimidation, and fraud. This lack of comfort on the part of courts and agencies has produced a range of responses, from hesitation to vehement opposition, and have all resulted in the enactment (or, in the case of California, the attempted enactment) of procedural constraints on the process of gaining card-check recognition.

In coming to these results, the courts and agencies appear to have accepted at face value, without any significant factual inquiry or record evidence, the necessary premise that the *potential* for union misconduct was a serious enough threat to employee free choice to merit the actions taken. Although the argument that existing mechanisms could effectively address any such fraud or coercion issues was available, and was made, in every situation, these arguments were not addressed. The potential for *employer* misconduct in the card-check process was similarly not addressed, despite the longstanding recognition in Board jurisprudence that conduct in solicitation of cards that indicates an alignment with the employer’s position has a greater potential to be coercive.<sup>141</sup>

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<sup>138</sup> 5 ILL. COMP. STAT. § 315/9(a)(1).

<sup>139</sup> *County of DuPage*, 874 N.E.2d at 329 (citation omitted).

<sup>140</sup> *County of DuPage II*, 879 N.E.2d 930 (Ill. 2007).

<sup>141</sup> *See, e.g.*, *Millsboro Nursing & Rehab. Ctr.*, 327 N.L.R.B. 879, 880 (1999) (“[I]n the cases cited by the dissent, both the employer and the supervisor opposed the union. Therefore, an employee solicited by a supervisor to revoke his authorization card would readily perceive the supervisor as speaking and acting on behalf of higher management. Thus, the two situations vary greatly in their coercive tendencies. . . .”).

Judicial skepticism about the accuracy of card check is certainly not new.<sup>142</sup> Concern among legislators can be seen as early as the time of consideration of the original NLRA, the Wagner Act,<sup>143</sup> in 1934 and '35, when “[p]artisans of management were especially alarmed,” about the language of section 9(c) of the Act, which allowed the NLRB to determine representation either through a secret ballot or “any other suitable method.”<sup>144</sup> These critics

alleg[ed] a threat to the democratic process, testifying that only a secret ballot was “fair” and “free from union coercion.” According to the Vice President of General Motors, “The rule of ‘and other suitable method’ is entirely too vague to be workable and is subject to grave abuse.”<sup>145</sup>

Coercion, misrepresentation, and fraud by unions or union adherents in the distribution and collection of authorization cards certainly occurs, and examples can be found throughout the jurisprudence of the Board.<sup>146</sup> These arguments have had such a longstanding place in the historical debate that they were discussed and ruled upon by the Supreme Court in *NLRB v. Gissel Packing Co.*,<sup>147</sup> thirty-five years after the beginning of the session of Congress during which the NLRA was first passed. It was thirty-five years after *Gissel Packing* that the Board granted review in *Dana Corp.*, as if the answer to this particular question has a half-life in the policy-making realm that had expired once again.

The Chief Justice’s opinion in *Gissel Packing* so thoroughly previewed and discussed the present-day arguments regarding card check, as discussed *supra*, that both the majority and dissent in the *Dana Corp.* decision cite to that opinion, for different propositions.<sup>148</sup> *Gissel Packing* also appeared on both sides of the briefing in *Dana Corp.*, and in the EFCA and PERB policy debates.<sup>149</sup> The primary holding of *Gissel Packing*, for which it is most often cited and which created a new class of Board remedy, the “*Gissel* bargaining order,”<sup>150</sup> was that union authorization cards “are reliable enough to support a bargaining order where a fair election probably could not have been held, or

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<sup>142</sup> See, e.g., *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 565 (4th Cir. 1967) (“It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a ‘card check,’ unless it were an employer’s request for an open show of hands.”), *overruled by* *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 590 (1969).

<sup>143</sup> Pub. L. No. 74-372, 49 Stat. 449 (1935).

<sup>144</sup> Becker, *supra* note 4, at 505-06.

<sup>145</sup> *Id.* at 506.

<sup>146</sup> See Brief of the HR Policy Association as Amicus Curiae in Support of Petitioners, at Appx. A, *Dana II*, 351 N.L.R.B. No. 28, 2007 WL 2891099 (Sept. 29, 2007) (listing 113 “[c]ases illustrating the long history of using deception, coercion and other abuses in the solicitation of authorization cards”). *But see* *Strengthening America’s Middle Class*, *supra* note 23, at 9 (testimony of Nancy Schiffer, Assoc. Gen. Counsel, AFL-CIO) (arguing that “only 42 [of those] decisions since the Act’s inception . . . actually found coercion, fraud or misrepresentation in the signing of union authorization forms”).

<sup>147</sup> 395 U.S. 575.

<sup>148</sup> See *supra* notes 68 and 217.

<sup>149</sup> See Brief of the General Counsel, *supra* note 67 at 3 n.3; Joint Brief of Petitioners, *supra* note 72, at 24; *The Employee Free Choice Act: Restoring Economic Opportunity for Working Families*, *supra* note 41 (testimony of Peter J. Hurtgen); and Letter from Caitlin Vega, Cal. Labor Fed’n, *supra* note 113.

<sup>150</sup> See generally Fred Feinstein, General Counsel, NLRB, *Guideline Memorandum Concerning Gissel*, Memorandum GC 99-08 (Nov. 10, 1999) (discussing standards for imposition of *Gissel* bargaining order).

where an election that was held was in fact set aside,” due to Unfair Labor Practices committed by the employer.<sup>151</sup> There were a number of important holdings made by the Court that supported this determination, and which address most of the arguments in the current debate, as discussed in detail *infra*.

Rarely cited in comparison to this well-known portion of the *Gissel Packing* decision is the rationale expressed in section IV of the opinion, which dealt with the final and least meritorious of the petitioners’ claims in the four consolidated appeals for which certiorari had been granted.<sup>152</sup> Chief Justice Warren, in rejecting the petitioners’ challenge to the Board’s regulation of employer speech during a union representation campaign under the First Amendment,<sup>153</sup> sketched the parameters of the intellectual framework which had guided the Court that day. It is the inversion – or the absence – of such a framework in the policymaking minds of today that is part of the reason for the starkly contrary decisions that have been reached of late.

The Court first made clear “that an employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board,” noting that the 1947 Taft-Hartley amendments to the NLRA<sup>154</sup> “implement[ed] the First Amendment,” by declaring that non-coercive employer speech cannot alone constitute an Unfair Labor Practice.<sup>155</sup> The Court then warned, however, that “an employer’s rights cannot outweigh the equal rights of the employees to associate freely,” as those rights were embodied in the NLRA.<sup>156</sup>

And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.<sup>157</sup>

By invoking this asymmetry of power and the effect that it has on otherwise permissible speech made in the workplace, the Court brought its decision in *Gissel Packing* into line with one of the dominant analytical frameworks of labor law jurisprudence in that era. The preamble to the NLRA<sup>158</sup> refers to the “inequality of

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<sup>151</sup> *Gissel Packing*, 395 U.S. at 601 n.18. The case is generally cited by opponents of card-check organizing for the proposition that “secret elections are generally the most satisfactory – indeed the preferred – method of ascertaining whether a union has majority support.” *Id.* at 602. *See* Joint Brief of Petitioners, *supra* note 72, at 24.

