UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LAMONS GASKET COMPANY, A DIVISION OF
TRIMAS CORPORATION (Employer)
and
MICHAEL E. LOPEZ (Petitioner)
and
UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND
SERVICE WORKERS INTERNATIONAL UNION (Union)

Case 16-RD-1597

UGL-UNICCO SERVICE COMPANY (Employer)
and
AREA TRADES COUNCIL a/w INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 877, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 103, NEW
ENGLAND JOINT COUNCIL OF CARPENTERS LOCAL 51,
PLUMBERS AND GASFITTERS UNION (UA) LOCAL 12, AND
THE PAINTERS AND ALLIED TRADES COUNCIL
DISTRICT NO. 35 (Petitioner)
and
FIREMEN AND OILERS CHAPTER 3, LOCAL 615,
SERVICE EMPLOYEES INTERNATIONAL UNION (Intervenor)

Case 1-RC-22447

GROCERY HAULERS, INC. (Employer)
and
TEAMSTERS LOCAL 294, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS (Petitioner)
and
BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND
GRAIN MILLERS, INTERNATIONAL UNION, LOCAL 50
(Intervenor)

Case 3-RC-11944

BRIEF *AMICI CURIAE* OF

NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN APPAREL & FOOTWEAR ASSOCIATION, AMERICAN COMPOSITES MANUFACTURERS ASSOCIATION, AMERICAN LIGHTING ASSOCIATION, ARIZONA MANUFACTURERS COUNCIL, ASSOCIATED INDUSTRIES OF MISSOURI, ASSOCIATION OF EQUIPMENT MANUFACTURERS, CAPITAL ASSOCIATED INDUSTRIES, INC., COLORADO ASSOCIATION OF COMMERCE AND INDUSTRY, EMPLOYERS' COALITION OF NORTH CAROLINA, EUROPEAN-AMERICAN BUSINESS COUNCIL, FORGING INDUSTRY ASSOCIATION, ILLINOIS

MANUFACTURERS' ASSOCIATION, INDA- ASSOCIATION OF THE NONWOVEN FABRICS INDUSTRY, INDUSTRIAL FASTENERS INSTITUTE, INDUSTRIAL TRUCK ASSOCIATION, INTERNATIONAL HOUSEWARES ASSOCIATION, INTERNATIONAL SIGN ASSOCIATION, INTERNATIONAL SLEEP PRODUCTS ASSOCIATION, IOWA ASSOCIATION OF BUSINESS AND INDUSTRY, JACKSON AREA MANUFACTURERS ASSOCIATION, KENTUCKY ASSOCIATION OF MANUFACTURERS, METAL SERVICE CENTER INSTITUTE, MICHIGAN MANUFACTURERS ASSOCIATION, MOTOR & EQUIPMENT MANUFACTURERS ASSOCIATION, NATIONAL COUNCIL OF TEXTILE ORGANIZATIONS, NATIONAL MARINE MANUFACTURERS ASSOCIATION, NATIONAL SHOOTING SPORTS FOUNDATION, NEBRASKA CHAMBER OF COMMERCE & INDUSTRY, NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION, NON-FERROUS FOUNDERS' SOCIETY, NORTH AMERICAN ASSOCIATION OF FOOD EQUIPMENT MANUFACTURERS, NORTH CAROLINA CHAMBER, NORTHEAST PA MANUFACTURERS & EMPLOYERS ASSOCIATION, OHIO MANUFACTURERS' ASSOCIATION, PENNSYLVANIA MANUFACTURERS' ASSOCIATION, SOCIETY OF CHEMICAL MANUFACTURERS AND AFFILIATES, STEEL MANUFACTURERS ASSOCIATION, TENNESSEE CHAMBER OF COMMERCE & INDUSTRY, TEXAS ASSOCIATION OF BUSINESS, TEXTILE CARE ALLIED TRADES ASSOCIATION, and, WEST VIRGINIA MANUFACTURERS ASSOCIATION

