Outside Counsel

NLRB Allows Pre-Recognition Framework Agreements

By Andrew M. Kramer

And Samuel Estreicher

The United Auto Workers' new president Bob King has declared that the UAW's long-term survival depends on its ability to organize German, Japanese and Korean-owned plants in the United States.[1] Meeting this goal will require a mix of traditional labor militancy but also, and perhaps more importantly, business acumen—convincing non-union automakers that union representation can coexist with their continuing prosperity. Relatedly, unions often try to pressure employers to agree to neutrality and card-check agreements but without being able to have any discussion of the likely terms of a future labor contract.

The recent 2-1 decision of the National Labor Relations Board (NLRB) in *Dana Corp.*[2] may help in both situations, by clearing legal obstacles to the ability of unions and employers to agree to a framework for recognition and future bargaining—even before the union acquires majority support among the employees and is recognized as their exclusive bargaining agent.

Background

The Dana Corporation manufactures automotive parts at about 90 facilities globally. Dana has had a long bargaining relationship with the United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO (UAW), which represents between 2,200 and 2,300 Dana employees in nine bargaining units at various facilities. UAW did not, however, represent any employees at Dana's St. Johns, Mich., plant, and the UAW began an organizing campaign there in 2002. The following year, Dana and the UAW entered into a Letter of Agreement (LOA), establishing ground rules for the organizing campaign and their future relationship in the event that the employees chose the UAW as their exclusive representative.

The LOA set forth certain ground rules for the organizing campaign, requiring Dana (i) to inform employees that it was "neutral" regarding union representation and had a "constructive and positive relationship with the UAW," (ii) to provide the UAW, on request, with a list of employees; and (iii) to provide the UAW with access to the workplace. The LOA also included what it termed "an expeditious procedure for determining majority status"—in effect, a card check by a neutral third party.

> The constraints placed on pre-recognition framework agreements appear to have been lifted at least for now.

Although the agreement stated that Dana would not "recognize the Union as the exclusive representative of employees in the absence of a showing" of majority status, the LOA recited the principles that would be reflected in any future labor agreement should UAW achieve majority status: a term of at least four years but no more than five years in length; competitive health care costs; minimum job classifications; team-based approaches; attendance and productivity standards; Dana's idea program; a continuous improvement program; flexible compensation; and mandatory overtime. The LOA also provided for arbitration should the parties be unable to reach a final agreement within a certain time after the UAW achieved majority status.

When the UAW requested an employee list for Dana's St. Johns facility, pursuant to the LOA, three employees filed unfair labor practice charges. The NLRB general counsel issued a complaint alleging that, by entering into and maintaining the LOA, Dana had rendered unlawful assistance to the UAW in violation of Sections 8(a)(2) and (1) of the National Labor Relations Act (NLRA), and that the UAW had restrained and coerced employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A).[3]

The ALJ Decision

Administrative Law Judge William G. Kocol dismissed the complaint, distinguishing the case at hand from the prior board decisions in *Bernhard-Altmann*[4] and *Majestic Weaving*.[5] In *Bernhard-Altmann*, ultimately ruled on by the U.S. Supreme Court, the employer recognized a minority union as the exclusive collective bargaining representative in violation of the NLRA; however, Dana in this case had not granted such recognition to the UAW. In *Majestic Weaving*, the employer and union had negotiated a complete collective bargaining agreement, the signing of which was conditioned on the union achieving majority status.

The ALJ distinguished the Dana-UAW LOA because, while it touched upon terms and conditions of employment, it did not reach the level of a complete collective bargaining agreement like the agreement in *Majestic Weaving*. In the alternative, the ALJ found the LOA lawful under the board's decision in *Houston Division of the Kroger Co.*,[6] which allowed "after-acquired stores" clauses that extend existing collective agreements between employers and unions to unrepresented facilities provid- » Page 6

ANDREW M. KRAMER *is a partner at Jones Day in the Washington, D.C. office.* SAMUEL ESTREICHER *is the Dwight D. Opperman Professor at New York University School of Law and counsel to Jones Day.* JOSEPH J. BERNASKY, *an associate, and* ANDREW S. KLEINFELD, *a law clerk at the firm, assisted in the preparation of this article. Jones Day represented Ford, General Motors and Chrysler as amici curiae in 'Dana Corp.,' discussed in this article. The views of the authors are their own.*

« Continued from page 4

ed that the union is chosen as the majority representative at those facilities.

Decision of the Board

The general counsel and charging parties appealed the ALJ's decision to the board,[7] which invited interested amici to file briefs. (The authors' firm represented three companies as amici.) The case came before a three-member panel consisting of Chairwoman Wilma Liebman and members Mark Pearce and Brian Hayes; member Craig Becker recused himself. NLRB Chairwoman Liebman and member Pearce affirmed the decision of the ALJ and dismissed the complaint on the merits as part of a 2-1 vote, with Mr. Hayes dissenting.[8]

The general counsel and charging parties, as well as the amici supporting them, argued that the "LOA included specific terms and conditions of employment and was negotiated at a time when the UAW did not have majority status,"[9] constituting unlawful support under the *Bernhard-Altmann* and *Majestic Weaving* decisions. They also argued that *Kroger* was inapplicable or, in the alternative, overruled by *Majestic Weaving*. Procedurally, they insisted that the complaint provided adequate notice of the alleged violation.