<sup>152</sup> *See Gissel Packing*, 395 U.S. at 579-80 (discussing the procedural posture of the various appeals).

<sup>153</sup> *Id.* at 616.

<sup>154</sup> Pub. L. No. 80-114, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 151–163 (2006)).

<sup>155</sup> *Gissel Packing*, 395 U.S. at 617 (citing 29 U.S.C. § 158(c)) (“The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.”).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> As the predecessor to every state’s public-sector labor relations statutes, the NLRA has had a great deal of influence on the goals and application of these statutes. *See, e.g.*, Douglas E. Ray, Jennifer Gallagher, &



bargaining power” between workers and employers as the reason for the statutory enactment of collective bargaining rights.<sup>159</sup> One commentator, in analyzing the historical context in which the NLRA’s election machinery was created, likened the creation of industrial democracy to “a new variant of [the] problem at the heart of liberal political theory – the problem of reconciling the dependence of wage earners with the personal independence deemed essential to citizenship.”<sup>160</sup>

In regulating election conduct by all parties under the Act, the Board and the courts initially remained mindful of these dynamics in their approaches,<sup>161</sup> and did so not only in relation to employer speech, as in *Gissel Packing*, but the conduct of employers as well. Supreme Court Justice Harlan memorably referred to the actions of employers as the “fist in the velvet glove,” in his majority opinion in *NLRB v. Exchange Parts*,<sup>162</sup> which held that the unconditional grant of benefits by an employer to employees, while a representation election was pending, was a violation of those employees’ self-organization rights under the NLRA. The opinion explained that, “Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.”<sup>163</sup>

In *Exchange Parts*, the employer announced to its employees, a few days prior to being notified by the union that an organizing campaign was underway, that they would receive an additional “floating holiday” the following year.<sup>164</sup> Six days after the Board issued an election order, the employer held a dinner for the employees, where they voted on whether they would take the extra “floating holiday” on their birthdays, and the employer’s Vice President and General Manager gave a speech about the upcoming election where he, among other things, “pointed out the benefits obtained by the employees without a union.”<sup>165</sup> A little over a week later, the employer sent a letter to employees listing all the benefits it provided to employees, including the new “floating

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Nancy A. Butler, *Regulating Union Representation Election Campaign Tactics: A Comparative Study of Private and Public Sector Approaches*, 66 NEB. L. REV. 532, 532-33 (1987) (“Because the National Labor Relations Act...far predates the collective bargaining laws of the approximately forty states authorizing public employee collective bargaining, it is not surprising that it has substantially influenced public employee labor law.”). See also *Admin. Office of the Ill. Cts. v. State and Mun. Teamsters, Chauffeurs and Helpers Union, Local 726*, 657 N.E.2d 972, 982 (Ill. 1995) (“The model of governance found in the Illinois Public Labor Relations Act has been borrowed from private sector bargaining. It must be recognized, however, that large differences exist between public and private employers.”).

<sup>159</sup> 29 U.S.C. § 151 (referring to the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association”).

<sup>160</sup> Becker, *supra* note 4 at 499.

<sup>161</sup> *But see id.* (“The political analogy facilitated a style of argument that presumed the equality of employers and unions as players in the union election process.”).

<sup>162</sup> 375 U.S. 405, 409 (1964). The Chief Justice had also contributed to this line of jurisprudence. See *NLRB v. United Steelworkers of America*, 357 U.S. 357, 368 (1958) (“Employees during working hours are the classic captive audience.”).

<sup>163</sup> *Exchange Parts*, 375 U.S. at 409. The opinion expressly did not rely on any “words of [the employer] dissociated from its conduct,” and cited to the Taft-Hartley-introduced “employer free speech” provision at § 9(c) of the Act as the reason for this. *Id.* at 409 n.3 (citing 29 U.S.C. § 158(c)).

<sup>164</sup> *Exchange Parts*, 375 U.S. at 406.

<sup>165</sup> *Id.* at 406-07.

holiday” and two additional, previously-unannounced benefits. It also pointed out in this letter “the fact that it is the Company that puts things in your envelope,” and that “[t]he Union can’t put any of those things in your envelope – only the Company can do that.”<sup>166</sup> The Court held that the Act

prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect.<sup>167</sup>

The Court reached this conclusion despite the fact that “in this case the questioned conduct stood in isolation” of any other unlawful conduct by the employer, holding that “when as here the motive [behind a grant of benefits while an election is pending] is otherwise established, an employer is not free to violate § 8(a)(1) [of the Act] by conferring benefits simply because it refrains from other, more obvious violations.”<sup>168</sup>

This understanding of the ways in which employer speech and conduct in particular contexts are received by employees was probably expressed in its most florid form by Judge Learned Hand in the early years of the Wagner Act, when he noted that the words of an employer in the workplace are not “pebbles in alien juxtaposition,” heard and understood in isolation from the setting in which they were spoken.<sup>169</sup> Based on this understanding, the Board for the most part in its early years applied analytical presumptions to the potential misconduct of employers,<sup>170</sup> the implications of whose actions to employees were not always amenable to factual inquiry. Even after passage of the Taft-Hartley amendments in 1947, which were broadly intended to regulate union conduct under the Act in a like manner to employer conduct,<sup>171</sup> the Board, with the approval of the Supreme Court, applied the Act’s prohibitions on union misconduct in a

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<sup>166</sup> *Id.* at 407.

<sup>167</sup> *Id.* at 409.

<sup>168</sup> *Id.* at 410. The line of jurisprudence that has come out of this decision has been the target of some deserved criticism. See, e.g., Julius G. Getman, Stephen B. Goldberg, & Jeanne B. Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465, 1477 (1975) (“The theory on which promises or grants of benefits are assumed to interfere with rational decisionmaking has never been fully articulated by the Board. . . . The Board has in some cases, by citing *Exchange Parts*, suggested a wholly different explanation for treating grants and promises of benefits as illegal.”); and Charles C. Jackson & Jeffrey S. Heller, *Promises and Grants of Benefits Under the National Labor Relations Act*, 131 U. PA. L. REV. 1, 24-25 (1982) (“*Exchange Parts* also has the unintended result of encouraging campaign gamesmanship. Subtle techniques of persuasion are encouraged in place of free and open disclosure of what proponents may be willing to do for employees.”).

<sup>169</sup> *NLRB v. Federbush Co.*, 121 F.2d at 957.

