UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

AT&T MOBILITY, LLC[1]

Employer

and

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 7803, AFL-CIO

Union

and Case 19-RD-3860

GARY BROOKS, An Individual

Petitioner

DECISION AND DIRECTION OF ELECTION[2]

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended ("the Act"), a hearing was held before a hearing officer of the National Labor Relations Board, ("the Board").[3] Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I make the following findings and conclusions.[4]

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[1] The name of the Employer appears as amended at hearing.

[2] At hearing, Petitioner made a motion to intervene on behalf of AT&T Mobility Employees Association ("the Employees Association"), relying on Petitioner's previously submitted showing of interest in support of the RD petition. The Hearing Officer conditionally approved the motion, deferring the ultimate decision to the undersigned Regional Director. Petitioner Brooks participated fully in the hearing, without differentiation between his role as Petitioner and representative of the Employees Association. It is well-established that the sufficiency of a showing of interest is an administrative determination, not subject to litigation at a representation hearing, and accordingly I have not addressed my showing of interest determination in this Decision. *River City Elevator Co.*, 339 NLRB 616 (2003); *Sheffield Corp.*, 108 NLRB 349, 350 (1954). Rather, by separate letter dated today, I have made an administrative determination to deny intervenor status to the Employees Association. I also note that the parties have placed many facts involving or related to the showing of interest in the record, and these facts are discussed in the "Labor Organization Status" section of this Decision.

[3] The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. A labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[4] The Petitioner and CWA submitted timely briefs, which I have carefully considered.

I. SUMMARY

AT&T Mobility, LLC ("the Employer") operates a nationwide communications network. The Employer and Communications Workers of America ("CWA") are party to several collective bargaining agreements covering employees in a variety of classifications. In January of 2010, pursuant to a recognition agreement with CWA, the Employer voluntarily recognized CWA as the exclusive collective bargaining representative of a bargaining unit of retail employees employed at various locations in Alaska.[5] Following recognition, the Employer and CWA's regional collective bargaining agreement was applied to the bargaining unit, and the bargaining unit was arguably merged into a larger regional or nationwide bargaining unit.[6]

Following recognition, the Employer submitted notice of its voluntary recognition to Region 19 of the Board. As part of case 19-VR-090, the Board issued workplace notices notifying employees of their right to file a decertification petition within a 45-day window period, pursuant to the Board's decision in *Dana Corp*., 351 NLRB 434 (2007). By the instant petition, an individual, Gary Brooks ("Petitioner"), seeks a decertification election among the newly represented bargaining unit.[7]

CWA opposes the petition, primarily on the grounds that *Dana* was incorrectly decided.[8] CWA also asserts that the Employer and CWA's voluntary recognition agreement merged the bargaining unit into a larger unit, so that the election sought by Petitioner is in a bargaining unit no longer co-extensive with the recognized unit. Additionally, CWA asserts the Employees Association, which made a motion to intervene at the hearing, is not a labor organization within the meaning of the Act.[9]

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[5] The parties dispute whether the Alaska retail employees are properly referred to as a "bargaining unit," as that is an issue in the case, or whether they should be referred to merely as a "voting group." For the reasons articulated in the analysis section, I will refer to the employees at issue as a bargaining unit in this decision. The voluntarily recognized bargaining unit is described as follows:

> All retail sales consultants, senior retail sales consultants and sales support representatives employed by the Employer at Company-owned retail locations within the State of Alaska, excluding those retail employees employed at Company-owned retail locations in the Fairbanks area represented by the International Brotherhood of Electrical Workers (IBEW), and excluding all other office clerical employees, professional employees, guards and supervisors as defined in the Act.

All parties agree that the IBEW represented employees in Fairbanks, Alaska, are properly excluded from the bargaining unit. Accordingly, the term "bargaining unit" as used in this decision excludes these employees.

[6] The applicable collective bargaining agreement is effective February 8, 2009, to February 9, 2013.

