UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Michael E. Lopez,
(Petitioner)

and

Lamons Gasket Company,
a Division of Trimas Corporation,
(Employer)
and

Case No. 16-RD-1597

United Steel, Paper and Forestry
et al. Union (USW),
(Union)

PETITIONER'S BRIEF ON THE MERITS IN OPPOSITION TO THE USW'S REQUEST FOR REVIEW, AND HIS RESPONSE TO THE BOARD'S NOTICE AND INVITATION TO FILE BRIEFS

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I. INTRODUCTION AND MOTION FOR RECUSAL[1]

On August 27, 2010, the Board granted the Request for Review filed by the United Steel, Paper and Forestry et al. Union ("USW" or "union"). On August 31, 2010, the Board invited the parties and amici to file briefs concerning whether Dana Corp., 351 NLRB 434 (2007), should be modified or overruled. By and through his undersigned attorney, Petitioner Michael Lopez files this Brief on the Merits in Opposition to the USW's Request for Review, and his Response to the Board's Notice and Invitation to File Briefs.

In its Request for Review, the USW asks the Board to overrule its 2007 decision in Dana Corp., and thereby disregard the secret-ballot election already conducted in this case

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[1] **MOTION FOR RECUSAL**: Petitioner Lopez hereby moves for the recusal of Member Becker in this case, due to the fact that he filed a brief for one of the parties in Dana Corp., 351 NLRB 434 (2007), the very case that the instant Petition for Review seeks to overrule. http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/UAWAFLCIObrief1.pdf Although Member Becker has refused to recuse himself in similar cases, SEIU Local 121 RN (Pomona Valley Hospital Medical Center), 355 NLRB No. 40 (June 8, 2010), Petitioner Lopez reiterates and adopts the Motions for Recusal that were ruled upon in that case. Petitioner finds it extraordinarily troubling that a Board Member would participate to overrule Dana Corp. when he represented a party and co-authored the lead brief in that very case. See Overnite Transp. Co., 329 NLRB 990, 998 (1999) (Member Liebman agreeing that the recusal standards for federal judges apply to NLRB Members); Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB, 121 F.2d 235, 238-39 (3d Cir. 1941); Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970). Whatever standard Member Becker chooses to use, however, it is axiomatic that a party to a federal adjudicatory proceeding is "entitled as a matter of fundamental due process to a fair hearing." Overnite Transp. Co., 329 NLRB at 998. "In determining whether a judge must disqualify himself under 28 U.S.C. § 455(b)(1), the question is whether a reasonable person would be convinced the judge was biased." Hook v. McDade, 89 F.3d 350, 355 (7th Cir. 1996).

Here, any reasonable person would conclude that an attorney for one of the losing parties in Dana Corp. should not now be deciding whether to overturn that very decision.

on August 26, 2010. (The Regional Director impounded these ballots and they have yet to be counted). The USW's Request for Review is intended to stymie the workplace freedom of choice guaranteed by Section 7 of the National Labor Relations Act ("NLRA" or "Act"), and force employees to accept a union that may well be unrepresentative of a majority of employees. The ruling in Dana Corp. has worked well and should be re-affirmed in its entirety.[2]

II. BACKGROUND FACTS

On July 11, 2003, the USW and various corporate affiliates of Lamons Gasket entered into a secret neutrality and card check agreement that covered multiple Lamons Gasket facilities, including the facility located in Houston, Texas.[3] (Joint Stipulation No.

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[2] The rationale of the majority opinion in Dana Corp. and the dissenting opinion in Rite Aid/Lamons Gasket, 355 NLRB No. 157 (2010) is adopted herein by reference.

[3] Lamons Gasket's affiliated corporations (Trimas and Heartland Industrial Partners) have a history of signing neutrality and card check agreements with the USW that are of dubious validity. See, e.g., Heartland Indus. Partners, 348 NLRB 1081, 1085 (2006) (Chairman Schaumber, dissenting), petition for review dismissed for lack of standing, Kandel v. NLRB, 188 LRRM (BNA) 2320, 2008 WL 441824 (D.C. Cir. 2008); Patterson v. Heartland Indus. Partners, 428 F. Supp. 2d 714 (N.D. Ohio 2006), appeal dismissed as moot, No. 06-03791 (6th Cir. 2006); United Steel, Paper & Forestry, et al. Union v. Trimas Corp., 531 F.3d 531 (7th Cir. 2008). As occurred here (see Joint Stipulation No. 5, Ex. 1, p. 9), the terms of these neutrality and card check agreements are usually kept secret from the targeted employees, and such secrecy raises suspicion and uncertainty regarding the legitimacy of the voluntary recognition. Merk v. Jewel Food Stores Div. of Jewel Cos., 945 F.2d 889, 893-96 (7th Cir. 1991) (secret agreements between unions and employers violate federal labor policy); Aguinaga v. UFCW, 993 F.2d 1463, 1470-71 (10th Cir. 1993) (same).

5).[4] In the summer of 2009, the union commenced a "card check campaign" at the Houston facility. On November 5, 2009, Lamons Gasket voluntarily recognized the USW as the exclusive representative of a production and maintenance unit located in Houston, based upon the secret neutrality agreement and the "card check." (Joint Stipulation Nos. 5-6 & Ex. 1). On that same day, pursuant to the Board's decision in Dana Corp., the union and Lamons Gasket notified Region 16 that the USW had been recognized. (Joint Stipulation No. 7).

On November 19, 2009, pursuant to the Board's decision in Dana Corp., Region 16 transmitted to Lamons Gasket a "Dana notice" for posting in the workplace, so that employees and other interested parties (e.g., rival unions) would be notified of their right to seek a secret-ballot election. (Joint Stipulation No. 8). On November 23, 2009, Lamons Gasket posted the "Dana notice" at its Houston facility. (Joint Stipulation No. 9). On December 9, 2009, employee Michael Lopez (the Petitioner) filed a timely decertification petition with Region 16, supported by an adequate showing of interest. The election petition was delayed for many months due to USW "blocking charges." Processing of the election petition eventually resumed and, on July 9, 2010, the parties signed a Joint Stipulation of Facts to obviate the need for a Representation Hearing. (The Joint Stipulation is part of the record in this case).

[4] To obviate the need for a Representation Hearing, the parties to this case signed a factual stipulation on July 9, 2010. That Joint Stipulation is part of the record in this case.

After the voluntary recognition occurred on November 5, 2009, Lamons Gasket and the union began bargaining for a first contract. Although Lamons Gasket and the union had not reached a contract as of July 9, 2010 (when the Joint Stipulation was signed, see Joint Stipulation No. 11), they subsequently did reach a contract, which went into effect in August 2010. See Brief of Lamons Gasket, at 2, 5-7.

On July 21, 2010, the Regional Director issued an order directing a decertification election. On August 26, 2010, that election was conducted but due to the filing of this Request for Review the ballots have been impounded.

III. STATEMENT OF THE ISSUES

The Board's Notice and Invitation to File Briefs question whether Dana Corp. was wrongly decided and should, therefore, be modified or overruled. As such, the overarching issues in this case remain the same as those presented to the Board in the original Dana Corp. case:

1) Notwithstanding that an employer's voluntary recognition of a union may be lawful under the NLRA, should such voluntary recognition be given "bar quality" so as to prohibit employees from exercising their rights under Sections 7 and 9(c)(1)(A)(ii) of the Act to hold a secret-ballot election to reject the union that their employer chose?

2) Where self-interested employers (e.g., Lamons Gasket) sign secret "voluntary recognition agreements" with a favored union (the USW) and thereafter voluntarily

recognize that favored union without permitting the employees the benefit of a Board-supervised secret ballot election, should the Board overrule Dana Corp. and return to its former policy that denied, for as long as four (4) years, employees' statutory right to a secret-ballot election under Section 9(c)(1)(A)(ii)?

IV. ARGUMENT

A. THE BOARD'S 2007 DECISION IN DANA CORP. SHOULD NOT BE REVISITED, MODIFIED OR OVERRULED.

1. Dana Corp. properly protects employees' rights via secret-ballot elections.

A five-member Board carefully considered the decision in Dana Corp., 351 NLRB 434 (2007). After the Board granted the Request for Review, Dana Corp., 341 NLRB 1283 (2006), it solicited amicus briefs from the public to assist with its analysis and make sure all interested parties were heard.[5] Many unions and union supporters filed briefs.

Upon reviewing these extensive amicus briefs and the parties' briefs, the Board issued a well-reasoned decision in Dana Corp. that fosters the stability of relationships created by "voluntary recognition" while protecting employees' Section 7 rights to join a union or refrain from unionization. The Board properly recognized that, while there may be competing interests at stake, the paramount policy of the NLRA is to protect

[5] In response to the Board's solicitation, several dozen amicus briefs were filed. Because Dana Corp. was such an important case and the public interest surrounding it was enormous, the amicus and party briefs remain accessible to this day on the Board's "frequently requested documents" website, http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/DanaMetaldyneAmicusBriefs.html.

employees' right to freely join a union or to refrain from unionization under Section 7. See, e.g., Pattern Makers League v. NLRB, 473 U.S. 95 (1985) (overriding policy of the NLRA is "voluntary unionism"); Rollins Transp. Sys., 296 NLRB 793, 793 (1989) ("A Board election is the arena for exercise of the employee's right to free choice, a right closely guarded by the Act. . . . The paramount concern in such instances must be the employees' right to select among two or more unions, or indeed to choose none."); International Ladies Garment Workers v. NLRB, 366 U.S. 731, 738-39 (1961) (deferring to even a "good-faith" determination that a union has majority employee support "would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act – that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives").