<sup>170</sup> See, e.g., *American Tube Bending Co.*, 44 N.L.R.B. 121, 133 (1942) (rejecting notion that employer was candidate in representation election and holding unlawful employer campaign speech that “attained a force stronger than [its] intrinsic connotation, and beyond that of persuasion . . .”). But see generally Becker, *supra* note 4 at 532-46 (discussing eventual disfavor of *American Tube* and the trend towards application of the political election model to labor representation election jurisprudence).

<sup>171</sup> See generally Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1533-35 (2002) (discussing the context in which Taft-Hartley “amended section 7 to affirm employees’ right to refrain from concerned activity, and added section 8(b), which prohibited unions from coercing or discriminating against employees, from refusing to bargain, and from engaging in secondary boycotts . . .”).

far more limited manner, citing the differing restrictions on employer and union conduct contained in the Act.<sup>172</sup>

One of the Board's responses to the Taft-Hartley amendments was to create in 1948<sup>173</sup> the "laboratory conditions" doctrine as its intellectual framework for the regulation of representation elections, and this framework still governs the Board today. The laboratory conditions standard derives from the Board's belief that "it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."<sup>174</sup> In such a setting, "[c]onduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice," and "the experiment must be conducted over again."<sup>175</sup> The standard's express analogy to the scientific method and its accompanying emphasis on the circumstances and theoretical ramifications of conduct rather than their actual effects, has provided a potent means for the Board to disregard or abandon many of the foundational presumptions of the Act, such as the asymmetrical effect of an employer's speech and conduct in comparison to an employee's.<sup>176</sup> By the 1970's, the Board had begun to equate the presumptive effects of comparable union and employer misconduct on the laboratory conditions of an election.<sup>177</sup>

The recent emphasis on the potential for union misconduct in the card check context exists in the absence of any factual inquiry into what potential actually exists and whether existing mechanisms are capable of addressing such misconduct. The Board's willingness to contemplate the specter of such misconduct, but its lack of interest in actually exploring whether such conduct is indeed a worthy concern, signals that it has journeyed towards a precise inversion of the original understandings that led to the

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<sup>172</sup> See, e.g., *N.L.R.B. v. Drivers, Chauffeurs, Helpers, Local 639 (Curtis Bros. Inc.)*, 362 U.S. 274, 285-91 (1960) (declining to construe prohibitions on union picketing as broadly as prohibitions on employer conduct, consistent with legislative history explaining the differences between § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), prohibiting employer interference with employees' exercise of rights under the Act, and § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), which prohibits union restraint of such rights).

<sup>173</sup> *General Shoe*, 77 N.L.R.B. 124 (1948).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See generally Jennifer Dillard & Joel F. Dillard, *Fetishizing the Electoral Process: The NLRB's Problematic Embrace of Electoral Formalism*, EFMA 2003 Helsinki Meetings, at 31 (Aug. 28, 2007) available at <http://ssrn.com/abstract=1009636> ("[D]espite the Board's best intentions, the rules developed under the laboratory conditions standard became more and more formalistic, and less and less protective of employee free choice under intense judicial scrutiny.").

<sup>177</sup> See, e.g., *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973) (applying the *Exchange Parts* rule on unconditional grants of benefits to hold unlawful union promise to waive initiation fees for card signers). See also *Millsboro*, 327 N.L.R.B. at 881 (Hurtgen, Member, dissenting) ("[W]hen a supervisor asks an employee to sign a union authorization card, the employee is asked, in a most graphic way, to openly declare himself on the issue of unionization. Similarly, if a supervisor asks an employee to withdraw a union authorization card, the employee is being asked to openly declare himself on the issue of unionization. Since the latter conduct is objectionable, I believe that the former is objectionable as well. . . . The solicitation itself, by a supervisor to a vulnerable employee, contains the 'seed' of coercion."). But see Becker, *supra* note 4 at 569-85 (criticizing the development of this doctrine of "mutuality" of unions and employers in regulation of election conduct).

passage of the NLRA. This one hundred and eighty degree turn in doctrine can be seen in the differing ways the Court in *Gissel Packing* came down on many of the same concerns that animated the Board in the *Dana Corp.* decision.

#### **V. The Inversion of the Principles of *Gissel Packing* by the Board in *Dana Corp.***

The questions of the reliability of cards and the potential for union misconduct in card check were front and center in *Gissel Packing*.<sup>178</sup> Three of the four consolidated cases that came before the Supreme Court in that case were appeals of decisions of the Fourth Circuit Court of Appeals. In each case, the union demanded recognition from the employer on the basis of authorization cards signed by a majority of employees. “All three employers refused to bargain on the ground that authorization cards were inherently unreliable indicators of employee desires; and they either embarked on, or continued, vigorous antiunion campaigns that gave rise to numerous unfair labor practice charges,”<sup>179</sup> including “coercively interrogating employees about Union activities, threatening them with discharge, and promising them benefits,” “creating the appearance of surveillance, and offering benefits for opposing the Union,” and “wrongfully discharg[ing] employees for engaging in Union activities.”<sup>180</sup>

In each case, the Board found that “the employer’s refusal to bargain with the Union in violation of § 8(a)(5) was motivated, not by a ‘good faith’ doubt of the Union’s majority status, but by a desire to gain time to dissipate that status.”<sup>181</sup> The “fact that the employers had committed substantial unfair labor practices during their antiunion campaign efforts to resist recognition” was the basis for the Board’s disbelief that the employers had acted in good faith in refusing to bargain.<sup>182</sup> The Board also “found that all three employers had engaged in restraint and coercion of employees in violation of § 8(a)(1),” and that two of the three employers “had wrongfully discharged employees for engaging in Union activities in violation of § 8(a)(3).”<sup>183</sup>

The Fourth Circuit “sustained the Board’s findings as to the §§ 8(a)(1) and (3) violations, but rejected the Board’s findings that the employers’ refusal to bargain violated § 8(a)(5),”<sup>184</sup> holding “that the cards themselves were so inherently unreliable that their use gave an employer virtually an automatic, good faith claim” that employee sentiment was in “dispute,” warranting a secret-ballot election.<sup>185</sup>

The fourth consolidated case in *Gissel Packing* came out of the First Circuit Court of Appeals. The union in that case had made a request for recognition based on authorization cards it had collected from employees, but the employer refused, asserting

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<sup>178</sup> 395 U.S. 575 (1969).

<sup>179</sup> *Id.* at 580.

<sup>180</sup> *Id.* at 583.

<sup>181</sup> *Id.* at 582-83.

<sup>182</sup> *Id.* at 583.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 585.

<sup>185</sup> *Id.* at 585-86.