[7] As filed, the Petition seeks an election in a unit of "retail sales consultants and financial cell tower technicians in Alaska." This was amended at hearing, however, to mirror the reality of the recognized unit, eliminating "financial cell tower technicians" and changing the inclusion to "all retail sales consultants, sales support representatives and finance representatives employed by AT&T in the state of Alaska." This amendment was not opposed and more accurately represents the positions at issue herein.

[8] I have not addressed this argument, as *Dana* is the Board's current law and I am required to apply its directives.

[9] Specifically, in contesting labor organization status, CWA asserts that the Employees Association is a "front" for International Brotherhood of Electrical Workers Local 1547 ("IBEW"), which previously sought to represent the bargaining unit in case 19-RC-15237, and which currently represents the retail employees in Fairbanks, Alaska. Although the issue is arguably moot, in light of my administrative dismissal of the Employees Association's motion to intervene, I have addressed labor organization status both in the interest of completeness and because CWA asserts Brooks is a "front" for IBEW, both in his role as Petitioner, and as representative of the Employees Association.

Based on the record evidence and the parties' contentions and arguments I find, contrary to CWA, that the instant petition was properly filed during the *Dana* window period, and accordingly it is appropriate to direct an election. I further find, even assuming a merger did take place, it would be inappropriate to allow this merger to preclude an election under *Dana*.

As for CWA's arguments regarding labor organization status, I would find the Employees Association is a labor organization within the meaning of the Act. To the extent CWA raises labor organization status to argue fraud or deception has taken place, the instant proceeding is not the forum in which to resolve those allegations, and I decline to address these allegations herein. In light of all the above, I have directed an election consistent with these findings.

Below, I have set forth the relevant evidence contained in the record, as well as the legal framework of the Board's *Dana* decision and its impact on the contract bar doctrine, including the scope of the bargaining unit issue. Following that, I have applied the *Dana* standards to the evidence and articulated the rationale for my Decision. I have then, in turn, discussed CWA's arguments regarding the Employees Association's labor organization status. In conclusion, I have addressed the details of the directed election, and the procedures for requesting review of this Decision.

II. RECORD EVIDENCE

A. The Employer's Operations and Bargaining History

The Employer employs numerous employees in operating a large and complex nationwide communications network, including technical, retail and administrative functions. CWA represents a number of bargaining units consisting of the Employer's employees, and the Employer and CWA have a longstanding collective bargaining relationship.

The Employer and CWA maintain four collective bargaining agreements covering four geographic regions.[10] Each Regional Labor Agreement covers a number of bargaining units in that region, assuming employees in each unit are represented. The Employer and CWA are also signatories to a Memorandum of Understanding ("Memorandum"), with effective dates parallel to the collective bargaining agreements, addressing voluntary recognition of unrepresented employees who select CWA as their representative during the term of the Employer – CWA contracts. Pursuant to this Memorandum, once voluntarily recognized, the newly represented unit is "as soon as practicable...included within the existing and appropriate Labor Agreement…with respect to wages, hours, and other terms and conditions of employment."

The bargaining unit at issue consists of approximately 87 retail sales consultants, sales support and finance representatives, employed at 15 of the 16 retail locations owned by the Employer in Alaska. The retail employees at the remaining location, in Fairbanks, Alaska, are currently represented by the IBEW, and are specifically excluded from the petitioned-for unit.[11]

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[10] Alaska is part of the Employer's "West Region." The "Regional Labor Agreement" for the West Region is referred to by the parties in the record and in this Decision as "the orange book."

[11] The record does not contain the circumstances under which the IBEW became the exclusive collective bargaining representative of the Fairbanks' employees.

B. The Employer's Voluntary Recognition and the Instant Petition

Pursuant to the Employer and CWA's Memorandum, in January of 2010, CWA submitted to the American Arbitration Association written union representation authorizations, from the previously unrepresented bargaining unit.[12] On January 14, the Association certified CWA's majority status in that unit. Accordingly, the Employer recognized CWA as the exclusive collective bargaining representative of the employees, and on January 21, notified Region 19 of the voluntary recognition.[13]

The notification resulted in case 19-VR-090, of which I take administrative notice. On January 26, Region 19 sent the appropriate *Dana* notice to the Employer for posting.[14] From materials submitted in case 19-VR-090, it appears notices were posted at the 15 locations at issue between February 19 and March 18. All parties agree the instant petition was timely filed on March 12.

