BEFORE THE
UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

LAMONS GASKET COMPANY, A DIVISION OF TRIMAS CORPORATION, Employer,	]	
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.	]	

BRIEF OF AMICUS CURIAE SERVICE EMPLOYEES INTERNATIONAL UNION

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I. INTRODUCTION

In *Dana Corp.*, 351 NLRB 434 (2007), the NLRB overturned its decision in *Keller Plastics*, 157 NLRB 583 (1966), which held that after an employer lawfully recognizes a union, the parties must be afforded a reasonable time to bargain and execute a collective bargaining agreement before the representative status of the union can be challenged. In place of this "recognition bar", consistently enforced by the Board and the courts in the 40 years since *Keller,* the Board in *Dana* mandated a procedure where the union's representative status is subject to challenge at the creation of the collective bargaining relationship with the employer at a time when it is generally recognized that the relationship is most tenuous.

The decision in *Dana* was premised on two fundamentally flawed assumptions: (1) signed authorization cards are an inherently unreliable gauge of employee choice regarding union representation; and (2) a collective bargaining relationship founded on lawful voluntary recognition by an employer is less worthy of protection during its vulnerable initial stages than a collective bargaining relationship arising from a post election certification by the NLRB. The Board has now conducted a three-year clinical trial, with over 1,100 subjects, that has served to conclusively demonstrate the falsity of the first assumption. Because the second assumption is premised on the Board's unsupported conclusion that employee free choice can only be expressed through Board conducted elections, it must fail as well. The Board's own experience under *Dana,* as well as the experience of workers who have obtained voluntary recognition from their employers demonstrates that the concerns that animated the Board majority in *Dana* were unfounded, and accordingly, *Dana* should be overruled.

In its Notice and Invitation to File Briefs in the review of its decision in *Dana*, the Board observed, citing *American Cyanamid Co.*, 131 NLRB 909 (1961), that it must further the

objectives of the statute through "an empirical approach" taking into account the "evolving realities of industrial progress and the reflection of that change in organizations of employees." In their dissent to the grant of review, Members Schaumberg and Hayes argue that the empirical evidence, collected in the Board's own data base, demonstrates that there is "not a scintilla of objective evidence" that the *Dana* process does not properly balance employee choice with the stability of the collective bargaining process. *Rite-Aid Store 6473-Lamons Gasket Co.*, 355 NLRB No. 157, slip op. at 5. (Members Schaumberg and Hayes dissenting). Notwithstanding this rhetoric, a cursory examination of the very "objective evidence" cited in the dissent reveals that in 98.6% of the cases reported in the Board's data base, the choice that a majority of the workers made when they signed union authorization cards remained unchanged after the exhaustion of the Dana procedures. What did change however, as a result of *Dana*, is that the free choice of this overwhelming majority of workers for union representation was frustrated, and the ability of their union to act on their behalf of was undermined, at a time when the expectations of the workers are at their highest and the standing of the union in the eyes of both its members and their employer is most vulnerable. *Dana* has encouraged anti-union employees to continue to resist unionization and petition for decertification even where a clear majority of employees favor unionization.

Perhaps recognizing that the factual basis for the *Dana* majority's employee free choice claim does not add up, Members Schaumber and Hayes appear to have abandoned that argument for a new one. Now they argue that there is no need to overturn *Dana* because it does not discourage voluntary recognition. Further, they argue that any disruption to collective bargaining caused by the filing of decertification petitions is worth it as long as there are any cases where some workers vote to decertify their union. In other words, they argue that even if

Dana was based on false assumptions, it does not really cause any harm so there is no reason to overturn it. We will demonstrate below that, in fact, *Dana* causes substantial harm to employees by delaying meaningful bargaining; continuing the stress and confrontation of a representation dispute that a majority of the workers thought was settled when they authorized the union to bargain on their behalf; and, by tainting the workers' view of the effectiveness of their chosen collective bargaining representative. Moreover, even if the harm from *Dana* is difficult to measure, it serves no valid purpose since the Board's own experience proves the reliability of authorization cards.

II. INTEREST OF AMICUS CURIAE

Service Employees International Union ("SEIU") is one of the largest unions in North America, representing over 2.2 million men and women who work in health care, property services, and public employment. SEIU focuses heavily on organizing unorganized workers. While SEIU and its affiliates have experience with NLRB-conducted elections, SEIU and its affiliates have also obtained recognition voluntarily from employers in many instances. These experiences inform this brief.

III. ARGUMENT

A. The Key Assumption Underlying *Dana* – that Authorization Cards Do Not Reflect Employees' True Choice -- Has Been Proven False.

When the Board decided *Dana*, the majority's rationale for overturning over 40 years of precedent was that "[t]here is good reason to question whether card signings ... accurately reflect employees' true choice concerning union representation." *Dana*, 351 NLRB at 439.

According to the Notice of Invitation to File Briefs, as of August 18, 2010, the Board had received 1,111 requests for *Dana* notices. Of those 1,111 requests, there have only been 15 instances where the employees subsequently voted against continued representation by the

voluntarily recognized union. *Id.* In other words, 98.6% of the time, after the workers were formally notified of their right to obtain an election to vote out the union, they either took no action or voted to retain union representation. Thus, while the Board majority in *Dana* speculated that authorization cards might not accurately reflect employees' true choices, the Board's subsequent experience under *Dana* proves that this concern was misguided. Empirical evidence in cases where parties have requested *Dana* notices demonstrates that a presentation of authorization cards from a majority of workers in a bargaining unit is a very reliable indicator that the workers do indeed desire union representation.

As misguided as the *Dana* decision was, it has served the useful purpose of providing a body of empirical data that confirms just how wrong the *Dana* majority was. If, in fact, authorization cards were an unreliable means of determining employee preferences about representation, one would have expected that 1,100 *Dana* notices would have led to several hundred instances where employees subsequently voted against representation. Instead, in virtually every case where a *Dana* notice has been posted, the employees have decided to retain the representative that they initially chose via authorization cards. It is difficult to think of any evidence that would serve as a more compelling repudiation of the factual premise on which the *Dana* majority based its decision.

