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RESISTING ITS OWN OBSOLESCENCE—HOW THE NATIONAL LABOR RELATIONS BOARD IS QUESTIONING THE EXISTING LAW OF NEUTRALITY AGREEMENTS

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INTRODUCTION

Neutrality and card check recognition agreements have existed in various forms for decades, but there is surprisingly little law under the National Labor Relations Act1 ("NLRA" or "Act") examining these types of agreements. The law that does exist generally holds that neutrality and card check agreements are lawful and enforceable. Federal courts hold that, while union representation issues are within the primary jurisdiction of the National Labor Relations Board ("NLRB" or "Board"), neutrality and card check agreements are enforceable in federal court as long as they are consistent with federal labor law. The NLRB, in turn, has been willing to defer to private agreements that resolve union representation matters, rather than deciding the representation question through a Board-supervised secret ballot election.2

Existing law may soon change, however, once decisions issue in a series of cases now pending before the NLRB. At a minimum, existing law will be closely examined by the Board. The

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2. This willingness by the Board to defer to neutrality and card check recognition agreements has resulted in a diminishment of the Board's role in union representation issues. See Charles I. Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence? 16 LAB. LAW. 201 (2000).
Board appointed by President Bush has said the time has come to take a "critical look" at the law regarding neutrality agreements. Whether that "critical look" will result in a fundamental change in the law remains to be seen, but some change—or at least significant clarification—seems likely.

This Article reviews the extant law concerning neutrality and card check agreements, and then discusses the various issues that are now ripe for decision by the NLRB. These issues range from the fundamental policy question of whether the Board should enforce an employer's agreement to recognize a union without an NLRB-supervised secret ballot election, to questions concerning whether certain terms that may be included in a neutrality agreement violate the Act even if the agreement as a whole does not. The Board's answers to these questions will have a profound impact on labor-management relations in many industries where neutrality agreements have become a ubiquitous feature in the modern landscape of collective bargaining.

I. THE GROWTH AND DEVELOPMENT OF NEUTRALITY AGREEMENTS

Although neutrality agreements are now a common and significant topic at the bargaining table, that was not the case as recently as a decade ago. Neutrality agreements first began to appear in the automobile, rubber, and steel industries (among others) in the 1970s. But it was not until the 1990s that neutrality agreements became the focal point of discussion in numerous negotiations. Neutrality agreements have now become so common that unions in many industries have virtually abandoned the NLRB's secret ballot election procedure, reluctantly using that procedure only as the method of last resort.

Neutrality agreements have become an essential organizing tool for the labor movement because they often call for much more than simple neutrality and recognition based on a majority (or occasionally a super-majority) showing of authorization cards. Modern neutrality agreements often contain a variety of provisions that affirmatively assist a union in its organizing campaign and expedite the bargaining process once recognition has been obtained. For example, in addition to an agreement to recognize the union based on a card check and a commitment to maintain a neutral position with respect to the union's organizing campaign, a neutrality agreement may contain the following additional provisions that afford the union a distinct advantage:

3. Dana/Metaldyne Corp., 341 NLRB No. 150, slip op. at 1-2 (June 7, 2004).
• A complete "gag order" against any employer communications with employees about the subject of unionization.
• An agreement to meet promptly with the union concerning the scope and composition of the bargaining unit to be organized, and to resolve any disputes concerning these issues through an expedited arbitration process.
• An agreement to provide the union with an early list of names and contact information for employees in the agreed-upon bargaining unit.
• An agreement granting the union access to the employer's facilities for the purpose of distributing information and meeting with employees.
• An agreement to submit unresolved issues to interest arbitration if agreement on a first contract is not quickly reached. Or, an agreement to apply an existing contract to the new bargaining unit once it has been organized.
• An agreement to extend coverage of the neutrality agreement to subsidiaries, affiliates, and successors of the signatory company.

Provisions such as these significantly increase the chances that an organizing drive will be successful. As dissenting Board Members Liebman and Walsh noted in Dana Corporation/Metaldyne Corporation, "American labor unions have had increasing success in organizing employees by winning voluntary recognition from employers."\(^4\) Employers, in turn, agree to provisions such as these usually as the result of pressure from a corporate campaign, from fear of the union's influence in the regulatory arena, or simply through the leverage applied in collective bargaining concerning employees who are already represented by the union.

