**UNITED STATES OF AMERICA**

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| LAMONS GASKET COMPANY, A DIVISION OF TRIMAS CORPORATION,<br><br>Employer,<br>and<br><br>MICHAEL E. LOPEZ,<br><br>Petitioner,<br>and<br><br>UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION,<br><br>Union. | Case No. 16-RD-1597 |

**BRIEF OF *AMICI CURIAE* UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AND UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCALS 135, 324, 770, 1167, 1428 AND 1442**

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## I. INTRODUCTION

For 40 years, through both Republican and Democratic administrations, the Board applied the rule, first announced in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), that unions voluntarily recognized upon a showing of majority support are entitled to a reasonable amount of time to bargain without being challenged by a decertification petition. *Id.* at 587; *Sound Contractors*, 162 NLRB 364 (1966); *MGM Grand Hotel, Inc.*, 329 NLRB 464 (1999); *Seattle Mariners*, 335 NLRB 563 (2001); *Rockwell International Corp.*, 220 NLRB 1262 (1975); *Dana Corp.* 351 NLRB 434, 445-47 (2007) (Members Liebman and Walsh, dissenting). In *Dana*, a bare majority of the Board turned this doctrine inside out by imposing a 45-day window period during which any newly-recognized union may be forced into a decertification election. *Dana* undermined the longstanding balance between employee free choice and stable collective bargaining embodied in *Keller Plastics*, and cast doubt on the certainty of card check as an alternative method of union organizing.

The amici filing this brief, United Food and Commercial Workers International Union and its affiliated local unions in Southern California ("Amici"), agree wholeheartedly with the parties and other amici who urge the Board to overrule *Dana* in its entirety and restore the *Keller Plastics* rule. Rather than repeat their arguments, Amici instead focus on two closely related issues: (1) the false premise on which *Dana* rests, namely that recognition of a union based on authorization cards is inherently less reliable than a Board election, and (2) the inappropriateness of applying *Dana* to voluntary recognition pursuant to "after-acquired" locations provisions in existing collective bargaining agreements.

The first issue requires the Board to reconsider one of the factual assumptions that the Board and the courts have made over the years – something that the Board is uniquely suited to

do. *Chevron U. S. A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). The empirical evidence shows that, far from being the most effective way to gauge employees' desires, the conventional NLRB-conducted election has become the less reliable and less fair method for determining whether employees wish to be represented by a union. *Dana* is founded on folklore that the Board should reexamine – and reject.

But even if *Dana* were not so fundamentally wrong, it would still not make sense, either as a matter of law or policy, to apply it to cases governed by *Kroger Co.*, 219 NLRB 388 (1975). Our national labor policy seeks to further two goals: (1) to encourage the practice and procedure of collective bargaining and (2) to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. Applying *Dana* to *Kroger* agreements would undermine both goals by negating agreements that (1) preserve the integrity of stable multilocation units created through collective bargaining and (2) allow employees to decide whether they want to be represented as part of that unit.

## II. INTEREST OF AMICI

The United Food and Commercial Workers International Union represents more than 1.3 million members in North America primarily in the retail food, non-food retail, food processing, packing, and manufacturing industries. United Food and Commercial Workers Union, Locals 135, 324, 770, 1167, 1428, and 1442 represent more than 80,000 employees in the retail supermarket, drug store, and other industries in Southern California. Local 1167 is the incumbent union in *Rite Aid Store #6473*, Case No. 31-RD-1578, on which the Board initially granted review, and all six local unions are parties to a multilocation collective bargaining agreement with Rite Aid covering employees working at 376 stores and containing an after-

acquired stores provision.

Although Rite Aid has withdrawn its request for review of the Regional Director's dismissal of the decertification petition in that case, the Notice and Invitation to File Briefs was not changed, and the Board subsequently stated on its website that the withdrawal "does not affect the scope of review." Amici here wish to express their views on *Dana* in general, as well as its particular application to "after-acquired" locations provisions, as discussed in *Kroger Co.*, 219 NLRB 388 (1975).

## III. ARGUMENT

### A. Majority Signup Is a Long-Accepted Method for Determining Union Representation

The Supreme Court validated the legitimacy of voluntary recognition through authorization cards long ago in its seminal decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969):

> Cards have been used under the act for 30 years; [the Supreme] Court has repeatedly held that certification is not the only route to representative status; and the 1947 attempt in the House-passed Hartley bill to amend section 8(a)(5) . . . was rejected by the conference committee that produced the Taft-Hartley Act. No amount of drumbeating should be permitted to overcome, without legislation, this history.

