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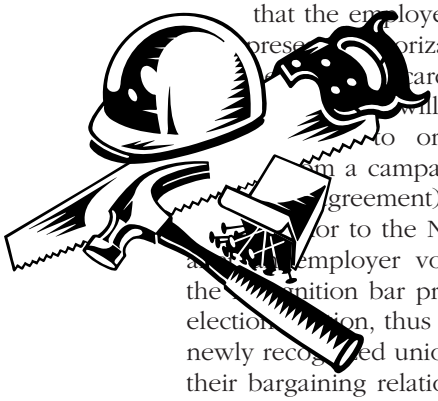
The National Labor Relations Board, Dana Corp., and Voluntary Recognition of Unions

In its Sept. 29 decision in Dana Corp.,[1] the National Labor Relations Board (NLRB) dramatically changed the legal landscape concerning an employer's voluntary recognition of a union.[2] In what the board itself described as a "significant departure from pre-existing law,"[3] it held that "an employer's voluntary recognition of a labor organization does not bar a decertification petition or a rival union's petition for an election that is filed within 45 days of notice to employees of the voluntary recognition."[4] This ruling modified more than 40 years of board precedent and has been labeled a "fundamental change" to the board's recognition bar and contract bar doctrines.

Generally, the formal election process under the National Labor Relations Act begins with the filing of an election petition with the National Labor Relations Board asking the board to conduct an official election to determine whether the union has sufficient support to represent a group of employees for collective bargaining purposes. Alternatively, when there is sufficient evidence of majority support for a union, the employer may voluntarily recognize the union without an election. Voluntary recognition has quickly become the most common way for unions to become recognized by employers, and it is increasingly preceded by "an agreement between the employer and the union that the employer will recognize the union if it presents authorization cards signed by a majority (a card check agreement) and/or that it will remain neutral in the union's efforts to organize employees, refraining from a campaign against the union (neutrality agreement)."[5]



Prior to the NLRB's decision in Dana Corp., after an employer voluntarily recognized a union, the recognition bar prevented anyone from filing an election petition, thus allowing the employer and the newly recognized union a "reasonable time" to begin their bargaining relationship without any outside interference. Furthermore, if during that reasonable time a collective bargaining agreement was reached, the contract bar interceded and prevented election petitions from being filed for three years or the length of the agreement, whichever is shorter. Holding that "immediate post-recognition imposition of an election bar does not give sufficient weight to the protection of the statutory rights of affected employees to exercise their choice on collective bargaining representation through the preferred method of an NLRB-certified election," the board's decision in Dana Corp. provides a 45-day window after a voluntary recognition to file an election petition before the recognition or contract bar forecloses that option.

The recognition bar was established by the board's decision in *Keller Plastics Eastern Inc.*[6] In that case, the NLRB was presented with claim that a voluntarily recognized union no longer had the support of a majority of the employees in the bargaining unit. The board answered the question of whether that loss of majority status should be allowed to disrupt the bargaining relationship that had been established. The board held that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."[7] The board reasoned that the parties must be able to rely on the continuing representative status of a lawfully recognized union for at least a reasonable period of time.

The Dana Corp. case involved two companies that each entered into separate neutrality and card check agreements with unions seeking to represent employees at their respective facilities. Upon a showing of majority support by the employees in the two units, the employers voluntarily recognized the unions. Soon after the voluntary recognitions, employees within each unit filed petitions seeking decertification of the unions. The petitions were dismissed as improper, because of the recognition bar. On appeal, the NLRB agreed to reconsider the recognition bar, citing the increased use of recognition agreements, the superiority of board-supervised secret ballot elections, and the importance of employee rights.[8] The board stated its belief "that changing conditions in the labor relations environment can sometimes warrant a renewed scrutiny of extant doctrine."

The majority opinion of the board in Dana Corp. rests on the premise that there is a need to strike an appropriate balance between two important, but often competing, interests included in the National Labor Relations Act: the protection of employees' freedom of choice and the promotion of stability in bargaining relationships. In modifying the recognition bar,

the board found that the current policy—immediate post-recognition imposition of an election bar—"fails to give adequate weight to the substantial differences between board elections and union authorization card solicitations as reliable indicators of employee free choice." Even while acknowledging the increasing favor that has been shown to voluntary recognition of unions through card check procedures, the board declared that "authorization cards are 'admittedly inferior to the election process,'" which is intended to provide a completely sterile environment in which employees can, through a secret ballot process, express their true opinions about union representation free from coercive influences.

The NLRB found elections superior to authorization cards, because cards may be signed out of a desire to be left alone or to conform, instead of any desire for union representation. In addition, cards collected over a series of weeks or months do not give a clear picture of an employee's preference at a single moment in time provided by an election. Elections, declared the board, provide greater protection for employees' right to free choice, and, even though elections conducted by the board may delay the proceedings, "it remains preferable to determine employee free choice by a method that can assure greater regularity, fairness, and certainty in the final outcome."

Finally, the majority responded to the dissenters' arguments that this decision would be a major setback to the practice of voluntary recognition. The board stated that it remains constant in its support for voluntary recognition and encourages the stability of collective bargaining by continuing to apply the recognition bar, albeit in a slightly modified form. The board noted that this new 45-day window "does not encourage, much less guarantee, the filing of a petition," and this modification "merely postpones the recognition bar" without abolishing it or destroying the benefits it conveys.