The respondents urged that *Bernhard-Altmann* and *Majestic Weaving* were distinguishable because the LOA was not a complete collective bargaining agreement; Dana did not recognize the union by virtue of the LOA; and the employees were free to reject UAW representation altogether. Alternatively, they maintained, the LOA was lawful under *Kroger*.

The majority began its analysis by explaining that Section 8(a)(2) of the NLRA prohibits an employer from "dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribut[ing] financial or other support to it,"[10] and that the policy behind this provision was to eradicate the practice of companies establishing in-house labor organizations to prevent organization by independent unions. The NLRA does not, however, outlaw all cooperation between employers and unions as such a rule would run contrary to the statutory objective of encouraging collective bargaining.

The majority explained, however, that an employer does violate the act when it recognizes a union before it achieves majority support, as was the case in *Bernard-Altmann*. In this case, however, under the LOA, Dana explicitly disclaimed recognition of the union until it obtained the employees' majority support. Moreover, unlike *Majestic Weaving*, where the parties negotiated a complete collective bargaining agreement and the employer solicited authorization cards, here "the LOA did no more than create a framework for future collective bargaining, if (as specified in the agreement) the UAW were first able to provide proof of majority status by means of a card-check conducted by a neutral third-party."[11]

The majority emphasized that it was not holding "that every prerecognition agreement...will always be lawful." In this case, the LOA was lawfully entered into because it (a) was reached at arm's length in a context free of unfair labor practices; (b) disclaimed any recognition of the union as the exclusive bargaining representative; (c) included a lawful mechanism for determining majority support, had no immediate effect on employees' terms and conditions of employment; (d) and its future effect was contingent on the union's achieving majority status and future negotiations.[12]

In sum, "nothing [in the LOA] present[ed] UAW representation as fait accompli," which would violate the NLRA. The majority further explained that "[c]ategorically prohibiting prerecognition negotiations over substantive issues would needlessly preclude unions and employers from confronting workplace challenges in a strategic manner that serves the employer's needs" while "still preserv[ing] employee free choice."

Mr. Hayes dissented, rejecting the majority's distinctions of *Majestic Weaving* and *Bernhard-Altmann*. He reasoned that "premature recognition is not a prerequisite for finding unlawful support in dealings between an employer and a minority union."[13] Pre-recognition negotiations of terms and conditions of employment interfere with employee free choice because they provide the union with what the court in *Bernhard-Altmann* called a "deceptive cloak of authority with which to persuasively elicit additional employee support."[14]

Implications

Although the board "leave[s] for another day the adoption of a general standard for regulating prerecognition negotiation between unions and employer,"[15] the constraints placed on prerecognition framework agreements by decisions like *Majestic Weaving*, likely to be overturned if the current board membership is unchanged,[16] appear to have been lifted at least for now. *Dana* is a welcome decision that hopefully will enable labor and management to explore new approaches in economically challenging times.

At least two important legal issues remain open. First, the board will need decide in a future case whether the pre-recognition framework agreement should be made readily available to the affected employees before they are asked to vote on unionization or solicited by the union to sign authorization cards. We believe such a requirement would be salutary because transparency and an informed vote by the employees are especially important in this context.

A second issue is whether the union can enter into such a framework agreement with an employer with whom it has no prior relationship. Because the *Dana* majority did not rely on the *Kroger* doctrine, the absence of a pre-existing relationship should not make a legal difference. Of course, the parties need to be careful to act in an above-board manner to minimize charges of unlawful assistance.

In past years, some unions have been successful in obtaining neutrality/card-check agreements where the employer did not have any real chance to insist on a discussion of what a future contract might look like. Whether such agreements were struck at all was a function of the potency of the union's "corporate campaign" rather than the potential for a constructive relationship. *Dana* provides an opportunity for employers to seek guidelines for any future relationship as a pre-condition to agreeing to a neutrality or card-check agreement. The decision also provides an opportunity for unions to present themselves as realistic bargaining partners in any future relationship.

.....oOo.....

1. Ken Thomas, Bob King: If UAW can't organize foreign plants, 'I don't think there's a long-term future' for union, Crain's Detroit Business, Jan. 18, 2011, http://www.crainsdetroit.com/article/20110118/FREE/110119848/bob-king-if-uaw-cant-organize-foreign-plants-i-dont-think-theres-a-long-term-future-for-union#.
2. *Dana Corp.*, 356 N.L.R.B. No. 49, at 2 (Dec. 6, 2010).
3. Id. at 3.
4. *International Ladies' Garment Workers Union v. NLRB (Bernhard-Altmann)*, 366 U.S. 731 (1961).
5. *Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964).
6. 219 N.L.R.B. 388 (1975).
7. Even though the appeal reached the board in 2006, it did not hear the case during the period in which it only had two members.
8. Because the board affirmed the dismissal on the merits, it did not address the procedural issues.
9. 356 N.L.R.B. No. 49 at 3.
10. Id. at 4 (quoting 29 U.S.C. §158(a)(2)).
11. Id. at 6.
12. Id. at 8.
13. Id. at 10.
14. Id. at 11.
15. Id. at 4.
16. The board's historic policy is not to overturn precedent without a three-member majority. Mr. Becker, serving under a recess appointment, while a practitioner expressed disagreement with *Majestic Weaving*, and may be disposed to vote for its overruling in a proper case. See Jonathan P. Hiatt & Craig Becker, "At Age 70, Should the *Wagner* Act Be Retired? A Response to Professor Dannin," 26 Berkeley J. Emp. & Lab. L. 293 (2005).