There is, of course, no comparable control group of workers who have participated in Board-conducted elections, since the Board, with the approval of the Supreme Court, has created a certification bar to protect newly established bargaining relationships that follow a Board election. *Brooks v. NLRB,* 348 U.S. 96 (1954). The Board has explained that the certification bar is necessary in order to give a union "ample time for carrying out its mandate on behalf of its

members" without "exigent pressure to produce hothouse results or be turned out." *Id.* at 100. Thus, even the 1.4% reversal rate is undoubtedly inflated by the timing of the *Dana* elections.

The practical effect of the *Dana* notice is to give the minority of employees who have chosen not to authorize the union to bargain on their behalf a road map to delay and possibly frustrate the choice made by a majority of their co-workers. A *Dana* election generally takes place well before the union has had an opportunity "for carrying out its mandate." In many cases the *Dana* election may occur before any meaningful bargaining has occurred, and in the vast majority of cases the election occurs before the union has succeeded in negotiating a collective bargaining agreement. Workers are especially likely to be disillusioned about their selection of a collective bargaining representative (and receptive to challenges to the union's status) when they have not yet witnessed any of the changes that they anticipated when they chose a bargaining representative. There is no reason to think that the 1.4 % reversal rate reflects that the authorization cards in those cases were unreliable, rather than reflecting frustration or buyer's remorse after several months went by without any tangible results. This frustration or buyer's remorse does not depend upon the procedure used to obtain recognition and it could be equally present following an election. The Supreme Court acknowledged this very point in *NLRB v. Gissel Packing Co.*, 375 NLRB 575, 604 (1969) where it observed that "no voter, of course, can change his mind after casting a ballot in an election even though he may think better of his choice shortly thereafter."

The Board's experience under *Dana* proves that the key assumptions underlying the majority opinion was incorrect. Accordingly, the Board need look no further than its own experience to overturn its misguided decision.

B. The *Dana* Majority Erred in Asserting that the Act Was Intended to Encourage Resort to Board Elections Rather Than Voluntary Recognition.

The Act declares that the policy of the United States is to protect the "**designation of representatives**" by employees, not merely the election of representatives. *See* 29 U.S.C. § 151 (emphasis added). Toward that end, the Board and the courts have long held that "voluntary recognition is a favored element of national labor policy." *NLRB v. Broadmoor Lumber Co.,* 578 F.2d 238, 241 (9th Cir. 1978). While the *Dana* majority paid lip service to this principle, it erred by deciding that the Board's administration of the Act should "encourage the initial resort to Board elections to resolve questions concerning representation." *Dana,* 351 NLRB at 438. Actually, the reference to "questions concerning representation" is somewhat misleading because the Board had previously held that there is no question concerning representation where an employer has lawfully recognized a union. *See, e.g., Timbalier Towing Co.,* 208 NLRB 613 (1974)(dismissing RC petition and finding no question concerning representation where employer had previously recognized another union on the basis of signed authorization cards).

Prior to *Dana,* the Board had held in *Linden Lumber Div., Summer & Co.,* 190 NLRB 718 (1971), that employers may refuse to accept evidence of majority status other than the results of a Board election. But, at the same time, the Board reaffirmed that it "recognize[d] and encourage[d] the principle of voluntarism," and was simply acting to ensure that the option of a Board election was available to employers that "did not find any alternative route acceptable." *Id.* at 721. Even after *Linden Lumber,* the Board has continued to find that if an employer agrees that it will recognize a union based upon a check of authorization cards, the employer must bargain with the union if the card check demonstrates the union's majority status. *See Jerr-Dan Corp.,* 237 NLRB 302, 303 (1978); *Contemporary Guidance Services, Inc.,* 291 NLRB 50, 64 (1988); *Research Management Corp.,* 302 NLRB 627, 638-9 (1991).

Moreover, while both the majority and the dissenters in *Dana* assert that unions are increasingly turning to card checks as their preferred means of obtaining recognition, in fact, unions have sought and obtained voluntary recognition throughout the entire history of the Act. The Board volumes are replete with numerous cases from every decade where unions have obtained voluntary recognition. These cases indicate that voluntary recognition has often been the norm rather than the exception. For instance, twenty years ago, an ALJ found that an SEIU local's "normal practice in seeking recognition is to obtain authorization cards from a majority of an employer's employees and have a card check with the employer to verify majority status and obtain voluntary recognition." *Research Management Corp.*, 302 NLRB 627, 639 (1991).

The Supreme Court has recognized that the Act "is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers." *NLRB v. American National Ins. Co.*, 343 U.S. 395, 401 (1952). Particularly, in this era of large government deficits where there is much talk of shrinking the federal bureaucracy, it would be anomalous for the Board to discourage unions and employers from voluntarily avoiding representational disputes. Surely the Board can make better use of its limited resources than to incur the expense of running an election where there is no genuine question concerning representation.

The *Dana* experience shows that both paths to collective bargaining, voluntary recognition through card check and certification through a Board election, are based on the exercise of free choice by employees. Therefore, the Board cannot, in the name of that free choice, justify denying protection to bargaining relationships founded on voluntary recognition in a misguided effort to encourage parties to resort to Board elections.

C. The *Dana* Majority Acted On the False Premise That Undermining the Stability of Bargaining Relationships Promotes Employee Free Choice.

In *Dana*, the majority asserted that it was required to strike a balance between "protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other." *Dana*, 351 NLRB at 434. But, in a situation where workers have recently opted for representation, promoting the stability of the bargaining relationship actually protects the employees' choice, and *Dana* undermines that choice by depriving workers of their collective strength at a time when the bargaining relationship is most vulnerable. The bargaining relationship is especially vulnerable at its inception because the workers have not realized any of the benefits of collective bargaining, such as compelling the employer, often for the first time, to surrender its power to unilaterally set the workers' terms and conditions of employment. The Board is well aware that the fear that bargaining will be futile is quite powerful, and in fact, employers often exploit this fear by threatening as much. *See, e.g., DHL Express Inc.,* 355 NLRB No. 224, slip op at 2 (2010)(finding that employer violated Section 8(a)(1) by threatening employees that they would gain nothing in collective bargaining). One national opinion survey found that 90% of employees who had experienced the benefits of collective bargaining would vote to retain union representation.[1] But, in the immediate aftermath of recognition, workers have yet to enjoy the benefits of collective bargaining.