II. Existing Law Concerning Neutrality and Card Check Agreements

A. Federal Court Enforcement

The Supreme Court has acknowledged that, while a Board-supervised secret ballot election is the "most commonly traveled" and "preferred" route for a union to obtain recognition, it is not the only way in which a union may be recognized.\(^5\) Recognition may be obtained by presenting the employer with authorization cards signed by a majority of the employees to be represented.\(^6\)

\(^4\) Id. at 2.
\(^6\) Id. at 597.
The employer is not required, however, to accept authorization cards as proof of a union’s majority status, and may insist on a secret ballot election conducted by the NLRB.7 A neutrality/card check agreement amounts to a waiver by the employer of its right to insist on an NLRB election as the basis for union recognition.

Federal courts generally hold that neutrality and card check agreements are enforceable under Section 301 of the Labor-Management Relations Act (“Section 301”).8 For instance, the United States Court of Appeals for the Ninth Circuit in Marriott Corporation held that a neutrality and card check agreement was enforceable under Section 301 because it did not require the court to decide representational issues that are within the NLRB’s primary jurisdiction:

We have recognized repeatedly that courts must refuse to exercise jurisdiction over claims involving representational issues; such issues are more appropriately resolved by the NLRB . . . . However, we have also held that while the courts may not resolve representational issues, the parties may resolve these issues contractually.9 Although recognizing that an agreement would not be enforceable if it were contrary to federal labor policy, the Ninth Circuit in Marriott held that the neutrality and card check provisions of the agreement at issue in that case were enforceable in federal court because they were consistent with federal labor law.10 The Ninth Circuit also held, however, that a federal court would not have jurisdiction to imply a requirement to provide the union with access to the employer’s facilities or a list of employees’ names, addresses, and phone numbers unless the parties specifically agreed to such a requirement.11

The United States Court of Appeals for the Second Circuit reached the same conclusion with respect to the enforceability of a neutrality agreement in J.P. Morgan Hotel. The Second Circuit held that the NLRB’s jurisdiction over representational issues is primary, but not exclusive, and that Section 301 “grants courts

8. See UAW v. Dana Corp., 278 F.3d 548 (6th Cir. 2002); Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561 (2d Cir. 1993); Hotel Employees, Rest. Employees Union, Local 2 v. Marriott Corp., 961 F.2d 1464 (9th Cir. 1992).
10. Id. at 1468, 1470.
11. Id. at 1469.
concurrent jurisdiction over representation issues." This conclusion was bolstered, in the court's view, because the neutrality agreement at issue in J.P. Morgan contained an arbitration provision, so that the "crucial initial representation decision is made by the arbitrator, as the parties agreed, and the court is presented with the much more narrow and common issue of interpreting a contract arbitration clause, over which its power of review is extremely limited." In addition, the court rejected the argument that the neutrality agreement at issue was not enforceable under Section 301 because the union did not have majority support at the time it was negotiated. The court noted that Section 301 jurisdiction applies to a wide range of labor contracts, and not just a traditional collective bargaining agreement which may be negotiated only if the union has achieved representative status.

B. Existing NLRB Precedent Regarding Neutrality or Card Check Agreements

The seminal Board case concerning card check recognition agreements is Kroger Company. The Kroger case involved a so-called "after acquired stores" clause in two collective bargaining agreements. The clauses were interpreted to require the employer to recognize the union and apply the existing agreements to stores added to the Houston Division of the Kroger Company. The Board found that these clauses amounted to a waiver of the employer's right to insist on a Board election as the basis for union recognition. Ironically, although there was no explicit requirement that the union demonstrate majority support before seeking recognition pursuant to the after-acquired stores clauses, the Board inferred a card check requirement in order to preserve the validity of the clauses. Implicitly holding that the clauses were a mandatory subject of bargaining, the Board concluded that the employer violated Section 8(a)(5) of the Act by refusing to recognize the union based on a card check. Also significant was the Board's holding that an employer may lawfully enter into a card check recognition agreement with a union before the union begins an organizing campaign.

12. J.P. Morgan Hotel, 996 F.2d at 565.
13. Id. at 567-68 (emphasis in original).
14. Id. at 566.
16. Id. at 389.
17. Id.
Subsequently, in *Mine Workers (Lone Star Steel)*, the Board held that a union did not violate Section 8(b)(3) of the Act by striking in support of its demand to include an "application of contract" clause in the parties' collective bargaining agreement. That clause would have ensured that the existing agreement would be applied to any facility owned or acquired by the employer, following recognition by the employer or Board certification. The Board held that the proposed application of contract clause, like the after-acquired stores clause in *Kroger*, constituted a mandatory subject of bargaining. Therefore, the union did not violate Section 8(b)(3) by striking in support of it. The Tenth Circuit, however, rejected this conclusion on the employer's petition for review, holding that the application of contract clause "is much broader than necessary to accomplish the legitimate Union goal of protecting employees against a shift of production to another mine to evade standards and wages at the [bargaining unit] mine." 