“a good faith doubt of majority status because of the cards’ inherent unreliability . . . .”<sup>186</sup> The union then petitioned for a representation election, during the campaign for which the employer made a number of statements to employees to the effect that the union was a “strike happy outfit,” that “a possible strike would jeopardize the continued operation of the plant,” and “that because of their age and the limited usefulness of their skills outside their craft, the employees might not be able to find re-employment if they lost their jobs as a result of a strike.”<sup>187</sup>

The Board found these communications, “when considered as a whole, ‘reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead (the Company) to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs . . . .’”<sup>188</sup> The Board set the election aside and ordered the employer to bargain, and was sustained in its entirety by the First Circuit.<sup>189</sup> In upholding the Board, the court “rejected the Company’s proposition that the inherent unreliability of authorization cards entitled an employer automatically to insist on an election, noting that the representative status of a union may be shown by means other than an election . . . .”<sup>190</sup> In great part because of the split between these two circuit courts on the reliability of authorization cards in assessing employee intent, the Supreme Court granted certiorari and consolidated the cases for review.<sup>191</sup>

Despite the prevalence of the issue of the reliability of cards in the four cases that made up *Gissel Packing*, “there were no allegations of irregularities” in all but one of those cases, and the trial examiner in that last campaign found there was insufficient evidence to support the allegations there.<sup>192</sup> Nevertheless, the issues of coercion and misrepresentation in the solicitation of authorization cards were raised in the arguments before the Court in much the same way they were raised in the arguments in *Dana Corp.* The Court summarized the arguments made by the employers in *Gissel Packing* on these issues as follows:

[C]ards cannot accurately reflect an employee’s wishes . . . because the choice was the result of group pressures and not individual decision made in the privacy of a voting booth . . . [and] cards are too often obtained through misrepresentation and coercion which compound the cards’ inherent inferiority to the election process.<sup>193</sup>

“Neither contention is persuasive,” the Court concluded, “and each proves too much.”<sup>194</sup> Even in light of the Board’s recognition “that secret elections are generally the

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<sup>186</sup> *Id.* at 587.

<sup>187</sup> *Id.* at 588-89.

<sup>188</sup> *Id.* at 589.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 590.

<sup>191</sup> *Id.* at 590.

<sup>192</sup> *Id.* at 606.

<sup>193</sup> *Id.* at 602.

<sup>194</sup> *Id.*

most satisfactory – indeed the preferred – method of ascertaining whether a union has majority support,” this “does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective – perhaps the only – way of assuring employee choice.”<sup>195</sup>

In response to the fear that “an employee may, in a card drive, succumb to group pressures or sign simply to get the union ‘off his back,’” the Court made the obvious point that “the same pressures are likely to be equally present in an election.”<sup>196</sup> As for the fact that an employee who signs a card that is later used as the basis to recognize a bargaining representative is thereby “unable to change his mind as he would be free to do once inside a voting booth,” the Court noted that “no voter, of course, can change his mind after casting a ballot in an election even though he may think better of his choice shortly thereafter.”<sup>197</sup>

The employers in *Gissel Packing* had also argued that cards could not accurately reflect employee sentiment “because an employer has not had the chance to present his views and thus a chance to insure that the employee choice was an informed one . . . .”<sup>198</sup> For example, the “employers argue[d] that their employees cannot make an informed choice because the card drive will be over before the employer has had a chance to present his side of the unionization issues.”<sup>199</sup> The Court was equally skeptical of the merits of this argument, noting first that, “[n]ormally . . . the union will inform the employer of its organization drive early in order to subject the employer to the unfair labor practice provisions of the Act,” and second that, “in all of the cases here [but one] . . . the employer . . . was aware of the union’s organizing drive almost at the outset and began its antiunion campaign at that time . . . .”<sup>200</sup> Even the odd employer in the case who had not learned about the organizing drive at its outset learned of it early enough “to deliver a speech before the union obtained a majority.”<sup>201</sup>

The Court acknowledged that “[w]e would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers.”<sup>202</sup> But there was already a mechanism for addressing such concerns. “[I]n any specific case of alleged irregularity in the solicitation of cards, the proper course is to apply the Board’s customary standards . . . and rule that there was no majority if the standards were not satisfied.”<sup>203</sup> The Court then discussed the Board’s *Cumberland Shoe*<sup>204</sup> doctrine, which is still applied by the present-day Board in deciding the authenticity and accuracy of signed employee authorization cards where claims of misrepresentation or coercion in the acquisition of

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 603-04.

<sup>197</sup> *Id.* at 604.

<sup>198</sup> *Id.* at 602.

<sup>199</sup> *Id.* at 603.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 604.

<sup>203</sup> *Id.* at 602-03.

<sup>204</sup> 144 N.L.R.B. 1268 (1963).

those cards are made.<sup>205</sup> The Court in *Gissel* noted that, at that time, “various courts of appeal and commentators have differed significantly as to the effectiveness of the” doctrine.<sup>206</sup> The question before the Court, as it saw it, was “whether the *Cumberland Shoe* doctrine is an adequate rule under the Act for assuring employee free choice.”<sup>207</sup> In deciding this question, the Court first expressed its belief that

employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.<sup>208</sup>

Furthermore, the Court did not “agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else,”<sup>209</sup> noting other areas of labor law where “Congress has expressly authorized reliance on employee signatures...even where criminal sanctions hang in the balance.”<sup>210</sup> Finally, the Board upheld the Board’s *Cumberland Shoe* approach to card check misconduct, but warned that “trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the *Cumberland* rule.”<sup>211</sup> The Court also “reject[ed] any rule that requires a probe of an employee’s subjective motivations as involving an endless and unreliable inquiry,” noting that

employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8(a)(1) [of the Act].<sup>212</sup>

It is not being argued herein that *Gissel Packing* stands for the proposition that card check recognition should be the general rule. The decision explicitly did *not* address “a union’s right to rely on cards as a freely interchangeable substitute for elections where there has been no election interference...” The employers in all of those cases had interfered with protected activity, and so all of the Court’s findings were made in the

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<sup>205</sup> See, e.g., *Flamingo Hotel-Laughlin*, 1996 WL 33321556 (N.L.R.B. Div. of Judges, Apr. 25, 1996) (citing *Cumberland Shoe* 144 N.L.R.B. 1268, and *Levi Strauss & Co.*, 172 N.L.R.B. 732 (1968), for standards in determining purpose of card signers, and separately noting that the “key question” of card authenticity “is that of whether from all circumstances any given card appears to genuinely express a timely desire for representation . . .”).

<sup>206</sup> *Gissel Packing*, 395 U.S. at 604.

<sup>207</sup> *Id.* at 606. The Court limited its holding to the “single-purpose” cards used in the cases before it, which “stat[ed] clearly and unambiguously on their face that the signer designated the union as his representative,” rather than that the signer sought an election. *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 607.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 607-08.