Thus, the Board in Dana Corp. determined that the so-called "voluntary recognition bar" should be slightly modified, to give employees the opportunity for a secret-ballot election in the event that their employer's recognition of a particular union did not actually represent the employees' free choice. The Board decided to slightly modify – but not eliminate – the voluntary recognition bar, which continues to exist. Indeed, as the Board's own statistics show, over 1,000 voluntary recognitions have gone into effect since 2007, unimpeded by the Dana Corp. ruling. No one has filed petitions in the vast majority of these 1,000 voluntary recognition cases, and no delay has occurred as a result of the Dana Corp. ruling.

In this regard, the only "burden" that the Dana Corp. rule has imposed is: 1) the parties to the voluntary recognition must mail a letter to the NLRB Regional Office to acquire a "Dana notice" (cost: $0.44); and 2) the NLRB must return the notice (cost: $0.44) and ensure its subsequent posting in the workplace. All the while this is occurring, the voluntarily recognition remains in effect, and the bargaining can commence or continue, notwithstanding the posting of the Dana notice. In over 1,000 cases, this "Dana notification process" has had no affect whatsoever on the parties' behavior.

Even in the 85 situations where petitions to challenge the voluntary recognition were filed, the law requires that bargaining continue unimpeded, and that is exactly what happened in this very case, where a contract was successfully reached notwithstanding the pending Dana petition. Most importantly, in the 15 election cases where the recognized union was voted out or another union selected, it is clear that freedom and workplace democracy were well served. "Just ask the employee voting majority in the 14 [sic] 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 three years or more before they could petition for an election." Rite Aid/Lamons Gasket, 355 NLRB No. 157 at 6 (2010) (Members Schaumber and Hayes, dissenting).

The Board in Dana Corp. recognized that employees subject to "voluntary recognitions" need the safety valve of a secret-ballot election because of frequent employer and union "back room deals" over recognition. In many such cases, employees

are pressured or misled to sign union authorization cards that are then used as the basis for the "voluntary recognition." See, e.g., Duane Reade, Inc., 338 NLRB 943 (2003) (employer unlawfully assisted UNITE and unlawfully granted recognition).[6] Through its affiliated corporations (Trimas and Heartland Industrial Partners), the employer in this case (Lamons Gasket) has a history of signing secret neutrality and card check agreements with the USW that are of dubious validity. See Joint Stipulation No. 5 & Ex. 1, p. 9 regarding secrecy of the neutrality and card check agreement; see also Heartland Indus. Partners, 348 NLRB at 1085 (Chairman Schaumber, dissenting); Patterson v. Heartland Indus. Partners, 428 F. Supp. 2d at 718 ("Heartland . . . has apparently selected

[6] The cases where an employer illegally conspired with its favored union to secure "voluntary recognition" of that union are legion. See, e.g., Fountain View Care Center, 317 NLRB 1286 (1995), enforced, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other agents of the employer actively encouraged employees to support the union); NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619 (2d Cir. 1994), enforcing 310 NLRB 579 (1993) (employer provided sham employment to union organizers and assisted their recruitment efforts); Kosher Plaza Super Market, 313 NLRB 74, 84 (1993); Brooklyn Hosp. Center, 309 NLRB 1163 (1992), aff'd sub nom. Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB, 9 F.3d 218 (2d Cir. 1993) (employer permitted local union, which it had already recognized as an exclusive bargaining representative, to meet on its premises for the purpose of soliciting union membership); Famous Casting Corp., 301 NLRB 404, 407 (1991) (employer actions unlawfully supported union and coerced the employees into signing authorization cards); Systems Mgmt., Inc., 292 NLRB 1075, 1097-98 (1989), remanded on other grounds, 901 F.2d 297 (3d Cir. 1990); Anaheim Town & Country Inn, 282 NLRB 224 (1986) (employer actively participated in the union organizational drive from start to finish); Meyer's Café & Konditorei, 282 NLRB 1 (1986) (employer invited union it favored to attend hiring meeting with employees); Denver Lamb Co., 269 NLRB 508 (1984); Banner Tire Co., 260 NLRB 682, 685 (1982); Price Crusher Food Warehouse, 249 NLRB 433, 438-49 (1980) (employer created conditions in which the employees were led to believe that management expected them to sign union cards). Dana Corp. simply held that employees should have a better way to fight these unlawful and abusive voluntary recognitions than via ULP litigation, which can drag on for years.

and contracted with a union of Heartland's choice"). The USW's ability to negotiate secret neutrality agreements and eliminate secret-ballot elections raises serious concerns among employees. What is the harm in giving employees a quick and speedy device – a secret-ballot election – to check the largely unchecked power of their employer and the union that covets them?

The USW's claim that "industrial peace and stability" is the primary element of national labor policy (USW Request for Review at 6-7) is overstated and wrong. While voluntary recognition may be *an* element of the national labor policy, it does not trump the elements of federal policy that are actually favored: employee free choice via secret-ballot elections, unimpeded by union or employer pressure and misrepresentations. NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory – indeed the preferred – method of ascertaining whether a union has majority support"). Only where employees freely choose union representation does the collective bargaining process become an element of federal labor policy.[7] This is especially true

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[7] The policy of "encouraging the practice and procedure of collective bargaining," stated in the preamble to the Act at 29 U.S.C. § 151, does not mean that the Act endorses favoritism towards unions or employees who support union representation over those who wish to refrain from union representation. Only where a majority of employees freely select union representation is there any policy interest in promoting collective bargaining or "labor stability." This is because collective bargaining is itself entirely predicated on the exercise of employee free choice enshrined in Section 7 of the Act.

> [T]he Act itself, in its substantive provisions, gives employees the fundamental right to choose whether to engage in collective bargaining or not. The preamble and the substantive provisions of the Act are not inconsistent. Read together, they pronounce a policy under which our nation protects and encourages the practice and procedure of

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under Dana Corp., 351 NLRB at 439, where the Board drew upon the record (consisting of employees' sworn declarations) and its knowledge of labor law to make specific findings about the unfairness and anti-democratic nature of many "card check" campaigns:

> [U]nion card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options. As to the former, misrepresentations about the purpose for which the card will be used may go unchecked in the voluntary recognition process. Even if no misrepresentations are made, employees may not have the same degree of information about the pros and cons of unionization that they would in a contested Board election, particularly if an employer has pledged neutrality during the card solicitation process.

Sworn declarations by employees who have faced such abusive card check campaigns (e.g., Clarice Atherholt and Lori Yost in Dana Corp., accessible at http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/DanaMetaldyneAmicusBriefs.html) constitute first-hand empirical evidence that the Board should not ignore. See also HCF, Inc., 321 NLRB 1320 (1996) (recounting union threats to force employees to sign authorization cards).

The USW does not argue that "card check campaigns" provide more protection of employee freedom than secret-ballot elections. Indeed, the USW admits with refreshing candor that "union organizers and supporters can intimidate, coerce, mislead or pressure employees during a card check campaign" (USW Request for Review at 12), and that

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[7](...continued)
collective bargaining **for those employees who have freely chosen to engage in it.** Levitz Furniture, 333 NLRB 717, 731 (2001) (Member Hurtgen, concurring) (emphasis added).

"employees can be shielded from peer pressure in the freedom and secrecy of the ballot booth." (USW Request for Review at 13). Given these stark realities and the USW's admissions, the Board was correct in Dana Corp. in reiterating that voluntary unionism is the paramount policy under the Act, and that this policy is fostered by encouraging use of the secret-ballot in a Board conducted election. See, e.g., Levitz Furniture Co., 333 NLRB 717, 723 (2001) ("we emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions").

2. The evidence shows that the rule of Dana Corp. is working as intended.

As noted, the Board has compiled statistics on voluntary recognitions and Dana petitions that have occurred from 2007 (when Dana Corp. was issued) until the present. According to the Board's Notice and Invitation to File Briefs:

> As of August 18 [2010], the Agency had received 1,111 requests for voluntary recognition notices. In connection with those requests, 85 petitions were filed, which resulted in the Board's conducting of 54 elections. In 39 of the elections, the voluntarily recognized union prevailed. In 15 elections, the employees voted against the voluntarily recognized union, including 2 instances in which a petitioning union was selected over the recognized union. As to the other 31 petitions, one is blocked and the other 30 have either been withdrawn or dismissed.

See VR chart at http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Dana.xls.

These statistics show that Dana Corp. is working precisely as intended, and has not hindered or delayed the vast majority of voluntary recognitions from taking effect. The Board in Dana Corp. correctly understood that its ruling would enhance employee freedom (especially in the most egregious and abusive card check situations), while

causing negligible delay or interference with the newly formed "voluntary recognition" relationship. This is borne out by the Board's own statistics, for only in the most egregious situations (85 out of 1,111 "VR" filings) have employees or rival unions filed petitions to challenge a voluntary recognition. Indeed, the USW's Request for Review admitted that it was then finalizing, after eight (8) months of negotiations, a contract with the employer (USW Request for Review at 4), so the fact that employees filed for a prompt decertification within forty-five (45) days of the voluntary recognition in no way hampered or delayed the union's ability to negotiate a timely first contract. Here, the USW actually secured a contract at Lamons Gasket in August 2010, less than a year after the voluntary recognition occurred.