The Board essentially reaffirmed its holding in *Lone Star Steel* twenty years later, in *Pall Biomedical Products Corporation*. At issue in *Pall Biomedical* was a clause that required the employer to recognize the union at its facility in Port Washington, New York, "in the event that it employs one (1) or more employees performing bargaining unit work" at that facility. The clause did not, however, require that the existing collective bargaining agreement be applied automatically upon recognition, as did the clauses at issue in *Kroger* and *Lone Star Steel*. Like a typical neutrality agreement, the clause provided only that the employer and union would "meet to discuss the terms and conditions of employment for such employees" following recognition. The Board nonetheless concluded that the clause was a mandatory subject of bargaining, reasoning that the union "would be in a position to protect the interests of the existing unit employees by achieving recognition . . . and negotiating terms and conditions of employment similar to those enjoyed" by the existing bargaining unit employees. Member Hurtgen dissented, arguing that the clause was not a mandatory subject of bargaining because it did not remove the economic incentive to transfer work to the Port Washington facility by requiring application of the existing

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19. *Id.* at 576.
20. *Lone Star Steel Co. v. NLRB*, 639 F.2d 545, 558 (10th Cir. 1980).
22. *Id.* at 1674.
23. *Id.*
24. *Id.* at 1677.
contract to that facility; the clause only mandated recognition.\textsuperscript{25} The D.C. Circuit agreed with Member Hurtgen's position and reversed the Board, holding that the clause was a non-mandatory subject of bargaining because it was not a "direct frontal attack" on the problem of preventing the transfer of bargaining unit work to the Port Washington facility.\textsuperscript{26} Palla Biomedical portended the debate over whether a typical neutrality agreement constitutes a mandatory subject of bargaining. Like the clause at issue in Palla Biomedical, a typical neutrality agreement does not require automatic application of an existing collective bargaining agreement when the union is recognized. Instead, a neutrality agreement normally calls for the parties to negotiate a new collective bargaining agreement following recognition of the union. Therefore, according to the D.C. Circuit's analysis in Palla Biomedical, a typical neutrality agreement would not constitute a mandatory subject of bargaining because it would not necessarily protect the interests of an existing bargaining unit if the contract negotiated at a newly organized facility does not provide the same level of wages and benefits as the contract for the existing bargaining unit. Accordingly, a union could not strike at an existing facility in support of a demand for a neutrality agreement covering other facilities, nor could a union enforce a neutrality agreement through the filing of a charge under Section 8(a)(5) of the Act,\textsuperscript{27} because the agreement would not constitute a mandatory subject of bargaining under the D.C. Circuit's decision in Palla Biomedical.

In the years following its decision in Palla Biomedical, the Board has not decided whether a neutrality agreement constitutes a mandatory subject of bargaining. The Board has, however, demonstrated a willingness to cede its primary jurisdiction over representation matters when the parties have agreed to a neutrality or card check recognition agreement. For instance, in Central Parking System,\textsuperscript{28} the employer filed an election petition in response to the union's demand for recognition pursuant to a contract provision which the union asserted was an "after acquired" clause. The Board dismissed the employer's petition, holding that the union's demand for recognition based on the alleged "after-acquired" clause did not entitle the employer to an election under Section 9(c)(1)(B) of the Act.\textsuperscript{29} The Board deferred to arbitration the issue of whether the contract provi-

\textsuperscript{25} Id. at 1681.
\textsuperscript{26} Pall Corp. v. NLRB, 275 F.3d 116, 122 (D.C. Cir. 2002).
\textsuperscript{28} Central Parking Sys., Inc., 335 NLRB 390 (2001).
\textsuperscript{29} Id. at 390.
sion in question constituted an "after acquired" clause, which would require the employer to recognize the union based on a showing of majority support.30

Similarly, in Verizon Information Systems,31 the Board dismissed a union's election petition when the union had already invoked the recognition procedure established under a neutrality and card check agreement. The parties deadlocked about the scope of the bargaining unit under the neutrality/card check agreement and submitted the unit scope issue to arbitration. Before the case was heard by the arbitrator, the union filed an election petition with the Board. The Board found that the neutrality/card check agreement barred the petition, explaining that this holding was "expressly premised on the fact that the Petitioner invoked the provisions of the Agreement in seeking to organize the Employer's employees."32 The Board noted that it would not have reached the same conclusion if the union had filed the petition initially, without invoking the agreement. Ultimately, the Board held that the issue was "really one of estoppel" and concluded that "the policies of the Act can best be effectuated by holding the Petitioner to its bargain."33