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BRIEF OF THE *AMICI CURIAE*

INTRODUCTION

By Notice dated August 31, 2010, the National Labor Relations Board (NLRB or Board) invited interested *amici* to file briefs on or before November 1, 2010 addressing whether the Board should modify or overrule *Dana Corp.*, 351 NLRB 434 (2007). *Notice and Invitation To File Briefs*, (*August 31, 2010)*(Notice), *Rite Aid Store #6473*, Case 31-RD-1578 and *Lamon Gasket Co.*, Case No. 16-RD-1597.[1]

Dana modified the Board's voluntary recognition bar as announced in *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966). *Keller Plastics* recognized that parties must be afforded time to negotiate an agreement without challenges to the recognized union, including decertification or rival union petitions, for a "reasonable period." *Rockwell International Corp.*, 220 NLRB 1262, 1263 (1975)(Three weeks found reasonable). The Board has "no rules concerning what constitutes a 'reasonable time.'" *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 179 (1996). The Board found 356 days "reasonable" in *MGM Grand Hotel*, 329 NLRB 464 (1999), effectively converting the limited voluntary recognition bar to the one year certification bar granted union representation following a secret ballot union election victory. *Brooks v. NLRB*, 348 U.S. 96 (1954).

Dana did away with the bar to decertification or rival union petitions following voluntary recognition but attached two conditions: (1) adequate notice to affected employees of the employer's voluntary recognition and of the affected employees' opportunity to file an election petition within 45 days of the notice and (2) passage of 45 days from the date of notice without the filing of a valid petition.

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[1] On September 17, 2010, the employer in Rite Aid Store #6473, cited as the lead case in the Notice and Invitation to File Briefs, withdrew its request for review.

There is no doubt that a secret ballot election is a more reliable method of determining whether employees want third-party representation than the signing of authorization cards, a process hallmarked by a lack of privacy and susceptibility to group or peer pressure. *NLRB v. Cayuga Crushed Stone*, 474 F.2d 1380, 1383 (2d Cir. 1973); *General Shoe Corp.*, 77 NLRB 124, 127 (1948). Requiring a notice to employees of an employer's voluntary recognition of a union and affording a limited opportunity to petition for an election before the voluntary recognition bar attaches strikes "the proper balance between two important but often competing interests under the National Labor Relations Act: 'protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other.'" *Dana*, at 434 citing *MV Transportation*, 337 NLRB 770 (2002). Clearly, the Board's efforts to "promote" or "facilitate" a negotiated agreement depends upon, and must not take precedence over, the fulfillment of the Board's duty to ensure employee free choice regarding whether to be represented by a third-party or a particular third-party. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 277 (1978); *Dana*, *supra* at 434.

The Board *should not* overrule *Dana.* The cure, if any, for the decline in private sector union density is not the elimination or constriction of employee free choice. Were the Board to choose to eliminate or compromise free choice, in addition to achieving an illogical inversion of statutory purposes, the Board would indeed be opting to live in "administrative law exile" or worse. *Rite Aid Store #6473*, 355 NLRB No. 157 (2010), at 1 citing C. Fisk and D. 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).

INTEREST OF THE AMICI CURIAE

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 states. American Apparel & Footwear Association (AAFA) is the national trade association representing apparel, footwear, other sewn products companies and their suppliers competing throughout the global marketplace. AAFA's mission is to promote and enhance its members' competitiveness, productivity and product quality in the world by minimizing regulatory, legal, commercial and trade restraints. The American Composites Manufacturers Association is a trade association representing 3,000 composites manufacturers and their suppliers throughout the United States. The American Lighting Association is a trade association representing the lighting industry. The Arizona Manufacturers Council (AMC) is the Arizona state affiliate of the National Association of Manufacturers. As a part of the Arizona Chamber of Commerce and Industry, the AMC represents manufacturers of all sizes statewide through policy development and advocacy at the county, state, and federal levels. Associated Industries of Missouri is Missouri's longtime manufacturing advocate, representing more than 1,100 employers. Associated Industries of Missouri was founded in 1919 to write the state's first workers' compensation law and continues to provide a unified voice for Missouri businesses. The Association of Equipment Manufacturers (AEM) is the U.S.-based international trade group serving the off-road equipment manufacturing industry. AEM members number over 800 companies that manufacture equipment, products and services used worldwide in the agriculture, construction, forestry, mining, and utility fields. Capital Associated Industries, Inc. is a non-profit association servicing over 1,000 North Carolina employers with workplace advice, education, and training. The Colorado Association of Commerce and Industry (CACI) was created in 1965 when the Colorado Chamber of Commerce and the Colorado Manufacturers'

