# Labor and Employment Law

## Pre-Recognition Agreements: Can Employers Lawfully Acquire Contractual Control Over the Future Representative of their Employees under § 8(a)(2) of the NLRA?

*By William Messenger**

Consider a hypothetical. An attorney enters into contract with a company. The company agrees to assist the attorney with recruiting new clients. In exchange, the attorney agrees to settle disputes between newly retained clients and the company pursuant to prearranged terms favorable to the company. Is the attorney's arrangement with the company ethical?

If you are an attorney (even if you're not), your answer should be "no." The company controlling how the attorney can represent clients *vis a vis* itself creates a conflict of interest for the attorney. An attorney subject to the contractual control of an opposing party cannot satisfy his fiduciary obligation to solely represent the interests of his clients. Any legal proceedings between the company and a person the attorney represents would be a farce, as the company would be on both sides of the dispute.

The National Labor Relations Board ("Board") is currently considering the propriety of an arrangement similar to this hypothetical in *Dana Corp. (Int'l Union, UAW)*, 7-CA-46965 *et seq*. At issue is an agreement between the International Union, United Automobile and Agricultural Implement Workers of America ("UAW") and Dana Corporation ("Dana"), an employer in the automotive industry. In this agreement, Dana agreed to assist the UAW with becoming the representative of its employees. In exchange, the UAW agreed that the collective bargaining agreements it negotiates for future-represented employees will include prearranged terms favorable to Dana. The question presented is whether the UAW's commitment is lawful under the National Labor Relations Act, ("NLRA" or "Act").[1]

The answer to this question should also be "no."[2] An employer having contractual control over how a union can represent employees *vis a vis* the employer creates a conflict of interest in violation of § 8(a)(2) of the NLRA.[3] The UAW cannot satisfy its fiduciary duty to represent the interests of employees when subject to the contractual control of their employer. Collective bargaining negotiations between Dana and the UAW would be a sham, as Dana would be sitting on both sides of the table.

The Board's decision in *Dana Corp*. will determine whether collective bargaining under the NLRA, which heretofore has been permitted only after a union is lawfully recognized as the representative of employees,[4] can occur prior to such recognition (i.e., "pre-recognition bargaining"). The Board's ultimate disposition on this issue will have significant ramifications for employee rights and labor policy.

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### I. Pre-Recognition Bargaining and "Bargaining to Organize" Agreements

Organizing new members and dues-payers is a priority for organized labor. The strategy most unions currently favor is to organize pursuant to "organizing agreements" with employers (sometimes called "recognition" or "neutrality" agreements).[5]

The terms of organizing agreements vary, but common provisions include an employer's commitment to: (1) recognize the union as the exclusive representative of employees based on a "card check," and without a secret-ballot election; (2) prohibit speech by management that is unfavorable to the union; (3) issue communications favorable to the union; (4) grant union organizers access to company property; (5) provide the union with personal information about employees; and (6) conduct captive audience meetings in support of the union.[6]

A pre-requisite of this top-down organizing strategy is that employers enter into organizing agreements. Most employers are understandably loathe to hand over their employees to a union and balk at entering into organizing agreements. Therefore, unions utilize a variety of tactics to coerce or induce employers to enter into organizing agreements.

One prevalent union tactic is "bargaining to organize," in which a union makes bargaining concessions at the expense of employees the union already represents in exchange for an organizing agreement concerning other employees. A variation of this tactic is "pre-recognition bargaining," in which a union commits to make bargaining concessions at the expense of the employees it seeks to represent in return for an organizing agreement concerning those employees.

An example of these tactics is the agreements between the UAW and Freightliner Corporation, a truck manufacturer. In 2002, the UAW exclusively represented employees at a Freightliner facility in Mt. Holly, North Carolina, and sought to represent the employees of other Freightliner facilities. To organize the latter, the UAW entered into an organizing agreement (called the "Card Check" agreement) and a pre-recognition agreement (called the "Preconditions" agreement) with Freightliner.[7]

In the "Card Check" agreement, Freightliner committed to recognize the UAW as it employees' representative pursuant to a card check, to prohibit negative comments about the UAW, to grant union organizers access to its

facilities, and to hold joint captive audience meetings at which UAW authorization cards would be distributed to employees.