Petitioner is not an employee of the Employer, but is a retired IBEW business manager.[15] At hearing, Petitioner made a motion to intervene on behalf of the Employees Association, of which he is President, seeking to have the Employees Association placed on the ballot. The Employees Association, represented by Brooks, relied solely on the showing of interest Brooks had previously submitted as Petitioner.[16] The Hearing Officer granted the motion on a temporary basis, and deferred a final decision on the matter to my determination. Accordingly, the Employees Association, through the same person as Petitioner, participated fully in the hearing.

C. Previous Involvement by the IBEW

The IBEW previously sought to represent the bargaining unit by a petition filed September 2, 2009, in case 19-RC-15237. Following the filing of that petition, CWA made a complaint under Article XXI of the AFL-CIO Constitution, and by decision dated October 8, 2009, the AFL-CIO Executive Council Subcommittee found in favor of CWA. IBEW subsequently withdrew the RC petition on October 13, 2009.

Following the filing of the instant petition, CWA contended to the AFL-CIO that IBEW

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[12] All dates 2010 unless otherwise indicated.

[13] Under the terms of the Employer - CWA Memorandum, following recognition the Employer is obligated to apply the terms and conditions of the "orange book" to the bargaining unit "at the earliest practicable date." The record does not indicate if this change has taken place.

[14] The Employer discovered an error in its original submission to the Region and requested a revised posting to correct the error. The Region sent a corrected notice on February 1.

[15] An individual, who is not an employee, may file a decertification petition. *Bernson Silk Mills, Inc.*, 106 NLRB 826, fn. 1 (1953) ("There is no requirement in the Act that an individual petitioner, seeking the decertification of a labor organization, be an employee of the employer.")

[16] The showing of interest form used here, absent names, was submitted as an exhibit at hearing. It reads as follows:

> We the undersigned employees of AT&T Mobility in Alaska exercise our right to self-organize for purposes of collective bargaining, mutual aid and/or protection. We ask that the National Labor Relations Board (NLRB) conduct an election so that employees can exercise rights afforded to us under the National Labor Relations Act.

was in non-compliance with the October 8 decision. By letter dated March 24, 2010, IBEW International President, asserted that Petitioner, while a former Business Manager and a retired member, was acting independently of IBEW, and that IBEW would not appear on the ballot in any election.

III. LEGAL ANALYSIS

A. Contract Bar

In *Dana Corp*., 351 NLRB 434 (2007), the Board established a new policy for decertification or rival union petitions filed subsequent to an employer's voluntary recognition of a union. Previously, the Board applied the recognition bar doctrine in voluntary recognition cases, barring the processing of a decertification petition for a reasonable period of time following an employer's voluntary recognition of a union. *ibid.* at 437. In *Dana*, however, the Board stated that employees' interest in free choice would be better protected in the voluntary recognition context by applying the recognition bar or contract bar doctrines only where:

> (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. *ibid.* at 434.

Under the Board's well-established contract bar principles, a contract having a fixed term of more than 3 years operates as a bar for as much of its term as does not exceed 3 years. *General Cable Corp*., 139 NLRB 1123 (1962). In *Dana*, however, addressing the interplay between its modifications to the recognition bar and contract bar principles, the Board stated in reference to the 45-day window:

> These rules apply notwithstanding the execution of a collective-bargaining agreement following voluntary recognition. *ibid*. at 441.

Accordingly, pursuant to the reasoning in *Dana*, parties with an established collective bargaining relationship are not able to foreclose the opportunity for an election in response to a timely petition by simply applying an existing contract to a voluntarily recognized unit.