As the Supreme Court has explained, "[c]entral to the policy of fostering collective bargaining, where the employees select that course, is the principle of majority rule." *Emporium Capwell Co. v. Western Addition Community Organization et al.*, 420 U.S. 50, 62 (1975). Thus,

[1] U.S. Commission on the Future of Worker-Management Relations, *The Dunlop Commission on the Future of Worker-Management Relations - Final Report* 100 (1994) (summarizing data from Richard B. Freeman and Joel Rogers, *Worker Representation and Participation Survey - Waves 1 and 2: Data Description and Documentation* (Nat'l Bureau of Econ. Research, 1998), *available at* http://www.nber.org/~freeman/wrps.html).

the "choice" that the Act should protect is the choice made by the majority, and where the majority has selected a bargaining representative, the Board protects that choice by giving the bargaining representative an opportunity to bargain. In order to bargain effectively, a union must present a united front to the employer. As the Supreme Court explained in *Emporium Capwell*, "[i]n establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power." *Emporium Capwell*, 420 U.S. at 62. *Dana* deprives workers of this collective strength by encouraging those who opposed unionization to continue to fight, rather than encouraging them to accept majority rule.

D. The Experience of SEIU's Affiliates Demonstrates That *Dana* Has Hindered Employee Choice and Destabilized Bargaining

SEIU's affiliates have reacted to *Dana* in different ways, and have explored different strategies to address the ways in which *Dana* affects first-contract bargaining. The *Dana* dissenters correctly pointed out that *Dana* would allow a 30 percent minority to destabilize nascent bargaining relationships. The Board's own statistics vindicate the fears voiced by the dissenters. *Dana* has had the effect of encouraging decertification petitions even where those petitions are only supported by a minority of employees. Thus, 85 petitions were filed following the posting of *Dana* notices, but in only 15 instances did workers subsequently vote the incumbent union out. *Notice and Invitation to File Briefs* at 2, n. 4. A strikingly high percentage of these petitions were withdrawn or dismissed, and even where there was an election, the incumbent union won 72% of the time. In other words, even where a majority of workers favors representation, the procedure adopted in *Dana* encourages the anti-union minority to attempt to undermine the will of the majority.

The experience of SEIU Local 503 at Farmington Centers, Inc./Laurelhurst Village illustrates how *Dana* allows a small minority to undermine the will of the majority. In that case,

the union obtained voluntary recognition through a card-check that was conducted on November 23, 2009. After the *Dana* notice was posted, a group of workers filed a decertification petition (Case 36-RD-1735). In the decertification election, only 23 workers in a unit of 144 voted against union representation. Nevertheless, the mere existence of the pending decertification petition slowed down the bargaining process. Pro-union workers became discouraged by the decertification petition, and there was a high level of tension in the facility while the decertification petition was pending. While Local 503 had generally been able to conclude contract negotiations at nursing homes within two or three months following recognition, the union did not reach a first contract at Laurelhurst until August 2010 – nine months after recognition.

Not only does *Dana* encourage a dissident minority to foment dissension among the workers, SEIU affiliates also report that *Dana* has encouraged mischief by employers. Because the *Dana* process delays the resolution of the representation dispute, which would otherwise have been resolved by the union's demonstration of majority support through authorization cards, an employer has additional opportunities to interfere with the right of its employees to freely choose whether to be represented by a union. In some cases, employers may agree to a card check based on the mistaken belief that the union will not obtain majority support. The Employer may then take advantage of *Dana* to promote a decertification effort following recognition. Similarly, local managers may have opposed the employer's national decision to grant voluntary recognition, and *Dana* gives them a chance to reverse that decision by assisting a decertification effort. This happened at the Aramark laundries in Denver and Salt Lake City. *See* 27-VR-008 and 27-VR-009. Fortunately, the local managers acted so blatantly that the Board found that the decertification petitions were tainted by the unfair labor practices. But,

where the employer acts more subtly, it is often extremely difficult for the union to prove that an employer has unlawfully assisted decertification efforts.[2] Since the union is not privy to conversations that take place between employers and anti-union workers, unless the anti-union worker brags to the wrong person, an unlawful grant of benefits or improper assistance may never come to light. When an anti-union worker is given permission to circulate a decertification petition during work time, it can be very hard to prove that the employer actually gave permission as long as supervisors are not present when the actual solicitation takes place.

In addition, even where the union has no reason to believe that the employer has promoted the employees' decertification efforts, it has been our experience in a number of cases that employers have been reluctant to engage in serious negotiations during the initial *Dana* posting period and as long as there is uncertainty regarding the union's status. It may be that the employer is unwilling to devote the resources necessary to engage in meaningful bargaining if an election will make those efforts moot, or it may be that the employer has made a conscious decision to try to undermine the union's strength. In either case, the result is the same – workers are deprived of the benefits of collective bargaining.

Furthermore, apart from the role of the employer, the existence of a pending decertification petition, or the chance that one may be filed, affects unions in much the same

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[2] The difficulty of establishing unlawful assistance is illustrated in *Sodexo America, LLC,* Case No. 27-RD-1229. In that case, the decertification petition was filed by a kitchen manager. The union had initially agreed to include the kitchen managers in the unit under the mistaken belief that they were only straw bosses, but once bargaining was underway, the parties agreed to exclude the kitchen managers. Since the exclusion did not occur until after the decertification petition was filed, the Regional Director allowed the election to go forward. At the hearing, the union tried to prove that the kitchen managers were supervisors based in large part on their role in the employee evaluation process. But, since the employer had put the evaluation process on hold during the organizing and bargaining period, the Regional Director refused to rely upon the prior years' evaluations, and ultimately, the Regional Director found that the union had failed to meet its burden of establishing supervisory status.

way that a looming election affects members of Congress – the period leading up to an election is inevitably spent campaigning rather than doing substantive work. This denies workers the full benefit of the bargaining representatives they have selected, yet unions have little choice but to devote those resources to the ongoing election campaign. The vote tally sends a signal to management about the union's strength. Unions want to win any election by the widest possible margin in order to demonstrate the unity of the workforce. In practice what this means is that union staff will spend time making house calls to workers and engaging in other campaign-related activities. To the extent union staff feel compelled to spend time campaigning, they have less time for tasks related to bargaining. Even where bargaining committee meetings take place, the workers are inevitably distracted by the decertification petition and the activities of anti-union co-workers, and there is little time to discuss substantive proposals.

