Rite Aid Store #6473 *and* Matthew Silcox and UFCW Local 1167

Lamons Gasket Company, a Division of Trimas Corporation *and* Michael E. Lopez and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union. Cases 31–RD–1578 and 16–RD–1597

August 27, 2010

ORDER GRANTING REVIEW

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER, BECKER, PEARCE, AND HAYES

Rite Aid Store #6473's Request for Review of the Regional Director's Order Dismissing Petition, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union's Request for Review of the Regional Director's Decision and Direction of Election are granted as they raise substantial issues concerning voluntary recognition arising under the Board's decision in *Dana Corp.*, 351 NLRB 434 (2007). We have decided to consolidate these cases and to solicit amicus briefs on the issues raised in these cases.

As in Member Schaumber's dissent from the Board's grant of review in *UGL-UNICCO Service Co.*, 355 NLRB No. 153 (2010), our dissenting colleagues have written an impassioned decision on the merits, but we choose to review the briefs and consider the actual experience of employees, unions, and employers under *Dana Corp.,* before arriving at any conclusions. In particular, we cannot embrace the dissent's conclusion, announced prior to giving any interested party any opportunity to present any evidence, that "[t]here is not a scintilla of objective evidence" suggesting the Board should reconsider its holding in *Dana*.

Dated, Washington, D.C. August 27, 2010

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN LIEBMAN, concurring.

I join the Board's opinion, but write separately—as the only member of today's majority to have participated in *Dana Corp.* and *Levitz*[1]—to respond to some of my dissenting colleagues' assertions.

The dissent's position is easily summarized: *Dana* was a sound and moderate decision. The new election mechanism it created has done no harm and real good. There is no reason to re-examine the legal, policy, or practical issues involved, because there is no information that could possibly be presented to the Board that would support any change in its current approach. Seeking information "sua sponte" is "unprecedented," and it "will yield no truly objective evidence."[2]

The dissent's view of the proper role and function of a federal administrative agency like the National Labor Relations Board is unusual, particularly coming from within such an agency. Compare, for example, the Supreme Court's quite recent observation:

> "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis," . . . for example, in response to changed factual circumstances, or a change in administrations.

National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967, 981 (2005), quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863–864 (1984).

Two scholars have characterized the Board as living "in administrative law exile," and they use the *Dana* decision—"one of the most controversial decisions" of recent years—as a case in point. Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 Duke L. J. 2013, 2060–2068 (2009).[3] In their view, the "*Dana* rule rests on a number of factual and policy premises, none of which are clearly stated or actually defended in the [majority] opinion," while the "dissenting opinion rests on diametrically opposed policy preferences and factual premises" and also

[1] 333 NLRB 717 (2001).

[2] Rather, the dissent insists, the Board should "[e]schew partisan opinions, empirical surveys, and academic treatises" in favor of asking employees who voted against union representation in *Dana*-mandated elections whether they approve of the existing scheme.

It is not clear if my colleagues propose this sort of approach for developing labor law doctrine generally or just in this one instance. We might survey a random and representative sample of American employees about the whole range of Board precedent, asking whether they want broader or narrower Sec. 7 rights, easier or more difficult paths to union representation.

[3] The article examines the *Levitz* decision, as well (among others). See id. at 2065–2068.

"suffers from a lack of unchallenged empirical support for its positions." Id. at 2062–2063. As Professors Fisk and Malamud explain:

> That neither the majority nor the dissent relied on factual evidence to support their conclusions is not surprising. Lacking any social science experts within the agency staff and having no capacity to conduct studies of actual labor conditions, the Board does not have access to social science data or other factual research in deciding cases except as the parties choose to provide it in their briefs.

Id. at 2065.

To judge from their dissent, my colleagues do not see the Board's difficulty in educating itself about the real world as a problem. Indeed, they seem to reject the basic premise that there is anything that *could* be learned: there is no "objective" information out there, only "partisan" argument and "academic" speculation, which can be of no use to the Board. The consequences of accepting the dissent's view are bleak, for it implies that every Board decision—including, of course, *Dana* itself—is based on little more than prejudice.

But I doubt that my dissenting colleagues really mean what they say. And their own opinion refutes their claim that there is nothing more to learn or debate about *Dana*. The dissent offers a *new* defense of the *Dana* decision, albeit an unpersuasive one.[4] My colleagues also invoke "empirical evidence" involving compliance with *Dana*, which they argue "show[s] that the *Dana* principles are working well in practice." "There has been no apparent deterrent to voluntary recognition," the dissent states, and "[o]nce established, the vast majority of [bargaining] relationships [subject to *Dana*] were not disrupted by the filing of election petitions."