Association merged. CACI champions free enterprise, a healthy business environment and economic prosperity for all Coloradans. Employers' Coalition of North Carolina is a statewide coalition of 2,500 employers focusing on public policy advocacy to improve the workplace without causing unnecessary burdens on businesses and job growth. The European-American Business Council is a trans-Atlantic trade association of 75 multinational member companies based in the US, Europe, and Canada. EABC is committed to fortifying EU-US economic investment, innovation, regulatory integration, and Trans-Atlantic competitiveness. The Forging Industry Association represents the North American forging industry, accounting for 73 percent of custom forgings produced in the United States, Canada, and Mexico. The Illinois Manufacturers' Association is the oldest and largest association focusing on the needs of manufacturers in the nation comprised of more than 4,000 members. INDA, is the international organization representing the entire value chain of the global nonwoven fabrics industry. The Industrial Fasteners Institute is a trade association representing 85 percent of the North American production capacity for mechanical fasteners. The Industrial Truck Association represents manufacturers of forklift trucks and their suppliers in the United States, Canada, and Mexico. The International Housewares Association represents 1,600 manufacturers and marketers of household nondurable goods. International Sign Association (ISA) represents nearly 2,000 on-premise sign manufacturers, suppliers and distributors. ISA supports the right of American employees to choose whether or not to have union representation through the secret ballot. The International Sleep Products Association represents the mattress manufacturing industry. The Iowa Association of Business and Industry was formed over a century ago and is Iowa's oldest and largest business organization. As a trade association working to advance manufacturing and general business in Iowa, ABI provides public policy, training and education, and community and leadership development services to its 1,400 member companies located throughout the

state. The Jackson Area Manufacturers Association represents over 200 manufacturing and associate members across south-central Michigan. Established in 1911, the Kentucky Association of Manufacturers is Kentucky's most effective advocate for manufacturers. KAM's mission is to protect and create a manufacturing-friendly environment in Kentucky. In addition to advocating, KAM connects, educates and provides cost saving programs and products to members. The Metals Service Center Institute is a trade association with more than 360 members operating from about 1,200 locations in the U.S., Canada, Mexico, and elsewhere in the world. Together, MSCI members constitute the largest single group of metals purchasers in North America, amounting each year to more than 55 million tons of steel, aluminum, and other metals, with about 300,000 manufacturers and fabricators as customers. The Michigan Manufacturers Association is an organization made up of approximately 3,000 private businesses organized and existing to study matters of general interest to its members, to promote the interests of Michigan businesses and of the public in the proper administration of laws relating to its members, and promote the general business and economic climate of the state of Michigan. The Motor & Equipment Manufacturers Association represents nearly 650 companies manufacturing motor vehicle parts for use in light vehicle and heavy-duty original equipment and aftermarket industries. The National Council of Textile Organizations represents the United States textile industry. National Marine Manufacturers Association (NMMA) is the leading national recreational marine trade association, with nearly 1,500 members involved in every aspect of the boating industry. NMMA members manufacture over 80 percent of recreational boats, engines, trailers, accessories, and gear used in the United States. Recreational boating contributes significantly to the U.S. economy, generating $30.8 billion in sales and services during 2009. The National Shooting Sports Foundation is the trade association for the firearms, ammunition, hunting, and shooting sports industry. The Nebraska Chamber of Commerce and