The vehement arguments made by the minority centered on two areas: the fact that a balance in this area had been struck 40 years ago in Keller Plastics and that the idea that this decision is a "swipe to the knees" of voluntary recognition.[9] The dissent argued that the majority "undercuts the process of voluntary recognition as a legitimate mechanism for implementing employee free choice and promoting the practice of collective bargaining." The dissenters also argued that labor unions should not be hindered in their effort to seek out alternative mechanisms for establishing the right to represent employees, given that the unions do not want to deal with the delays and opportunities for employer coercion present in the board's election process. The dissenters repeatedly cited the uniform endorsement of the voluntary recognition process by the board as well as the courts as a "favored element of national labor policy" and lamented this majority decision, which "relegates voluntary recognition to disfavored status by allowing a minority of employees to hijack the bargaining process just as it is getting started."

The dissenters on the board are by no means the only voices of opposition to the result reached by the majority in Dana Corp. Union advocates and a variety of other commentators have decried this decision as a reversal of more than 40 years of precedent and the result of partisan decision-making by the "Republican-dominated" board.[10] There is no doubt that this decision, along with the issue it confronts, is a contentious one. However, whereas some deride the board for an "ugly, below-the-belt blow to working Americans,"[11] there are those who see this as the correct decision.[12]

Regardless of one's opinion about the merits of the NLRB's decision, there is no doubt that Dana Corp. sets forth important new guidelines, an understanding of which will be necessary for employers who want to be able to make informed decisions when the union requests voluntary recognition. Dana Corp. provides that, upon voluntary recognition, the employer and/or union must immediately notify the NLRB.[13] The recognition must be in writing, and it must set forth the unit and the date of the recognition. The board will then provide the employer with printed notices that advise employees of their right to file a decertification election petition within 45 days of being notified of the

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recognition. If an election petition that is supported by at least 30 percent of the bargaining unit is filed within the 45-day window, the NLRB will conduct an election; if not, the recognition bar will take effect.

The NLRB's decision has a significant effect on the recognition and contract bars, but several key issues were not addressed in this ruling. The majority explicitly avoided questioning the legality of voluntary recognition, neutrality, or card check agreements. The board also did not address situations in which an employer wants to file a post-recognition petition or unilaterally withdraw voluntary recognition. Finally, the board turned down the opportunity to discuss what constitutes a "reasonable time" under the recognition bar doctrine.

Given the fundamental change embodied in Dana Corp. and the questions that remain unanswered, a logical observer's next step is to wonder what the future holds for the Dana Corp. decision and the recognition bar in general. Some commentators believe that this decision will revitalize the board, which some observers in organized labor see as "an increasingly irrelevant institution."[14] However, any potential for new vitality springing from the Dana Corp. decision may be short-lived because of the likelihood that proponents of the unmodified recognition bar have not abandoned their fight. Initially, it is likely that a decision of this importance will be appealed, and thus the board's holding may not be the last word in this case.

In addition, the Dana Corp. decision may give dissenters more motivation to renew their legislative efforts to pass the Employee Free Choice Act. The act, proposed to Congress in 2007, would require that the NLRB certify a union without an election when a majority of the employees in an appropriate bargaining unit sign valid authorizations. This would put voluntary, card check recognition of unions on equal footing with the board-certified election process and negate the effect of the board's ruling in Dana Corp.

The National Labor Relations Board's Dana Corp. decision brought about a significant change in modern-day labor law. The battle over this issue is far from over and is likely to work its way through all three branches of government before all is said and done. Regardless of the final outcome, this decision by the NLRB sets forth important guidelines for unions as well as employers confronted with organizational efforts. **TFL**

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Endnotes

[1]Dana Corp., 351 NLRB No. 28 (2007).

[2]Winston and Strawn LLP, *NLRB Modifies Recognition and Contract Bar Doctrines to Provide 45-Day Period to Challenge Voluntary Recognition*, www.winston.com/siteFiles/publications/NLRB_Modifies_Recognition.pdf (Oct. 2007).

[3]Dana Corp., *supra* note 1, at 47.

[4]Scott Silverman, *NLRB Dana Corp. Decision Marks Change in Doctrine*, employment.law360.com (Oct. 15, 2007).

[5]*Id.*

[6]*Keller Plastics Eastern Inc.*, 157 NLRB 583 (1966).

[7]*Id.* at 586 (quoting *Franks Bros. Company v. N.L.R.B.*, 321 U.S. 702, 705–706 (1944)).

[8]Dana Corp., 341 NLRB 1283 (2004); *see also Divided NLRB Allows 45-Day Window to Challenge Voluntary Recognition*, CCH, Oct. 8, 2007, hr.cch.com/news/employment/100807a.asp (Oct. 8, 2007).

[9]Dana Corp., *supra* note 1, at 62 (Liebman and Walsh, dissenting).

[10]*See* Steve Smith, *NLRB Hits Card Check*, www.ibew.org/articles/07daily/0710/071009_NLRB.html.

[11]Service Employees International Union, Press Release, *Bush NLRB Deals Ugly Blow to Workers and Employers*, www.seiu.org/media/pressreleases.cfm?pr_id=1513 (Oct. 4, 2007).

[12]Jesse J. Holland, *NLRB Sets Window for Decertification*, AP, Oct 2, 2007, news.yahoo.com/s/ap/20071002/ap_on_go_ot/union_decertification.

[13]Seyfarth Shaw LLP, *NLRB Decisions Significantly Affect Union Organizing Initiatives*, www.seyfarth.com/index.cfm/fuseaction/publications.publications_html/object_id/6dea18db-9c0d-481b-8852-8b4455ae4f5d (Oct. 10, 2007).

[14]Mark W. Robbins and Noah G. Lipschulz, *United States: NLRB Modifies "Recognition Bar" Doctrine to Permit Employees and Rival Unions to File Election Petitions*, www.mondaq.com/article.asp?articleid= 53038 (Oct. 9, 2007).