**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| **LAMONS GASKET COMPANY,**<br>**A DIVISION OF TRIMAS**<br>**CORPORATION**<br>**Employer** | ) | |
| **and** | ) | |
| **MICHAEL E. LOPEZ**<br>**Petitioner** | ) | **Case 16-RD-1597** |
| **and** | ) | |
| **UNITED STEEL, PAPER AND**<br>**FORESTRY, RUBBER,**<br>**MANUFACTURING, ENERGY, ALLIED**<br>**INDUSTRIAL AND SERVICE**<br>**WORKERS INTERNATIONAL UNION**<br>**Union** | ) | |

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# BRIEF OF *AMICUS CURIAE*
# CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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## I. INTRODUCTION

*Amicus curiae* the Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief in support of the holding in *Dana Corp.*, 351 NLRB 434 (2007). In *Dana* the National Labor Relations Board retained but modified the recognition bar doctrine and held that employees have the limited right to file a decertification petition after an employer's voluntary recognition of a union based on authorization cards. The *Dana* decision produced a well-reasoned and balanced prophylactic rule that provides an essential "check" for the increasing use of voluntary recognition in lieu of traditional NLRB-supervised elections. The *Dana* rule simultaneously reaffirms the universally recognized position that a secret-ballot election is not only the most accurate but the preferred way of determining employees' support for a union.

Pursuant to the Notice and Invitation to File Briefs, this Brief shall address each of the issues posed (in no particular order), including:

(1) What has been the 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?

*Rite Aid Store #6743/Lamons Gasket*, Notice and Invitation to File Briefs (Aug. 31, 2010).

## II. INTEREST OF THE AMICUS

The Chamber of Commerce of the United States of America is the world's largest business federation, representing approximately 300,000 direct members with an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. An important function of the Chamber is to represent the interests of its members in deciding cases addressing issues of widespread concern to the American business community and thus of importance to the economy of our country. The Chamber has participated as *amicus curiae* in dozens of cases before the National Labor Relations Board.

## III. HISTORY OF *DANA* LITIGATION

The voluntary recognition bar doctrine was first developed by the NLRB in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). In *Keller Plastics*, an unfair labor practice charge was filed alleging the employer unlawfully executed a collective bargaining agreement with a union that had previously obtained majority status but had lost such status prior to the execution of the collective bargaining agreement. *Id.* The Board held that an employer's voluntary recognition of a union based upon the union's showing of majority support barred the filing of a decertification petition for a reasonable period of time thereafter, even though it was undisputed that the union had lost its majority support.[1] *Id.* at 587. In announcing its decision, the Board reasoned that guaranteeing a "reasonable period of time" for the parties to negotiate before a

[1] *Keller Plastics* was decided in the context of an unfair labor practice. Later that same year, the Board extended the same principles to representation cases, holding that the recognition bar would prevent an election petition from being filed for a reasonable time after the grant of voluntary recognition. *See Sound Contractors*, 162 NLRB 364 (1966).

decertification petition may be filed would promote labor-relations stability. *Id.*; *see also MGM Grand Hotel*, 329 NLRB 464, 466 (1999) ("It is a long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations."); *Baseball Club of Seattle, LP, d/b/a Seattle Mariners*, 335 NLRB 563, 564 (2001). While the *Keller Plastics* decision might arguably have encouraged labor peace, it certainly had the potential to deny employees freedom of choice in some instances.

Since *Keller Plastics*, the recognition bar principle continued to be ever widened at the expense of employee rights.[2] Although *Keller Plastics* requires only a "reasonable period of time" prior to the filing of a decertification petition, the NLRB has essentially interpreted that provision to require at least a one year period of time—placing the recognition bar on the same level as the more reliable certification bar. *See MGM Grand*, 329 NLRB at 466. Such decision essentially provided voluntary recognition procedures, which lack the inherent procedural integrity of a secret ballot election, with the same protections as an election and certification. Soon after *MGM Grand*, the Board went further and ruled that the recognition bar would apply even if, at the time of the card check procedures, a substantial minority of the employees had demonstrated they did not want to be represented by the union. *See Seattle Mariners*, 335 NLRB at 564. Accordingly, for years the recognition bar continued to be used in ever broadening circumstances to prevent employees from exercising their rights to a secret ballot election to determine union representation.