<sup>212</sup> *Id.* at 608.

context of such employer misconduct.<sup>213</sup> But, as section IV of the opinion illustrates, the Court’s analysis began from a point where certain categories of employer conduct were presumed to be able to affect the representation election atmosphere negatively. When such conduct rose to a certain level, the Court was comfortable relying on authorization cards to create collective-bargaining obligations, due to its confidence in the Board’s procedures for determining majority support and addressing allegations of union or employee misconduct. This is a level of comfort that the Board does not appear to be able to provide anymore.

The new focus of the Board begins with the question of whether the employer in question has sufficient information to decide whether to opt in or out of the collective-bargaining process. This has been the longstanding focus of another strain of labor law, and it has now been imported into the card check context. This approach carries with it a presumption of union misconduct, and an absence of any concern about the potential for employer misconduct,<sup>214</sup> due to the point of view of the question being asked. The effects of this approach can be seen in how the *Dana Corp.* majority discussed and ruled upon identical arguments to the ones made in *Gissel Packing*.<sup>215</sup>

On the issue of group pressure and the accuracy of authorization cards in such an environment, the Board in *Dana Corp.* held (without citation) that

[c]ard checks are less reliable because they lack the secrecy and procedural safeguards of an election, and employees may change their minds after signing the cards and further exploring the issue, but they may hesitate publicly to withdraw their signed cards.<sup>216</sup>

The dissent, citing *Gissel Packing*, noted that “*the same is true* of [the] employee antiunion petitions” that the majority wished to encourage with the 45-day decertification window it created.<sup>217</sup> The Board majority disagreed, stating “there is an obvious difference,” namely that such an anti-union petition only “obtains a secret-ballot election.”<sup>218</sup> As discussed in the next section *infra*, this is no longer the case after the Board’s decision, issued on the same day as *Dana Corp.*, in *Wurtland Nursing &*

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<sup>213</sup> *Id.* at 601 n.18.

<sup>214</sup> This is despite abundant evidence that employer misconduct is quite prevalent in representation election campaigns. See Brudney, *supra* note 8 at 870 (“By 1990, there were incidents of unlawful termination in fully 25% of organizing campaigns: one out of every fifty union supporters in an election campaign could expect to be victimized by such conduct. A more recent study estimated that by the late 1990’s, one out of every eighteen workers who participated in a union organizing campaign was the object of unlawful discrimination.”).

<sup>215</sup> See, e.g., Brief of the HR Policy Association, *supra* note 146 at 15, 27 (arguing that, “[e]ven in the best of circumstances, an employee is likely to feel the influence of peer pressure from pro-union coworkers to sign the card,” and “the substantial evidence of the lack of safeguards and potential for deception and coercion in the card-check procedure makes clear” that voluntary recognition bar should be abolished); Joint Brief of Petitioners, *supra* note 72, at 36 (“The overarching question in this case is *whether* the employer-recognized union, the UAW, actually has the uncoerced support of a majority of employees.”).

<sup>216</sup> *Dana II*, 351 N.L.R.B. No. 28, 2007 WL 2891099, at \*4 (Sept. 29, 2007).

<sup>217</sup> *Id.* at \*21.

<sup>218</sup> *Id.* at \*7 n.19.



*Rehabilitation Center*,<sup>219</sup> which allowed an employer to withdraw from bargaining based on an employee petition asking for a decertification election.

The *Dana Corp.* majority also cast doubt on the usefulness of Board Unfair Labor Practice charge processes to police card check misconduct, on the basis that the “laboratory conditions” standard for election interference is a lower threshold than the threshold for a ULP, and therefore there would be a class of card check misconduct that would be actionable in an election but not otherwise.<sup>220</sup> The Board did not discuss the role that its existing proof-of-support standards, which would not count any cards obtained through misconduct,<sup>221</sup> would play in such a situation. Finally, the Board expressed concern that, “[e]ven if no misrepresentations are made, employees may not have the same degree of information about the pros and cons of unionization that they would in a contested Board election, particularly if an employer has pledged neutrality during the card-solicitation process.”<sup>222</sup>

The latter comment about employer neutrality highlights the most notable issue discussed in *Dana Corp.* that was *not* previewed in *Gissel Packing*: the use of voluntary-recognition card check and neutrality agreements by unions to secure advance agreement from an employer to abide by the wishes of a majority of card signers.<sup>223</sup> There has been some scholarly analysis of the election process that questions whether employer opposition in a representation election is a necessary predicate for the adequate expression of employee free choice,<sup>224</sup> including specifically in the context of a card check and neutrality agreement.<sup>225</sup> As noted *supra*, Chief Justice Warren expressed his

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<sup>219</sup> 351 N.L.R.B. No. 50, 2007 WL 2963268 (Sept. 29, 2007). However, one important difference between the two situations is that a union from which recognition has been withdrawn may thereafter petition again for representation. *See, e.g.,* Levitz Furniture Co. of the Pac., 333 N.L.R.B. 717, 719-20 (2001). In contrast, a union granted recognition in the first instance could not, prior to *Dana Corp.*, face a decertification period until expiration of the recognition bar.

<sup>220</sup> *Dana II*, 2007 WL 2891099 at \*7 n.19.

<sup>221</sup> The Board is able to take such action even in the absence of an Unfair Labor Practice charge. NLRB CASEHANDLING MANUAL §§ 11028.1 (fraud, misconduct), 11029 (forgery).

<sup>222</sup> *Dana II*, 2007 WL 2891099 at \*8. Employer neutrality was important in making this point. The Board separately in the opinion acknowledged that in card check, “in many instances, including the present cases, the recognized union has taken months or even in excess of a year to solicit the necessary majority showing of support.” *Id.* at \*13. The Board did not see this length of time as an opportunity for employees “to fully discuss their views concerning collective-bargaining representation,” however. *Id.* Instead, it oddly cited the length of card-check campaigns as the basis for a longer decertification window than the Board’s General Counsel had sought, holding that “30 days is not a very long time for such discourse and action,” and invited “the recognized union and the employer” to participate in the discussion. *Id.* Apparently the Board majority presumed that no such dialogue occurs during the card-check campaign, and that employees are instead subjected to an unceasing barrage of pro-union propaganda.

<sup>223</sup> *See generally* Brudney, *supra* note 8, at 825-31 (discussing recent history of card check and neutrality agreements).

<sup>224</sup> *See, e.g.,* Becker, *supra* note 4, at 585 (“What complicates the analogy between industrial and political democracy – what disrupts the symmetry between the union election and the political election – is the economic authority of employers.”).