In Raley's,34 the Board again considered the effect of an "after acquired" clause in a collective bargaining agreement. The Board found that the clause in this case applied to preexisting stores as well as new stores, and held that the clause clearly and unmistakably waived the employer's right to determine the union's majority status through a Board election.35 Again assuming that the "after acquired" clause was a mandatory subject of bargaining, the Board held that the employer would have violated Section 8(a)(5) of the Act by refusing to recognize the union if the union had demonstrated majority support through authorization cards.36

Most recently, in Hotel Del Coronado,37 the Board rejected a successor employer's claim that a Board-conducted election was tainted by a neutrality agreement entered into by the predeces-

30. Id. at 391.
32. Id. at 560.
33. Id.
34. Raley's, 336 NLRB 374 (2001).
35. Id. at 376-77.
36. Id. at 378. The Board remanded the case for a factual determination as to whether the union did, in fact, demonstrate majority support through authorization cards. Id.
37. KSL DC Mgmt., LLC (Hotel Del Coronado), 345 NLRB No. 24, slip op. (Aug. 26, 2005).
sor employer and the union. The election was held, and the union was certified, less than two months before the successor purchased the property from the predecessor employer. The Board found that any of the issues raised by the successor could have been raised by the predecessor employer. Chairman Batta found it unnecessary to decide the issue of whether card check recognition based on a neutrality agreement would be binding on a successor employer.

III. Where Will the Board Go from Here?

The NLRB may soon reverse its trend of deferring to neutrality and card check agreements in an effort to defend its primary jurisdiction over representation matters and to emphasize the value of the Board's secret ballot election process. Two pending cases provide a strong indication that the current Board is inclined to reconsider Kroger and the broader policy question of whether an employer's waiver of the right to a Board-supervised secret ballot election should be enforced. Those two cases are Dana Corporation/Metaldyne Corporation and Shaw's Supermarkets, both of which are discussed below. In addition, the Board may consider the validity of certain key provisions that may be included in a neutrality agreement upon review of another Dana Corporation case (Dana Corp. or Dana II) and in Heartland Industrial Partners. These cases, and their implications at the bargaining table, also are discussed below.

A. Dana/Metaldyne: A Narrow Issue with Broad Implications

In Dana Corporation and Metaldyne Corporation (two cases that were consolidated on review and hereinafter referred to as "Dana/Metaldyne Corp."), the Board indicated that it may not treat recognition pursuant to a neutrality agreement as the equivalent of a secret ballot election. Both cases involved decertification petitions filed soon after recognition was granted pursuant to a neutrality agreement. In both cases, the petitions were dismissed by the Regional Director based on the Board's recognition bar

38. Id. at 1–2.
39. Id. at 2 n.6.
40. Dana/Metaldyne Corp., 341 NLRB No. 150, slip op. (June 7, 2004).
41. Shaw's Supermarkets, 343 NLRB No. 105, slip op. (Dec. 8, 2004).
42. Dana Corp., JD-24-05 (NLRB Div. of Judges Apr. 8, 2005).
doctrine, which provides that voluntary recognition of a union will bar an election petition for "a reasonable period of time." 44

The Board granted the employers' request for review, noting that in both cases the card check agreement was entered into before the union obtained authorization cards from the employees it sought to organize. In its order granting review, the Board distinguished existing precedent on the grounds that it "is based upon a union's obtaining signed authorization cards from a majority of the unit employees before entering into the agreement with an employer." 45 The Board was clear to express the limits of the issue under review, however, stating that "no party here challenges the legality of voluntary recognition." 46 The only issue under review is "the extent to which, if any, a voluntary recognition should be given election 'bar quality'"—i.e., whether voluntary recognition should bar an election petition for some period of time. 47 Despite this narrow framing of the issue, the Board majority concluded its order granting review with what seems to be a more sweeping pronouncement about recognition agreements:

In sum, we believe that the increased usage of recognition agreements, the varying contexts in which a recognition agreement can be reached, the superiority of Board supervised secret-ballot elections, and the importance of Section 7 rights of employees, are all factors which warrant a critical look at the issues raised herein. At this point, the only difference between our colleagues and ourselves is that we believe the time is appropriate to take that critical look and they do not. 48

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. A refusal to accord "bar quality" to recognition granted pursuant to a neutrality/card check agreement would certainly be a significant change in the law—if that is what the Board ultimately decides—but such a ruling would not preclude an employer from granting recognition in the first place. The validity of the recognition would be called into ques-