As a quid pro quo, the UAW committed in the "Preconditions" agreement to make bargaining concessions at the expense of any Freightliner employees it organized with regard to transfer rights, severance pay, strikes, pattern agreements, subcontracting, overtime scheduling, grievances, benefits costs, and wage adjustments. In addition, the UAW agreed to a wage freeze, an increase in health benefit costs, and the cancellation of profit sharing bonuses for UAW-represented employees at Freightliner's Mt. Holly facility.[8] In short, the UAW "bargained" with the wages, benefits, and terms of employment of current and future represented employees in order to "organize" new members and dues payers.[9]

Another example of "bargaining to organize" is the so-called "Side Letter" and "Framework" agreements between the Steelworkers union and Heartland Industrial Partners ("Heartland"), an investment firm.[10] Heartland agreed that companies in which it invested would support Steelworker organizing campaigns with access to company facilities, information about employees, and certain control over company communications. In exchange, the Steelworkers agreed to limits on the wages and benefits of future-organized employees and waived their right to strike in support of bargaining demands.[11]

*Dana Corp*. involves a "bargaining to organize" agreement between Dana and the UAW called the "Letter of Agreement."[12] In this agreement, Dana committed to assist the UAW with becoming the representative of its employees by: conducting captive audience meetings on company time and property for the UAW; providing UAW organizers access to Dana facilities; providing the UAW personal information about employees; informing employees that the UAW will help Dana secure business; forbidding supervisors from saying anything negative about the UAW; and recognizing the UAW without a secret-ballot election.

In exchange, the UAW made several commitments governing its conduct as the future representative of Dana employees. The UAW agreed not to seek employee health insurance coverage superior to that implemented by Dana on January 1, 2004; to several mandatory contract terms; to cap total wages and benefits to those of an organized facilities' competitors and comparable Dana facilities; and, not to strike in support of bargaining demands in the first contract. In addition, the UAW agreed that it could not organize the employees of certain Dana facilities if the collective bargaining agreements it negotiated for organized employees materially harmed the financial performance of their facilities.

At issue in *Dana Corp*. is whether § 8(a)(2) of the NLRA is violated by those portions of the Letter of Agreement that govern the terms of employment that the UAW can seek for Dana employees upon becoming their exclusive representative. In short, is pre-recognition bargaining lawful under the Act?

On April 8, 2005, Administrative Law Judge William G. Kocol found the pre-recognition agreements between Dana and the UAW to be lawful.[13] The Charging Parties and General Counsel filed exceptions to this decision with the Board.[14] On March 30, 2006, the Board recognized the importance of *Dana Corp*. by inviting interested parties to file amicus briefs.[15] Ten entities subsequently filed amicus briefs with the Board.[16] The case is now fully briefed and pending before the Board.

## III. Section 8(a)(2) of the NLRA

Section 8(a)(2) makes it an unfair labor practice for employers "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."[17] The statute was enacted to prevent employers from controlling their employees' bargaining agent, for Congress found such control incompatible with exclusive representation and the collective bargaining process.

Section 9 of the NLRA empowers unions to act as the "exclusive representative" of a unit of employees with respect to their wages, benefits, and other terms of employment.[18] The Supreme Court has found this agency relationship akin to that between attorney and client,[19] with the union owing a fiduciary duty of complete loyalty to represented employees.[20]

A union's duties as an exclusive representative require that it be independent of the employer with which it deals for employees.[21] Congress found that a "company-dominated union is one which is lacking in independence, and which owes a dual obligation to employers and employees. It is an agent which possesses two masters."[22] Section 8(a)(2)'s prohibitions "against the participation of management in any labor organization . . . are predicated on the principle that an agent cannot serve two masters."[23]

Collective bargaining under the Act involves a union negotiating with an employer as its employees' exclusive representative with respect to wages, hours, and other terms of employment.[24] Congress recognized that "[c]ollective bargaining is a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals."[25] Thus, § 8(a)(2) protects the integrity of collective bargaining by prohibiting employers from controlling the unions with which they bargain.

## IV. Pre-recognition Bargaining and § 8(a)(2) of the Act

### *A. Pre-Recognition Bargaining Should Be Held Unlawful Under § 8(a)(2)*

An employer enjoying contractual control over how a union can represent employees *vis a vis* that employer violates the letter and spirit of § 8(a)(2). Pre-recognition agreements inherently give employers control over what unions can bargain for on behalf of future-represented employees. As such, the agreements are unlawful under § 8(a)(2).