<sup>225</sup> *See* Brudney, *supra* note 8, at 849 (“[T]he argument that an employer’s formal neutrality stance compromises employee free choice seems to rest, at bottom, on the notion that § 8(a)(2) [of the Act] contemplates a fundamentally adversarial relationship between management and labor.”).

own skepticism in *Gissel Packing* that an employer would ever decline to present its side of the issue in a union election.<sup>226</sup>

Nevertheless, the petitioners in *Dana Corp.* drew a dire picture of card-check organizing under the shadow of private neutrality agreements.<sup>227</sup> Many of the most potent images of asymmetrical employer power were evoked here. The managers of Dana Corporation “held a series of company-paid captive audience meetings at the plant,” praising their agreement with the UAW.<sup>228</sup> “With a wink and a nod, it was implied that Dana Upper Sandusky would lose work opportunities or jobs if employees did not sign cards and bring in the UAW.”<sup>229</sup> At Metaldyne, “management held a mandatory meeting with the employees and played a video informing them that they should accept the UAW in the plant as it was a ‘win-win situation for all of us.’”<sup>230</sup> One *amicus* warned that, when faced with a union “corporate campaign” to get an employer to agree to a card check and neutrality agreement, “the employer’s primary concern is typically self-preservation, not preservation of its employees’ right of freedom of choice regarding union representation.”<sup>231</sup> It is not at all axiomatic that card-check campaigns include wholesale pro-union conduct by employers, for whom a variety of means by which to get their message out still exist, even when a neutrality agreement is in place.<sup>232</sup> Nevertheless, the presumption of additional weight to employer actions in this context was gladly invoked. The petitioners also utilized the oft-invoked image of the card solicitor “stand[ing] over [the employees] as they ‘vote,’”<sup>233</sup> a vivid evocation of intimidation that belies the pedestrian evidentiary purpose for witnessing the signing of a card and countersigning it in turn. Indeed, this witnessing-and-countersigning method was lauded as a valuable “safeguard” against fraud in the case made to California’s PERB by a management advocate in favor of its revocation regulations.<sup>234</sup>

The motivations for such concern over the potential for misconduct in the card-check process are cast in stark relief by the Board’s concurrent rulings in two failure-to-bargain cases decided around the same time as *Dana Corp.* Where the Board in *Dana Corp.* credited without further inquiry the petitioners’ concerns, it did not in these other two cases discuss whether such concerns would also be properly considered in a

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<sup>226</sup> *Gissel Packing*, 395 U.S. at 603.

<sup>227</sup> The Illinois courts have observed that public employers in that state have a neutrality obligation, at least with respect to competing representation claims of two or more unions. *See Local 253 Div. Affiliated With Local 50, Serv. Employees Int’l Union AFL-CIO, CLC v. Ill. Labor Relations Bd.*, 512 N.E.2d 1008, 1020 (Ill. App. Ct. 1987) (“The employer’s duty at all times is to remain neutral.”).

<sup>228</sup> Joint Brief of Petitioners, *supra* note 72, at 7.

<sup>229</sup> *Id.* at 8.

<sup>230</sup> *Id.* at 9.

<sup>231</sup> Brief of the HR Policy Association, *supra* note 146, at 23.

<sup>232</sup> *See, e.g., Eaton & Kriesky, supra* note 27, at 50 (“The rate of ‘other’ violations or tactics was substantially higher for neutrality than card check. Thus, there is support for the hypothesis that neutrality language reduces the use of some, but not all, management tactics.”). An example of one of the “other” tactics used by employers was “manager-organized card revocation or decertification campaigns.” *Id.*

<sup>233</sup> Joint Brief of Petitioners, *supra* note 72, at 30.

<sup>234</sup> Letter from Renne Sloan Holtzman Sakai LLP, *supra* note 117, at 2 (discussing SB180, which “would require, among other safeguards . . . that a witness be present when an employee signs a card and that the witness also then sign the card.”).

decertification drive, which is as public as a card check and a far cry from a secret ballot election. It also accepted without criticism the premise that employer and union campaigning is necessary for employees to reach an informed decision as to the pros and cons of unionization. Such campaigning would be strictly forbidden as an Unfair Labor Practice charge in the context of the circulation of a decertification petition,<sup>235</sup> yet the Board was comfortable presuming in both of the withdrawal-of-recognition cases that the employees' decisions in that context would be fully informed. And there is no basis given for the Board's apparent belief that a quickly-circulated employee decertification petition during the 45-day window period created by *Dana Corp.* would not be as susceptible to group pressures and uninformed decision-making as a card-check campaign that assuredly went on for a longer period.<sup>236</sup>

There is an irony to this turn of events. In a sense, the proponents of card check are arguing that the rationale and holding of *Gissel* be applied on a systemic level. Their claim is that the Board-run election system has become so unfavorable to employees that cards should generally be permitted to evidence majority support.<sup>237</sup> But this push has come at a time when modern decision-makers no longer view these issues in the way that the Warren Court, the Board of that era, and their predecessors did. As a result, at every opportunity these judicial and administrative decision-makers have credited the concerns of union misconduct, despite the lack of evidence,<sup>238</sup> and created procedural solutions to these concerns that provide employers with additional opportunities to assert their own uniquely-available forms of pressure and coercion.<sup>239</sup>

## **VI. The Novel and Overriding Importance of “Employer Free Choice”**

The emphasis on the degree of employer knowledge that should be required to obligate that employer to engage in collective bargaining is not an entirely new one for the Board. It has its origins in the foundational arguments surrounding passage of the Wagner Act.<sup>240</sup> It is also the animating perspective of a line of Board jurisprudence that deals with employers who withdraw from collective bargaining, in violation of their

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<sup>235</sup> See, e.g., NLRB CASEHANDLING MANUAL § 11730.3(a) (finding of merit to charge that employer was directly or indirectly involved in the initiation of a decertification petition may invalidate petition or some or all of the showing of interest).

<sup>236</sup> Cf. Fed. R. Evid. 803(2) (hearsay exception for “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition”).

<sup>237</sup> See Becker, *supra* note 4 at 583-84 (“Arguably, the direction of labor law reform should lie in transforming the *Gissel* exception into the general rule. . . . The nub of the *Gissel* ruling was that precisely because labor representatives do not govern, it is proper, at least in exceptional circumstances, for them to be chosen by nonelectoral means.”).

<sup>238</sup> But see Dillard & Dillard, *supra* note 176, at 35-41 (arguing that adherence to philosophy of “electoral formalism” in NLRA context explains lack of factual support for coercion-related arguments of card-check opponents).

<sup>239</sup> See, e.g., Eaton & Kriesky, *supra* note 27, at 57 (“While employers may continue to argue that [card check and neutrality] agreements hamper free choice by silencing one point of view, we found that they reduced the use of *illegal* tactics such as discharges and promises of benefits, as well as the supervisory one-on-one campaigns that are destructive of relationships and emotionally traumatizing.”).