I am interested in what members of the labor-management community (and not just my fellow Board members) have to say about this data and its lessons. Contrary to the dissent, the data cannot tell us everything we might want to know about *Dana*'s effect on voluntary recognition, because the statistics capture only voluntary recognition agreements that *were* reached, not those hypothetical agreements that were never consummated because of the parties' concerns about *Dana*. Nor does the data address the impact of *Dana* on the course of collective bargaining after voluntary recognition.

As for the rarity of *Dana* elections, and the even greater rarity of cases where employees reject the recognized union, the data prompts the question whether the asserted benefits of the *Dana* regime outweigh its costs.[5] There is an arguable historical analogue: the Taft-Hartley Act provision, enacted in 1947, which required a Board-conducted employee referendum before a union was authorized to negotiate a union-security clause in a collective-bargaining agreement. The provision was substantially modified only 4 years later, in 1951, after experience demonstrated that authorization was granted in 97 percent of the elections held, results which did not justify the "heavy administrative burden on the Board" and the "large expenditure of funds involved" in implementing the provision.[6] At a minimum, this historical precedent demonstrates that the Board is acting appropriately in examining experience under the *Dana* regime.

My dissenting colleagues obviously disagree, viewing *Dana* as "instantly carved in stone" (to borrow the Supreme Court's phrase). Yet the decision to revisit long-established legal rules in *Dana* itself was premised on the *Dana* majority's belief that "changing conditions in the labor relations environment can sometimes warrant a

[4] My colleagues assert that, consistent with *Levitz*, *Dana* "did no more than level the playing field" by letting employees opposed to their employer's voluntary recognition of a union seek a Board election immediately, just as prounion employees may file an election petition right after an employer unilaterally withdraws recognition. This claim—never made by the *Dana* majority itself—is based on a false equation of the two situations.

Dana involves the creation of a new bargaining relationship. The recognition bar doctrine, which *Dana* modified, is intended to insulate such relationships—that is, to preserve the status quo—for a reasonable period, furthering the statutory goal of promoting collective bargaining. The *Dana* decision, as I saw it in dissent, undermined that goal, by permitting an immediate challenge to the new bargaining relationship, rather than requiring a reasonable period for collective bargaining.

Levitz involves the employer's termination of an established bargaining relationship, where a union has lost majority support among employees. Withdrawal of recognition in that situation is justified doctrinally in terms of promoting employee free choice. Permitting an immediate Board election promotes the same statutory interest. There is no statutory policy that supports a postwithdrawal period of repose during which employees who support the union should be prevented from seeking to reinstate it. The contrast with the insulated period following voluntary recognition, which promotes collective bargaining as a matter of statutory policy, is clear.

[5] The statistics show that 54 elections were conducted, out of 1111 cases in which *Dana* notices were requested from the Board: an election rate of 5 percent. In 15 instances, 1 percent of the total cases, the recognized union was rejected by employees. In 99 percent of the total cases, in other words, it is arguable that *Dana* did not serve any clear purpose. As for the 1 percent remainder, it is important to remember that the pre-*Dana* regime would have kept the (unwanted) union in place only temporarily.

[6] House of Representatives Report No. 82–1082 (Oct. 1, 1951), accompanying Public Law. 82–189. See American Bar Association, Section of Labor & Employment Law, *The Developing Labor Law* 2103 (5th ed. 2006) (John E. Higgins, Jr., ed.). In place of the provision requiring prior employee authorization, Congress substituted a provision permitting employees to seek a Board election rescinding the union's authority with respect to an existing union-security clause. See Sec. 9(e), 29 U.S.C. §159(e).

renewed scrutiny of extant doctrine."[7] That belief is surely correct. Whether the *Dana* Board's ultimate policy choice was correct or not, the decision, by its own terms, cannot stand for the proposition that the Board rules are meant to last forever.

Dated, Washington, D.C. August 27, 2010

Wilma B. Liebman, Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBERS SCHAUMBER and HAYES, dissenting.