The Letter of Agreement at issue in *Dana Corp.* grants Dana contractual authority, enforceable through binding arbitration[26] and potentially § 301 of the Labor Management

Relations Act,[27] over the UAW's conduct as an exclusive representative of Dana employees. Dana has the power to prohibit its employees' future agent from negotiating for several terms of employment, such as improved healthcare benefits or voluntary overtime, or from striking in support of any bargaining demands.[28]

Dana's authority over the UAW "interfere[s] . . . with the . . . administration of any labor organization" within the meaning of § 8(a)(2). Indeed, Dana controlling what the UAW may negotiate for during collective bargaining far exceeds the degrees of interference that have previously been found unlawful under § 8(a)(2), such as supervisors merely participating in union negotiating efforts.[29]

Pre-recognition agreements are incompatible with § 8(a)(2)'s legislative purposes. The UAW cannot satisfy its fiduciary obligations as an exclusive representative of Dana employees under the Letter of Agreement because the union "owes a dual obligation to employers and employees."[30] For example, if Dana employees organized by the UAW wanted their union representative to bargain for health insurance superior to that implemented by Dana January 1, 2004, Dana could prohibit the UAW from doing so.[31]

Dana's contractual authority over what the UAW can seek when negotiating with Dana for employees is incompatible with the collective bargaining process, as Dana is effectively "on both sides of the table."[32] As Senator Wagner cogently stated when moving the Senate to consider the bill that would become the NLRA, "[c]ollective bargaining becomes a mockery when the spokesmen of the employee is the marionette of the employer."[33]

In *Dana Corp.*, Dana and the UAW argue that pre-recognition agreements are lawful because unions can lawfully enter into agreements governing employees' terms of employment after becoming their representative (i.e., collective bargaining agreements).[34] However, pre-recognition agreements differ from collective bargaining agreements in that they grant employers control over the internal "administration" of a union—the relationship between union and represented employees—within the meaning of § 8(a)(2).

Unions enter into collective bargaining agreements as the proxy of exclusively represented employees. By contrast, unions enter into pre-recognition agreements solely for themselves. A union that enters into a pre-recognition agreement cannot negotiate for terms of employment that differ from those specified in the agreement, regardless of what represented employees desire. A pre-recognition agreement therefore governs the future relationship between agent (the union) and principal (represented employees).

Analogously, an attorney entering into contract with a third-party as the proxy of a client does not interfere with the attorney-client relationship. But an attorney entering into contract with a third party on his own behalf, which governs how the attorney can represent future clients, does interfere with the attorney-client relationship. The distinction between collective bargaining agreements and pre-recognition agreements is much the same.

### *B. Prior Board Precedents: Majestic Weaving and Kroger*

The legality of pre-recognition bargaining is not an issue of first impression for the Board. In *Majestic Weaving*,[35] the Board considered the propriety of an employer and a union bargaining over terms for a collective bargaining agreement that would become effective when the union gained majority employee support.[36] The Board found this conduct unlawful, holding "that the [employer's] contract negotiation with a nonmajority union constituted unlawful support within the meaning of Section 8(a)(2) of the Act."[37]

In *Dana Corp.*, the UAW and Dana argue that the *Majestic Weaving* Board did not find pre-recognition bargaining to be unlawful, but rather that the employer violated the Act by recognizing the union as the exclusive representative of its employees prior to the union enjoying majority employee support.[38] This contention cannot be squared with *Majestic Weaving*, which overruled a prior precedent that held pre-recognition bargaining lawful:

> We hereby overrule our decision in *Julius Resnick, Inc.*, 86 NLRB 38 [1949] . . . to the extent that it holds that an employer and a union may agree to terms of a contract before the union has organized the employees concerned, so long as the union has majority representation when the contract is executed.[39]

Indeed, the AFL-CIO's General Counsel recognized in 1996 that "[n]egotiations over non-Board recognition procedure often spill over to discussing the terms of a future collective bargaining agreement, should the union demonstrate majority support. Under *Majestic Weaving*, however, this is an unfair labor practice."[40]

Dana and the UAW also cite *Kroger*, in which the Board found that an employer violated § 8(a)(5) of the NLRA by failing to enforce an "after acquired store clause" that applied the terms of a current collective bargaining agreement to other workplaces organized by the union.[41] Dana and the UAW aver that *Kroger* permits agreements regarding the terms of employment of future-organized employees.[42]

*Kroger's* applicability to the issue of pre-recognition bargaining is questionable. The collective bargaining agreement in *Kroger* was entered into by the union for currently represented employees. *Kroger* did not involve an agreement that solely affects the terms of employment of employees that the union did not yet represent.