<sup>240</sup> See, e.g., *Gissel Packing*, 395 U.S. 575, 597 n.11 (“The right of an employer lawfully to refuse to bargain if he had a good faith doubt as to the Union’s majority status, even if in fact the Union did represent a majority, was recognized early in the administration of the Act.”) (citation omitted).

obligation to bargain under § 8(a)(5) of the Act. This is because employers who recognize unions with the support of only a minority of employees violate § 8(a)(2) of the Act.<sup>241</sup> As a result, employers who refuse to bargain will offer as their defense a desire to avoid liability for recognizing a minority union. The plain language of the Act imposes strict liability on employers who recognize minority unions,<sup>242</sup> so the fundamental question in assessing the merits of this defense therefore becomes: what degree of evidence is sufficient to allow an employer to opt out of collective bargaining?

Over the years, the federal courts and the Board have gone back and forth on this issue. The Board has most recently held that an employer could only refuse to bargain where it could “prove that an incumbent union has, in fact, lost majority support.”<sup>243</sup> This decision came in response to the Supreme Court’s holding a few years prior that an employer only needed to have a “good faith reasonable doubt” as to the union’s majority,<sup>244</sup> and it represented the Board’s attempt to reinsert a requirement that an employer have actual factual support for its belief that the union no longer represents a majority of employees.<sup>245</sup>

In a 2-1 decision issued on the same day as *Dana Corp.*, the Board indicated that such factual support could be of a form vastly inferior to card check authorizations such as the ones used in that case. In *Wurland Nursing & Rehabilitation Center*,<sup>246</sup> two of the same Board members (including the Chairman) who had formed the majority in *Dana*

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<sup>241</sup> The existence or lack thereof of § 8(a)(2) liability was discussed in the briefing and decision in *Dana Corp.* See *Dana II*, 351 N.L.R.B. No. 28, 2007 WL 2891099 at \*5 (Sept. 29, 2007) (“[T]here is no 8(a)(2) challenge to the negotiations of the agreements or to the agreements themselves. Nor is there an 8(a)(2) challenge to the grant of recognition.”).

<sup>242</sup> See *Int’l Ladies’ Garment Workers’ Union v. NLRB (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731, 739 (1961) (“We find nothing in the statutory language prescribing scienter as an element of the unfair labor practices are involved. The act made unlawful by § 8(a)(2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for, even if mistakenly, the employees’ rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith.”).

<sup>243</sup> *Levitz Furn. Co. of the Pac.*, 333 N.L.R.B. 717, 723 (2001).

<sup>244</sup> *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 365-66 (1998). This case was decided in the context of whether an employer had interfered with its employees’ rights under § 8(a)(1) of the Act by polling them as to their degree of support for the union. See *Strucksnes Construction Co.*, 165 N.L.R.B. 1062 (1967); *Blue Flash Express*, 109 N.L.R.B. 591 (1954). However, the polling cases and withdrawal-from-bargaining cases have always been applied to each other insofar as they speak to the employer’s basis for acting as a defense to Unfair Labor Practice charge liability. See, e.g., *Levitz Furniture*, 333 N.L.R.B. at 723 (“Because polling raises concerns that are not presented here, we shall leave to a later case whether the current good-faith doubt (uncertainty) standard for polling should be changed.”).

<sup>245</sup> See, e.g., *Levitz Furniture*, 333 N.L.R.B. at 725 (“[U]nless an employer has proof that the union has actually lost majority support, there is simply no reason for it to withdraw recognition unilaterally.”). Proof is required because, “from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status.” *Id.* at 720 (citing, *inter alia*, *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 794 (1990)). Much like the presumption of asymmetrical employer power in the workplace, this presumption has been sharply criticized. See *Allentown Mack*, 522 U.S. at 378 (referring to the Board’s irrebuttable presumption of majority support for the union for one year after certification as a “counterfactual evidentiary presumption[ ]”).

<sup>246</sup> 351 N.L.R.B. No. 50, 2007 WL 2963268 (Sept. 29, 2007).

*Corp.* allowed an employer to withdraw from bargaining on the basis of “an employee petition containing the signatures of more than 50 percent of the employees in the unit,” which read: “We the employee’s [sic] of Wurland nursing and rehab wish for a vote to remove the Union S.E.I.U. 1199.”<sup>247</sup> The majority overruled the administrative law judge’s finding that “the word ‘vote’ necessarily implied a choice,” holding that “the more reasonable reading of the petition is that the signatory employees wished ‘to remove’ the Union as their representative.”<sup>248</sup>

The previous month, the Board Chairman had joined in another 2-1 majority in the *Shaw’s Supermarkets*<sup>249</sup> decision, which allowed an employer to withdraw from bargaining, after the expiration of the contract bar but during the term of a collective-bargaining agreement. The basis of the employer’s decision was an employee decertification petition comprised of “slips signed by bargaining unit employees stating, ‘I do not want UFCW Local 1445 to continue to represent me as my collective bargaining agent with my employer, “Shaw’s Supermarkets, Inc.””<sup>250</sup> Holding that “an uncoerced majority [of employees] has now rejected continued representation,” the Board declared that “the goal of employee freedom of choice must be vindicated.”<sup>251</sup> Declining to “await[ ] the outcome of the decertification election,” an option the majority considered “problematic where a union has actually lost majority support,”<sup>252</sup> the Board instead held that

[i]n light of the loss of majority, and the delays that can attend the processing of a petition, we would permit the withdrawal of recognition, so that the employees will not be forced to endure, for the rest of the agreement, representation they no longer desire.<sup>253</sup>

In neither case was there any discussion of the potential for (or actual existence of) coercion, misrepresentation, or fraud in the acquisition of the petition and slips used in each case to gather employee sentiment. Nor was the accuracy of those documents questioned. The Board in *Shaw’s Supermarkets* went out of its way to note that “the bona fides of the Respondent’s evidence of the Union’s loss of majority support is unchallenged,”<sup>254</sup> despite the fact that the slips were counted by an “accounting firm hired by the Respondent,”<sup>255</sup> a process that presumably was no more equivalent to the Board’s election processes than any given arbitrator’s counting and verification of card check authorizations.

Most telling was the Board majority’s reference to employees being forced to “endure” representation they did not desire. The *Shaw’s Supermarkets* majority made

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<sup>247</sup> *Id.* at \*1.

<sup>248</sup> *Id.* at \*2.

<sup>249</sup> 350 N.L.R.B. No. 55, 2007 WL 2322536 (Aug. 10, 2007).

<sup>250</sup> *Id.* at \*2.

<sup>251</sup> *Id.* at \*5-6.

<sup>252</sup> *Id.* at \*6.

<sup>253</sup> *Id.* at \*7.

<sup>254</sup> *Id.* at \*5.