Industry is a statewide federation of business firms and organizations, both large and small, dedicated to economic progress and the preservation of a sound business climate. The New Jersey Business & Industry Association is the nation's largest statewide employer association with 22,000 member companies in all industries and in every region of the State employing over one million workers. The Non-Ferrous Founders' Society is a not-for-profit trade association representing the aluminum and copper-based foundry industry. The North American Association of Food Equipment Manufacturers (NAFEM) is a trade association of more than 550 foodservice equipment and supplies manufacturers providing products for food preparation, cooking, storage and table service. The North Carolina Chamber is a non-partisan business advocacy organization that works in the legislative, regulatory and political arenas to proactively drive positive change to ensure that North Carolina is a leading place in the world to do business. The Northeast PA Manufacturers & Employers Association represents over 300 companies in a five county area in Northeast Pennsylvania. The Ohio Manufacturers' Association ("OMA") is a statewide association of approximately 1,500 companies, which collectively employ the majority of the 610,000 men and women who work in manufacturing in the state of Ohio. The Pennsylvania Manufacturers' Association (PMA) is a Harrisburg-based statewide trade organization representing the manufacturing sector in Pennsylvania's public policy process. Society of Chemical Manufacturers and Affiliates (SOCMA) is the only U.S. based trade association dedicated solely to the batch, custom and specialty chemical industry. The Steel Manufacturers Association represents electric arc furnace steelmakers in North America producing 75 percent of the steel produced in the United States. The Tennessee Chamber of Commerce & Industry is the state's largest broad-based business and industry trade association, representing the interests of employers in Tennessee. The Texas Association of Business is a broad-based business group representing over 3,000 small and large businesses as well as more than 210 local chambers of

commerce. The Textile Care Allied Trades Association is an international trade association representing manufacturers and distributors of laundry and drycleaning equipment and supplies. The West Virginia Manufacturers Association is a non-profit, statewide organization, representing the interests of the manufacturing industries in West Virginia with one hundred fifty member companies employing approximately 25,000 men and women in West Virginia.

RESPONSES TO QUESTIONS RAISED

Chairman Liebman questions "whether the asserted benefits of the *Dana* regime outweigh its costs" given "the rarity of *Dana* elections, and the even greater rarity of cases where employees reject the [voluntarily] recognized union...." *Rite Aid Store #6473*, *supra*, at 2. Chairman Liebman cites as an historical analogue the Board's experience under the 1947 Taft-Hartley amendments in conducting employee referendums to decide whether to authorize unions to negotiate union-security clauses in collective-bargaining agreements. Because authorizations were approved in 97 percent of the elections held, the referendum requirement was rescinded and replaced with a provision allowing employees to seek a Board election to rescind the union's authority regarding an existing union-security clause.

This historical analogue, however, does not support overruling *Dana*. The question whether a union should have the authority to negotiate a union-security clause necessarily arises only *after* the pre-condition of employee choice regarding third-party representation is satisfied. Initially presuming union authorization to negotiate a union security clause following employee selection of union representation is understandable and Agency expense to conduct an election regarding union security clause authorization is a consideration where legitimate alternatives afford savings. However, where the necessary precondition to *any* collective negotiation is individual employee free choice regarding whether to be represented at all or by a particular

third-party, Board efforts to *ensure free choice* must never be considered an option or a discretionary cost. In nearly 25 percent of the 54 *Dana* elections conducted by the Board, employees exercising free choice voted to reject the employer's initial, voluntary recognition. Given the Board's discretion in determining the "reasonable period" protecting card-based voluntary recognition - extending, in at least one case, to 356 days followed by a three year contract bar - if only one percent of *Dana* notices lead to decertifications, employee free choice remains a real and vital opportunity. *Rite Aid Store #6473, supra, at 2; MGM Grand Hotel, supra.*

The following responds to the questions raised in the Notice:

Question 1: What has been the experience under *Dana* and what have other parties to voluntary recognition agreements experienced under *Dana*?