[2] For further explanation and examples of the continuously widened recognition bar at the expense of employee feedback, see the *Brief of Amici Curiae The Chamber of Commerce of the United States of America and the Council on Labor Law Equality in Support of Petitioners*, *Dana*, Case 8-RD-1976, and *Metaldyne*, Cases 6-RD-1518 and 6-RD-1519 (July 15, 2004).

During the years prior to the *Dana* decision, the use of voluntary recognition expanded greatly, as unions more and more utilized such "top-down" organizing as neutrality agreements with card check provisions to attempt to organize more employees. *See Dana*, 351 NLRB at 13; James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 832 (2005); Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 43 (2001). Conversely, the use of NLRB-supervised elections has declined significantly. *See* National Labor Relations Board, 72ND ANNUAL REPORT (FY 2007) and National Labor Relations Board, 62ND ANNUAL REPORT (FY 1997) (showing that only 1,905 conclusive representation elections were conducted during FY 2007, a decline of 45% from the 3,480 conclusive representation elections conducted ten years earlier in FY 1997).

The Board re-examined the *Keller Plastics* decision in *Dana*. In granting the request for review in *Dana*, the Board recognized that in the forty years since the *Keller Plastics* decision, the organizing landscape had changed dramatically, primarily through the increasing usage of neutrality/card check agreements, necessitating a review of the voluntary recognition bar in light of present day practices. Specifically and importantly, the Board stated its belief that "the increased usage of recognition agreements, the varying contexts in which a recognition agreement can be reached, the superiority of Board-supervised secret ballot elections, and the importance of Section 7 rights of employees, are all factors which warrant a critical look at the issues raised herein." *See Dana*, 351 NLRB at 437.

In the *Dana* decision, the Board carefully modified but maintained the voluntary recognition bar principles. *Id*. at 438. The Board created a nuanced, balanced, prophylactic rule that provides for a limited 45 day window following voluntary recognition in which employees

may file a decertification petition. *Id.* at 441. If no petition is filed during this 45 day period, then the voluntary recognition bar begins, barring the filing of such petitions for a reasonable period of time. *Id.* However, if an employee files a petition supported by at least 30% of the employees during this 45 day period, then the Board will proceed with a secret ballot election to ascertain whether or not the union in fact has obtained majority status among the employees. *Id.* That way free choice is fully respected while both time to bargain and labor peace are maintained.

The *Dana* decision was announced on September 29, 2007. On August 27, 2010, the NLRB granted review in the above-captioned case to consider the appropriateness of continuing the voluntary recognition procedures delineated in *Dana*. *Rite Aid Store #6743/Lamons Gasket Company*, 355 NLRB No. 157 (Aug. 27, 2010).[3] The Chamber submits this *amicus* brief in support of the *Dana* decision, which it believes overall to be a well-reasoned, delicately-crafted decision designed to reflect the changing landscape of labor relations, promote industrial stability and preserve employees' rights under Section 7.[4]

## IV. *DANA*'S MODIFIED RECOGNITION BAR DOCTRINE IS SOUND BOARD POLICY AND MUST BE PRESERVED.

The Board's decision in *Dana* should be upheld as it provides a valuable check on the voluntary recognition system.[5] First, secret ballot elections have always been the preferred

[3] *Rite Aid* voluntary withdrew its request for review on September 17, 2010, leaving *Lamons Gasket* as the lead case.

[4] To the extent the Board has requested analysis on the appropriate scope of the *Dana* rule regarding after-acquired clauses in *Kroger Co.*, 219 NLRB 388 (1975) or mergers such as the one presented in *Green-Wood Cemetery*, 280 NLRB 1359 (1986), the Chamber believes the analysis in Section IV applies equally strongly in all such settings. Accordingly, the Chamber believes the *Dana* principles are equally applicable in cases of after-acquired clauses and mergers.