*Id.* at 600 n.17, *quoting* Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851, 861-862 (1967). *See generally* Raja Raghunath, *Stacking the Deck: Privileging "Employer Free Choice" Over Industrial Democracy in the Card-Check Debate*, 87 Neb. L. Rev. 329, 352-64 (2008).

Voluntary recognition has, in fact, been part of the fabric of American labor relations longer than the Act itself and has been repeatedly described as "a favored element of national labor policy." *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 750 (7th Cir. 1981), *quoting*

*NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978); *Terracon, Inc.*, 339 NLRB 221, 225 (2003), *affd.* 361 F.3d 395 (7th Cir. 2004); *MGM Grand Hotel*, 329 NLRB 464, 466 (1999); *Dana Corp.*, 351 NLRB 434, 450 (Members Liebman and Walsh, dissenting). The Congress that passed the Wagner Act did not outlaw voluntary recognition; on the contrary, it encouraged "the practice and procedure" of collective bargaining, while creating the Board's election machinery for those cases in which the parties could not resolve a question concerning representation without governmental intervention. Joel Dillard & Jennifer Dillard, *Fetishizing the Electoral Process: The National Labor Relations Board's Problematic Embrace of Electoral Formalism*, 6 Seattle J. Soc. Just. 819, 832-33 (2008). The Congress that passed the Taft-Hartley amendments likewise not only did not outlaw voluntary recognition agreements, but made them enforceable in federal court under Section 301 of the Act. 29 U.S.C. § 185.

*Dana* turns these principles upside-down by making any agreement for voluntary recognition presumptively invalid, subject to being challenged by a minority of the workers who have asked for union representation and denying the benefits of the recognition bar rule to those parties who do not submit to *Dana*'s new administrative requirements. The net result is not only to rewrite the parties' agreement, but to undermine the Act's stated goal of resolving labor disputes through bargaining by making the parties' agreements ineffective.

### B. The Board's Longstanding Assumption that Elections Are "Preferred" Is Disproved by the Empirical Evidence

The *Dana* majority emphasized "that the freedom of choice guaranteed by Section 7 is better realized by a secret election than a card check." *Dana*, 351 NLRB at 438. The dissent did not question this conclusion, acknowledging the "general proposition that an election is the 'preferred' method for determining majority status." *Id.* at 448 (Members Liebman and Walsh,

dissenting). Indeed, underlying *Dana* is a fundamental distrust of authorization cards as a fair and accurate means of determining employee preferences. In the majority's view, cards are "admittedly inferior to the election process." *Id.* at 438, *quoting NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969) (internal quotation marks omitted).

The Board's decision to reassess *Dana* presents an opportunity to test these assertions against a recent body of social science research examining the reliability and fairness of both majority signups (Amici's preferred term for card checks) and Board elections. It is notable that in support of its conclusion that majority signups are inferior to Board elections, the *Dana* majority cited no studies or reports by experts, only the same unproven conjecture repeated by the Board and the courts over time. As Chairman Liebman noted in her concurrence to the Board's grant of review in this case, *Dana* is an example of the Board's existence in "administrative law exile" because the doctrine "rests on a number of factual and policy preferences, none of which are clearly stated or actually defended in the [majority] opinion[.]" *Rite Aid Store #6473*, 355 NLRB No. 157, slip op. at 1, *quoting* Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 Duke L. J. 2013, 2062-63 (2009) (internal quotation marks omitted). Chairman Liebman endorsed the irrefutable observation that "neither the majority nor the dissent relied on factual evidence to support their conclusions[.]" *Rite Aid*, slip op. at 2, *quoting* Fisk & Malamud, 58 Duke L. J. at 2065.

In reality, recent studies compel the unmistakable conclusion that majority signup is a superior method to measure employee sentiment than Board-conducted elections as they are currently administered. This may be a difficult fact for the Board to admit. But it serves neither the labor-management community, nor policymakers, and certainly not the employees whom the

Act is designed to protect, for the Board to continuously repeat stale bromides extolling the "preferred" nature of Board elections. As discussed below, this assumption, which first appeared in Board decisions at a time when elections looked much different than they do today, bears no resemblance to the actual experience of employees.