Thus, in those abusive and egregious situations where the employees do not actually support the union that their employer "voluntarily recognized," the rule of Dana Corp. has effectively ensured the promise of the Act: that employees' Section 7 right to choose or reject unionization via majority rule is not "place[d] in permissibly careless employer and union hands." International Ladies Garment Workers, 366 U.S. at 738-39. Indeed, arguing against a secret-ballot election in cases where, as here, there may have been union and employer collusion via a secret neutrality agreement is simply un-American and smacks of totalitarianism. Since Dana Corp., the employees who successfully have decertified unwanted unions or voted for representation by rival unions in at least fifteen (15) cases have surely had their Section 7 rights vindicated in a way that

no unfair labor practice charge could ever do. Rite Aid/Lamons Gasket, 355 NLRB No. 157 at 6 (Members Schaumber and Hayes, dissenting).

Interestingly, the USW admits that under Dana Corp. all employers granting voluntary recognition have a continuing duty to bargain with the recognized union, notwithstanding the filing of a Dana decertification petition or a petition by a rival union. (Union Request for Review at 16). Here, the USW admits that such bargaining has occurred and has resulted in a tentative agreement (USW Request for Review at 4), thus undercutting any notion that a Dana decertification petition hinders bargaining for a first contract. The Brief of Lamons Gasket (filed 10/28/10) proves that Dana Corp. works.

Finally, even if the union's "parade of horribles" did occur and the instant petition in fact caused a slight delay in the bargaining, so what? There is no reason to believe that a slight delay in the bargaining, while the secret-ballot process unfolds, harms any employees or undermines the union's status. The Board in Dana Corp. was careful to mandate quick elections – within forty-five (45) days – precisely so that the bargaining could continue unimpeded in cases where the employees actually desire the union's representation. Here, it took only eight (8) months of bargaining to produce a contract between the USW and Lamons Gasket, and there is no allegation in the USW's Request for Review that the filing of the Dana decertification petition hindered that bargaining process.[8] Lamons Gaskets' Brief shows clearly that Dana did *not* hinder bargaining.

[8] The UAW raises a red herring when it complains that, under Dana Corp., a (continued...)

3. Dana Corp. properly protects employees' rights via public disclosure of the voluntary recognition process.

The ruling in Dana Corp. has helped shed at least *some* light on the neutrality, card check and voluntary recognition process, and has provided statistics on what was previously a dark and undocumented corner of labor law. Now, through the Board's "VR Database," employees can track their union's organizing activities, just as they can track NLRB election cases via the Board's website or the Freedom of Information Act. Is making more information available to employees about the "voluntary recognition" process a bad thing? Should unions and employers be able to operate in the dark, via secret neutrality agreements and hidden "voluntary recognitions" that are never shared with employees? What is wrong with allowing NLRB Regions to catalog voluntary recognitions and publish that list on the NLRB's website? The short answer to these questions is that Dana Corp. has opened up the voluntary recognition process, lifted the veil of secrecy, and helped drain it of some of the more severe abuses.

Indeed, in the absence of the "VR Database," employees have no way of learning anything about the terms of the secret neutrality and card check agreements that target them, because the General Counsel has refused to issue complaints when unions and

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[8](...continued)
recognition bar never goes into effect if the Dana notice is not posted. (USW Request for Review at 17-18). The instant case does not present such facts, as the USW and Lamons Gasket promptly posted the Dana notice after the recognition, and the election was sought within the first forty-five (45) days. The union's "parade of horribles" about situations where no notice is ever posted and no recognition bar is ever created is hypothetical and is not properly before the Board at this time. The facts here do not support such an argument.

employers deny employees' requests for copies of these secret agreements. Rescare & SEIU Local District 1199, 11-CA-21422 and 11-CB-3727 (NLRB Advice Memorandum, Nov. 30, 2007), accessible at http://www.nlrb.gov/shared_files/Advice%20Memos/2007/11-CA-21422.pdf. Amazingly, the General Counsel does not believe that employees should have access to the secret agreements that target them, even though they are enforceable labor contracts under Section 301 of the NLRA, 29 U.S.C. § 185. UAW v. Dana Corp., 278 F.3d 548 (6th Cir. 2002). To a small extent, Dana Corp. and the VR Database help ameliorate this problem by providing employees with some information about the voluntary recognition process.

In her concurrence to the Order Granting Review in this case, Chairman Liebman opined that the statistics on Dana Corp. elections "capture only voluntary recognition agreements that *were* reached, not those hypothetical agreements that were never consummated because of the parties' concerns about Dana." Rite Aid/Lamons Gasket, 355 NLRB No. 157 at 2. But this assumes that some hypothetical parties did not undertake voluntary recognition *because* of Dana Corp. However, the mere existence of Dana Corp. would not have dissuaded such parties unless: a) they knew their voluntary recognition was tainted and they did not want to face a prompt secret-ballot election; or b) they did not want to disclose the details of the recognition to the employees, the Board and the public, as Dana Corp. requires. Either way, such union and employer concerns

are illegitimate and subversive of employee rights under the NLRA.

Voluntary recognitions should not be allowed to operate in the shadows, especially when preceded by secret neutrality agreements that deprive employees of full knowledge about the genesis of the recognition and any underhanded "deals" that may have been cut. Federal labor law abhors secret deals between employers and unions.[9] Merk v. Jewel Food Stores Div. of Jewel Cos., 945 F.2d 889, 893-96 (7th Cir. 1991) (secret agreements between unions and employers violate federal labor policy); Aguinaga v. UFCW, 993 F.2d 1463, 1470-71 (10th Cir. 1993) (same). A common thread running through the "improper recognition" cases compiled in footnote 6, supra, is that many employer-favored unions do not obtain an uncoerced showing of interest from employees, but rather are unlawfully forced upon the employees. This sordid situation is all too common, and Dana Corp. helps curb the worst abuses.

Because Dana Corp. provides employees with at least some disclosure of the voluntary recognition that occurred in their workplace and the activities of their employer and the union that covets them, it should be reaffirmed.

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[9] As Joint Stipulation No. 5 & Ex. 1, p. 9 ¶15 show, Lamons Gasket and the USW agreed to withhold from employees all information about their secret neutrality and card check deal.

> This Side Letter and Framework Agreement will be treated as non-public by all parties except as otherwise required by the terms of either document, agreed to by mutual written consent of the parties, or by law. Neither of the parties nor their agents will issue any press release regarding the Side Letter or the Framework Agreement, or otherwise publish or publicize these agreements, except that if the Union is successful in organizing at the Company, it can publicize the organizing of such workplace and, to the extent it desires, the impact of Neutrality provisions on said success.

B. THE "VOLUNTARY RECOGNITION BAR" WAS ALLOWED TO EXPAND TOO FAR AND OPERATE UNDEMOCRATICALLY IN THE YEARS BEFORE DANA CORP.

In 1966, with virtually no reasoning or analysis, the Board planted the seeds of what has become known as the "voluntary recognition bar" with this simple, unreflective sentence:

> With respect to the present dispute which involves a bargaining status established as the result of voluntary recognition of a majority representative, we conclude that, like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining.

Keller Plastics Eastern, Inc., 157 NLRB 583, 587 (1966). From this rudimentary ruling mushroomed an unfair and undemocratic "recognition bar" that blocked employees from exercising their statutory right to a decertification election (or otherwise changing representatives) once an employer unilaterally bestowed voluntary recognition on a particular union.

Under the Board's pre-Dana policy, the "voluntary recognition bar" and the "contract bar" made it virtually impossible for any party (employee, union or employer) to obtain a secret-ballot election for close to four (4) years after a voluntary recognition occurred. See MGM Grand Hotel, Inc., 329 NLRB 464 (1999) (voluntary recognition bar can last for over eleven (11) months); Seattle Mariners, 335 NLRB 563 (2001) (voluntary recognition bar prohibits decertification elections even if employees signed a showing of interest prior to the employer recognition); Waste Mgmt.Co., 338 NLRB 1002 (2003)

(contract bar can last for three (3) years). This four-year incumbency is hardly a "temporary" bar to employees' free choice rights, as asserted by the dissenting NLRB Members in Dana Corp., 341 NLRB at 1284, and by Chairman's Liebman's concurring opinion in this case, 355 NLRB No. 157, at 2 n.5.

Employees enjoy a statutory right to petition for a decertification election under Section 9(c)(1)(A)(ii) of the Act. By contrast, the voluntary recognition bar, when coupled with the "contract bar," frustrates employees' right to a decertification election by locking them in for up to four (4) years. These "election bar" policies are not mandated by the Act, but rather are discretionary Board policies that undermine employee free choice by placing too much power in the hands of interested unions and employers. It was in recognition of these employee interests that the Board in Dana Corp. ordered a slight revision of the voluntary recognition bar.