If *Kroger* is considered applicable to the issue of pre-recognition bargaining, it should be overruled as inconsistent with § 8(a)(2). *Kroger* and its progeny involved alleged failures to bargain in violation of § 8(a)(5) of the NLRA, not whether "after acquired store clauses" violate § 8(a)(2).[43] As established above and in *Majestic Weaving*, pre-recognition agreements violate § 8(a)(2) of the Act. Because employers and unions cannot bargain in violation of § 8(a)(2), *Kroger* must be overruled if in conflict with § 8(a)(2) and *Majestic Weaving*.

### *C. Is Pre-Recognition Bargaining Favored By Labor Policy?*

In *Dana Corp*., the UAW argues that employees and employers benefit from pre-recognition agreements.[44] Employees can make a more informed choice regarding union representation if they know what it will entail, and employers will be less apt to resist union organizing if assured that unionization will not adversely affect their business interests.

Employees, unions, or employers ostensibly favoring pre-recognition agreements is no defense under § 8(a)(2). In fact, the incentive of employers and unions to satiate their respective self-interests at employees' expense by "bargaining to organize" is a compelling reason for the Board to bar pre-recognition bargaining.

The Supreme Court has long recognized that employee preference for unions controlled or supported by their employer is not exculpatory under § 8(a)(2).[45] When enacting the NLRA, "Congress heard extensive testimony from employees who expressed great satisfaction with their employee representation plans and committees," but "nonetheless enacted a broad proscription of employer conduct in Section 8(a)(2)."[46] Congress recognized that employer control over the agent of its employees is fundamentally incompatible with exclusive representation and collective bargaining, irrespective of potential employee support for the arrangement.

That pre-recognition agreements further union organizing objectives does not legitimize the practice under § 8(a)(2).[47] First, the NLRA protects only the rights of employees, not the self-interests of unions.[48] Second, far from being exculpatory, a union's complicity in an employer's domination, interference, or support is itself an unfair labor practice under § 8(b)(1)(A) of the NLRA.[49] The UAW's willingness to submit to Dana's control during future collective bargaining negotiations only proves that the union has violated the Act.

That pre-recognition agreements further employer interests in securing favorable terms for future collective bargaining agreements is certainly no defense under § 8(a)(2). The desire of employers to make unions subservient to their business interests by means of domination, interference, or support is the very threat that § 8(a)(2) exists to curb.

The incentive that unions and employers have to "bargain to organize" is a compelling reason for holding pre-recognition bargaining unlawful under the Act. In pre-recognition bargaining, unions and employers can each satiate their perceived self-interests (in organizing and securing favorable collective bargaining agreements, respectively) by imposing all costs on a vulnerable third-parties: employees.

Employees are not privy to pre-recognition negotiations. Their interests are not represented during these negotiations, for unions owe no fiduciary duty to employees that they do not (yet) represent. Indeed, employees are usually unaware that their interests are being bartered over, as unions and employers often conceal their pre-recognition agreements from employees.[50] Other than the NLRA's prohibitions, there is nothing to stop a union from trading away the wages, benefits, and terms of employment of unrepresented employees for the organizing agreement it desires. If not unlawful under the Act, the incentive that both unions and employers have to "bargain to organize" at employee expense means that the practice will only proliferate.

The NLRA's very purpose is to protect the rights of employees from the machinations of employers and unions.[51] Section 8(a)(2) in particular is aimed at preventing collusion between employers and unions that could work to the detriment of employees. The Board has been entrusted by Congress to enforce these provisions of law, and it should do so by unequivocally prohibiting employers and unions from "bargaining to organize" at the expense of employees.

## Footnotes

[1] 29 U.S.C. §§ 151 *et. seq.*

[2] The analogy is apt, for a union's relationship with exclusively represented employees is akin to that "between attorney and client." Air Line Pilots v. O'Neill, 499 U.S. 65, 74-75 (1991).

[3] 29 U.S.C. § 158(a)(2) ("It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it").