There are other reasons why the existence of a decertification petition, threatened or actual, interferes with collective bargaining. The Second Circuit has explained that "labor contracts, like international treaties, cannot be openly arrived at." *Rosario v. Amalgamated Ladies' Garment Cutters Union, Local 10, ILGWU,* 605 F.2d 1228, 1242 (2d Cir. 1979). The court observed that "because negotiation of contract terms ... requires each party to compromise some or all of its interests in order to achieve a settlement best for the group as a whole, negotiators realize that the bargaining process could easily be stymied if each of the multiple, heterogeneous constituencies they represent are apprised of the details of the process." *Id.* While SEIU affiliates do not embrace the principle that bargaining cannot take place in the open, many SEIU affiliates recognize that in various situations they cannot discuss the details of ongoing negotiations or share drafts of either party's proposals with workers who are not on the negotiating committee. Where a union has represented to management that it will not circulate

either party's proposals outside of the negotiating table, the union faces a serious dilemma if decertification efforts gain support based upon rumors about the negotiating process. The union can either ignoring the rumors and allow them to fester, or respond and compromising the negotiations.

In other bargaining situations, SEIU affiliates can take a more transparent approach to negotiations, sharing all proposals with the entire workforce, and even inviting all workers to negotiations. In those situations, the union has sometimes been reluctant to even make proposals while the threat of decertification is looming since any proposal can be taken out of context and used as a campaign issue.[3]

While *Dana* has generally had a tendency to slow down bargaining, in some instances, union have sought to speed-up bargaining in order to head off a potential decertification effort. There are cases where unions have rushed to conclude negotiations in order to demonstrate to the workers that they could secure a contract, but the contracts that resulted were likely not as strong as they would have been if the union had the benefit of the recognition bar without the need for "hothouse results."

For all of these reasons, unions have found it very difficult to engage in meaningful first contract bargaining while a decertification petition is pending. In the meantime, the longer it takes for the union to obtain a contract, the more its strength tends to deteriorate. *Cf. Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 38 (2d Cir. 1975)(recognizing that delays in bargaining may result in the union's position deteriorating "to such a degree that effective representation is no longer possible"). Thus, even after the union prevails in the decertification election, it is most likely in a weaker position than it was immediately after the initial recognition.

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[3] This is analogous to Members of Congress who are reluctant to take roll-call votes in the months immediately preceding an election.

Particularly now, after the Board's post-*Dana* experience has confirmed the reliability of authorization cards, the Board should acknowledge that the voluntary recognition bar actually protects both bargaining stability and employee freedom of choice.

E. The *Dana* Majority Overstated the Reliability of Elections Compared to Recognition Based Upon Authorization Cards.

1. Prior to *Dana,* the Board and the Courts Had Not Held That Authorization Cards are Unreliable.

In *Dana*, the Board asserted that the Board and the courts have long recognized that "the freedom of choice guaranteed employees by Section 7 is better realized by a secret election than a card check." *Dana*, 351 NLRB at 438. Notably, the leading case cited for this proposition, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), rejected the very arguments put forth in *Dana.* The Supreme Court held that the employers' argument regarding the supposed unreliability of authorization cards "cannot withstand close examination." *Gissel*, 395 U.S. at 603. In particular, the Court rejected the very argument relied upon by the *Dana* majority. The employers in *Gissel* argued that "without a secret ballot an employee may, in a card drive, succumb to group pressures." *Id.* at 603-4. The Court emphatically rejected this argument, explaining that "the same pressures are likely to be equally present in an election," and, especially in a small bargaining unit, "virtually every voter's sentiments can be carefully and individually canvassed." *Id.* at 604.

Other cases cited by the *Dana* majority for the proposition that a secret ballot is preferable to a card check fail to focus on the real issue here – whether a union's establishment of its majority status through the presentation of authorization cards is sufficiently reliable to warrant the conclusion that the workers in the unit desire union representation. In *Transportation Maintenance Services v. NLRB*, 275 F.3d 112 (D.C. Cir. 2002), the issue was not

the reliability of an election compared with a showing of majority status through the verification of authorization cards. Instead, the issue was the reliability of an election compared to one employee's assertions about the preferences of his co-workers. In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), while the Board asserted that "Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions," id. at 723, the Board nevertheless allowed employers to withdraw recognition without an election "[i]f a majority of the unit employees present evidence that they no longer support their union." *Id.* at 724. Moreover, in *Levitz*, the Board explained that this "evidence" could take the form of worker signatures on a petition. The holding in *Levitz* is antithetical to the notion that authorization cards are an unreliable measure of employee sentiment.

Underground Service Alert, 315 NLRB 958 (1994), is also inapposite because it involved the employer's unilateral withdrawal of recognition while the results of a Board-supervised election were pending. In explaining why it was preferable to rely upon the results of the Board election, the Board cited an Eighth Circuit opinion explaining that "unilateral withdrawal is based on the subjective belief of an inherently biased party." *Id.*, quoting *NLRB v. Cornerstone Builders*, 963 F.2d 1075, 1078 (8th Cir. 1992). By contrast, in the case of voluntary recognition based on authorization cards, in most cases, a disinterested neutral party has determined that a majority of employees support unionization. Moreover, in *Underground Service,* the Board reaffirmed the right of employers to withdraw recognition based upon petitions provided no Board election is underway. *Underground Service,* 315 NLRB at 961, n. 8.[4]

[4] In a sense, *Underground Alert* is the converse of *Verizon Information Systems,* 335 NLRB 558 (2001) where the Board held that once a union had submitted to a card-check procedure, it was estopped from filing a petition with the Board.

Moreover, while the Board has repeatedly declared that elections are the preferred way to resolve genuine questions regarding representation, the Board and the courts have also recognized that an agreement by an employer and a union "to accept the results of a card check in lieu of an NLRB election is consistent with federal labor policy." *Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992). The Board and the courts enforce these agreements out of an understanding that authorization cards are a reliable means of determining employee support for unionization, and out of recognition that the Act itself mandates protection of "designation of representatives" by employees' own choosing. 29 U.S.C. § 151.