Indeed, Dana Corp. simply followed Levitz Furniture Co., 333 NLRB 717 (2001), when it reassessed – but did not eliminate – the "voluntary recognition bar." The Board properly recognized that the pre-Dana Corp. recognition bar placed too much unchecked power in the hands of an interested employer and its chosen "partner" union. Employee free choice should not, and under the text of the Act cannot, be subject to the vagaries of self-interested unions and employers. See MGM Grand Hotel, 329 NLRB at 469-75 (Member Brame, dissenting).[10]

[10] The Board need look no further than Duane Reade, Inc., 338 NLRB 943 (2003), to (continued...)

Here, the employer's recognition of the USW was preceded by the negotiation of a secret, pre-arranged "recognition agreement" (Joint Stipulation No. 5 & Ex. 1 thereto) that obligated the employer to assist its "partner" union with organizing the employees. Lamons Gasket then anointed a particular, hand-picked union (the USW) with special privileges (e.g., lists of employees' home addresses and the waiver of a secret-ballot election in favor of a so-called "card check"). How is it fair to employees when their employer and a chosen union have such power over their workplace?

The Board's alteration of the "voluntary recognition bar" in Dana Corp. reestablishes the Board's proper oversight role in the representational process, and thereby protects employee rights to freely choose or reject union representation. Dana Corp. should not be modified or overruled.

C. THE FACTORS THAT LED THE BOARD TO DECIDE DANA CORP. HAVE NOT CHANGED IN THREE YEARS.

In granting the Request for Review in Dana Corp., 341 NLRB 1283 (2004), the Board identified various criteria that provided compelling reasons to reconsider the "voluntary recognition bar" and the extent, if any, to which an employer's voluntary recognition of a union should be of "bar quality." Among those criteria are: 1) the

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[10](...continued)
see this union and employer self-interest at work. There, in blatant disregard of employees' Section 7 rights to freely choose or reject a union, the employer unlawfully assisted its hand-picked union in coercing employees to sign union authorization cards so that "voluntary recognition" could be bestowed. This type of incestuous relationship is not worthy of a total "bar" against electoral challenges, as existed under pre-Dana Board policy.

increased use of recognition agreements; 2) the varying contexts in which a recognition agreement can be reached; and 3) the superiority of Board supervised secret-ballot elections. 341 NLRB at 1283. Petitioner will address those criteria in this brief because they underpin the propriety of the original Dana Corp. decision. Petitioner will also address the specific questions and issues raised by the Board in Rite Aid/Lamons Gasket, 355 NLRB No. 157 (2010) and its Notice and Invitation to File Briefs.

1. The increased use of "voluntary recognition agreements" counsels in favor of the Board strictly scrutinizing them.

In modern labor law there are few issues more timely and important than the legality of neutrality and card check agreements, and the manner in which they are obtained and enforced. See, e.g., Charles I. Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?, Lab. Law. (Fall 2000); Roger C. Hartley, Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement, 22 Berkeley J. Emp. & Lab. L. 369 (2001); see also Andrew Strom, Rethinking the NLRB's Approach to Union Recognition Agreements, 15 Berkeley J. Emp. & Lab. L. 50 (1994). This is because their use has grown exponentially over the past decade, and the reasons are not surprising. Unions face a steady decline in the number of employees choosing union representation when given a free choice in a secret-ballot election.[11] Financial self-interest has driven them to search for other ways to

[11] United States Bureau of Labor Statistics reports that in 2009 the union membership rate – the percentage of wage and salary workers who were members of a union – was (continued...)

acquire new dues paying members. Many unions attempt to increase their ranks by signing "voluntary recognition agreements" with employers and thereby eliminate employees' opportunity for a secret-ballot election.

The AFL-CIO's General Counsel advocates that unions should "use strategic campaigns to secure recognition . . . outside the traditional representation processes." Jonathan P. Hiatt and Lee W. Jackson, Union Survival Strategies for the Twenty-First Century, Lab. L.J., Summer/Fall 1996, at 176. By design, there are fewer protections of employee rights "outside the traditional representation processes," and thus little possibility of employees exercising their rights to resist union organizing campaigns that target them.

a. Pre-negotiated voluntary recognition agreements threaten employee rights to free choice.

A basic theory of the NLRA is that organizing is to occur "from the shop floor up." The Act envisions that unions will secure authorization cards from consenting employees, and either present those cards to the Board for an "RC" certification election, or, if a showing of interest by a majority is achieved, present them to the employer with a post-collection request for voluntary recognition. If the employer refuses (as is its legal

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[11](...continued)
12.3%, essentially unchanged from 12.4% a year earlier. The actual number of wage and salary workers belonging to unions declined by 771,000 to 15.3 million, largely reflecting the overall drop in employment due to the recession. In 1983, the first year for which comparable union data are available, the union membership rate was 20.1%, and there were 17.7 million union workers. http://www.bls.gov/news.release/union2.nr0.htm

right under Linden Lumber Division, Summer & Co. v. NLRB, 419 U.S. 301 (1974)), the union's proper course is to submit to an NLRB supervised secret-ballot election held under "laboratory conditions." General Shoe Corp., 77 NLRB 124, 127 (1948).

By contrast, union organizing under voluntary recognition agreements and "outside the traditional representation processes" occurs from the "top down." Unions organize *employers*, not employees, by using political power and "corporate campaigns" to coerce the employers to succumb to union demands. The employer and its anointed union then work together to achieve "recognition," irrespective of the employees' actual preference.

Top-down organizing is repulsive to the central purposes of the Act. See Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 632 (1975) ("One of the major aims of the 1959 Act[12] was to limit 'top-down' organizing campaigns"); Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 663 n.8 (1982) ("It is undoubtedly true that one of the central aims of the 1959 amendments to the Act was to restrict the ability of unions to engage in top-down organizing campaigns. . . .") (citations omitted). Top-down organizing tactics, such as the pre-negotiation of voluntary recognition agreements, create the potential for severe abuse of employees' Section 7 rights. There is a long history of cases in which employers and unions have cut "back room deals" over recognition, and then pressured employees to "vote" for the favored union by signing union authorization cards. See, e.g., Duane Reade, Inc., 338 NLRB 943

[12] The "1959 Act" is the Labor Management Reporting and Disclosure Act of 1959.

(2003) (employer unlawfully assisted UNITE and unlawfully granted recognition). A common thread running through the many "improper recognition" cases compiled in footnote 6, supra, is that the employer-favored unions did not obtain an uncoerced showing of interest from employees, but rather were forced upon the employees. This sordid situation is all too common, and Dana Corp. helps curb the worst abuses.

An example of the danger of top-down organizing is present in this case. Here, Lamons Gasket and its corporate affiliates made an advance written selection of the USW via their secret "neutrality and card check" agreement (Joint Stipulation No. 5 & Ex. 1), and provided that favored union with significant assistance and advantages prior to the union's solicitation of authorization cards. As one federal judge stated in a challenge to the identical USW neutrality and card check agreement, the employer "has apparently selected and contracted with a union of [its] choice," Patterson v. Heartland Indus. Partners, LLP, 428 F. Supp. 2d at 718, leaving little room for true employee free choice.

A similar danger is shown, albeit inadvertently, in one of the employer amicus briefs supporting the union in Dana Corp. The Amicus Brief of Liz Claiborne, Inc. states:

> We have a card check procedure in place covering specific units of workers. The use of card checks was just one agreement reached during **a complex negotiation, after rigorous debate**. Within the context of a contract negotiation, **an employer may find it beneficial to compromise** and accept use of a card check.

http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Liz%20Clairborne.pdf

(emphasis added). Thus, Liz Claiborne admits that it entered into its "card check agreement" because it was beneficial to the **employer's** interests, **not** the **employees'**.

One wonders what specific concessions Liz Claiborne and its favored union exchanged during their "compromise" to ban secret ballot elections and opt for card checks instead. Did the union agree to reduce employees' future wages in exchange for a reliable stream of dues income? Did the employer avoid a corporate campaign and the attendant bad publicity? While Petitioner Lopez is uncertain as to exactly what was "compromised" by Liz Claiborne and UNITE in exchange for their agreement to ban secret ballot elections, he is certain that effectuating employees' Section 7 right to freely choose or reject a union was not of utmost concern to these "rigorously debating" parties.[13]

In short, the explosive growth of voluntary recognition agreements makes Board scrutiny necessary, and mandates the common-sense limitations on voluntary recognition that were ordered in Dana Corp.

b. The Board's pre-Dana voluntary recognition bar policy rendered the NLRA's representational procedures irrelevant and unusable in the age of voluntary recognition agreements.

The continued viability of the Board's representation machinery is directly at issue in this case, as it was in Dana Corp. Unions and employers continue to enter into

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[13] Petitioner's dim view of the Liz Claiborne and UNITE "compromise" (and similar compromises that serve union-employer joint interests but diminish employees' Section 7 rights) is reinforced by the brief filed in Dana Corp. by two academicians, Adrienne Eaton and Jill Kriesky. http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Rutgers.pdf Echoing the Liz Claiborne brief, they state that employers can bargain for "weaker" neutrality clauses as they "assess the 'business case' in deciding whether or not to agree." (Eaton/Kreisky Brief at 3). The two professors never explain why employees' Section 7 rights should be diminished or otherwise subjected to horse-trading between unions that covet more dues payors and employers looking to make a good "business case" for their shareholders.

voluntary recognition agreements that render it impossible for the NLRB to conduct secret-ballot elections. The NLRB must not permit self-interested employers and unions to render the representation procedures of Section 9 unusable and irrelevant, and deny the Board its supervisory role in the union selection (or rejection) process. This is precisely what occurred at Lamons Gasket, when the parties contracted to avoid the Board's processes and rely instead upon a secret card check agreement to which employees were not privy. (Joint Stipulation No. 5 & Ex. 1).