Less than 3 years ago, the Board announced a measured but important modification of its recognition and contract bar policies in *Dana Corp*.[1] "In order to achieve a 'finer balance' of interests that better protects employees' free choice,"[2] *Dana* required the posting of an official Board notice that informed employees of their employer's voluntary card-based recognition of a union bargaining representative and the employees' right within 45 days to test the union's claim of majority support through a statutorily preferred Board-conducted secret-ballot election. Valid decertification or rival union representation petitions filed within the 45 day period would be processed. If no petition was filed within that period, electoral challenges to the union's representative status would thereafter be barred for a reasonable period of time.

Based on well-established legal principles, *Dana* did no more than level the playing field by providing an electoral option similar to that already available to employees whose employer relied on a petition signed by a majority of unit employees to withdraw recognition from an incumbent union. According to statistics maintained by the General Counsel, the *Dana* policy has served its intended function well, without any adverse impact on the legitimate process of voluntary recognition. In cases pending before us, the parties requesting that the Board grant review and overrule *Dana* offer no evidence to the contrary. Instead, they simply repeat the unfounded doomsday predictions of the dissenters in *Dana*. Although there is clearly no basis for granting review, our colleagues do so and issue an unprecedented invitation for parties and amici to brief the labor-management experience under *Dana*. This is but a prelude to what will most likely result in the overruling of *Dana*, in derogation of employees' Section 7 free choice rights. We dissent.

I.

Prior to *Dana*, Board law held that voluntary recognition of a union's representative status on the basis of a majority card showing resulted in an immediate bar to any election petition for a "reasonable period of time" that could be as much as a year.[3] Under the extant contract bar doctrine, the execution of a collective-bargaining agreement during this insulated postrecognition period would further bar any electoral challenge to the recognized union's status for as much as 3 years of the contract term.[4]

In 2004, the Board granted requests for review in two cases, *Dana* and *Metaldyne Corp.*,[5] to consider the requesting parties' arguments that the longstanding recognition bar policy should be modified or abolished. In *Dana*, the regional director had dismissed a decertification petition filed 34 days after voluntary recognition and supported by 35 percent of the bargaining unit. In *Metaldyne*, the Regional Director had dismissed a decertification petition filed 22 days after voluntary recognition and supported by over 50 percent of unit employees. Standing alone, the facts in *Metaldyne* presented substantial cause for concern about the absolute and immediate nature of the voluntary recognition bar. However, the parties requesting review also emphasized the need to reconsider Board precedent in light of the undisputed proliferation of campaigns to unionize employees through voluntary recognition, rather than through the Board-supervised electoral process. This trend was facilitated by a variety of prerecognition employer neutrality and union access agreements, often entered into by employers for reasons that had little or nothing to do with concern for their employees' views on collective-bargaining representation. Accordingly, the Board concluded that the parties seeking review had presented compelling reasons for reconsideration of the election bar rules: "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."[6]

[7] *Dana Corp.*, 341 NLRB 1283, 1283 (2004) (order granting review). In overruling a 40-year-old precedent, *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), the *Dana* Board observed that "Board precedent is not immune from reconsideration simply because it is of a certain vintage." 351 NLRB at 441 fn. 32.

[1] 351 NLRB 434 (2007)

[2] Id. (footnote omitted).

[3] *Keller Plastics Eastern*, *Inc.*, 157 NLRB 583, 587 (1966).

[4] *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996).

[5] 341 NLRB 1283. The cases were consolidated for consideration and issuance of a single decision.

[6] 341 NLRB at 1283.

Although not specifically mentioned in the Order Granting Review, the Board's action in *Dana* was consistent with the decision 3 years earlier in *Levitz*[7] to review and overrule a 50-year old policy with respect to the circumstances in which an employer could lawfully withdraw recognition from an incumbent union bargaining representative or petition for an election to test that union's continuing majority support. In agreement with the General Counsel and unions, including amicus AFL-CIO, the *Levitz* Board emphasized "that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions."[8] It therefore held that an employer could no longer withdraw recognition from an incumbent union bargaining representative absent proof of an actual loss of majority support, but it permitted employers to petition for a Board election based on a less stringent showing of employee disaffection. Furthermore, even in circumstances where an employer lawfully withdrew recognition under the new *Levitz* test, a 30 percent employee minority in the bargaining unit was free immediately thereafter to challenge the decision of a majority of their colleagues by filing a representation election petition.

II.