2. Workers Do Not Sign Authorization Cards in Order to Get an Election.

In *Dana,* the Board cited a 25 year-old circuit court decision for the proposition that workers sometimes sign authorization cards even where they do not intend to vote for the union in the election. *See Dana,* 351 NLRB at 439, citing *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983). The *Dana* majority further asserted that there may be "misrepresentations about the purpose for which the card will be used." *Dana,* 351 NLRB at 439. These assertions are based on outdated notions about union organizing, and the Board should not rely upon them in the 21st century.

In *Village IX,* the union had actually petitioned for an election, so there might well have been factual questions as to whether workers signed cards to show support for the union or simply to get an election. But in the ordinary case, when a union gathers authorization cards in order to obtain voluntary recognition, there is no reason why any worker would assume that the cards would be used for an election. As a starting point, the Board should recognize that the vast majority of workers in this country have absolutely no familiarity with the Board's election

processes. Each year, fewer than 100,000 workers in the entire country have the opportunity to vote in an NLRB-supervised election. That number represents less than one-tenth of one-percent of the private sector workforce. Thus, when a co-worker or a union organizer asks a worker if she wants to sign a union authorization card, they are asking "do you want a union?" and not "do you want an election?"

Moreover, in recent years, unions have tended to publicly and explicitly state their intention to obtain voluntary recognition through authorization cards. Indeed, in *Dana* and its companion case *Metaldyne,* the union did not solicit authorization cards until after the employers entered into a card check agreement. *Dana,* 351 NLRB at 435. In numerous other cases, unions have publicly campaigned for card-check agreements. *See, e.g., Rapera, Inc.,* 333 NLRB 1287 (2001); *New Otani Hotel,* 331 NLRB 1078 (2000). To the extent the option of an election comes up, it is from employers pushing for NLRB elections as a tactic to resist unionization.[5]

As the Board recognized in its Notice and Invitation to File Briefs, it must adjust its decisions to evolving realities. Today's reality is that the representation election is a foreign concept to unorganized workers. Moreover, since most unions believe that the Board's election procedures serve only to frustrate the desires of employees for representation, unions are generally extremely reluctant to advance the concept of a Board-conducted election as a means of obtaining representation. Instead, organizers typically explain that the union will wage a public campaign to get the employer to "agree to a mutually satisfactory process for voluntarily recognizing the union when a majority of employees show their interest in union representation."

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[5] This points to another pernicious effect of the *Dana* decision. Calling for an NLRB election is now a standard tactic in the anti-union playbook since any disinterested observer would have to concede that "an employer opposed to union representation has a one-sided advantage to exert pressure on its employees throughout each workday of an election campaign." *Dana,* 351 NLRB at 439. *Dana* has lent aid and comfort to anti-union employers by casting doubt on the reliability of authorization cards and by its assertion that parties ought to resort to Board elections.

UNITE (Hennes & Mauritz d/b/a H & M), Case 2-CP-1040 et al., Advice Memorandum dated January 21, 2004, 2004 NLRB GCM LEXIS 51. In light of this reality, there is no reason to assume that workers sign authorization cards with the expectation that the cards will be used solely for the purpose of obtaining an election.

3. Unfair Labor Practice Charges Can Address the Situation Where Authorization Cards Do Not Reflect Employees' True Choice.

The *Dana* majority asserted that elections are preferable to recognition based on authorization cards because "the Board will invalidate elections affected by improper electioneering tactics."[6] *Dana*, 351 NLRB at 439. But, the Board may similarly invalidate the results of a card check where there is evidence that the card check did not reflect the uncoerced views of the workers. Thus, if there is evidence that workers signed authorization cards as a result of threats made by a union agent,[7] or an employer's unlawful assistance to the union,[8] the Board will invalidate the recognition.

While the Board has referred to the ideal of "laboratory standards" in describing the conditions under which its elections are conducted, it ought to acknowledge, as reviewing courts have, that "[i]f absolute objectiveness and pristine conduct were required in order to sustain an election, then virtually none would survive the rough and tumble of labor-management contentiousness." *Contech Division, SPX Corp. v. NLRB*, 164 F.3d 297, 307-8 (6th Cir. 1998). If it could be said that conduct that does not rise to the level of an unfair labor practice somehow calls into question the reliability of authorization cards, it does not follow that Board elections

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[6] While the Board will set aside an election based on objectionable interference that does not rise to the level of an unfair labor practice, the remedy in those circumstances is often a hollow one. The lingering effects of the objectionable conduct may continue to taint the rerun election, and even where that is not the case, the delay in conducting the rerun election will likely weaken the union's standing among the workers.

[7] *See, e.g., Planned Building Services*, 318 NLRB 1049, 1062-63 (1995).

[8] *See, e.g., Windsor Castle Health Care Facilities,* 310 NLRB 579, 590 (1993).

are immune from similar criticism. Even the *Dana* majority conceded that the reliability of Board elections has been questioned on the grounds that "an employer opposed to union representation has a one-sided advantage to exert pressure on its employees throughout each workday of an election campaign." *Dana*, 351 NLRB at 439.

Since recognition based on authorization cards can be invalidated if the authorization cards were coerced, the Board should not discourage voluntary recognition where there is no evidence of coercion.

4. The *Dana* Majority Failed to Take Into Account the Flaws in the Board's Election Processes.

a. The Board's Election Procedures Inevitably Disenfranchise Some Employees.

The majority in *Dana* asserted that an election is more reliable than authorization cards because "a Board election presents a clear picture of employee voter preference at a single moment," while authorization cards may be gathered over an extended period of time. Dana, 351 NLRB at 439. But measuring employee preferences on a single day does not necessarily lead to a more accurate result. In particular, because the Board does not provide for any form of early or absentee voting, workers who are sick or out-of-town on vacation are simply disenfranchised. Particularly in small units, where the importance of each worker's vote is magnified, if even a single worker is unable to make it to the polling place, then the will of the majority may be thwarted. This is hardly a theoretical concern since the Board's statistics indicate that in Fiscal Year 2009 approximately 20% of eligible voters failed to cast valid votes.[9] 74 NLRB Annual Report 118 (2009)(Table 11). Here, it is worth noting that while a union must obtain support from an absolute majority of employees in order to obtain recognition based upon

[9] Obviously, in some cases the number of workers who fail to cast votes is much higher than 20%.

authorization cards, Board elections, like political elections, are decided by a majority of those who cast votes.

b. The Board's Election Procedures Often Mean that Workers Make Decisions Based Upon Misinformation and Lack of Information about Representational Options.