[5] While certainly not preferred, it is possible that some companies, either by choice or through pressure from external sources, may have supported voluntary recognition in a variety of circumstances. However, even such companies have supported the idea that a limited right to a decertification election is appropriate under certain circumstances. For example, Metaldyne, one of the employers in the original *Dana* case, generally supported voluntary recognition but acknowledged that modifications to the voluntary recognition bar, including NLRB supervised elections, may also be reasonable in some circumstances.

method for determining employee free choice of whether or not to be represented by a union. *Dana* simply extends these historical secret ballot principles to situations where there may be legitimate reason to doubt that employees desire to be represented by a voluntarily recognized union. Second, the use of the *Dana* procedures is a valuable safeguard to ensure the integrity of the entire recognition process overseen by the Board. Third, although *Dana* did modify the recognition bar policy announced in *Keller Plastics*, it modified the rule only to the extent needed to adjust to present day use of the neutrality/card check agreement, thus updating traditional principals to adjust to the modern era. Fourth and finally, the *Dana* decision has had no adverse effect on collective bargaining.

### A. Secret Ballot Elections are an Integral Part of Labor-Management Relations and Provide Important Checks to the Voluntary Recognition System.

The NLRB has two principal functions in its statutory assignment:

> (1) to determine and implement, through secret-ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union; and (2) to prevent and remedy unlawful acts, called unfair labor practices, by either employers or unions or both.

National Labor Relations Board, 74TH ANNUAL REPORT (FY 2009) (emphasis added). This is consistent with the Board's statement that it is "an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative." *See* National Labor Relations Board, News Release, *Boston Labor Law Conference Examines Changes at NLRB, DOL* (October 15, 2010). To this end, both the NLRB and the courts have clearly and repeatedly expressed a strong preference for secret ballot elections.

The U.S. Supreme Court has emphasized that "secret ballot elections are generally the most satisfactory, indeed the preferred method of ascertaining whether a union has majority

support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969) (emphasis added). The Supreme Court further explained:

> The unreliability of the cards is not dependent on the possible use of threats . . . It is inherent as we have noted, in the absence of secrecy and the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees.

*Id*. at n.20. Accordingly, the Supreme Court has found that the "privacy and independence of the voting booth" is a "safeguard[] of voluntary choice." *Brooks v. NLRB*, 348 U.S. 96, 99-100 (1954).

The NLRB has similarly affirmed that secret ballot elections are the preferred method of certifying a union as the employees' authorized bargaining representative. *See e.g.*, *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 723 (2001) ("We emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions."); *Underground Services Alert of Southern California*, 315 NLRB 958, 960-61 (1994) ("One of the attributes of Board-conducted elections that make them a more reliable indicator of employee choice is that they provide, through the objection and challenge procedures, an orderly and fair method for presentation and reasoned resolution of questions concerning the fairness of the process and whether particular individuals are eligible to have their preferences on union representation counted."); *W. A. Krueger Co.*, 299 NLRB 914 (1990) (Member Oviatt) ("The election, typically, also is a more reliable indicator of employee wishes because employees have time to consider their options, to ascertain critical facts, and to hear and discuss their own and competing views."); *EMR Photoelectric*, 273 NLRB 256, 257 (1984) ("This question must be answered in light of the facts of each case and with due regard for the principle that generally a secret-ballot Board-conducted election is the preferred method of ascertaining employee choice.").

Over the past 10 years at least, unions increasingly have tried to circumvent elections through card check agreements. However, even unions have admitted that "Board elections are the preferred means of establishing whether a union has the support of a majority of the employees in a bargaining unit." *See Levitz Furniture*, 333 NLRB at 719, 725. Accordingly, the NLRB, courts, employers and unions all are on record that secret ballot elections are the preferred method of designating the bargaining relationships.