In the instant case, all parties concede the petition was timely filed within the *Dana* window-period, and the sufficiency of the posting itself is not an issue. Both at hearing and on brief, CWA has repeatedly referenced the Board's contract bar doctrine. This reflects CWA's primary argument that *Dana* was wrongly decided and that a contract bar would apply absent that decision. However, as noted above, *Dana* represents current Board law in this area. To the extent CWA argues the collective bargaining agreement which now covers the bargaining unit, effective February 8, 2009, and applied to the employees following voluntary recognition, acts as a contract bar, I find this is a post-recognition contract precisely of the type identified in *Dana* as not barring an election.

Applying the principles of *Dana* discussed above, I conclude that the Board's contract bar doctrine does not prevent the instant petition from proceeding to an election.

B. Scope of the Petitioned-for Unit

It is also well-established Board law that a decertification election must almost always be held in a unit coextensive with the recognized or certified unit. *Mo's West*, 283 NLRB 130

(1987); *Campbell Soup Co.*, 111 NLRB 234 (1955). Here, the Employer and CWA's bargaining history, and voluntary recognition Memorandum, recognized the bargaining unit as a distinct unit in which to submit authorization cards. CWA's position, however, is that upon recognition, or when the terms of the "orange book" were applied to the voluntarily recognized bargaining unit, the Alaska retail bargaining unit ceased to have a separate identity and became part of a larger bargaining unit, such that the petitioned-for unit was no longer "coextensive with the recognized unit."

As discussed below, contrary to CWA, I find the scope of the petitioned-for unit does not present a barrier to an election. Assuming for the sake of argument that a merger did occur, allowing such a merger to preclude an election under *Dana* runs contrary to the reasons enumerated in *Dana* for the changes in the recognition and contract bar doctrines.[17] It is true that the *Dana* decision does not address post-recognition merger explicitly, but *Dana* did discuss, in extensive detail, reasons why employees in a voluntarily recognized unit should be allowed access to the Board's election process. Here, to deny the voluntarily recognized bargaining unit access to an election on the basis of a merger would run contrary to the rationale articulated in *Dana*. Although in future representation matters involving the voluntarily recognized bargaining unit, the evidence may indicate a merger has occurred, in the instant case CWA argues merger in the context of a timely filed *Dana* petition, and for this limited purpose, even assuming a merger had taken place, an election pursuant to *Dana* is appropriate in the bargaining unit that was voluntarily recognized.

In support of its position, CWA cites to a Regional Director's dismissal of a decertification petition, *Rite Aid Store #6473*, 31-RD-1584; a case where a group of employees, once recognized, became part of a larger multi-location unit and a decertification petition in the smaller, initial unit was found no longer appropriate. As an initial matter, Regional Director determinations are not binding.[18] Further, while the case appears to involve a *Dana* fact pattern, a petition filed following voluntary recognition, the Director's decision in that case does not include an analysis of *Dana*. As noted above, my finding that an election is appropriate is limited only to the *Dana* context, and does not address merger outside of that circumstance. Thus, I find the substance of CWA's argument misplaced.

Accordingly, for the reasons set forth above, I find that dismissing the instant petition on the grounds that the bargaining unit has been merged into a larger unit would defeat the policy considerations articulated in *Dana.* I therefore find this issue presents no bar to the further processing of the petition.

C. Labor Organization Status

Although a party seeking to represent employees is not required to be a "labor organization" under Section 9(c)(1)(A) of the Act, a proposed bargaining representative must have a bona fide interest in representing employees. Determining whether such a bona fide interest exists can raise a question of whether a party is a labor organization as defined by the Act. Section 2(5) defines "labor organization" as follows:

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[17] I note the evidence of merger in the record is limited only to the Memorandum, stating that the terms of the "orange book" will be applied to the bargaining unit. The record does not contain any evidence of whether this actually happened, or whether the bargaining units retain any separate identity following a merger.

[18] That decision was not reviewed by the Board and therefore has no precedential value. See *Boeing Co.*, 337 NLRB 152, 153, fn. 4 (2001).