<sup>255</sup> *Id.* at \*2.

sure to recite the boilerplate sentiment that “[c]ontinuing to recognize and deal with such a union is as deleterious to employee rights as failing to recognize a union that enjoys majority support.”<sup>256</sup> Yet there was no comparable concern expressed by these same Board members in the *Dana Corp.* majority that employees who had expressed a desire for representation would be forced to endure the absence of any such representation during “the delays that can attend the processing of a petition,”<sup>257</sup> such as a decertification election petition filed during the 45-day period after voluntary recognition. Instead, the merits of the proof that such a majority even existed were questioned, and unsupported concerns about the process by which such proof was obtained were credited without further discussion.

What this makes clear is that the entity which is in fact being forced to “endure” an unwanted situation, in both instances, is the employer – and this is where the Board’s concerns lie. Such a concern with *employer* free choice is consistent with the line of jurisprudence in which *Wurtland Nursing* and *Shaw’s Supermarkets* lie, and the perspective of the *Dana Corp.* decision indicates the extent to which this jurisprudence has been imported into the voluntary-recognition context. The question of when an employer may opt out of collective bargaining has mutated into the question of when an employer must *opt in* to bargaining with its employees. In this way, the Board has come to openly doubt the first principles of American labor relations.

## VII. Conclusion: Proposed Solutions

The concerns of PERB in California and the Appellate Court in Illinois illustrate that it is not just the federal labor board that has an interest in revisiting these issues. The legislatures in these two states quite literally agreed in writing on the degree to which they believe public employers should opt in to collective bargaining. This did not prevent a significant difference of opinion on the way the agreement is to be implemented. This should give pause to proponents of the Employee Free Choice Act, who may believe that passage of that federal legislation would provide an anodyne to these concerns.<sup>258</sup> The lesson of *Dana Corp.*, Illinois, and California is that card check may represent a “bridge too far” for the labor relations consensus in the United States, which has at all times been a fragile one.<sup>259</sup>

There are solutions that proponents of card check could propose in the hope that they may address these concerns. One proposal is to enhance the NLRB’s existing standards, for assessing whether fraud, coercion, or intimidation is implicated in the collection of cards,<sup>260</sup> so as to set out specific procedures for determining whether such

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<sup>256</sup> *Id.* at \*6.

<sup>257</sup> *Id.* at \*7.

<sup>258</sup> *Cf.* Becker, *supra* note 4, at 584-85 (arguing that “abandoning the union election is not merely politically infeasible. It would also cut against the principle of majority rule that is central to the union’s effective representation of employees.”).

<sup>259</sup> *See, e.g.*, Theodore J. St. Antoine, *Federal Regulation of the Workplace in the Next Half-Century*, 61 CHI.-KENT L. REV. 631, 639 (1985) (“The intensity of opposition to unionization which is exhibited by American employers has no parallel in the western industrial world.”).

<sup>260</sup> *See* NLRB CASEHANDLING MANUAL §§ 11028.1, 11028.3, 11029, 11029.4.

charges are valid. The Board's standards could also be modified to give parties a right to demand such an inquiry where sufficient evidence is presented, and perhaps even an expedited hearing on the matter, which are rights they do not currently enjoy.<sup>261</sup> As discussed in this article, PERB unsuccessfully attempted to modify its proof of support standards to eliminate the prima facie threshold for consideration of evidence submitted of fraud or coercion in the card-check process,<sup>262</sup> which may serve to indicate the prospects for that type of reform. Furthermore, both California and Illinois have more detailed, specified standards for determining the validity of a proof of support showing than the NLRB,<sup>263</sup> but that did not prevent attempts in those states to alter or overlay additional measures on top of those standards in the name of combating the specter of union card fraud or coercion.

If the EFCA comes before Congress again, greater proof of support procedures could be mandated by the legislation, which may ease its passage.<sup>264</sup> There is no mechanism to enforce greater proof of support standards on the arbitrators and other individuals who normally check cards gathered under a private card check agreement,<sup>265</sup> apart from the moral pressure of greater statutory standards and perhaps lobbying of the American Arbitration Association for the promulgation of guidance by that entity. However, even under existing law, the Board has no obligation to enforce a card-check recognition where it has been presented with credible evidence of invalid cards in sufficient numbers to defeat the proof of support showing.<sup>266</sup> Proponents of card check may be forgiven for failing to recall that there are already safeguards in existence, even for wholly private card-check organizing campaigns.

The acceptance of further proof standards for authorization cards, or the creation of additional procedural or evidentiary steps in the process, may be a necessary trade-off between opponents and proponents of card check for the continued sanction of this

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<sup>261</sup> Whether or not to engage in such an inquiry is presently within the discretion of the Board. NLRB CASEHANDLING MANUAL § 11021.

<sup>262</sup> *Supra* note 105.

<sup>263</sup> See PERB Regulation 32700 (proof of support standards for representation proceedings); 5 ILL. COMP. STAT. § 315/9(a-5) (directing election where ILRB is presented with "clear and convincing evidence that the dues deduction authorizations, and other evidence upon which the Board would otherwise rely to ascertain the employees' choice of representative, are fraudulent or were obtained through coercion").

<sup>264</sup> For example, New Hampshire, which passed a card-check law for its public employees in 2007, promulgated required minimum language for authorization cards, and specified the procedures for assessing the proof of support showing. See Pub 301.05, Proposed Interim Rule (Nov. 9, 2007), available at <http://www.nh.gov/pelrb/news.htm> (last visited Mar. 6, 2008). California's attempt to do something similar was defeated alongside the other modifications discussed in more detail in this article. See discussion *supra* at Section III(B).

<sup>265</sup> A similar problem applies to mediators from California's State Mediation and Conciliation Service (the "SMCS"), who check card authorizations under the MMBA. The SMCS mediators have no enforcement power and can only seek to have the parties consent to acceptable standards, although the mediators will look to PERB's proof of support regulation in defining the boundaries of what may be feasible. Interview with Paul Roose, State Mediation & Conciliation Serv. (Feb. 15, 2008).

<sup>266</sup> See, e.g., NLRB v. Regency Grand Nursing & Rehab. Ctr., 2008 WL 449782, at \*3 (3d Cir. Feb. 20, 2008) ("The Board has held that it is 'not bound by a neutral party's authorization card count where it was shown that particular cards which were counted toward a union's majority status were, in fact, invalid.'") (citing Sprain Brook Manor, 219 N.L.R.B. 809 (1975)).

organizing method. That should not belie the lack of alternatives available to proponents of card check in making such trade-offs. Labor presently lacks the density in the American workforce that would allow it to clearly demonstrate the benefits of encouraging collective bargaining in this country, and it views card check as its best hope for ultimately achieving that density. However, the absence of the principle of asymmetrical employer power in the card-check debate – except where it aids, to whatever limited extent, the anti-union argument – illustrates the degree to which the American labor movement and its supporters must broadly re-argue that such benefits even exist, before they can move to the next step of proving that case. A union cannot, after all, argue its record of representation to a workforce if it has no such record of which to speak.