Response: Despite Chairman Liebman's preference for the views of scholars or neutrals over those of practitioners or "partisan commentators," in the absence of robust experiential data for voluntary recognitions, *Dana*-notice and non-*Dana*-notice, even scholarly, qualitative analysis is compromised and subject to challenge. *UGL-UNICCO Service Company*, 355 NLRB No. 155 (2010), fn. 1. Evidence regarding one or a few *Dana, supra,* experiences or remarks from a single employer, union, and/or industry sector cannot yield relevant, reliable information on which to construct a rule that would restrict an employee's opportunity for informed and free choice. *Id.* To the extent the NLRB's request for information is an informal approach to informal rulemaking, a notice compliant with applicable administrative law may yield more information and more robust data from additional persons and/or entities.

The NLRB's reported *Dana*-notice information, as well as the information in footnote 5, *Rite Aid Store #6473, supra, at 2,* is deficient and inadequate as a basis for policy formulation. The NLRB's data fail to provide, for example, the number of employees/eligible voters in the

prospective bargaining units, the duration of each card-signing campaign, whether a neutrality agreement applied, the number of signed cards, whether there were allegations of intimidation or threats during card-signing/solicitation, the number of votes cast for and against representation, the length of time for contract bargaining, the number of bargaining sessions, whether a contract was consummated, and whether contract terms or consideration were agreed-to or exchanged in advance. *Notice,* fn. 4.

The Board's data reveals that 85 or 7.65 percent of the 1,111 reported *Dana* notices resulted in petitions for elections. Of the 85 petitions, the Board conducted 54 elections, a 63.5 percent validation of the required 30 percent minimum showing of interest filing requirement. Notably, 13 of the 54 elections conducted, nearly 25 percent, resulted in the employees' *rejection* of the voluntarily recognized unions. Were the overall data robust, this result alone argues against overturning *Dana*. However, 15.4 percent of the reported requests for voluntary recognition notices involved one company; one union accounted for 17.6 percent of all notice requests; and only two industry sectors – transportation and restaurant/hospitality - accounted for 36.1 percent of the 1,111 notice requests. Moreover, data reporting both attempts and successes in obtaining voluntary recognition without demonstrating the minimum showing to acquire recognition bar protection is non-existent. Drawing conclusions from anecdotal and incomplete data to formulate policy for general application that would compromise or defeat the statutory goal of employee free choice would be inadvisable if not inexcusable.

Although there is no publicly available data reporting the number of eligible voters in any of the affected units, that nearly one in four elections rejected the card-based majority showing is significant, reflecting the criticality of government conducted, secret ballot elections and, arguably, the benefit of information and open discussion from both the union and the employer

regarding the advantages and disadvantages of third-party representation and/or of representation by a particular union where there is a choice among unions.

Question 2: In what ways has the application of *Dana* furthered or hindered employees' choice of whether to be represented?

Response: *Dana* has furthered, not hindered, employees' free and informed choice regarding third-party union representation. By definition, and as demonstrated by the reported experience to date under *Dana,* employee choice is, on the margin, freer and more informed by providing a "second chance" to become informed and to vote unimpeded. The opportunity for a secret ballot election to validate or reject an employer's voluntary, card-check, union recognition ensures employee free choice when it was not, or may not have been, previously available and guaranteed. Without *Dana*, employees are left, as before, with the likelihood of peer pressure and/or coercion, lack of information, no measurement of unit-wide employee sentiment at the same point in time, and no assurance that the alleged, resulting majority is an accurate reflection of free choice.

Question 3: In what ways has the application of *Dana* destabilized or furthered collective bargaining?

Response: Free and informed employee choice is a necessary precondition to third-party representation and the then required statutory obligation to bargain in good faith. Collective bargaining and/or a resulting agreement that follows from intimidation, if not coerced signatures, enabling voluntary recognition or that results from pre-recognition bargaining, neutrality, and/or other consideration unknown to the employees in the targeted unit must not be a Board policy objective. The negotiation of a collective agreement following recognition of a union the affected employees would not vote for is not the collective bargaining result the National Labor Relations Act (Act) encourages. *29 U.S.C. §§151 et. seq.* Such a policy and result will not lead

to industrial peace and would negate employees' statutory Section 7 rights to choose for themselves whether representation or representation by a particular union is desired.