44. Dana/Metaldyne Corp., 341 NLRB No. 150, slip op. at 1 (citing Seattle Mariners, 335 NLRB 563 (2001); MGM Grand Hotel, 329 NLRB 464 (1999)).
45. Id.
46. Id.
47. Id.
48. Id. at 1–2.
tion only if employees or a rival union file an election petition in the months immediately following recognition and before agreement on a first contract is reached. Moreover, the potential impact of Dana/Metaldyne Corp. would be even further limited if the Board adopts the suggestion, advanced by the Petitioners in an alternative argument and by the General Counsel as amicus curiae, that any exception to the recognition bar should be confined to a thirty or forty-five day period following recognition—and perhaps even then only if the petition is supported by a majority (rather than the normal thirty percent) of bargaining unit employees. Thus, while Dana/Metaldyne Corp. has attracted a great deal of attention and criticism, its impact on the administration of neutrality and card check agreements is likely to be quite limited.

B. Shaw's Supermarkets: The End of the Kroger Era?

Shaw's Supermarkets, meanwhile, has not attracted the same level of attention as Dana/Metaldyne Corp. (measured at least in terms of amicus curiae briefs), but its impact is potentially much greater. The issue in Shaw's Supermarkets is whether an employer's election petition should be dismissed based on an "after acquired" clause in the parties' collective bargaining agreement. This is essentially the same issue that was presented in Central Parking System, as the Board acknowledged. The Board in Shaw's Supermarkets explained that its decision in Central Parking System was "contrary to the general rule that the Board does not defer representation case issues to arbitration." Accordingly, the Board warned of the possibility that it will "abide by the general rule rather than Central Parking."

In granting review, the Board identified two issues raised by the employer's petition: (1) whether the employer had clearly and unmistakably waived the right to a Board election; and (2) if so, whether public policy considerations outweigh the employer's private agreement not to have an election. With respect to the second issue, the Board identified the policy concerns motivating its decision to grant review:

49. Once agreement on a first contract is reached, the Board's contract bar doctrine would preclude an election for the duration of the contract, to the extent it does not exceed three years. See, e.g., General Cable Corp., 139 NLRB 1123 (1962).

50. Shaw's Supermarkets, 343 NLRB No. 105, slip op. at 2 (Dec. 8, 2004).

51. Id.

52. Id. at 1.
It is clear that the Board's election machinery is the preferred way to resolve the question of whether employees desire union representation. That method, as compared to a card-check, offers a secret ballot choice under the watchful supervision of a Board agent. We recognize that, under current law, an employer can voluntarily recognize a union based on a card-majority, and that such recognition can operate to preclude employee resort to election machinery for a reasonable period of time. However, in Dana Corporation and Metaldyne Corporation, we have granted review to consider inter alia, that issue. We can do no less here.\textsuperscript{53}

The Board remanded the case to the Regional Director to conduct an evidentiary hearing on the issue of whether the employer in this case did, in fact, waive its right to a Board election through the after-acquired stores clause.

On remand, the Regional Director concluded that the employer did in fact waive its right to a Board election, based on extant law involving after-acquired stores clauses (i.e., Kroger and Central Parking System).\textsuperscript{54} Citing Kroger, the Regional Director noted that "[f]or the last 30 years, the Board has found that an employer waives its right to a Board election by agreeing to such an additional stores clause."\textsuperscript{55} But even if the employer had not waived its right to a Board election, the Regional Director found that the employer was estopped from filing an election petition under the Board's decision in Verizon Information Systems. Accordingly, the Regional Director dismissed the employer's election petition. The employer requested review of the Regional Director's decision on remand, which the Board granted on March 15, 2006.

The public policy issue that is now framed for consideration by the Board in Shaw's Supermarkets has broad implications for all forms of neutrality and card check agreements, not just after-acquired stores clauses. The Board has set the stage for reconsidering whether a voluntary recognition agreement should preclude a Board-supervised secret ballot election. Thus, Shaw's Supermarkets provides further indication of how the Board is likely to rule in Dana/Metaldyne Corp.

\textsuperscript{53} Id. at 2 (footnotes omitted).
\textsuperscript{54} Shaw's Supermarkets, 1-RM-1267 (NLRB Reg'l Dir., 1st Region Mar. 22, 2005). The Regional Director did not consider the public policy issue identified by the Board to be within the scope of the remand.
\textsuperscript{55} Id. at 9.
It seems likely that the Board will hold that a neutrality or card check agreement which is entered into by the employer and union before the organizing campaign begins will not operate as a waiver of the employees' right to seek a Board election. Moreover, the Board in Shaw's Supermarkets seems inclined to change the law regarding the effectiveness of a waiver of an employer's right to insist on a Board election as the method for determining a union's majority support. The Board, at a minimum, was skeptical of the proposition that an after-acquired stores clause, on its face, "clearly and unmistakably" waives the employer's right to insist on a Board election. But the policy concerns expressed in Shaw's Supermarkets seem to extend beyond mere skepticism, and reflect a more fundamental concern about the widespread use of card check recognition agreements and the consequent decline in use of the Board's secret ballot election process.