The notion that elections present employees with the opportunity to choose or reject union representation in an environment free of coercion, or "laboratory conditions" in the parlance of the Board, is simply false. Several recent studies have found that Board elections create manifold opportunities for employer coercion, and that lawlessness by employers is rampant.

Building on her previous work examining employer tactics during union organizing campaigns, Cornell University Professor Kate Bronfenbrenner studied a representative sample of NLRB elections taking place from 1999 through 2003. Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Economic Policy Institute (2009). She found that employers threatened to close the facility in 57 percent of those elections and discharged union activists in 34 percent. *Id.* at 10. In the vast majority of campaigns in which employees were discharged in violation of Section 8(a)(3), the workers were not reinstated prior to the Board election. *Id.* Bronfenbrenner also found that employers disciplined or harassed employees in 41 percent of elections, threatened to cut wages and benefits in 47 percent, and threatened workers in one-on-one meetings with supervisors in 54 percent. *Id.* at 10-11. Employees were interrogated about union activity in fully 64 percent of Board election campaigns. *Id.* at 10.

Bronfenbrenner found that such tactics have a significant impact on election results. Specifically, unremedied discharges of union activists reduce the rate of union victories by 25

percentage points. Threats of plant closure reduce union victory rates by eight percentage points.

Other studies have found similarly startling rates of employer unfair labor practices during Board elections. The University of Illinois examined 62 union organizing campaigns in Chicago and found that employees were discharged for union activities in 30 percent of the campaigns, and that employers threatened to close or relocate all or part of the business in 49 percent of campaigns. Chirag Mehta & Nik Theodore, *Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns*, Center for Urban Economic Development, University of Illinois at Chicago, at 5 (2005). Yet another study applied a "conservative methodology" and found that from 2001 through 2007, pro-union workers were illegally fired in 26 percent of NLRB election campaigns. John Schmitt & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951-2007*, Center for Economic and Policy Research, at 3 (2009). Assuming conservatively that 10 percent of pro-union workers are union activists and that individuals discriminatorily discharged during organizing drives tend to be activists, the study estimated that from 2001 through 2007, 19 percent of all union activist employees were unlawfully terminated. *Id.* at 12.

In sum, there is an epidemic of unlawful employer activity during Board elections, and the Board's remedial authority is grossly insufficient to protect employee rights. Moreover, the work of University of Oregon Professor Gordon Lafer suggests that coercion is attributable to the structure of Board elections. In two in-depth reports, Lafer compared the characteristics of NLRB elections to widely-accepted standards for political elections. Gordon Lafer, *Free and Fair? How Labor Law Fails U.S. Democratic Election Standards*, American Rights at Work (2005) and Gordon Lafer, *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections*, American Rights at Work (2007). Lafer found that even in the

abstract, the rules and principles governing Board elections frequently do not meet fundamental electoral standards.

In particular, the parties to NLRB elections lack equal opportunities to present their messages to employees. While an employer can force employees to hear its message at any time and through various media and formats in the workplace, unions have virtually no access to employees at work, and employees themselves are limited as to when they can communicate with coworkers about the election. The assumption of labor law, in stark contrast to the principles governing political elections, is that "as long as pro-union employees are not *completely* prohibited from communicating their message to potential voters, the process is fair." *Lafer, Free & Fair?*, at 16.

The deficiencies of NLRB elections are even more apparent when viewed in light of the common tactics, both lawful and unlawful, leveraged by employers to defeat unionization efforts. Lafer's second report lays bare a "biographical sketch" of many NLRB elections characterized by egregious coercion that undoubtedly undermines employees' ability to make a free and untainted choice. Lafer, *Neither Free Nor Fair*, at 9-37.

While recent studies have demonstrated the failure of the Board election process to effectuate the principle of employee free choice, other research has found that majority signup campaigns result in less coercion and an environment more conducive to employee decisionmaking. One comprehensive study found that employers discharge pro-union employees in only 8.7 percent of organizing campaigns conducted under majority signup agreements in comparison to 24 to 32 percent of private sector organizing campaigns overall. Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 49 (2001). A more recent report studied public

sector majority signup campaigns in four states where public employers are required to recognize unions for which a majority of employees have signed authorization cards. Robert Bruno, et al., *Majority Authorization and Union Organizing in the Public Sector: A Four-State Perspective*, University of Illinois School of Labor and Employment Relations, Department of Labor Studies and Employment Relations, Rutgers University, Extension Division, School of Industrial and Labor Relations, Cornell University, University of Oregon Labor Education and Research Center (2009). The report reviewed 1,359 majority signup campaigns conducted between 2003 and 2009 in New York, Illinois, New Jersey, and Oregon, and found not even a single confirmed incident of union misconduct. *Id.* at 2.