In contrast, voluntary recognition does not have the inherent reliability of a secret ballot election. Without a doubt, there are numerous reasons why employers may enter into a voluntary recognition agreement. In many situations, unions pressure or even coerce an employer to enter into such an agreement. It is possible in special circumstances that an employer may wish to enter into a cooperative recognition relationship with the union (e.g., perhaps where that union already represents many of the employer's workers). Regardless of the reasons for entering into such agreements, it is indisputable that neutrality/card check agreements lack the "laboratory conditions" of an NLRB election, including, but not limited to:

- Presence of a neutral NLRB official to conduct the election;
- Presence of employer and union "observers";
- An anonymous ballot;
- The opportunity to vote privately without informing others of one's intentions;
- A voting environment free of coercion or other undue influences; and
- True proof of majority support (or lack of support) of a union at a given point in time.

In contrast, the process of collecting cards for card check procedures is not guaranteed the same type of safety and "laboratory conditions," or even the verification that a majority of employees support a union at any given point in time. As the use of voluntary recognition

agreements has become increasingly widespread, the misuse of the voluntary recognition procedures in card checks in contravention of employee free choice has become an ever larger concern.[6]

The *Dana* decision furthered the long-standing policy preference in favor of secret ballot elections because of the protections built into the election process. Accordingly, it created an appropriate "balance" to the voluntary recognition process by incorporating a limited right to an election under precisely described circumstances. The *Dana* safeguards help ensure that in voluntary recognition cases where they may be a reason to doubt the union enjoys majority support, the employees have the opportunity to vote in a secret ballot election free from coercion and undue influence.

### B. The Use of *Dana* Petitions In the Last Three Years Confirms that it Has Furthered Employee Free Choice and Acts as an Important Safeguard.

In her concurrence in the Order Granting Review, Chairman Liebman argued that the low number of *Dana* elections actually taking place must somehow mean that the *Dana* decision "did not serve any clear purpose." 355 NLRB No. 157, n.5 (Liebman, Chairman, concurring). Chairman Liebman noted that of the 1,111 cases in which *Dana* notices had been requested, the recognized union was rejected by employees on 15 occasions. *Id.* Accordingly, she posited, in "99 percent of the total cases . . . it is arguable that *Dana* did not serve any clear purpose." *Id.*

Chairman Liebman's argument, however, narrowly focuses only on those instances where the voluntarily recognized union was not rejected by the employees rather than on the number of instances in which the union was rejected as a percentage of elections held, a more

[6] One of the ways in which such concerns could be addressed would be to require a Board-supervised election after each grant of voluntary recognition. The Board could develop special procedures to ensure an expedited election within days after each voluntary recognition. Such procedures also would be a prophylactic practice and would confirm whether voluntary recognition is appropriate under the circumstances by ensuring that at such time the union in fact enjoys the support of a majority of the employees in the proposed bargaining unit.

meaningful number. Importantly, in the 54 elections held, the employees rejected the recognized union on 15 occasions (i.e., approximately 28% of the *Dana* elections held resulted in the employees rejecting the recognized union). In two of the fifteen elections, the employees voted to certify a rival union and not the union voluntary recognized by the employer. On these two occasions, the *Dana* election ensured the employees were represented by the union of their choice.

For these fifteen cases, imposing a recognition bar would have required the employees to join a union that did not enjoy majority support, thereby undermining any reliability of the card check and voluntary recognition procedures. From the perspective of employees and employers, these fifteen cases were critical in ensuring that the appropriate bargaining unit (or none at all) was recognized and to ensure that the voluntary recognition process includes adequate safeguards—which was the very purpose of *Dana*. *See, e.g.*, *Brooks v. NLRB*, 348 U.S. 96, 99-100 (1954) (finding the "privacy and independence of the voting booth" is a "safeguard[] of voluntary choice").

The proper emphasis, therefore, should not be on the cases where the employers' voluntary recognition was confirmed, but on the cases where the employers' grant of voluntary recognition would have violated basic tenets of the NLRA: promoting stable labor-management relations between an employer and a union but only where a union is the choice of a majority of employees in a proper bargaining unit. It cannot be, as some unions and other have suggested, that an election is preferred in the certification process but "serves no purpose" in the voluntary recognition process, particularly when the available data firmly and undeniably show that *Dana* serves the fundamental purpose of the NLRA.