C. Dana Corp.: How Far Can the Parties Go in a Neutrality Agreement?

The issue in a recent case again involving the Dana Corporation (Dana Corp. or Dana II) is whether or not a neutrality agreement entered into between the Dana Corporation and the United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") was unlawful because, in addition to establishing a procedure governing the recognition process, it made substantive agreements on terms and conditions of employment. The Administrative Law Judge ("ALJ") dismissed the complaint on procedural grounds, because the complaint failed to allege that the company had unlawfully recognized the union. However, the ALJ still went on to address the merits of the case, "in the event that the Board might find that useful."

The agreement at issue included provisions typically found in a neutrality agreement, such as an agreement by Dana to adopt a position of neutrality regarding the UAW's efforts to organize employees at a covered facility, and an agreement to provide the UAW with access to employees at its facilities and, upon request, a list of employees' home addresses. The agreement also established an expedited process for negotiating a first contract at a newly organized facility, a process that would culminate in interest arbitration if the parties were unable to reach agreement. In addition to these fairly typical provisions,

56. Shaw's Supermarkets, 343 NLRB No. 105, slip op. at 1 (Dec. 8, 2005).
57. JD-24-05 (NLRB Div. of Judges Apr. 8, 2005).
58. Id. at 6.
59. Id.
the agreement included a no-strike/no-lockout commitment that would be triggered when the UAW requested a list of employees at a covered facility. The parties further agreed that any collective bargaining agreement negotiated would have a duration of at least four years, and they agreed that any agreement negotiated must include the following conditions in order for the facility "to have a reasonable chance to succeed and grow":

- Healthcare costs that reflect the competitive reality of the supplier industry and product(s) involved;
- Minimum classifications;
- Team-based approaches;
- The importance of attendance to productivity and quality;
- Dana's idea program (two ideas per person per month and eighty percent implementation);
- Continuous improvement;
- Flexible compensation; and,
- Mandatory overtime when necessary (after qualified volunteers) to support the customer.\(^{60}\)

It thus seems that the agreement in Dana Corp. represents a new generation of neutrality/card check agreements. Instead of the more typical variety designed to ease the union's ability to obtain recognition and a first contract, this one provided assurances that the employer could be competitive under the collective bargaining agreement ultimately negotiated. But agreements such as these implicate other legal issues.

The Board in Majestic Weaving Company\(^{61}\) held that an employer unlawfully assisted a union, in violation of Section 8(a)(2) of the Act, when it negotiated a collective bargaining agreement that was contingent on the union achieving majority support. The Board noted the Supreme Court's holding in Bernhard-Altmann\(^{62}\) that there "could be no clearer abridgment" of employees' Section 7 rights than to recognize a union as the bargaining agent of employees who have not yet selected the union as their representative.\(^{63}\) Accordingly, the Board held that the employer in Majestic Weaving violated Section 8(a)(2) by negotiating a contract with a union that did not have majority support among the employees who would be covered by the contract.\(^{64}\)

\(^{60}\) Id. at 7.


\(^{62}\) Int'l Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731 (1961).

\(^{63}\) Majestic Weaving, 147 NLRB at 860.

\(^{64}\) Id. at 862.
In dismissing allegations that the agreement in *Dana Corp.* violated Sections 8(a)(1) and (2) and Section 8(b)(1)(A) of the Act, the ALJ found no evidence that Dana had, in actuality, recognized the UAW as the representative of the employees in question. To the contrary, the ALJ found that the agreement "explicitly states that recognition has not been granted." The ALJ also rejected the allegation that the UAW and Dana "went beyond discussing tentative contract proposals in the letter of agreement and made substantive agreements on the terms and conditions of employment of employees." The ALJ found that the letter agreement did not constitute a collective bargaining agreement "from which recognition can be inferred" because it did not deal with "significant matters such as wages, pensions, grievances and arbitration, vacations, union security, etc." Indeed, the ALJ noted that the complaint described the letter agreement as setting forth terms and conditions of employment "to be negotiated in a collective bargaining agreement." The ALJ also found that the no-strike commitment waived only the UAW's right to call a strike; "the employees' Section 7 right toconcertedly strike remains intact."