The current 45 day *Dana* notice posting and the possible conduct of a Board conducted secret-ballot election does not destabilize collective bargaining. Organized labor is well aware of its regular delay in initiating negotiations, especially in first contract settings, due to necessary, internal discussions with unit employees, acquiring information regarding the employer's business, and crafting draft proposals. This start-up effort can go forward during a *Dana* notice posting period. Certainly collective bargaining, as well as union leverage, will be enhanced as a result of the *Dana* notice posting and a subsequent union victory in a Board conducted secret ballot election under *Dana*.

Finally, without robust data facilitating comparative analysis regarding the passage of time and whether negotiated agreements are reached in both *Dana*-notice and non-*Dana*-notice fact patterns, any conclusion based on anecdotal information will be suspect. The Board's data is devoid of any information regarding collective bargaining outcomes, the time involved, the number of sessions following voluntary recognition with and without *Dana* notices and analogous data for negotiations following traditional secret-ballot election outcomes favoring union recognition.

Question 4: What is the appropriate scope of application of the rule announced in *Dana*, specifically, should the rule apply in situations governed by the Board's decision regarding after-acquired clauses in *Kroger Co.*, 219 NLRB 388 (1975), or in mergers such as the one presented in *Green-Wood Cemetery*, 280 NLRB 1359 (1986)?

Response: The *Dana* notice rule should apply in after-acquired, merger, and successor fact patterns. In *Kroger,* the Board held that negotiated "after-acquired" clauses are valid waivers of the employer's right to demand an election in determining union representation at

newly added stores where the unions had valid card majorities in the units involved. For the reasons discussed above concerning card solicitation, notice to all unit employees, and the need for full exchange of information to ensure informed choice, the *Dana* notice rule should be applied to *Kroger* fact patterns. Where new stores or additional facilities, for example, are added to a bargaining unit by contractual agreement with signed cards offered as proof of majority, absent the *Dana* notice protocols, there is no assurance that every unit employee was informed of the card solicitation/card signing opportunity and/or that the choice to sign or not was free or informed.

At issue in *Green-Wood Cemetery* was the unit scope for a decertification election. A unit of field employees was certified following a secret ballot election specifically excluding office clerical employees. Subsequently, the employer voluntarily recognized the union as the representative of the office clerical employees pursuant to a card check. The Board found that the parties negotiated a contract with a merged recognition clause and, over several years, operated with an intent to merge the two units. Consequently, the Board held that the petitioned-for decertification election for office clerical employees *only* was inappropriate. *Green-Wood Cemetery* is a good example of the need for the *Dana* notice protocols. The parties' effective merger of units was in stark contradiction to the prior election for field employees only, the initial contract specifically excluding office clericals, and the subsequent voluntary recognition of office clericals. The office clericals' decertification petition reflects the damage done by ignoring employee free and informed choice. The Board's refusal to process the decertification petition denied employees any choice. Unit mergers should be conditioned on employee choice through the application of the *Dana* notice.

The *Dana* notice should also apply in cases of successorship to allow the employees of the acquired company the opportunity to evaluate and consider voting out the incumbent union

or consider a rival union petition. In the Board's forthcoming review of *MV Transportation*, 337 NLRB 770 (2002) which overturned *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999) which overturned *Southern Moldings, Inc.*, 219 NLRB 119 (1975), the Board should reaffirm that an incumbent union in a successorship situation, including a "perfectly clear" successor situation, is entitled *only* to a rebuttable presumption of continuing majority status which will not serve as a bar to an otherwise valid decertification, rival union, or employer petition and require the *Dana* notice protocols. *UGL-UNICCO Service Company*, *supra*; *UFL-UNICCO Service Company*, Case No. 1-RC-22447 and *Grocery Haulers, Inc.*, Case No. 3-RC-11944, *Notice and Invitation to File Briefs*, August 31, 2010; *NLRB v. Burns Security Services*, 406 U.S. 272, 294-295 (1972). Employees who chose a union to represent them at predecessor employer "Alpha" did not choose union representation in the abstract but relative to Alpha's financial condition and/or treatment by Alpha's management. When a new and different entity "Beta" becomes the employer with a different financial situation and management team, employees should have the opportunity to assess under these changed conditions whether they want or need union representation or the same union.