*Dana* has not resulted in a torrent of post-voluntary recognition decertification petitions. However, it has gone a significant way towards ensuring the integrity of the recognition and bargaining process. That integrity has its own value.

There are numerous other labor law procedures that are not often used but are nonetheless valuable, even critical.[7] For example, in the first two years since the *Dana* decision, there have been only seven cases seeking a 10(l) injunction against certain forms of union misconduct, principally involving "hot cargo" clauses, "secondary boycotts" and "recognitional picketing." *See* National Labor Relations Board, 74TH ANNUAL REPORT (FY 2009) and National Labor Relations Board, 73RD ANNUAL REPORT (FY 2008). However, despite the paucity of filing of 10(l) injunctions, no one is arguing that such procedures do not serve a valuable role or should be eliminated. Prohibiting hot cargo clauses, secondary boycotts and recognitional picketing—and maintaining an effective mechanism to stop them—is critical to maintaining the mandates of the National Labor Relations Act. No one has suggested that 10(1) injunctions should be eliminated from the NLRA because of low usage. However, these are the very same arguments being used to urge the reversal of the *Dana* procedures.

By unduly focusing upon the low occurrence of *Dana* elections, the NLRB risks sacrificing the integrity of the Board's recognition process in favor of some undefined and largely imaginary administrative "burden" or "cost." Indeed, there is no evidence that the simple issuance of a *Dana* notice has any meaningful impact on the administrative burden of the NLRB. Moreover, the number of actual elections held during the relevant time period is 54—less than 2% of the total 3,550 conclusive representation elections conducted by the NLRB from October

[7] Even outside of the labor law context there are numerous examples of important procedural safeguards that may be rarely used, but insure the integrity of an important principle. They contradict the argument that the high number of grants of voluntary recognition that are approved by employees belies the need for any method to voice disapproval. For example, impeachment and election recount procedures of elected officials and judges might not often be used and even more rarely successful, but serve as important checks in the political process.

1, 2007 through September 30, 2009. *See* National Labor Relations Board, 74TH ANNUAL REPORT (FY 2009) and National Labor Relations Board, 73RD ANNUAL REPORT (FY 2008). Surely the additional 54 elections over the course of three years cannot be considered a large administrative burden or cost—particularly in light of the critical tangible and intangible benefits that thereby accrue to employee free choice.

It is inapposite, therefore to compare *Dana* elections to the 1947 Taft-Hartley Act provisions regarding union security agreements. Under those provisions, a referendum was required in every situation where a union wanted to negotiate a union-security clause in a collective bargaining agreement, an extremely common occurrence. This provision was modified four years later to eliminate the mandatory referendum and to provide a method in which employees could seek a Board election rescinding the union's authority with respect to an existing union-security clause (the so-called "deauthorization procedure"). *See* 29 U.S.C. § 159(e).

The optional *Dana* procedures are markedly different in both form and function from the mandatory referendum provisions enacted in 1947. If anything, the *Dana* procedures are more akin to the current deauthorization procedure permitting a Board election in cases where the employees seek to rescind or revoke the union's authority. In the NLRB 2008 and 2009 fiscal years (i.e., October 1, 2007 through September 30, 2009), a total of 188 petitions were filed seeking elections to vote on deauthorizing existing union-security agreements. *See* National Labor Relations Board, 74TH ANNUAL REPORT (FY 2009) and National Labor Relations Board, 73RD ANNUAL REPORT (FY 2008). In contrast, during that same time period approximately 77 petitions were filed under *Dana*. *See* National Labor Relations Board, POST *DANA CORP.* CASE PROCESSING. Since the Section 9(e) procedure for an election regarding the union's union-

security clause is not a significant administrative burden, it can hardly be argued that the parallel provisions provided for in *Dana,* which resulted in fewer petitions being filed, constitute such a burden.

The benefits of *Dana* are clear and demonstrated. Voluntary recognition procedures are inherently less reliable than secret ballot elections. Without the *Dana* procedures, the voluntary recognition system risks whatever integrity it arguably has by requiring (even for a limited period of time) employers to bargain with a union that no longer enjoys majority support and by sacrificing the preference of employees as expressed through a secret ballot election.