Based on these findings, the ALJ concluded that the letter agreement was a "far cry" from the sort of pre-hire collective bargaining agreement which the Board found to be unlawful in *Majestic Weaving.* The ALJ concluded that *Majestic Weaving* was not controlling for two reasons. First, in *Majestic Weaving,* the employer had recognized the union "apart from negotiating the contract"—an element the ALJ found was not present in this case. Second, the ALJ found that the collective bargaining agreement in *Majestic Weaving* was "complete and whole," whereas the agreement at issue in *Dana II* did not establish many significant terms and conditions of employment.

As an alternative basis for dismissing the complaint, the ALJ found that *Kroger* sanctioned the parties' negotiation of limited terms and conditions of employment to be applied at newly organized facilities. Since the Board in *Kroger* found that an after-acquired stores clause was lawful even though it required the application of the *entire* existing collective bargaining agree-
ment upon a showing of majority support, the ALJ reasoned that it must be lawful to require application of only limited portions of an existing agreement at a newly organized facility:

It seems to me that if Dana and the UAW are free to extend their existing agreements to cover the [new facilities'] employees they should be free to bargain for less than a full extension so as to allow greater employee participation in the terms and conditions of employment at the new facilities.\(^7\)

Exceptions have been filed to the ALJ's decision in *Dana II*, and thus a wide range of issues are now before the Board for resolution. The main issue presented is the continuing validity of *Majestic Weaving* and its application in the context of a neutrality agreement. Furthermore, the Board must reconcile the tension between *Majestic Weaving* and *Kroger*. Whereas *Majestic Weaving* squarely holds that a collective bargaining agreement negotiated before the union has majority status is unlawful even if it is conditioned on the union subsequently achieving majority status,\(^7^4\) *Kroger* expressly sanctions a clause that applies an existing collective bargaining agreement to a new group of employees as long as the union demonstrates majority support. *Kroger* may be distinguished on the grounds that an after-acquired stores clause preserves the stability of an established collective bargaining relationship, and protects the interests of existing bargaining unit employees by discouraging the transfer of work from a covered facility to a non-covered facility. But, given the current Board's stated desire to reconsider *Kroger*, the likely outcome seems to be that *Majestic Weaving* will be reaffirmed—perhaps at the expense of *Kroger* and its progeny.

D. Heartland Industrial Partners: *Can the Parties Impose a Neutrality Agreement on Subsidiaries or Affiliated Companies?*

Also before the Board is the question of whether parties to a neutrality agreement may lawfully agree to impose that agreement on subsidiaries or corporate affiliates of the signatory company. In *Heartland Industrial Partners, LLC,\(^7^5\)* an Administrative Law Judge held that such a provision in a neutrality agreement did not violate Section 8(e) of the Act. Section 8(e) generally prohibits an employer and a union from entering into an agreement in which the employer agrees to "cease doing business with

\(^7^3\) *Id.* at 9.

\(^7^4\) *Majestic Weaving*, 147 NLRB 859, 860 (1964).

\(^7^5\) JD(NY)-23-05 (NLRB Div. of Judges June 16, 2005).
any other person.” 76 Here, there was an agreement between Heartland and the United Steelworkers of America (“Steelworkers”) which provided that Heartland would “cause” any Covered Business Entity (“CBE”) to execute a neutrality agreement with the Steelworkers within ten days of notification of the Steelworkers’ intent to organize any of the CBE’s facilities. It was alleged that this provision violated Section 8(e) of the Act because it required Heartland to “cease doing business” with any company that refused to enter into a neutrality agreement with the Steelworkers.

The ALJ dismissed the Section 8(e) allegation on the grounds that a single event transaction involving the purchase or sale of a business does not constitute “doing business” within the meaning of Section 8(e). 77 This conclusion was based on a line of cases which holds that a successorship clause which requires an employer to condition the sale of its business on the purchaser’s assumption of the existing collective bargaining agreement does not violate Section 8(e). 78 As the Board held in Cascade Employers Association, “the sale or transfer of an enterprise has been viewed not as a business transaction but as a substitution of one entity for the other while the conduct of business continues without interruption.” 79 Additionally, the ALJ found that the agreement at issue in Heartland Industries did not require a cessation of business with “any other person” within the meaning of Section 8(e) because the agreement only applied to business entities controlled by Heartland. 80 Thus, the ALJ noted that “if the acquired entity is controlled by Heartland . . . then the neutrality agreement would simply be an agreement, by Heartland, to cease doing business with itself.” 81

The ALJ’s decision in Heartland is currently before the Board on exceptions filed by the General Counsel and the Charging Parties. It is possible that the Board will adopt the