The *Dana* majority asserted that Board elections are preferable to recognition based upon authorization cards because "union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options." *Dana*, 351 NLRB at 439. As the dissent pointed out, it was odd that the majority would imply that misinformation is less likely to be an issue in an election since for almost thirty years the Board has chosen to leave misrepresentations in the course of Board-election campaigns largely unregulated. *Dana*, 351 NLRB at 450, n. 22 (Members Liebman and Walsh dissenting), citing *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). In any event, the Board has held that cards signed as a result of deliberate misrepresentations regarding the purpose of the card are invalid for purposes of proving the union's majority status. *DTR Industries*, 311 NLRB 833, 940 (1993). The availability of a remedy in the rare cases where workers are fraudulently induced to sign cards makes it unnecessary for the Board to dispense with the recognition bar in the vast majority of cases that do not involve such facts.

As for lack of information, the *Dana* majority simply assumed that employees are more likely to obtain adequate information in a campaign that precedes a Board election than in a campaign where a union obtains voluntary recognition through authorization cards. In making that assumption, the Board ignored widespread evidence that during the typical campaign associated with a Board election, many employees are unlikely to have any contact with a union representative. More than 40 years ago, the Board recognized this problem in *Excelsior*

Underwear Inc., 156 NLRB 1236 (1966), noting that employers have the ability to communicate with employees at the worksite, while labor organizations are often unable to reach employees with the arguments in favor of representation, leaving many employees "completely unaware of that point of view." *Id.* at 1240-41. Unfortunately, the solution the Board devised in *Excelsior Underwear* is thoroughly inadequate. Trying to chase down workers one at a time in their homes is hardly a substitute for talking to them while they are together at the worksite. Not only do workers often resent the intrusion on their personal space, but with long commutes, second jobs, and other commitments, they are rarely at home during waking hours. Thus, despite *Excelsior*, workers are still often completely unaware of the pro-union point of view.

Since Board-supervised elections can just as easily be accompanied by misinformation and a lack of information about representational options, the Board erred in *Dana* when it relied upon concerns about misrepresentations and lack of information to overturn the voluntary recognition bar.

F. A Secret Ballot Cannot Immunize Workers From External Pressure.

The decision in *Dana* is based in large part on the assumption that there is a fundamental difference between a secret ballot election and a determination of employee preferences based upon signed authorization cards. The *Dana* majority opined, "unlike votes cast in privacy by secret Board election ballots, card signings are public actions, susceptible to group pressure exerted at the moment of choice." *Dana*, 351 NLRB at 438. The *Dana* majority blithely asserted that the public anti-union petition leading to a decertification election does not implicate the same concern because it leads to a secret ballot election. *Dana*, 351 NLRB at 438-9, n. 19. But the assertion that secret ballots immunize workers from external pressure is at odds with long-settled Board law and the realities of the workplace.

Most notably, in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), the Supreme Court considered whether a union's offer to waive initiation fees for all employees who sign authorization cards before a Board-supervised election interferes with employee free choice. The Court held that the secret ballot was not sufficient to erase the interference for two reasons: first, the outward manifestation of support is "a useful campaign tool," and second, "there may be some employees who would feel obliged to carry through on their stated intention to support the union." *Id.* at 277. More recently, the Board endorsed this same view in *Harborside Healthcare Inc.*, 343 NLRB 906 (2004). In that case, the issue was whether a supervisor's solicitation of union authorization cards was objectionable conduct. Relying upon *Savair*, the Board held that "the impact of the supervisor's solicitation would ordinarily continue to be felt during the critical period." *Harborside*, 343 NLRB at 912.[10]

The majority in *Dana* seemed to assume that as long as the ballots themselves are cast in secret, the results are akin to a "laboratory" experiment, entirely insulated from any undue external influence. Of course, if that were true, there would be little reason for the Board to consider whether conduct by unions, employers, and third parties constitutes objectionable interference. Not only is the entire body of law regarding election objections premised on the understanding that secret ballots do not insulate employees from external pressure, but common sense and experience confirm that view. Indeed, the Board itself has acknowledged that workers

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[10] While the focus in *Harborside* was on pro-union supervisory conduct, the far more common issue is anti-union supervisory conduct. For instance, one academic study that surveyed workers who had participated in Board elections reported that 26% of workers reported experiencing "a great deal" of pressure from management to oppose unionization. Adrienne E. Eaton and Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 Ind. and Labor Relations Review 157, 165 (2009). Where supervisors urge workers to oppose unionization, it can be extremely difficult for workers to resist that pressure. And once workers publicly stake out an anti-union position to appease their supervisor, the consequences when that worker enters the voting booth would presumably be the mirror image of *Savair* and *Harborside*.

generally know how their co-workers will vote. *See, e.g., Nurses United for Improved Patient Healthcare,* 338 NLRB 837, 838-9 (2003)("Although the ballot is secret, union supporters would generally know who was in favor and who was not").

There is a widely observed phenomenon known as the "bandwagon effect," which holds that people often alter their opinions in an election in an effort to be on the winning side. This is one reason why union election campaigns, like political campaigns, are necessarily public affairs, with proponents on both sides urging those who are undecided to publicly proclaim their views. *See, e.g., Maremont Corp. v. NLRB*, 177 F.3d 573 (6th Cir. 1999) (finding union did not commit objectionable conduct where it distributed leaflet with names of workers indicating that they were voting "yes" in the upcoming election). As noted above, the Supreme Court recognized in *Gissel*, that, at least in small bargaining units, "virtually every voter's sentiments can be carefully and individually canvassed." *Gissel*, 395 U.S. at 604.[11] Moreover, the worker desiring anonymity would need to sacrifice her own free speech rights in order to preserve the sanctity of her secret ballot. In practice, very few workers want to make that choice.