### C. The *Dana* Decision Responds to Present Day Labor Relationships, and There is No Objective Evidence to the Contrary.

The *Dana* procedures were not designed to undermine or eliminate the voluntary recognition bar. Indeed, in the original *Dana* decision the petitioners and several *amici*, including the Chamber, argued for the elimination of the recognition bar but such position was rejected by the Board. Nevertheless, *Dana* provided an important procedural device designed to ensure that all three affected parties—employers, unions and employees—may agree that at the time of recognition the union should appropriately be recognized as the bargaining representative.

The decision modified the recognition bar doctrine to permit the processing of a decertification petition, supported by at least 30% of the employees and filed within 45 days after the posting of the prescribed notice. *Dana* did not completely overrule *Keller Plastics* nor did it disregard the history of voluntary recognition cases (even though a good argument could be made that circumstances had changed so much that it could have).

The General Counsel of the NLRB argued in *Dana* that the recognition bar needed to generally be preserved. However, the General Counsel elaborated that "[c]ard check recognition

therefore fundamentally differs from certification [by secret ballot election]." *Amicus* Brief of the General Counsel at p.9, *Dana*, Case 8-RD-1976, and *Metaldyne*, Cases 6-RD-1518 and 6-RD-1519 (dated July 14, 2004). Specifically,

> Authorization cards are typically collected during the organizing campaign over a period of time. Employee sentiment is often volatile over the course of the campaign. Moreover, peer pressure and other external influences may result in signatures that do not really reflect a particular employee's wishes.
>
> In addition, in contrast to certifications, where the election date is certain, in the card check context employees generally will not know when majority status is achieved or when recognition will be granted. Therefore, if during the card collection period individuals change their minds as to their desire for representation, they may not know when they must revoke their cards in order to ensure that their true intention is not misrepresented by a count that includes them.
>
> All of these circumstances make cards a less reliable indicator of employee choice than a certification election. It is therefore appropriate for the Board to be more vigilant in deciding whether the circumstances warrant applying the bar against challenges to the employees' expression of support for representation.

*Id*. at pp.9-10. Accordingly, the General Counsel urged the Board to modify the recognition bar to give employees a limited but necessary opportunity to file an adequately supported decertification petition within a limited time period after the grant of voluntary recognition. *Id*. at pp.10-11. The Board ended up adopting a rule similar to that advocated by the General Counsel.

The Board in *Dana* was confronted with a forty year old precedent that simply no longer reflected the realities of today's labor law relationships. In the 1960s when *Keller Plastics* was decided, voluntary recognition was relatively rare by today's standards. Indeed, *Keller Plastics* was decided ten years before the first reported major "neutrality agreement"—many of which now incorporate card check agreements as well. *See* Auto Workers Approve General Motors Contract, DAILY LAB. REP. (BNA), at A-13 (Dec. 8, 1976).

In the years prior to the *Dana* decision, neutrality/card check agreements had become exponentially more popular. *See Dana*, 351 NLRB at 13; James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 832 (2005); Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 43 (2001). For example, in just the five years from 1998 to 2003, more than 80% of the approximately three million new members organized by the AFL-CIO were organized by card check procedures. *See* Brudney, 90 Iowa L. Rev. at 828.

While the use of neutrality/card check agreements changed significantly from 1966 to 2007 when *Dana* was decided, thereby justifying the change that occurred in *Dana*, there has not been any comparable change in organizing tactics during the three years since.[8] While *Dana* was based upon a clear and documented change in the use of neutrality/card check agreements, a reversal of *Dana* at this early date cannot possibly be based upon any similar documented changing conditions in the market. Certainly, there is no indication that the use of voluntary recognition procedures, including neutrality/card check agreements, has decreased since *Dana* nor is there any other indication of rapidly changing circumstances necessitating a drastic change in labor policy.