The Board received over 30 briefs from the parties and numerous amici in *Dana*. Reflecting the same animated differences of opinion expressed by advocates of competing card check legislative proposals in Congress, some briefs advocated the total elimination of election bar protection for bargaining relationships established through voluntary recognition, while others urged retention of the immediate postrecognition election bar. The Board instead adopted a middle ground alternative proposed, with some variation, in several briefs including one filed by the General Counsel, as amicus. Accordingly, the Board held:

> that no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition 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 (2) 45 days pass from the date of notice without the filing of a valid petition. If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed. The requisite showing of interest in support of a petition may include employee signatures obtained before as well as after the recognition. These principles will govern regardless of whether a card-check and/or neutrality agreement preceded the union's recognition.

There is nothing radical about the rational underpinnings of the *Dana* modifications. It is well-established that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions.[9] Further, authorization cards, while sufficiently reliable to justify voluntary recognition, are "admittedly inferior to the election process."[10] Neither is there anything radical about the *Dana* procedures. The voluntary notice posting requirement is comparable to the notice posting requirement for Board elections. The limited open period for the filing of decertification or rival union petitions is comparable to open periods for filing such petitions prior to the expiration date of a collective-bargaining agreement.

Further, permitting an electoral challenge to a recent majority choice was not, as claimed by the dissenters in *Dana*, "contrary to the principle of majority rule on which the Act is premised."[11] In fact, the *Dana* modifications brought the law for establishing a bargaining relationship based on cards signed by an employee majority more in line with the law for disestablishing a bargaining relationship based on petitions signed by an employee majority. Just as an employer may lawfully recognize a union without an election based on proof of actual majority support, so may it withdraw support without an election under *Levitz* based on proof of actual loss of such support. On the very next day after a lawful, majority-based withdrawal of recognition, an employee minority of as few as 30 percent of the bargaining unit could petition for a Board election to reinstate the union as their bargaining representative.[12] Prior to

[7] 333 NLRB 717 (2001).
[8] Id. at 723.

[9] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).
[10] Id. at 603.
[11] *Dana*, 351 NLRB at 447. The electoral challenge option has historical antecedents in the political "direct democracy" platforms of the Populist and Progressive movements in the late 19th and early 20th centuries. Today, 18 states and the District of Columbia have a process in which a minority percentage of voters from a prior election can petition for another election to recall an official selected by the voting majority in the prior election. The most recent high profile recall election involved the ouster of California Governor Gray Davis in 2003. Critics of *Dana* claiming there is no political analog to permitting a minority to challenge majority choice seem to have overlooked the recall process.
[12] Critics of the decision in *Wurtland Nursing*, 351 NLRB 817 (2007), issued the same day as *Dana*, fail to acknowledge this point. In *Wurtland*, the employer withdrew recognition based on petitions signed by a majority of employees. Supporters of the union, if they numbered at least 30 percent of the unit, could have tested the employer's action by immediately petitioning for an election. The union chose instead to file an unfair labor practice charge, as was its right, contending that the language of the petitions was insufficient to show employee disaffection. The Board resolved this factual issue by finding the language was

Dana, however, under the immediate recognition bar rule, even an employee *majority* (as was the case in *Metaldyne*) could not petition for a Board election for up to 1 year (or 3 years, in the event of a contract's execution) to test the representative status of the voluntarily recognized union.

III.

In high dudgeon, the dissenters in *Dana* stated that "the majority decision cut[s] voluntary recognition off at the knees"[13] and created uncertainties that destroyed the incentives for voluntary recognition. There was no such intent behind *Dana*'s modification of election bar rules and, almost 3 years later, it is clear that it had no such effect. As of June 1 of this year, according to statistics maintained by the General Counsel, the regional offices had received 1111 requests for voluntary recognition notices, 85 election petitions were filed, 54 elections were conducted, and in 15 of those elections employees voted against the voluntarily recognized union, including 2 elections in which a petitioning union was selected over the recognized union. These statistics show that the *Dana* principles are working well in practice. There has been no apparent deterrent to voluntary recognition; at least 1111 recognition agreements were executed since the *Dana* decision (not including voluntary recognition agreements where the parties chose not to pursue the notice posting option, as in 2 pending request for review cases). Once established, the vast majority of those relationships were not disrupted by the filing of election petitions. However, in 15, or 25 percent, of the 54 Board-supervised private ballot elections that were held, the majority choice on representation differed from the majority choice indicated by cards solicited by the recognized union and its employee proponents during an organizational campaign.