In the real world, whether the decision is made via authorization cards or through a Board-supervised election, a worker's decision is likely to be influenced by a variety of external forces, and it is unlikely to remain secret. Thus, the *Dana* majority erred in assuming that a Board-supervised election would immunize workers from external pressure.

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[11] Of course, since a large bargaining unit will inevitably consist of a series of smaller departments or subdivisions, even in the largest units, each voter's sentiments can be just as carefully canvassed within his or her department. It is well recognized that all workplace organizing efforts, like politics generally, are inherently local. Anti-union consultants routinely advise supervisors how to determine the sentiments of each employee. *See* Gordon Lafer, *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections* 27-28 (2007).

In sum, while a secret-ballot election may have a visceral appeal, there is no objective basis for asserting that a Board-conducted election will yield a more reliable indication of employee sentiment than a showing of majority status through the presentation of authorization cards signed by a majority of employees in the bargaining unit. The *Dana* majority acted on nothing more than an article of faith when it concluded that Board-conducted elections are so much more reliable that the Board's longstanding policy favoring bargaining stability should be abandoned. That article of faith is belied by the statistics on decertification efforts post-*Dana*, and is unsupported by the Board's own cases. The recognition bar, employed for decades before *Dana*, should be restored.[12]

G. The *Dana* Posting Requirements Give Employers Unwarranted Power.

While SEIU strongly believes that *Dana* must be overturned in its entirety, nevertheless, we believe it is important to make one point regarding the notice-posting question raised in the Notice and Invitation to File Briefs. The Board has asked whether substantial compliance should be sufficient to satisfy the notice-posting requirements. One of the many disturbing aspects of *Dana* is that the union is placed at the mercy of the employer when it comes to posting the notices. Thus, the employer can extend the 45-day window period simply by delaying in posting the notices, and the window could potentially be permanent if the employer posts the notices improperly. The Board should realize that allowing an otherwise barred petition to go forward due to an employer's failure to post the notices properly, or its premature removal of the notices "would permit [the employer] to benefit from its own improper conduct, encourage collusion,

[12] The Notice and Invitation to File Briefs asked amici to address whether the rule announced in *Dana* should apply it situations involving after-acquired clauses or mergers. Since we believe the rule should be overturned in its entirety, we are not addressing that question.

and serve no substantial interest of the employees." *Maple View Manor, Inc.,* 319 NLRB 85, 86 (1995).

H. The Decision in This Case Should Be Applied Retroactively.

1. The Board's Ordinary Practice is to Apply New Policies Retroactively.

Newly announced Board policies are generally applied retroactively "in all pending cases in whatever stage. *Kentucky River Medical Center,* 356 NLRB No. 8, slip op. at 4 (2010). The Board has explained its rationale for this longstanding practice as follows:

> Thus, to adopt these revisions of contract-bar policy and then allow the instant proceeding as an exception without permitting a similar exception to all pending cases would be inequitable. To establish an *in futuro* rule for all pending cases would create an administrative monstrosity. The judicial practice of applying each pronouncement of a rule of law to the case in which the issue arises and to all pending cases in whatever stage is traditional and, we believe, the wiser course to follow.[13]

There are limited exceptions[14] for circumstances which would otherwise yield results which are manifestly unjust,[15] or "contrary to a statutory design or to legal and equitable principles."[16] *Machinists Local Lodge 2777* recently listed the three criteria determining whether to apply a case prospectively only:

> (1) the reliance of the parties on preexisting law;
> (2) the effect of retroactivity on accomplishment of the purposes of the Act; and

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[13] *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958). See also *Dana*, 351 NLRB at 435 ("general practice is to apply new policies and standards to 'all pending cases in whatever stage'"), citing *Deluxe Metal*; and *SNE Enterprises*, 344 NLRB 673, 673 (2005) ("Board's usual practice").

[14] *Dana*, 351 NLRB at 434 (limiting rule to prospective application "an exception").

[15] *SNE Enterprises*, 344 NLRB 673, 673 (2005) (new rule applied retroactively "so long as this does not work a 'manifest injustice'"), citing *Pattern and Model Makers Assn. of Warren*, 310 NLRB 929, 931 (1993); *Loehmann's Plaza*, 305 NLRB 663, 672 (1991), supplemented by 316 NLRB 109 (1995), review denied by *Food & Commercial Workers, Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996), and *NLRB v. Bufco Corp.*, 899 F.2d 608, 609 (7th Cir. 1990) (citing cases).

[16] *Dana*, 351 NLRB at 443 and *SNE Enterprises*, 344 NLRB at 673, and both quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

(3) particular injustice arising from retroactive application.[17]

As explained below, none of these exceptions apply here.

2. Any New Rule Announced Here Should Be Applied Prospectively, as in the Contract Bar Cases Insulating Bargaining Relationships From Electoral Challenge.

If the Board overturns *Dana* and restores the voluntary recognition bar, the Board's actions would be most analogous to the cases in which the Board changed its contract bar rules. Petitioners both here and in the contract bar cases relied on previous law in the same manner. They both expended the time and effort necessary to accumulate an interest showing and file the petition. Both sets of petitioners would be similarly affected by retroactive enforcement. They would not get their election for some time into the future, but that is no reason for not applying the rule retroactively.

The contract bar cases all turned on the second *Machinists* criterion, "the effect of retroactivity on accomplishment of the purposes of the Act." This criterion yields differing results when applied to two separate categories of contract bar cases, (1) cases affecting the timing of the open period, and (2) cases lengthening the period during which bargaining relationships are insulated from challenge. Denying an election to a petitioner who, under newly changed rules, has filed a little before or a little after the open period, does little to advance the Act's purposes. Applying the old law to such a petitioner is consistent with the statutory purpose underlying both the old and new policies, that of giving employees the opportunity to choose or reject their representatives towards the end of a contract's third year. And conducting an election

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[17] *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174 (2010), slip op. at 8, fn.37 citing *Allied Mechanical Services*, 352 NLRB 662 (2008), vacated and remanded on other grounds, 2010 U.S. App. LEXIS 19619 (D.C. Cir., Sept. 20, 2010), reaffirmed, 356 NLRB No. 1 (2010); *SNE Enterprises*, 344 NLRB at 673; *Epilepsy Foundation*, 331 NLRB 676, 679 (2000), enf. denied 268 F.3d 1095 (D.C. Cir. 2001).

does little harm to the principle of industrial stability, because the bargaining relationship would be vulnerable to challenge at around the same time under both the old and new policies.

Changes in Board law that extend the period during which bargaining relationships are insulated from challenge are different. Elections based on petitions filed during such times do violence to the principle of industrial stability. Processing the petitions frustrate the Act's purpose of furthering industrial stability whether they are pending at the time of or filed after a new decision. So cases lengthening the contract bar have been applied retroactively. *General Cable Corp.*[18] retroactively applied a new rule extending the contract bar from two to three years. And *Deluxe Metal* retroactively plugged a loophole permitting petitions to be filed during a new contract's first 10 days.[19] Under prior law, after a contract between an employer and an incumbent union expired, a competing union could demand that the employer recognize it, and, within 10 days, file its petition, even though the employer and the incumbent had signed a contract in the interval between demand and filing.[20]

By contrast, in the contract bar cases applying new open period rules, the Board has favored prospective application. In *Leonard Wholesale Meats*,[21] with prior law dictating an open period of 150 to 60 days before the contract's termination, the Board saw early-filed petitions resulting in early elections, some of which resulted in long periods during which lame-duck unions had to administer their unexpired contracts. So the Board narrowed the open period to 60 to 90 days before the contract's expiration, and applied the change prospectively only. And in *Trinity Hospital*, the Board acknowledged the Congressional policy that healthcare institutions

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[18] 139 NLRB 1123, 1128-1129 (1962).
[19] 121 NLRB at 995-998,1006-1007.
[20] *General Electric X-Ray Corp.*, 67 NLRB 997 (19??).
[21] 136 NLRB 1000 (1962).

need more time to negotiate contracts. So it gave healthcare parties a longer insulated period by applying a special 90 to 120 day open period. It applied the change prospectively only.

In the instant case, as in those cases strengthening the contract bar, a major purpose of the new rule is to further industrial stability by insulating the bargaining relationship from electoral challenge. The new rule's purpose isn't to tinker with the open period's timing. In both *Leonard Wholesale Meats* and *Trinity Hospital*, under both the earlier and the new rules, petitioners were entitled to elections sometime around the contract's end. But here, as in *Deluxe Metal* and *General Cable*, if the Board restores the voluntary recognition bar, the petitioner would not be entitled to demand any election. Here, insulating the union from attack while it negotiates its first contract furthers industrial stability. And affording the majority that chose the union the right to see whether the union benefits them through collective bargaining furthers employee free choice. Since the Act's purposes will be furthered by restoring the recognition bar in all cases, it any new rule should be applied retroactively.

3. No Significant Reliance Interests are at Stake Here and there is No Manifest Injustice in Applying a New Rule Retroactively.

If the Board restores the voluntary recognition bar to provide an insulated period for newly recognized unions to bargain, it is difficult to understand how any worker could claim that the decision would result in manifest injustice due to reliance on preexisting law. As the Board explained in *SNE Enterprises, Inc.*, 344 NLRB 673 (2005), "the Board is not finding a violation or ordering any party to pay damages or issuing any kind of order against a party." *Id.* at 674. Nor is the Board leaving the employees open to any reprisals. *Cf. Wal-Mart Stores, Inc.*, 351 NLRB 130, 136 (2007)(refusing to apply *IBM Corp,* 341 NLRB 1288 (2004) retroactively where retroactive application "would effectively permit the [r]espondent to punish [an employee] for relying on his then-existing rights under the Act"). In *Dana* itself, the Board recognized that

retroactive application would frustrate voluntary recognition agreements that unions and employers had entered into "with the understanding that the established recognition bar would immediately preclude the filing of Board petitions for a reasonable period of time."[22] *Dana's* retroactive application would also have removed the election bar provided by many contracts that the parties achieved after the employers voluntarily recognized the unions. With *Dana's* retroactive application, the reliance interests of numerous unions and employers "would be unequivocally and substantially frustrated."[23]

By contrast, here, the only thing the petitioners could have done differently is that they might not have circulated decertification petitions. If the Board bars decertification at this time, the efforts of the petitioners still provide them with benefits – they have now identified co-workers who are receptive to their arguments. To the extent that the petitioners might argue that they would have waited longer to file their decertification petitions, to allow a reasonable period of time for bargaining, it is too speculative to say what would have happened in that event. Had the employees been allowed to experience the benefits of collective bargaining, the petitioners may never have obtained the necessary showing of interest.

As explained above, restoring the voluntary recognition "honors the free choice already exercised by a majority of unit employees, while promoting stable bargaining relationships." *Dana,* 351 NLRB at 444 (Members Liebman and Walsh, dissenting). There is no injustice to the petitioners in revising Board policy to further those goals. Accordingly, the decision announced in this case should be applied retroactively.

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[22] 351 NLRB at 443-444.
[23] *Dana*, 351 NLRB at 444.

V. CONCLUSION

For the reasons stated above, the Board should overrule *Dana* and restore the voluntary recognition bar.

Respectfully submitted,

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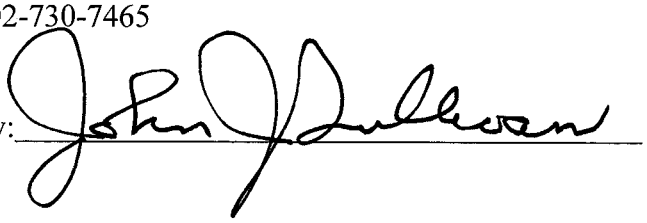
By: 

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CERTIFICATE OF SERVICE

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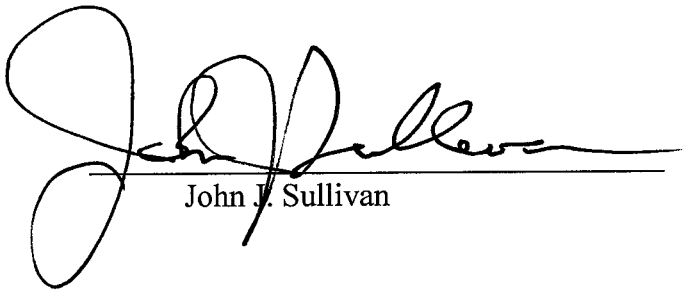

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