A significant change in the law now (i.e., reversal of the *Dana* decision after only three years) does not foster labor-relations stability but causes volatility by limiting the ability of the

[8] While the Board has requested such studies as part of its Invitation and Notice to Follow Briefs, given the limited period of time from the *Dana* decision to the date of this brief, there has not been sufficient time for any meaningful objective studies to be conducted regarding the impact of the *Dana* procedures. Accordingly, the NLRB should not view the lack of such studies as suggesting that *Dana* has had no impact. Rather, the lack of such studies can only be attributed to the short amount of time that has elapsed since the *Dana* decision.

parties' to rely on current Board precedent.[9] The Courts have likewise recognized that contradictory and rapidly changing positions by the NLRB due only to changes in Board membership diminish the reliability of such decisions. "[W]hen the NLRB 'fails to distinguish contradictory decisions rendered in similar cases,' it forfeits 'the deference we would otherwise show to its very considerable expertise in strictly labor matters.'" *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 37 (1st Cir.1989), *quoting Local 777, Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862, 871-72 (D.C.Cir.1978); *see also Blankenship and Assocs., Inc. v. N.L.R.B.*, 999 F.2d 248, 251 (7th Cir.1993) (noting that NLRB must explain why it is departing from its previous decisions).

Indeed, the *Dana* decision continues to promote industrial stability. First, there is no objective empirical evidence of any "hypothetical agreements that were never consummated because of the parties' concerns about *Dana.*"

Second, there is no objective evidence that the *Dana* decision has had any noticeable deterrence on voluntary recognition. As noted above, the use of neutrality/card check agreements to obtain voluntary recognition continues to rise. Voluntary recognition remains a popular option, as evidenced by the at least 1,156 instances of voluntary recognition from the date of the *Dana* to the filing of this *amicus curiae* brief.[10] *See* National Labor Relations Board, POST *DANA CORP.* CASE PROCESSING.

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[9] While the Chamber strongly disagrees that the *Dana* decision should be reversed, to do so retroactively, as the Board appears to consider in its Notice and Invitation to File Briefs, would only further undermine the ability of employees, employers and unions to rely upon NLRB decisions as having any type of precedential effect. Employers, employees and unions alike have proceeded with the understanding that the *Dana* principles represent the Board's official policy on limited decertification post-voluntary recognition. Retroactively reversing *Dana* would further disrupt labor relations and serve no clear purpose. Accordingly, in the event the NLRB would reverse *Dana* (which the Chamber strenuously urges against), the NLRB should not apply such decision retroactively.

[10] In her concurrence in the Order Training Review, Chairman Liebman noted there were 1,111 cases in which a *Dana* notice was requested. 355 NLRB No. 157, n.5 (Liebman, Chairman, concurring). Since Chairman Liebman authored her concurrence, another 45 *Dana* petitions have been requested.

This is, of course, not to undermine the importance of *Dana*. As explained more fully above, the decertification procedures provided under *Dana* have, in fact, validated the voluntary recognition process on multiple occasions. This ensures that recognition permitted by the NLRB maintains some integrity.

Accordingly, there is simply no evidence that *Dana* has had any deleterious impact on voluntary recognition. The only effect has been to act as a prophylactic rule to ensure a modicum of reliability and integrity to increasingly frequently used voluntary recognition procedures. Since the factual predicate for the *Dana* rule has not changed in the last three years, it is difficult to imagine what administrative jurisprudential principle now justifies abandon or modifying the *Dana* rule.

### D. There has been No Adverse Impact on Collective Bargaining Under *Dana*.

Precisely because *Dana* petitions must be filed shortly after the grant of voluntary recognition, there is little impact on collective bargaining. *Dana*, by its very terms, is meant to provide a quick check on the voluntary recognition process and not to otherwise disrupt the collective bargaining process.

First, any alleged "delay" under *Dana* is minimal. A *Dana* decertification petition must be filed within 45 days after the posting of the required notice. For the majority of voluntary recognition relationships, any projected "delay" would be limited to approximately 45 days. Parties often must both make internal strategic and logistical determinations, including but not limited to what initial positions should be taken, prior to sitting down at the bargaining table. Therefore, the post-recognition time period can be useful to the parties for planning and initial discussions.

As for the timing of the election itself, the Board's most recent statistics indicate that initial elections were conducted, on average, 38 days from the filing of a petition. General

Counsel, National Labor Relations Board, SUMMARY OF OPERATIONS (Oct. 29, 2008). On average (and assuming the decertification petition is filed on the 45th day), the *Dana* election will take place less than 100 days after required posting. Since only approximately 54 Board elections have been held under *Dana*, only 54 potential first contracts have even been subject to any potential delay due to an election.[11]

Second, in contrast to the approximately 3-4 months it may take for the *Dana* election to be held, first contracts typically take many months to negotiate. Such negotiations are often prolonged for many reasons:

- The employees must determine who will now serve in leadership roles in the newly recognized union;

- Both parties must determine who will represent them at the bargaining table;

- Unions may have made far-reaching campaign promises to the employees that they must now attempt to make good on at the bargaining table;

- The union may need to learn the internal operational issues, procedures and costs impacting the employer and the effect of the same on the union's demands;

- If there is no pre-existing contract between the parties, each word in the contract must be negotiated, drafted, reviewed and approved by both sides (often dozens of pages); and

- The first contract will typically have long-lasting economic consequences for both the employer and union. Accordingly, both parties will require additional time to determine what impact the contract terms will have on both the present and future business of the employer.

The NLRB has recognized that due to the "special problems" inherent in initial bargaining sessions, bargaining for an initial contract can take much longer than the bargaining for a

[11] With regard to the other 31 petitions that have been filed as of August 18, 2010, and did not result in an election, 30 were either withdrawn or dismissed. Only one petition is blocked. *Rite Aid Store #6743/Lamons Gasket*, Notice and Invitation to File Briefs (Aug. 31, 2010). In other words, only one petition is currently experiencing any type of extraordinary delay in processing due to a blocking charge.

renewal contract. *See Lee Lumber*, 334 NLRB 399, 403, n.40, and Appx. B. (2001) (noting that according to the Federal Mediation and Conciliation Service, an initial contract in 1998 took on average 296 days from the date of certification to the conclusion of the collective bargaining agreement to complete. In 1999 an initial contract took, on average, 313 days to negotiate and in 2000 an initial contract required, on average, 347 days to negotiate). Therefore, *Dana* is well designed to both support employee free choice and not interfere with the parties' bargaining relationship.

Third, nothing in the *Dana* decision modifies the general principle of the recognition bar that an appropriately recognized union and employer must have a reasonable period of time to negotiate before any further decertification petition may be filed. Thus, the parties are still guaranteed a reasonable time to negotiate a first contract if no *Dana* petition is filed (as occurs in the majority of such occurrences) or if a *Dana* election confirms that the union maintains majority support.

For these three reasons, *Dana* has little or no negative impact on collective bargaining. If anything, *Dana* has a positive effect on the collective bargaining relationship by removing any doubt from the affected parties that the union enjoys the support of the majority of the employees.

## V. CONCLUSION

The preservation of the *Dana* decision serves to advance both of the underlying tenets of the NLRA: (1) it promotes employee free choice by ensuring employees have the opportunity to confirm or reject a voluntary recognition in a secret ballot election; and (2) it maintains industrial stability by allowing the procedures employers, unions and employees have come to rely upon to remain in place and by ensuring that only majority-based bargaining relationships are

maintained. *Dana* was not devised as a rejection of the voluntary recognition bar. Indeed, to date the voluntary recognition bar remains firmly in place. Rather, *Dana* represents a prophylactic rule designed to ensure and promote employee free choice in the face of a proliferation of neutrality/card check agreements that have been designed to expedite employee choice.

For all of the foregoing reasons, the Chamber urges the Board to adhere to the reasonable procedural safeguards announced in *Dana* to ensure the integrity of collective bargaining relationships while maintaining traditional standards of employee free choice.

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Respectfully submitted,

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I hereby certify that on November 1, 2010, I caused a true and accurate copy of the foregoing Brief of *Amicus Curiae* the Chamber of Commerce of the United States of America to be served by overnight delivery on the following:

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