77. Heartland, JD(NY)-23-05, at 10, 14.
78. Id. at 9 (citing Mine Workers (Lone Star Steel), 231 NLRB 573 (1977), enf’d, 639 F.2d 545, 550 n.12 (10th Cir. 1980); Teamsters Local 814 (Bader Bros. Warehouses, Inc.), 225 NLRB 609 n.1 (1976); Cascade Employers Ass’n, 221 NLRB 751 (1975)).
79. See Heartland, JD(NY)-23-05, at 9 (quoting Cascade Employers Ass’n, 221 NLRB 751, 752 (1975)).
80. The agreement defined a Covered Business Entity as one in which Heartland: “Directly or indirectly (i) owns more than 50% of the common stock; (ii) controls more than 50% of the voting power; or (iii) has the power, based on contacts, constituent documents or other means, to direct the management and policies of the enterprise . . . .” Id. at 1.
81. Id. at 15.
ALJ's decision, based on the single event transaction cases cited by the ALJ, but it should be expected that the Board will take a hard look at whether that precedent should be applied in the context of a neutrality agreement. For instance, the single event transaction cases cited by the ALJ in Heartland generally involve a successorship clause which seeks to preserve a collective bargaining agreement currently in effect for an established bargaining unit, so that those employees do not lose work or suffer a reduction in wages, benefits, or other working conditions as a result of a sale of the business. A neutrality agreement, by contrast, does not so directly preserve the interests of an existing bargaining unit. The objective of a neutrality agreement is to regulate the process of establishing a new bargaining unit at a different business or facility—albeit one that is affiliated with the existing business. Thus, the same work preservation objective that is present in a traditional successorship clause is not necessarily present in a neutrality agreement. Indeed, the ALJ in Heartland found no work preservation rationale for the neutrality agreement in that case because "Heartland itself does not directly employ any workers whose work would be adversely affected by the acquisitions."

The ALJ's reliance on the right of control by Heartland over affiliated business entities appears misplaced, however. In the absence of a work preservation objective, Heartland's ostensible control over the operations of an affiliated business entity is not sufficient to avoid a violation of Section 8(e). The Board in Manganaro Corporation found that an anti-double breasting clause did not violate Section 8(e) because it passed both prongs of the two-part test established by the Supreme Court in the ILA cases: the clause had a lawful work preservation objective and the contracting employer had the "right of control" over the work in question. The Heartland agreement, however, has no work preservation objective, as the ALJ found. Therefore, any "right of control" Heartland may have with respect to affiliated business entities is irrelevant. The only relevant inquiry is whether Heart-

82. As the D.C. Circuit held in Pall Corp. v. NLRB, "prescribing the manner of recognition at a new facility is not a 'direct frontal attack' upon the problem of transfer of work facing employees at already organized facilities." 275 F.3d 116, 122 (D.C. Cir. 2002). The court also pointed out that "even expedited recognition is only the first step toward equalizing labor costs and thereby preventing the transfer of work." Id.

83. Heartland, JD(NY)-23-05, at 11.


85. Id. at 164 (citing NLRB v. Longshoremen ILA, 447 U.S. 490 (1980)).

86. Heartland, JD(NY)-23-05, at 11.
land and its affiliated business entities are a “single employer” under the Act.87

CONCLUSION

The issues currently before the Board, while they are distinct legal issues, have many common themes and therefore cry out for a coherent solution. Whichever way the Board ultimately decides these issues, the Board should articulate a unifying theory which makes the result in each case consistent with the next. Ultimately, the Board must decide what role neutrality agreements will play in modern labor law, and conversely what role the Board will reserve for itself as unions seek alternative methods for reversing their steady decline in membership in the private sector. For many years, employers and unions have been struggling with these issues at the bargaining table, and through the various forms of leverage each side may exert in the economic and public relations arenas. The opportunity has finally arrived for the Board to answer difficult questions that are reflective of a sea change in modern labor relations—a sea change that has occurred largely outside the Board’s administrative framework. The Board’s task now is to answer these questions in a manner that effectuates the dual purposes of the Act: protecting employee free choice in selecting their collective bargaining representative (or in refraining from doing so) and preserving industrial peace. Reconciling these dual purposes is not an easy task, particularly in the context of an issue as contentious as neutrality and card check agreements, but it is nonetheless the important task now before the Board.

87. See Manganaro, 321 NLRB at 158, n.5 (Member Cohen, dissenting); Carpenters Dist. Council of Ne. Ohio (Alessio Construction), 310 NLRB 1023, 1025–26 (1993). Even then, a single employer inquiry may be unnecessary if the Heartland agreement violates Section 8(e) on its face. See Carpenters (Novinger’s, Inc.), 337 NLRB 1030, 1030 (2002), enf’d, 352 F.3d 831 (3d Cir. 2003).