In light of these results, it should not be surprising that in a recent scientific survey of employees from worksites at which either majority signup or NLRB election campaigns took place, the workers involved in majority signup campaigns reported much less coercion. American Rights at Work, *Fact Over Fiction: Opposition to Card Check Doesn't Add Up*. Specifically, workers reported feeling management coercion in only 23 percent of majority signup campaigns versus 46 percent of NLRB elections. Likewise, only 17 percent reported experiencing union coercion in majority signup campaigns versus 22 percent in NLRB elections.

In short, the Board's past statements that elections are superior to majority signup are not supported by evidence. In fact, the opposite is true. While elections will remain the statutorily-mandated method for certifying unions unless and until Congress amends the Act, the Board is not justified in further limiting the role of majority signup or questioning its reliability. *Dana* rested on a faulty premise, and if it is retained at all, it should not be extended to cover additional circumstances, such as voluntary recognition pursuant to "after-acquired" locations provisions.

### C. *Dana* Is Inconsistent With the Fundamental Policy of the Act Favoring Collectively Bargained Methods for Resolving Representational Disputes Over Board Intervention

As noted above, the preamble to the NLRA sets out the two purposes that the Act is intended to achieve: (1) to encourage collective bargaining as a means of resolving labor disputes and (2) to protect workers' freedom to choose their representatives. *Dana* ignores the first and undermines the second.

This is particularly true in those cases in which the parties have agreed to a procedure, as part of a multilocation collective bargaining agreement, to permit employees in new facilities to choose whether they want to become part of that unit. The Board upheld the legality of this sort of "after-acquired" stores clause in *Kroger Co.*, 219 NLRB 388 (1975) more than 35 years ago and on hundreds of occasions since.

These "after-acquired" clauses do not, moreover, simply drop out of the sky: they are the result of collective bargaining between the parties and represent precisely the sort of collectively bargained resolution of labor disputes, with each side compromising its position to achieve agreement, that the Act was designed to encourage, not hinder. The Regional Director correctly refused to apply *Dana* to Rite Aid's compliance with the "after-acquired" clause of its agreement with the Amici.

*Dana* rests on the premise that Board-conducted elections are always superior to other means of determining whether employees wish union representation. That is, as noted above, at odds with the empirical evidence and contrary to the actual history of the Act. Based on a policy conclusion lacking both statutory and real-world support, *Dana* undermines the Act's undeniable policy favoring private resolution of labor disputes.

As bad as that is in the case of freestanding agreements for voluntary recognition, it is even worse in the case of *Kroger* agreements. *Kroger* agreements are precisely what the authors

of the Wagner Act intended to bring about: an agreement that provides a method for determining the scope of the parties' contractual unit as new locations are opened that (1) respects workers' right to choose their representative and (2) does not require either strikes or governmental intervention. Applying *Dana* to them would do more than merely undermine collective bargaining; it would attack it directly.

### D. Applying *Dana* to *Kroger* Agreements Would Be Antagonistic to the Basic Premises Necessary For Multiemployer and Multilocation Bargaining

Applying *Dana* to *Kroger* agreements would also do irreparable damage to another settled area of Board law by making multilocation and multiemployer units presumptively invalid, able to be fragmented by a decertification petition at a single location. The Regional Director properly refused to apply *Dana* to just such a petition in *Rite Aid Store #6473*, Case No. 31-RD-1578, on which the Board initially granted review.

The case law in this area is so well established that it should not be necessary to repeat it. The only appropriate unit in a decertification election is the unit as it exists at the time of the decertification petition. *See, e.g.*, *W. T. Grant Co.*, 179 NLRB 670 (1969) and cases cited therein at note 2.

In some cases the existing unit will be the one that the NLRB certified. *See, e.g.*, *Campbell Soup*, 111 NLRB 234 (1955). In many other cases, however, it will be one that the parties created, either by merging what were originally separate units at different locations into a single unit, *see, e.g.*, *Westinghouse Electrical Corp.*, 238 NLRB 763 (1978), or by entering into bargaining on a multiemployer basis. *See, e.g.*, *Mo's West*, 283 NLRB 130 (1990).