Voluntary recognition agreements cut the Board out of other aspects of the union selection process as well. For example, the agreements often preclude the Board from determining whether particular organizing conduct is lawful or not, as most such agreements forbid any post-selection disputes to be brought to the Board. The result is that important challenges and objections concerning the conduct of the card check process are not heard by the Board, no matter how coercive the conduct. This leads to incongruous results such as demonstrated in Service Employees International Union v. St. Vincent Medical Center, 344 F.3d 977 (9th Cir. 2003). There, an SEIU union lost an NLRB supervised secret-ballot election, but was nevertheless able to force an employer to "arbitrate" before a private arbitrator over purported objectionable election conduct. The purported "objections" of the SEIU union could have been – and clearly should have been – filed with the Board under its Rules and Regulations. Instead, the Board was cut out of post-elections proceedings in a Board supervised election!

Such results show the insidious nature of many "voluntary recognition agreements." In effect, private parties can now repeal, at their mutual discretion, all of the Board's Rules and Regulations related to elections and post-election challenges and objections. The Board has no role in any of this, and, apparently, neither do the individual employees whose rights are at stake whenever a union is being selected.

The union strategy of eliminating the NLRB from its proper role in determining representational issues through use of voluntary recognition agreements is having its intended effect. The Board is increasingly cast aside and prevented from making labor law policy and overseeing private sector labor relations. For example, the number of representation elections held by the NLRB in FY 2009 decreased to 2,696 from 3,158 in FY 2008. General Counsel Memorandum 10-01 (Dec. 1, 2009).

The Board should not (and cannot) abdicate its statutory duties to the self-interested desires of unions and employers. Congress empowered the NLRB to administer the NLRA and decide representational matters. See 29 U.S.C. §§ 153, 154, 159-61.

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled.

General Shoe, 77 NLRB at 127 (emphasis added); see also NLRB v. Sanitary Laundry, 441 F.2d 1368, 1369 (10th Cir. 1971) (Section 9 of the Act imposes on the Board "the broad duty of providing election procedures and safeguards"). The NLRB must not sit passively on the sidelines and allow its representational processes to become irrelevant.

See e.g., Charles I. Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?, Lab. Law. (Fall 2000).

In short, the increased use of "recognition agreements" permits employers and unions to strip employees of their Section 7 rights and their ability to vote via secret ballot, and erases the Board from the process of employees selecting (or rejecting) a union. These abusive practices were properly limited in Dana Corp. and that decision should not be revisited.

2. The varying contexts in which recognition agreements can be reached counsel in favor of the Board strictly scrutinizing them.

Employer recognition of a union pursuant to a voluntary recognition agreement is not an "arm's length" determination that necessarily reflects the free choice of employees. Instead, it reflects the intersection of the employer and union's self-interests. As such, employer recognition of a union pursuant to a voluntary recognition agreement should not be considered of "bar quality." Employees and the NLRB must retain the ability to test such recognition through a secret-ballot election.

Unions seek voluntary recognition agreements to satisfy their self-interest in acquiring more dues paying employees to replenish their rapidly diminishing ranks. Every newly organized facility brings more members into the union, more money into union coffers through compulsory dues payments, and places more power in the hands of union

officials.[14]

Unions obtain voluntary recognition agreements from employers with a combination of the "stick" and the "carrot." The "stick" often includes "corporate campaigns" against the employer,[15] the use of secondary pressure,[16] and the enlistment of state or local governments to force private employers to sign voluntary recognition agreements with a favored union as a condition of doing business with the governmental

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[14] In UFCW Local 951 (Meijer, Inc.), 329 NLRB 730, 732, 734-35 (1999), the UFCW unions and the Board majority relied upon the expert testimony of a labor economist, Professor Paula Voos. Professor Voos has written that unions seek to organize for a whole host of reasons, including union leaders' desire for political aggrandizement and power; union leaders' monetary self-interest to keep and enhance their own jobs and wages; and the perceived "social idealism" and "ideological gains" brought about by union organizing. See Paula Voos, Union Organizing Costs and Benefits, 36 Indus. & Lab. Rel. Rev. 576, 577 (July 1983). Professor Voos also wrote that organizing is a profit-making venture for many unions. Id. & n.5. For example, she recognized that unions often organize larger units precisely because that is "where the money is"! Id. at 578 n.8.

[15] It is well documented that these corporate campaigns include, inter alia, baseless lawsuits, unfavorable publicity to cast the employer in an evil light and pressure by so-called "community activists." See Daniel Yager and Joseph LoBue, Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century, 24 Employee Rel. L.J. 21 (Spring 1999); Symposium: Corporate Campaigns, 17 J. Lab. Res., No. 3 (Summer 1996); Herbert R. Northrup & Charles H. Steen, Union 'Corporate Campaigns' as Blackmail: the RICO Battle at Bayou Steel, 22 Harv. J. L. & Pub. Policy 771 (1999).

[16] See e.g., Pittsburgh Fulton Renaissance Hotel, No. 6-CE-46, at 5 (NLRB G.C. Feb. 7, 2002) (Division of Advice finds that provision of neutrality agreement that "does not permit the Employer to lease, contract or subcontract its operations . . . to any person unless that person agrees to neutrality, access, voluntary recognition, card-check, no-strike/no-lockout, etc. provisions of the neutrality agreement" violates Section 8(e), but advises against issuing a complaint because it is time-barred under Section 10(b)).

entity.[17] The "carrot" includes pre-negotiation of terms and conditions of employment favorable to the employer that will come into effect with the union's successful organizing of employees. See Majestic Weaving Co., 147 NLRB 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2d Cir. 1966).[18]

Employers similarly have a wide variety of self-interested business reasons to enter into voluntary recognition agreements. This primarily includes avoiding the "stick" of union pressure tactics, and/or obtaining the "carrot" of favorable future collective bargaining agreements, as discussed above. Other reasons for which employers have assisted union organizing drives include: (1) the desire to cut off the organizing drive of a less favored union, see Price Crusher Food Warehouse, 249 NLRB 433 (1980); (2) the existence of a favorable bargaining relationship with the union at another facility, see Brooklyn Hospital Center, 309 NLRB 1163 (1992), aff'd sub nom. Hotel, Hospital

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[17] See Aeroground, Inc. v. City & County of San Francisco, 170 F. Supp. 2d 950 (N.D. Cal. 2001) (San Francisco Airport Authority mandate that private concessionaires who wished to lease space at the airport had to first sign a neutrality agreement preempted); Chamber of Commerce v. Brown, 554 U.S. 60, ___, 128 S. Ct. 2408, 2414 (2008) (California statute that forbids employers who receive state grants or funds from using such funds to advocate against union organizing is preempted).

[18] Most "neutrality and card check" arrangements are thinly disguised "bargaining to organize" schemes, wherein union officials commit to act in a manner favorable to management interests in exchange for employer assistance with gaining and maintaining control over employees. The media has noted the UAW's proclivity to make wage and benefit concessions in exchange for employer assistance with organizing more employees via "neutrality agreements." "UAW Trades Pay Cuts for Neutrality," http//www.labornotes.org/archives/2003/07/c.html and http//www.labornotes.org/archives/2003/10/b.html.

Nursing Home & Allied Services Local 144 v. NLRB, 9 F.3d 218 (2d Cir. 1993); or (3) a bargaining chip during negotiations regarding other bargaining units, see Kroger Co., 219 NLRB 388 (1975).

As is self-evident, none of these union or employer motivations for entering into voluntary recognition agreements take into account the employees' Section 7 interests. Unions and employers seek and enter into these agreements to satisfy their own self-interests, not to facilitate the free and unfettered exercise of employee free choice. For this reason, the Board in Dana Corp. was correct in refusing to blindly defer to employer and union determinations regarding employees' representational preferences under a voluntary recognition agreement by attributing "bar quality" to such recognition.

This lesson was recently reiterated in Nova Plumbing, Inc. v. NLRB, 330 F.3d 531 (D.C. Cir. 2003). There, the Board deferred to a contractual agreement between an employer and union stating that the union had majority employee support, without independently verifying the truth of that assertion. The D.C. Circuit reversed, holding that "[b]y focusing exclusively on employer and union intent, the Board has neglected its fundamental duty to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistakes at issue in International Ladies Garment Workers." Id. at 537.

The Board's pre-Dana "voluntary recognition bar" policy – which dismisses employee election petitions whenever an employer and union aver that the recognition

was based on majority employee support – repeats the folly identified in International Ladies Garment Workers and Nova Plumbing. The Board's failure to conduct a secret-ballot election and determine for itself whether the employer-recognized union actually commands the support of a majority of employees places fundamental employee rights in "permissibly careless employer and union hands." International Ladies Garment Workers, 366 U.S. at 738-39.