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

An organization will not be disqualified as a labor organization merely because it is in the early stages of development, and has not as yet won representation rights. *Michigan Bell Telephone Co.*, 182 NLRB 632 (1970). An organization will also not be disqualified for a lack of formal structure, such as a constitution or bylaws, or by the failure to collect dues or initiation fees. *Butler Mfg. Co.*, 167 NLRB 308 (1967).

In addressing allegations of "fronting," the Board has considered such allegations narrowly. *Penn-Keystone Realty Corp.*, 191 NLRB 800, 801 (1971). The Board has found obligations under a no-raid agreement, if found to exist, are an insufficient basis for dismissing a representation proceeding. *ibid.*; *North American Aviation, Inc.*, 115 NLRB 1090 (1956). The Board has also found an insufficient basis for dismissal where a party contends another party is not a labor organization because it did not intend to fulfill its bargaining obligation if certified, but instead to affiliate with another labor organization immediately after certification, finding it premature to consider such a contention. *Butler Mfg. Co.*, supra. Rather, the Board held that after certification, it could, pursuant to its authority to police its certifications, examine the propriety of a post certification affiliation if an appropriate motion were filed. *ibid.*; *Guardian Container Co.*, 174 NLRB 34 (1969).

Here, CWA contests the labor organization status of the Employees Association, alleging Brooks, as Petitioner and a representative of the Employees Association, is a "front" for the IBEW. At hearing, however, Brooks testified that the purpose of the Employees Association was to represent employees in the bargaining unit with regard to wages and other terms and conditions of employment, although he did testify the organization lacked any formal structure, including a constitution or bylaws, and there is no indication of the date on which the Employees Association was established. Nevertheless, under the Board's permissive standard for finding labor organization status, if it were a relevant and material issue, I would find the Employees Association has met the minimal requirement.

I note, however, that CWA's objection is clearly targeted at Brooks's motivation, specifically questioning whether he intended, as representative of the Employees Association, to affiliate with the IBEW post-election. In regard to the question of motivation, I find it not relevant to the instant case for two reasons. First, assuming the evidence demonstrated Brooks, as Petitioner or representative of the Employees Association, was a front for the IBEW, it would demonstrate a violation of the Article XXI decision which, consistent with the Board's decision's cited above, is not a sufficient basis to dismiss the petition. Second, to the extent a future affiliation is at issue, the question is premature and, as found in similar cases, the Board may address this issue, if necessary, as part of its capacity to police its certifications.

IV. CONCLUSION

Based on the foregoing, the entire record, and having carefully considered the parties' briefs, I conclude that the petitioned-for election is appropriate, as CWA's arguments regarding contract bar, the scope of the bargaining unit, or any question of the Petitioner's motivation

either lack merit under *Dana* or are not resolvable in this proceeding. In light of the above, I find the instant decertification petition is appropriate.

Accordingly, I shall direct an election in the following appropriate Unit:

> All retail sales consultants, sales support representatives and finance representatives employed by the Employer at Company-owned retail locations within the State of Alaska, excluding those retail employees employed at Company-owned retail locations in the Fairbanks area represented by the International Brotherhood of Electrical Workers (IBEW), and excluding all other office clerical employees, professional employees, guards and supervisors as defined in the Act.[19]

There are approximately 87 employees in the Unit found appropriate.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by COMMUNICATIONS WORKERS OF AMERICA, LOCAL 7803, AFL-CIO.

A. List of Voters

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in Region 19 of the National Labor Relations Board, 915 Second Avenue, Suite 2948, Seattle, Washington 98174 on or before **April 23, 2010.** No extension of time to file this list may be granted except in extraordinary

[19] The Unit description is in substantial accord with the agreement of the parties at the hearing.

circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B. Notice Posting Obligations

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20570. This request must be received by the Board in Washington by **5 P.M. ET, April 30, 2010.** The request may be filed through E-Gov on the Board's web site, ***http://www.nlrb.gov***, but may not be filed by facsimile.[20]

DATED at Seattle, Washington on the 16th day of May, 2010.

/s/ Richard L. Ahearn
Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

[20] To file a request for review electronically, go to ***http://www.nlrb.gov*** and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary, and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, ***http://www.nlrb.gov***.