In sum, we already have empirical evidence showing that *Dana* has served its purpose of protecting employees' free choice without discouraging voluntary recognition or the overall process of collective bargaining. There is not a scintilla of objective evidence to the contrary.

IV.

The Board's Rules and Regulations Section 102.67(c)(4) state that the Board will grant review of regional director decisions in representation proceedings when there are "compelling reasons for reconsideration of an important Board rule or policy." Our colleagues recently described these rules as "stringent requirements" in denying an employer's request that the Board reexamine precedent in light of a more recent and apparently relevant Board decision.[14] Here, in cases where regional directors correctly applied *Dana*, the requesting parties do not even bother to contend that a recent decision or other objectively substantiated factors present "compelling circumstances" for Board reconsideration of that case. There are no circumstances comparable to those that led the Board to grant review in *Dana*. Instead, the requesting parties simply argue that *Dana* was "wrongly decided"; yet our colleagues grant review and sua sponte extend an invitation of unprecedented breadth to reexamine the collective "experience under *Dana*."[15]

In response to this invitation, the Board will predictably receive mostly subjective and partisan claims that *Dana* fettered a collective-bargaining relationship in its fragile infancy or persuaded an employer not to recognize a union for fear that a subsequent election would deprive the employer of benefits sought by recognition. There may be some who, unlike the parties in their requests for review, provide statistical analyses hastily gathered to support their position. However, as discussed above, the Board already has its own reliable and objective empirical data for evaluation of the *Dana* experience.

There is no "sunset" provision for Board precedent, requiring reexamination and reaffirmation of legal principles at specified intervals. Principles of stare decisis, although certainly less binding in the administrative law context, remain relevant. Generally, changes in Board law result from (1) intervening judicial precedent, (2) substantial changes in business or union practices, or (3) changes in Board membership reflecting the results of a Presidential election. Of course, more than one factor may motivate the Board's review, but the more that the political factor weighs on the reexamination and reversal of precedent, the greater the detriment is likely to be for labor relations stability. Frequent, politically-driven, back-and-forth changes in the rules by which parties are expected to conduct their affairs under the Act can only engender confusion and frustration among employees, unions, and employers, as well as substantially lessen the deference Federal courts of appeals accord Board "exper-

sufficient. *Wurtland* does not stand for the proposition that employee signatures on a decertification petition are more or less reliable than those on cards supporting a union's claim of majority support. After *Dana*, however, the reliability of either can be put to the immediate test of a Board election.

[13] 351 NLRB at 447.

[14] *St. Barnabas Hospital*, 355 NLRB No. 39, slip op. at 1 (2010).

[15] We note that the Employer in *Rite Aid Store #6473*, 31–RD–1578, requests review of the Regional Director's *failure to apply Dana* in dismissing a decertification petition. We would grant review, summarily reverse the Regional Director, and remand with instructions to reinstate and process the petition in accord with *Dana*.

tise" in reviewing our legal pronouncements on questions concerning representation. The overruling of *Dana*, should it come to pass, will surely have these unfortunate destabilizing effects.

Should our colleagues really want to find out if retention of the *Dana* policy is warranted, we can suggest a starting point. Eschew the partisan opinions, empirical surveys, and academic treatises. Just ask the employee voting majority in the 14 cases where the recognized union lost a Board election conducted pursuant to *Dana* if they would have preferred a system that would have required them to wait as much as 3 years or more before they could petition for an election. Of course, an alternative could be simply to tell those employees that they are statistically insignificant in a grander scheme of promoting industrial peace by insulating unions for a prolonged time from any challenge to representative status achieved by a private card solicitation campaign. They might disagree with that construction of the Act's protection of Section 7 rights. We certainly do.

We are confident that our colleagues' invitation to brief the labor relations experience under *Dana* will yield no truly objective evidence that the notice requirement and election bar modifications in that decision have had the deleterious impact on voluntary recognition and collective bargaining predicted by its critics. Were we as confident that, without such evidence, our colleagues would vote to reaffirm *Dana* and to apply it in all cases pending review before us, we would regard the review process as unnecessary but essentially harmless. Unfortunately, the majority gives us no reason to believe that they would follow such a course. We must therefore strongly dissent from the grant of review to consider whether to modify or overrule *Dana*.

Dated, Washington, D.C. August 27, 2010

Peter C. Schaumber, Member

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD