

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RITE AID STORE #6473  
Employer

and

MATTHEW SILCOX  
Petitioner

Case 31-RD-1578

and

UFCW LOCAL 1167  
Union

LAMONS GASKET COMPANY, A  
DIVISION OF TRIMAS CORPORATION  
Employer

and

MICHAEL E. LOPEZ  
Petitioner

Case 16-RD-1597

and

UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION  
Union

NOTICE AND INVITATION TO FILE BRIEFS

On August 27, 2010, the Board, Members Schaumber and Hayes dissenting, granted the parties' Requests for Review in the above-captioned cases.<sup>1</sup> The Board invites the filing of briefs in order to afford the parties and interested amici the opportunity to address the issues raised in these cases.<sup>2</sup>

In *Dana Corp.*, 351 NLRB 434 (2007), the Board modified its recognition bar principles. The Board held that, after an employer's voluntary recognition of a union based on authorization cards, employees in the recognized unit must receive written notice of the recognition and of their right, within 45 days of the notice, to file a

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<sup>1</sup> 355 NLRB No. 157.

<sup>2</sup> The Board has included these cases in a single notice inviting the filing of briefs. The Board, however, has not consolidated these cases for decision.

decertification petition or to support a representation petition filed by a rival union. A valid petition filed within 45 days of the posting of the notice will be processed. If the notice is posted and no petition is filed within 45 days, the recognized union's majority status will be irrebuttably presumed for a reasonable period of time to permit the parties to engage in bargaining.

*Dana* represented a major departure from prior law and practice respecting voluntary recognition agreements. In response to the decision, the Board developed new procedures: the employer or the union must notify the Regional Office of the Board, in writing, of a grant of voluntary recognition. The Regional Office will then send an official Board notice that the employer is to post in conspicuous places at the workplace for 45 days.<sup>3</sup> The period during which a petition for an election may be filed begins with the posting of the notice.

*Dana* was decided nearly 3 years ago. To date, over 1,000 requests for voluntary recognition notices have been filed.<sup>4</sup> As a result, the Board is now in a position to evaluate whether its decision in *Dana* and the procedures developed to implement that decision have furthered the principles and policies underlying the Act. In addition, parties to voluntary recognition and affected employees are now in a position to inform the Board whether *Dana* and the procedures implemented pursuant to *Dana* have advanced or hindered employees' choice of whether to be represented and the process of collective bargaining that should take place if employees choose to be represented.

In each of the captioned cases, at least one party has asked the Board to reconsider its decision in *Dana* or its application to particular facts. Almost a half century ago in *American Cyanamid Co.*, 131 NLRB 909 (1961), the Board stated, "The Board must hold fast to the objectives of the statute using an empirical approach to adjust its decisions to the evolving realities of industrial progress and the reflection of that change in organizations of employees." The Board continues to believe that it is its obligation under the Act to continually evaluate whether its decisions and rules are serving their intended purposes, and this is particularly true of novel rules, such as those adopted in *Dana*, with which there was no experience at the time of adoption.

The parties and amici are invited to file briefs addressing the issues raised in these cases, including whether the Board should modify or overrule *Dana*. Specifically, the

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<sup>3</sup>Requests for the notice are assigned a Voluntary Recognition (VR) case number. The Board also provides employers with a form, entitled "Certification of posting of Dana notices," which the Board requests be returned to the Regional Office upon the completion of the 45-day posting period, confirming that the notice has been posted for 45 consecutive days.

<sup>4</sup> As of August 18, 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.nlr.gov/nlr/about/foia/DanaMetaldyne/Dana.xls>.

parties and amici in their briefs should address some or all of the following questions. (1) What has been their experience under *Dana* and what have other parties to voluntary recognition agreements experienced under *Dana*? (2) In what ways has the application of *Dana* furthered or hindered employees' choice of whether to be represented? (3) In what ways has the application of *Dana* destabilized or furthered collective bargaining? (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)? (5) Under what circumstances should substantial compliance be sufficient to satisfy the notice-posting requirements established in *Dana*? (6) If the Board modifies or overrules *Dana*, should it do so retroactively or prospectively only? In answering these questions, the parties and amici are invited to submit empirical data and factual descriptions of their experience under *Dana*.

Briefs not exceeding 50 pages in length shall be filed with the Board in Washington, D.C. on or before November 1, 2010. The parties may file responsive briefs on or before November 15, 2010, which shall not exceed 10 pages in length. No other responsive briefs will be accepted. The parties and amici shall file briefs electronically at <http://mynlrb.nlrb.gov/efile>. If assistance is needed in filing through <http://mynlrb.nlrb.gov/efile>, please contact the undersigned.

Dated, Washington, D.C., August 31, 2010

By direction of the Board:

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Lester A. Heltzer  
Executive Secretary