[4] 29 U.S.C. § 158(d); Majestic Weaving Co., 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds,* 355 F.2d 854 (2nd Cir. 1966).

[5] *See e.g.,* Joseph A. Barker, *Keeping Neutrality Agreements Neutral*, 84-AUG. Mich. B.J. 33 (2005); A. Eaton & J. Kriesky, *Union Organizing Under Neutrality And Card Check Agreements*, 55 Ind. & Lab. Rel. Rev. 42 (2001).

[6] *See supra* note 5.

[7] The agreements are online at http://www.nrtw.org/neutrality/freightliner.php.

[8] This arrangement is online at http://www.nrtw.org/20050215freightliner.pdf.

[9] The "Preconditions" agreement and portions of the "Card Check" agreement were nullified as a result of a settlement agreement reached in *Thomas Built Buses*, Case Nos. 11-CA-20338 and 11-CB-3455 (2004). A civil action filed by Freightliner employees under the Racketeer Influenced and Corrupt Practice Act, 18 U.S.C. §§ 1961-1968, for damages they suffered as a result of these agreements is currently pending in *Adcock v. Int'l Union, UAW*, Case No. 3:06-CV-32-MU (W.D.N.C. 2006). A copy of the Complaint in *Adcock* can be found online *at* http://www.nrtw.org/pdfs/20060124rico_complaint.pdf.

[10] The agreements are available at http://www.nrtw.org/neutrality/Patterson_Exhibit_1.pdf.

[11] Employees are challenging the legality of certain portions of the "Side Letter" and "Framework" agreements under 29 U.S.C. § 186 in *Patterson v. Heartland Industrial Partners*, 428 F.Supp.2d 714 (N.D. Ohio 2006), *appeal pending*, Case Nos. 06-3791, and under § 8(e) of the NLRA, 29 U.S.C. § 158(e), in *United Steelworkers of America (Heartland Industrial Partners)*, Case No. 34-CE-9. *At* http://www.nrtw.org/neutrality/heartland.php.

[12] The "Letter of Agreement" can be found online at http://www.nrtw.org/20050215letter.pdf.

[13] The decision is online at http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/JD-24-05.pdf.

[14] All briefs filed with the Board in *Dana Corp.* are available on the NLRB's website under "Hot Docs," *at* http://www.nlrb.gov/nlrb/about/foia/FrequentlyRequestedDocuments.asp.

[15] *Id.*

[16] *Id*.

[17] 29 U.S.C. § 158(a)(2).

[18] 29 U.S.C. § 159.

[19] Air Line Pilots v. O'Neill, 499 U.S. 65, 75 (1991).

[20] Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953); Air Line Pilots, 499 U.S. at 74-75.

[21] NLRB v. Brown Paper Mill Co., 108 F.2d 867, 870-71 (5th Cir. 1970); Nassau & Suffolk Contractors Ass'n., 118 NLRB 174, 187 (1957); *see also* 78 Cong. Rec. 3444 (March 1, 1934) (Sen. Wagner), *reprinted in* 1 NLRB Legislative History of the National Labor Relations Act 1935, at 16 1935) (hereinafter "LHNLRA") ("only representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees").

[22] 79 Cong. Rec. 2332 (February 20, 1935) (Rep. Boland), *reprinted in* 2 LHNLRA at 2443*; see also* Brown Paper Mill, 108 F.2d at 870-71.

[23] *Hearing on S. 2926 Before the Senate Comm. on Educ. & Labor*, 73d Cong. (1934) (statement of NLRB General Counsel Milton Handler), *reprinted in* 1 LHNLRA at 68.

[24] 29 U.S.C. §§ 158(d), 159.

[25] NLRB v. Penn. Greyhound Lines, 303 U. S. 261, 268 (1938) (*quoting* H.R. Rep. No. 74-1147 (1935), *reprinted in* 2 LHNLRA at 3066-68); *see also* H.R. Rep. No. 74-969 (1935), *reprinted in* 2 LHNLRA at 2925-26 (same); H.R. Rep. No. 74-972 (1935), *reprinted in* 2 LHNLRA at 2971-73 (same).

[26] Letter of Agreement, *supra* note 12, § 5.1.2.4 (binding arbitration procedures); § 4.2.5 - 4.2.7 (interest arbitration procedures).