Here, employees' Section 7 interests were simply not a part of the calculation of the USW and Lamons Gasket in reaching and executing their "card check agreement." Petitioner and his fellow employees were not asked whether they wanted a "card check" instead of a secret-ballot election, or whether they approved of their names and addresses being turned over to USW organizers. (Joint Stipulation No. 5 & Ex. 1). Instead, the USW and the employer, each of whom was pursuing its own self-serving agenda, made these decisions for them in secret.

In short, the varying contexts in which "voluntary recognition agreements" are reached – often in a secret "back room" and without regard to employee interests – counsel strongly in favor of strict Board scrutiny.

3. The Superiority of Board Supervised Secret-Ballot Elections Is Beyond Dispute.

a. Secret Ballot Elections Are the Act's Preferred Method for Determining the Representational Preferences of Employees.

Congress created the NLRA's representation procedures (primarily Section 9(a) of

the Act) to determine whether employees support or oppose representation by a particular union. Accordingly, the Supreme Court has long recognized that Board supervised secret-ballot elections are the preferred method for gauging whether employees desire union representation. See Linden Lumber, 419 U.S. at 307; Gissel Packing, 395 U.S. at 602 ("secret elections are generally the most satisfactory – indeed the preferred – method of ascertaining whether a union has majority support"); Brooks v. NLRB, 348 U.S. 96 (1954) ("an election is a solemn and costly occasion, conducted under safeguards to voluntary choice"). The Board and the lower courts similarly "emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions." Levitz Furniture, 333 NLRB at 723, citing Gissel Packing, 395 U.S. at 602; Underground Serv. Alert, 315 NLRB 958, 960 (1994); NLRB v. Cornerstone Builders, Inc., 963 F.2d 1075, 1078 (8th Cir. 1992).

Because NLRB conducted secret-ballot elections are the best means to effectuate employee free choice as to union representation, it is imperative that the Board favor and encourage this option. After all, it is employee free choice that must be granted the greatest weight in any analysis, as the fundamental and overriding principle of the Act is "voluntary unionism." Pattern Makers, 473 U.S. at 104-07; see also Rollins Transp. Sys., 296 NLRB at 793 ("The paramount concern . . . must be the employees' right to select among two or more unions, or indeed to choose none.").

Even the USW admits that NLRB supervised secret-ballot elections are superior to

"card checks" in establishing the true choice of the uncoerced majority. (See USW Request for Review at 13, conceding that employees may be subject to undue "pressure from union organizers or supporters during a card check campaign"). Additionally, no less an authority than the AFL-CIO has argued to this Board that employee petitions and cards "are not sufficiently reliable indicia of the employees' desires," and that employees and employers should only be able to remove a union pursuant to a secret-ballot election. See Brief of the AFL-CIO to the NLRB in Chelsea Indus. & Levitz Furniture Co., No. 7-CA-36846, at 13 (May 18, 1998).[19]

Fully recognizing this principle, the Board has held that non-electoral evidence of employee support – even if untainted by any unfair labor practices – is not as reliable as an election in gauging employee support for a union. In Underground Service Alert, 315 NLRB 958 (1994), the Board faced a situation where a majority of employees voted for union representation in a decertification election. However, well before the election results were known, a solid majority of employees delivered a signed petition to their employer making clear that they did not support union representation. The employer withdrew recognition. Even though the investigation revealed no "impropriety, taint, factual insufficiency, or unfair labor practice of any type with respect to this employee petition," id. at 959, the Board held that the employer violated Section 8(a)(5) of the Act

[19] Clearly, labor union officials are not advocating voluntary recognition based on cards or petitions because they sincerely believe that this method reflects employee sentiment more reliably than a Board supervised secret-ballot election. Rather, they advocate the "card check recognition" process solely to advance their self-serving interests.

because the election results were a far superior indication of employee wishes. The employee petition was considered a "less-preferred indicator of employee sentiment," particularly as compared to "the more formal and considered majority employee preference for union representation which was demonstrated by the preferred method – the Board-conducted secret-ballot election." Id. at 961.[20]

> One of the attributes of Board-conducted elections that make them a more reliable indicator of employee choice is that they provide, through the objection and challenge procedures, an orderly and fair method for presentation and reasoned resolution of questions concerning the fairness of the process and whether particular individuals are eligible to have their preferences on union representation counted.

Id. at 960.

That the superiority of secret-ballot elections could require extended argument is itself remarkable. Every American understands instinctively that such elections are the cornerstone of any system that purports to be democratic. Accordingly, any claim by the USW or its amici that unions are "saving industrial democracy" by overruling Dana Corp. and eliminating employees' right to call for a secret-ballot election after a voluntary

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[20] The Board in Underground Service Alert quoted with approval Member Oviatt's accurate observation that:

> The election, typically, also is a more reliable indicator of employee wishes because employees have time to consider their options, to ascertain critical facts, and to hear and discuss their own and competing views. A period of reflection and an opportunity to investigate both sides will not necessarily be available to an employee confronted with a request to sign a petition rejecting the union. No one disputes that a Board-conducted election is much less subject to tampering than are petitions and letters.

315 NLRB at 960, quoting W.A. Krueger Co., 299 NLRB 914, 931 (1990) (Member Oviatt, concurring in part, dissenting in part).

recognition occurs should be greeted with the incredulity such a proposition deserves.

b. Conduct That Would Be Considered Objectionable and Coercive in a Secret-Ballot Election Is Inherent in Every "Card Check" Campaign.

In secret-ballot elections, the Board provides a "laboratory" in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. See General Shoe, 77 NLRB at 127; see also Sanitary Laundry, 441 F.2d at 1369; Gissel Packing, 395 U.S. at 601-02. In contrast, the fundamental purpose and effect of most "voluntary recognition agreements" is to *eliminate* Board-supervised "laboratory conditions" protecting employee free choice, and substitute a system in which unions and employers have far greater leeway to pressure employees to accept union representation.

The contrast between the rules governing a Board supervised secret-ballot election and the "rule of the jungle" governing "card checks" could not be more stark. In an NLRB supervised secret-ballot election, certain conduct that does not rise to the level of an unfair labor practice has been found to violate employee free choice and warrant overturning an election. General Shoe, 77 NLRB at 127. Yet, a union engaging in the same conduct can lawfully attain the status of exclusive bargaining representative in a "card check" campaign under current Board policy.[21] Worse still, conduct that is

[21] Because employees' Section 7 rights to choose a union or refrain are put to the test both in Board elections and card check recognition situations, the safeguards in both should be equal. Petitioners urge the Board to change existing policy and require that any employer recognition of a union outside of Board processes must be done pursuant to "laboratory

(continued...)

objectionable in a secret-ballot election is inherent in every card check campaign.

For example, in an NLRB supervised secret-ballot election, the following conduct has been held to upset the laboratory conditions necessary to guarantee employee free choice, thus requiring the invalidation of the election: (a) electioneering activities, or even prolonged conversations with prospective voters, at or near the polling place;[22] (b) speech making by a union or employer to massed groups or captive audiences within twenty-four (24) hours of the election;[23] and (c) a union or employer keeping a list of employees who vote as they enter the polling place (other than the official eligibility list).[24]

Yet, this conduct occurs in virtually every card check campaign. When an employee signs (or refuses to sign) a union authorization card, he is not likely to be alone. To the contrary, it is likely that this decision is made in the presence of one or more union organizers soliciting the employee to sign a card, and thereby "vote" for the union.[25] This

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[21](...continued)
conditions," or be invalid upon challenge.

[22] See Alliance Ware, Inc., 92 NLRB 55 (1950) (electioneering activities at the polling place); Claussen Baking Co., 134 NLRB 111 (1961) (same); Bio-Medical Applications, 269 NLRB 827 (1984) (electioneering among the lines of employees waiting to vote); Pepsi Bottling Co., 291 NLRB 578 (1988) (same).

[23] Peerless Plywood Co., 107 NLRB 427 (1953).

[24] Piggly-Wiggly, 168 NLRB 792 (1967).

[25] The Board's justification for prohibiting solicitation immediately prior to employee voting in a secret-ballot election is fully applicable to the situation of an employee making a determination as to union representation in a card check drive.

The final minutes before an employee casts his vote should be his own, as free from
(continued...)

solicitation could occur during or immediately after a union mass meeting or a company-paid captive audience speech. In all cases the employee's decision is not secret, as in an election, because the union clearly has a list of who has signed a card and who has not.

Indeed, once an employee has made the decision "yea or nay" by voting in a secret-ballot election, the process is at an end. By contrast, a choice against signing a union authorization card does not end the decision-making process for an employee in the maw of a "card check drive," but often represents only the beginning of harassment and intimidation for that employee. (See Petitioner's Brief on the Merits in Dana Corp., Declaration of Clarice Atherholt, ¶ 5, stating that "many employees signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them." This Brief is accessible on the Board's website at http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Petitioner.pdf.

Other Board decisions demonstrate that conduct inherent in all card check drives would be objectionable and coercive if done during a secret-ballot election. For example, in Fessler & Bowman, Inc., 341 NLRB 932 (2004), the Board announced a prophylactic rule that prohibits union officials from performing the ministerial task of handling a sealed secret ballot – even absent a showing of tampering – because, where "ballots come

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[25](...continued)
interference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.

Milchem, Inc., 170 NLRB 362, 362 (1968). Union soliciting and cajoling of employees to sign authorization cards (and thereby cast their "vote") is incompatible with this rationale.

into the possession of a party to the election, the secrecy of the ballot and the integrity of the election process are called into question." Id. at 933.

In all card check campaigns, union officials do much more than merely handle a sealed secret ballot as a "convenience" to the employees. In these cases, union officials directly solicit the employees to sign an authorization card (and thereby cast their "vote"), stand over them as they "vote," know with certainty how each individual employee has "voted," and then physically collect, handle and tabulate these purported "votes." The coercion inherent in this conduct is infinitely more real than the theoretical taint found to exist in Fessler & Bowman.

Accordingly, even a card check drive devoid of conduct that may constitute an unfair labor practice does not approach the "laboratory conditions" guaranteed in a Board conducted election.[26] The superiority of Board supervised secret-ballot elections for protecting employee free choice is beyond dispute. It is, therefore, incongruous for the Board to overrule Dana Corp. in order to re-create an unyielding voluntary recognition bar over card check recognitions, because the lack of integrity inherent in such card checks would surely taint a Board election held under similar circumstances.

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[26] The Board knows well that many "card check drives" are fraught with union coercion, intimidation and misrepresentations that do not necessarily amount to unfair labor practices. See HCF Inc., 321 NLRB 1320 (1996) (union "not responsible" for threats to employee by authorization card solicitor that "the union would come and get her children and it would also slash her tires"); Levi Strauss & Co., 172 NLRB 732, 733 (1968) (employer was ordered to recognize the union even though the Board had evidence of union misrepresentations to employees as to the purpose and effect of signing authorization cards).

D. SECRET-BALLOT ELECTIONS ARE SUPERIOR TO UNFAIR LABOR PRACTICE CHARGES IN DETERMINING EMPLOYEES' REPRESENTATIONAL PREFERENCES.

In its Request for Review, the USW posits the notion that secret-ballot elections under Dana Corp. are unnecessary because employees may file ULP charges if they believe that coercion occurred in the card check campaign or that their employer recognized a union that lacks true majority support. (USW Request for Review, at 12-14). This argument mirrors the dissent in Dana Corp., which stated:

> [T]he Act provides recourse for employees who believe their employer recognized a union that lacks uncoerced majority support. An employers recognition of a union, even if done in good faith, violates Section 8(a)(2). The standard remedy for such a violation is to order the employer to cease and desist from recognizing and bargaining with the union until the union has been certified by the Board.

341 NLRB at 1286-87.

But these assertions about the availability of a ULP remedy miss the point. What Petitioner Lopez desires is not to "punish" Lamons Gasket and the USW for the statutory offense of an invalid recognition, nor does he seek a remedy after a General Counsel's prosecution. Clearly, Petitioner could have filed unfair labor practice charges, but chose not to. Instead, he and his co-workers seek an opportunity for a prompt and timely vote on whether the USW should be their representative. They want a quick election, not a lengthy ULP prosecution.

The USW's assertion about the availability of ULP charges to counter an unlawful recognition begs the critical question: if employees can test whether an employer-

recognized union enjoys the uncoerced support of a majority of employees through ULP charges, why should employees be barred from testing the same proposition through a secret-ballot election? After all, everyone admits that elections are the preferred method for making such determinations.

Indeed, the issue in this case can be restated as: "How – or through what procedural mechanism – will the NLRB determine if an employer-recognized union actually has the uncoerced support of a majority of employees?" There are two possible methods: (1) ULP proceedings; or (2) representational proceedings. The Board's pre-Dana voluntary recognition bar policy permitted only the former method. However, the latter method (secret-ballot elections) is far superior to ULP charges for determining whether and by whom employees wish to be exclusively represented.

Unfair labor practice procedures are inadequate to determine whether employees support or oppose union representation because that is not what the procedures were designed by Congress to accomplish. Sections 10 and 11 of the Act empower the Board to prevent and remedy violations of the Act. Sections 3(d) and 10 of the Act assign the General Counsel the responsibility of investigating unfair labor practice charges, issuing and prosecuting complaints, and seeking compliance with Board orders in federal court. These sections were not designed to determine the representational wishes of employees. In contrast, Congress specifically enacted Section 9 of the Act to gauge whether employees support or oppose union representation, and Congress empowered the Board

alone to decide such representational issues. 29 U.S.C. § 159.

Additionally, ULP charges are not the proper vehicle to determine employees' electoral preferences since they are filtered sparingly through the General Counsel's discretionary prosecutorial lens. See 29 U.S.C. § 153(d); NLRB v. UFCW, 484 U.S. 112 (1987) (General Counsel has unreviewable discretion to issue or not issue complaints in ULP cases). Allowing the General Counsel to resolve what are effectively representational issues – determining whether the union designated by an employer has the uncoerced support of a majority of employees – is contrary to the basic structure of the Act.

As a practical matter, an after-the-fact investigation of an unfair labor practice allegation does not affirmatively determine the representational desires of employees. It merely hunts for unfair labor practices. It is impossible for the General Counsel, after-the-fact, to divine the true wishes of employees by trying to piece together all of the myriad events and circumstances that occurred in a "card check" campaign.

Perhaps most important, a higher standard for union and employer conduct is required in representational proceedings than unfair labor practice proceedings. As shown above, conduct that does not rise to the level of an unfair labor practice can still be found to violate employee free choice under the "laboratory conditions" standard for representation proceedings. Thus, a union can become an exclusive bargaining representative through a "card-check" procedure by engaging in conduct that would have

precluded it from obtaining such status through a secret-ballot election, because such conduct may not necessarily amount to an unfair labor practice.

Moreover, the Board's standard practice is to expedite representational proceedings. See NLRB Case Handling Manual, ¶ 11000 "Agency Objective" ("The processing and resolution of petitions raising questions concerning representation, i.e., RC, RM, and RD petitions, are to be accorded the highest priority."). In contrast, ULP charges are not similarly expedited, and often drag on for years. Dana Corp. expressly took these factors into account by mandating that any post-recognition election petition had to be filed promptly, within a mere 45 days after notice of recognition.

Finally, representational proceedings are more decisive than ULP adjudications, as an election is a one-time occurrence that definitively decides the issue. By contrast, ULP proceedings generate multiple preliminary decisions as the charge proceeds from the General Counsel, to trial before an Administrative Law Judge, to the Board itself, and then to an appellate court. Long and drawn-out ULP proceedings are equivalent to holding a "sword of Damocles" over a potential collective bargaining relationship. Ironically, while the USW claims that the pre-Dana Corp. voluntary recognition bar effectuates the Act's interest in the stability of labor-management relations, the reality is that by forcing employees to turn to long and drawn-out ULP proceedings to protect their representational rights, that interest is grievously harmed.

In short, representational proceedings are far superior to ULP proceedings for

stabilizing lawful collective bargaining relationships, as they settle the issue of whether the employer-recognized union enjoys uncoerced majority support quickly and in "one fell swoop." Board policy strongly favors secret-ballot elections, not unfair labor practice proceedings, to determine employees' true representational preferences. This is true when a union seeks to become the exclusive representative of employees, Gissel Packing, 395 U.S. at 602, and when employees seek to remove a union as the exclusive representative. Levitz Furniture, 333 NLRB at 723. The Act should be interpreted consistently, so that employees also have the right to an election when a self-interested employer unilaterally designates a self-interested union as the exclusive bargaining representative.

E. THE ACT MANDATES SYMMETRY FOR EMPLOYEES' RIGHTS WHEN THEIR EMPLOYERS GRANT VOLUNTARY RECOGNITION AND WHEN THEY WITHDRAW RECOGNITION.

The NLRA does not favor union representation, but rather favors "freedom of choice and majority rule." Conair Corp. v. NLRB, 721 F.2d 1355, 1381 (D.C. Cir. 1983). In Conair, the court held the NLRB powerless to mandate recognition of a union that the employees had not affirmatively selected, precisely because the Act favors employee free choice, not unionization per se. See also Chamber of Commerce v. Brown, 128 S. Ct. at 2414 ("§ 7 calls attention to the right of employees to refuse to join unions"). Properly interpreted, the Act provides employees with a level playing field to select or reject a union, nothing more. The free and unfettered choice is theirs.

Thus, Dana Corp. properly followed Levitz Furniture by leveling the playing field for employees and unions when confronted with either a voluntary recognition or a withdrawal of recognition. Rite Aid/Lamons Gasket, 355 NLRB No. 157 at 4-5 (Members Schaumber & Hayes, dissenting). When an employer withdraws recognition of a union under Levitz Furniture, the union is free to immediately petition for a secret ballot election with only a 30% showing of interest, if it so chooses. Id. at n.12, citing Wurtland Nursing, 351 NLRB 817 (2007). Why should employees who are suspicious of their employer's "voluntary recognition" of a particular union be prohibited from seeking the same prompt secret-ballot election? That is all that Dana Corp. allowed, precisely because it recognized that "employee freedom of choice" – not unionization – is the cornerstone of the Act. Conair, 721 F.2d at 1381. Both Levitz Furniture and Dana Corp. properly recognize that it is *the employees*' rights of free choice that are paramount in grants of recognition as well as withdrawals of recognition.

Chairman Liebman contests this point, Rite Aid/Lamons Gasket, 355 NLRB No. 157 at 4 n.4, but her analysis sacrifices employee freedom of choice on the altar of "industrial stability" and mandated collective bargaining, thereby slanting the playing field in favor of unionization. This favoritism is illegitimate because the Act is neutral as to the choice to unionize or not. As noted above, the Act does not support collective bargaining unless the employees actually choose that option. "[O]ur nation protects and encourages the practice and procedure of collective bargaining *for those employees who*

have freely chosen to engage in it." Levitz Furniture, 333 NLRB at 731 (emphasis added) (Member Hurtgen, concurring); 29 U.S.C. § 157 (rights to join or refrain are equal).

Chairman Leibman further asserts that "Dana involves the creation of a new bargaining relationship," Rite Aid/Lamons Gasket, 355 NLRB No. 157 at 4 n.4, so there is a governmental interest in entrenching that union and "insulating" it from challenges, unlike in withdrawal of recognition cases. But that distinction again ignores employee free choice and tilts the scales in favor of unionization. What governmental interest is fostered if the union that is "voluntarily recognized" lacks majority support and was illegitimately foisted on the employees, as in Duane Reade, Inc., 338 NLRB 943 (2003) and similar cases? How is the Act fostered by entrenching that union, even temporarily? It is not, as the fifteen (15) successful Dana decertifications eloquently attest.

In short, Dana Corp. followed the Act precisely, and did nothing more than level the playing field to make it as easy for employees to bring in a union representative as it is for them to shed that representative. Dana Corp. should be reaffirmed in all respects.

F. THE RULE IN DANA CORP. SHOULD NOT BE GUTTED TO CREATE A LOOPHOLE FOR KROGER "AFTER ACQUIRED STORES" AND GREEN-WOOD "MERGER" SITUATIONS.

Over the years, and in the name of "industrial stability," the Board has adopted various rules, policies and "bars" that serve the interests of unions and employers but limit employees' rights to free choice and self-determination. Stark examples of this can be found in the Kroger "after acquired stores" and the Green-Wood "merger" situations.

The Board should not create additional loopholes in employee rights by limiting Dana Corp. in Kroger and Green-Wood situations.

In Kroger, 219 NLRB 388 (1975), the Board upheld an "after acquired stores" clause, thus limiting employees' right to a secret-ballot election in their own store after it was summarily lumped into a pre-existing bargaining unit. Kroger clearly did not take into account the employees' paramount interests in free choice, as the Board noted in Dana Corp., 341 NLRB at 1283:

> The issue in [Kroger] is whether an employer violates Section 8(a)(5) if it *dishonors* an agreement to recognize a union upon acquisition of majority status. The instant cases present a far different issue. The Employers have honored the agreement and have recognized the Union. The issue [in Dana Corp.] is whether that recognition should operate as a bar to decertification petitions filed by employees who were not parties to that agreement.

Indeed, Kroger unfairly diminishes employees' rights and choices by arbitrarily lumping them into huge and unwieldy bargaining units, and it should not be extended any further.

Moreover, Kroger is in conflict with the Board's long line of "pre-recognition bargaining" cases, such as Majestic Weaving Co., 147 NLRB 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2d Cir. 1966). Kroger encourages unlawful pre-recognition bargaining over substantive terms and conditions of employment, and disregards employee free choice as to union representation.

For all of these reasons, the Board should not carve out a "Kroger" exception to Dana Corp. that would allow voluntary recognitions to be of "bar quality" based simply on the fortuity that there exists an "after acquired stores" clause in the particular voluntary

recognition agreement.

Similarly, Green-Wood, 280 NLRB 1359 (1986), concerned a situation where, over a course of a number of years, two separate bargaining units were merged into one. See also Gibbs & Cox, Inc., 280 NLRB 953 (1986) (Chairman Dotson & Member Dennis dissenting) (employer violates law by withdrawing recognition at one location, where, over the course of many years, separate bargaining units had merged into one). Green-Wood situations are quite unlike Dana Corp. situations. Under Dana Corp., the unit where the voluntary recognition occurs will necessarily be a new unit, and the election petition will have to be filed within forty-five (45) days for that same unit. As such, there cannot be any merger of units in that short time frame, and the newly organized unit should still be entitled to its own election under Dana Corp. There is no reason to create a "Green-Wood" loophole around Dana Corp., and none should be created.

G. IN THE ABSENCE OF COMPLETE AND TOTAL COMPLIANCE WITH THE NOTICE POSTING RULES, DANA CORP. SHOULD BE ENFORCED IN ITS ENTIRETY.

As noted above, the Board and the labor-management community have learned to use and apply Dana Corp., and it is now settled law. This is shown by the Regional Director's thoughtful decision in AT&T Mobility, Case No. 19-RD-3854 (NLRB Feb. 22, 2010), accessible at www.nlrb.gov/shared_files/Regional%20Decisions/2010/19-RD-3854-01-22-10.pdf . In that case, the employer failed to properly post the Dana notice at several facilities

where a large number of employees worked. The Regional Director found the postings improper, and excused the employees' late filing of the Dana election petition on account of the improper posting. This was a sensible and proper application of Dana Corp., and there is no reason for the Board to weaken the Dana notice posting rules or otherwise hold that employees' forty-five (45) day filing period runs even in the absence of valid Dana postings. Any such ruling simply guts the principles of employee free choice that were so carefully considered in Dana Corp.

Moreover, predictability and certainty are critical parts of the federal labor laws, and the Regional Directors have properly applied Dana Corp. in many circumstances.[27] There is no reason to create loopholes and incentives for unions and employers to perform inadequate compliance with Dana's posting requirements, and upset the clear and firmly established law under Dana Corp.

H. IF THE BOARD OVERRULES OR SIGNIFICANTLY MODIFIES DANA CORP., IT SHOULD DO SO PROSPECTIVELY.

In Dana Corp., the Board applied its new rule prospectively. If this Board overrules or modifies Dana Corp., such changes should be applied prospectively as well. As discussed most recently in J. Picini Flooring, 356 NLRB No. 9 at 5 (Oct. 22, 2010)

[27] For a variety of Regional Director decisions that properly apply Dana Corp., see, e.g., AT&T Mobility, 19-RD-3860 (May 16, 2010), accessible at http://www.nlrb.gov/shared_files/Regional%20Decisions/2010/19-RD-03860-04-16-10%20.pdf; Benchmark Conference Centers, 22-RD-1502 (Aug. 5, 2009), accessible at http://www.nlrb.gov/shared_files/Regional%20Decisions/2009/22-RD-01502-08-05-09.pdf; Building Technology Engineers, 1-RC-22359 (Sept. 18, 2009), accessible at http://www.nlrb.gov/shared_files/Regional%20Decisions/2009/01-RC-22359-09-18-09.pdf.

(concerning the criteria for Board decisions to be applied retroactively), the parties in this case have relied upon Dana Corp's substantive rules, and the Board has impounded ballots in this case and others where elections have been held. See, e.g., Aramark Uniform & Career Apparel, Case No. 18-RD-2692. No matter what the Board does with Dana Corp., there is no reason to apply the changes retroactively and literally destroy ballots in elections that have already been held, or forbid elections from going forward in cases where they have already been sought under current rules. The parties have relied upon the substantive rules of Dana Corp. in this case and in many other pending cases. Destroying ballots in already-completed elections or prohibiting elections validly sought under current rules is something that occurs in tyrannical Third World regimes, not the United States of America.

V. CONCLUSION

The Board's decision in Dana Corp. is approximately three (3) years old. The rules have worked as intended, allowing the vast majority of voluntary recognitions to proceed while providing a "safety valve" for employees who may be saddled with a minority union they have not genuinely chosen. Unions, employers, employees, NLRB Regional staff and the public have learned the rule in Dana Corp. and have followed it well. More than one thousand (1,000) unions and employers have filed the necessary "voluntary recognition" papers with NLRB Regional offices, and more than one thousand (1,000) employers have posted a simple Dana notice apprising employees of their rights.

Where no petition is filed, the union continues to enjoy a complete and total "recognition bar." The system is workable and effective, and protects all parties' rights. The Dana Corp. rules pose no burden on any party, but do much to ensure the promise of the Act.

As such, the Board should not give way to pure partisan politics and sully its own reputation by modifying or reversing a carefully considered decision of a five-Member Board, in which many interested amici filed briefs and participated. The Board should not suddenly and arbitrarily jettison a rule that protects and promotes the "gold standard" of employee free choice – the secret-ballot election. Gissel Packing, 395 U.S. at 602.

The Request for Review should be denied on the merits, and the Regional Director should be ordered to count the ballots in this case.

Respectfully submitted,

/s/ Glenn M. Taubman

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2010, I caused a copy of the foregoing Brief to be filed electronically with the National Labor Relations Board's Office of the Executive Secretary through the NLRB's e-filing program. Additionally, I further certify that on November 1, 2010, I served a true and correct copy of this document by e-mail on the following parties:

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