Question 5: Under what circumstances should substantial compliance be sufficient to satisfy the notice-posting requirements established in *Dana*?

Response: It is recommended that the Board follow its standards applicable to official notice-posting: NLRB Casehandling Manual Part One-Unfair Labor Practice Proceedings §10132, Casehandling Manual Part Two-Representation Proceedings §11314.7, and/or NLRB Compliance Manual §10518.

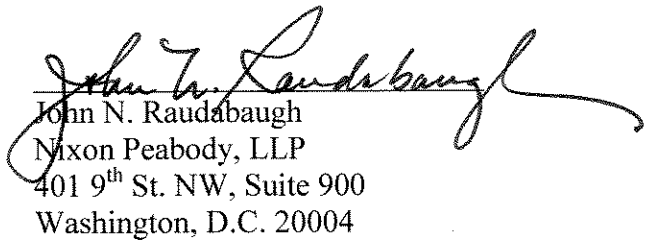
Question 6: If the Board modifies or overrules *Dana*, should it do so retroactively or prospectively only?

Response: The Board *should not* overrule *Dana*. The Board *should* modify the *Keller Plastics* voluntary recognition bar "doctrine" and define "a reasonable period of time" for the voluntary recognition bar to not exceed six (6) months. Should the Board inadvisably proceed to overrule *Dana*, it should do so prospectively only for the same reason it did so in announcing the recognition-bar modifications. *Dana,* 351 NLRB at 435.

CONCLUSION

In the interest of ensuring free and informed employee choice regarding third-party representation, *Dana Corp.*, 351 NLRB 434 (2007) should not be overturned but remain Board law, *MV Transportation*, 337 NLRB 770 (2002) should be reaffirmed, and the "perfectly clear" successor situation as defined by *NLRB v. Burns Security Services*, 406 U.S. 272 (1972) should be revised to conform with both *Dana* and *MV Transportation* recognition bar principles.

Respectfully submitted,



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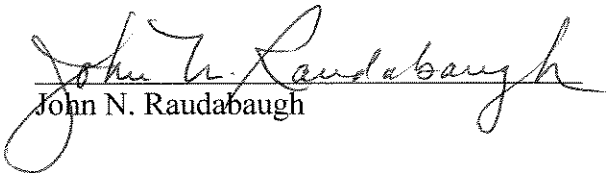
CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amici Curiae National Association of Manufacturers, American Apparel & Footwear Association, American Composites Manufacturers Association, American Lighting Association, Arizona Manufacturers Council, Associated Industries of Missouri, Association of Equipment Manufacturers, Capital Associated Industries, Inc., Colorado Association of Commerce and Industry, Employers' Coalition of North Carolina, European-American Business Council, Forging Industry Association, Illinois Manufacturers' Association, INDA-Association of the Nonwoven Fabrics Industry, Industrial Fasteners Institute, Industrial Truck Association, International Housewares Association, International Sign Association, International Sleep Products Association, Iowa Association of Business and Industry, Jackson Area Manufacturers Association, Kentucky Association of Manufacturers, Metal Service Center Institute, Michigan Manufacturers Association, Motor & Equipment Manufacturers Association, National Council of Textile Organizations, National Marine Manufacturers Association, National Shooting Sports Foundation, Nebraska Chamber of Commerce & Industry, New Jersey Business & Industry Association, Non-Ferrous Founders' Society, North American Association of Food Equipment Manufacturers, North Carolina Chamber, Northeast PA Manufacturers & Employers Association, Ohio Manufacturers' Association, Pennsylvania Manufacturers' Association, Society of Chemical Manufacturers and Affiliates, Steel Manufacturers Association, Tennessee Chamber of Commerce & Industry, Texas Association of Business, Textile Care Allied Trades Association, and West Virginia Manufacturers Association was filed electronically with the National Labor Relations Board this 1st day of November, 2010.



John N. Raudabaugh