The scope of the unit may change, moreover, during the term of a collective bargaining agreement, as the parties add additional facilities to an existing multifacility unit. The Board

addressed that scenario in the *General Electric* case:

> The unit appropriate in a decertification election must be coextensive with either the unit previously certified or the one recognized in the existing contract unit. The issue before us is whether the pattern of bargaining between the Union and the Employer has brought about an effective merger of the individually certified units into a multiplant contractual unit thereby precluding the processing of the instant decertification petition. We are satisfied that such a merger has taken place. . . . With regard to contractual coverage the national agreements not only apply to the currently represented employees but also provide for immediate automatic coverage of newly organized locations. . . .
>
> [T]he record establishes a controlling history of multiplant bargaining resulting in the establishment of a single multiplant unit embracing all of those plants of the Employer in which the Union has been recognized as the exclusive bargaining agent and which are covered by the national agreements. We shall therefore dismiss the petition which requests an election in a single-plant unit.

180 NLRB 1094, 1095 (1970) (footnotes omitted).

That is, in fact, the normal mode for bargaining in the retail grocery industry, in which bargaining is not – and, in practical terms, could not be – conducted on a store-by-store basis. That is also why bargaining parties in that industry enter into *Kroger* agreements, since they allow the parties to maintain the integrity of multilocation units, notwithstanding the constant closing and opening of stores within a region or district, by allowing addition of new sites on a showing of majority support for union representation.

The Amici's agreement with Rite Aid contains just such a clause, as do their agreements with the major employers in the Southern California grocery industry. If *Dana* were allowed to override such clauses then they would have to treat these new stores as isolated units, to be added to the existing multilocation/multiunion agreements only through the time-consuming and contentious procedures of a Board election, followed by bargaining on a store-by-store basis to

extend the existing agreement to these new locations.[1] It is hard to overstate the damage that applying *Dana* to *Kroger* agreements would do to existing, successful collective bargaining relationships and the rights of the workers covered by those collective bargaining agreements.

The same is true, but on a different scale, when we apply *Dana* to freestanding voluntary recognition agreements limited to a single employer and a single facility: employees' desires for union representation are thwarted because of that decision's knee-jerk hostility toward the parties' private efforts to resolve a dispute over representational issues. The result serves no one's interests.

The majority in *Dana* misunderstood the NLRB's place in the universe. The NLRA could never have worked for any period of time if the NLRB had insisted that all labor law disputes must pass through it for its review; on the contrary, the drafters of the Wagner Act created a system that depends on the initiative of private parties to resolve labor disputes, while the Congress that passed the Taft-Hartley amendments rejected a proposal that would have given the Board jurisdiction over every potential violation of a collective bargaining agreement as an unfair labor practice. *NLRB v. C & C Plywood Corp*., 385 US 421, 426-27 (1967). The Board's attempt to thrust itself into the middle of disputes governed by lawful private agreements is at odds with the basic premises of the Act.

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[1] And while *Dana* should be reversed *in toto*, even the majority's opinion would not support extension of its new and burdensome requirements to *Kroger* agreements. On the contrary, the *Dana* majority assumed that the doctrine would apply only before the parties "engage[d] in negotiations for a first collective-bargaining agreement." *Dana Corp.*, 351 NLRB 434, 441 (2007).

## IV. CONCLUSION

For the foregoing reasons, the Board should overrule *Dana* in full and dismiss the decertification petition. In addition, the Board should make clear that the rule announced in *Dana* was never meant to apply when the parties to an existing collective bargaining agreement have negotiated an "after-acquired" locations provision, as described in *Kroger Co.*, 219 NLRB 388 (1975).

DATED: October 31, 2010

Respectfully submitted,


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## DECLARATION OF SERVICE BY U.S. MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 3699 Wilshire Boulevard, Suite 1200, Los Angeles, California 90010.

On October 31, 2010, I served the following document described as:

**BRIEF OF *AMICI CURIAE* UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AND UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCALS 135, 324, 770, 1167, 1428 AND 1442**

I served the above document by depositing a copy in a sealed envelope with postage paid, in a deposit box regularly maintained by the United States Postal Service in Los Angeles, California, addressed as follows:

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and was executed by me in Los Angeles, California on October 31, 2010.

s/ Michael D. Weiner