[27] International Union, UAW v. Dana Corp., 278 F.3d 548 (6th Cir. 2002).

[28] Letter of Agreement, *supra* note 12, § 4.2.1 (healthcare limitation); § 4.2.4 (mandatory overtime); § 6.1 (waiver of right to strike).

[29] *See* General Steel Erectors, 297 N.L.R.B. 723 (1990), *enforced,* 933 F.2d 568 (7th Cir. 1991); Vanguard Tours, 300 N.L.R.B. 250 (1990), *enforced in part*, 981 F.2d 62 (2nd Cir. 1992); Nassau & Suffolk Contractors Ass'n., 118 N.L.R.B. 174, 187 (1957).

[30] *See supra* note 22.

[31] Letter of Agreement, *supra* note 12, § 4.2.4 ("the Union commits that in no event will bargaining between the parties erode current solutions and concepts in place or scheduled to be implemented January 1, 2004, at Dana's operations which include premium sharing, deductibles, and out-of pocket maximums").

[32] *See supra* note 25.

[33] 79 Cong. Rec. 7483 (March 15, 1935) (Sen. Wagner), *reprinted in* 2 LHNLRA at 2334; *see also* 79 Cong. Rec. 9329 (1935) (Rep. Marcantonio), *reprinted in* 2 LHNLRA at 3152.

[34] UAW's Brief in Opposition to Exceptions, 35-36 ("UAW Brief"); Dana's Answering Brief to Exceptions ("Dana Brief"), 19-20.

[35] 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds* 355 F.2d 854 (2nd Cir. 1966).

[36] *Id.* at 860, 866-67.

[37] *Id.* at 860.

[38] UAW Brief at 8-18; Dana Brief at 24-29.

[39] 147 N.L.R.B. at 860 n.3.

[40] Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176-77 (1996).

[41] Houston Division, Kroger Co., 219 N.L.R.B. 388 (1975).

[42] UAW Brief at 27-35; Dana Brief at 32-37.

[43] *See* Amicus Brief of National Alliance for Worker and Employer Rights, 23-26.

[44] UAW Brief at 14-16, 28-34.

[45] NLRB v. Newport News, Shipbuilding & Dry Dock Co., 308 U.S. 241, 250-51 (1939); *accord* NLRB v. Link Belt Co., 311 U.S. 584, 588 (1941); *see also* Ladies Garment Workers v. NLRB, 366 U.S. 731, 736 (1961) (employer recognizing and bargaining with non-majority union violates § 8(a)(2) because it provides it with "a deceptive cloak of authority with which to persuasively elicit additional employee support").

[46] Electromation Inc. v. NLRB, 35 F.3d 1148, 1164 (7th Cir. 1994).

[47] Duane Reade, Inc., 338 N.L.R.B. 943 (2003) (employer support of union organizing efforts unlawful under § 8(a)(2)); Famous Castings Corp., 301 N.L.R.B. 404 (1991) (same); NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619, 623 (2nd Cir. 1994) (same); *see also* Connell Construction Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 625 (1975) (union organizing tactics not immune from anti-trust laws although organizing is a legitimate goal).

[48] Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms . . . the NLRA confers rights only on employees, not on unions"); MGM Grand Hotel, Inc., 329 N.L.R.B. 464, 475 (1999) (Brame, dissenting) ("Unions represent employees; employees do not exist to ensure the survival or success of unions").

[49] Duane Reade, Inc., 338 N.L.R.B. 943 (2003); Sav-On Drugs, Inc., 267 N.L.R.B. 639 (1983); Welsbach Electric Corp., 236 N.L.R.B. 503, 516 (1978); Sweater B. by Banff Ltd., 197 N.L.R.B. 805 (1972). It is difficult to conceive how an employer could dominate, interfere with, or support a union under § 8(a)(2) without that union's willing complicity.

[50] Letter of Agreement, *supra* note 12, § 12.1 ("Neither party can disclose this agreement, or its content or any actions taken hereunder, without the consent of the other"); *see also* Complaint in Adock v. Int'l Union UAW, *supra* note 9, ¶¶ 29, 35, 55-57 (UAW / Freightliner "Card Check" and "Preconditions" agreements concealed from employees); Heartland/Steelworkers "Side Letter," supra note 10, § 15 (agreements "will be treated as non-public by all parties").

[51] *See* 29 U.S.C. §§ 158(a) - (b).