

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

In the Matter of

BUILDING TECHNOLOGY ENGINEERS, INC.

Employer¹

and

AREA TRADES COUNCIL, a/w IUOE LOCAL 877; IBEW LOCAL 103; PLUMBERS UNION (UA) LOCAL 12; CARPENTERS UNION (NERCC) LOCAL 51, PAINTERS UNION (IUPAT) DC #35

Petitioner

and

FIREMEN AND OILERS, CHAPTER 3, LOCAL 615, SERVICE EMPLOYEES INTERNATIONAL UNION

Intervenor

Case 1-RC-22359

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Case 1-RC-22361

¹ The name of the Employer and the name of the Petitioner appear as amended at the hearing.

DECISION AND DIRECTION OF ELECTION²

This case raises the issue of recognition bar. On August 25, 2009, the Area Trades Council filed the petition in Case 1-RC-22359, in which it sought to represent certain employees of the Employer. The Employer and Intervenor Firemen and Oilers contend that an election pursuant to the Area Trades Council's petition is barred by a voluntary recognition agreement between the Employer and the Firemen and Oilers.³ I find that there is no recognition bar because the employees in the bargaining unit who are subject to the voluntary recognition agreement have not received the notice required by the Board's decision in *Dana Corp.*⁴ I shall, therefore, process the petitions.

FACTS

The record reveals the following, based on documentary evidence and offers of proof submitted by the Firemen and Oilers and the Employer:

The Employer, a wholly owned subsidiary of EMCOR, provides maintenance and facilities management to over 35 clients at 120 work sites. The Employer and the Firemen and Oilers are parties to a Master Agreement covering various facilities in the New England area. Pursuant to Article II of the Master Agreement, the Employer has agreed to notify the Firemen and Oilers when it adds new sites within the geographic jurisdiction of the Agreement, to give the Firemen and Oilers access to its premises to visit its employees, to take a positive approach to union organization efforts, and to recognize the union after a card check by a disinterested, neutral party.

² Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

³ On August 31, 2009, the Firemen and Oilers filed its own petition in Case 1-RC-22361, and an order consolidating the two cases was issued on September 1, 2009. The Firemen and Oilers stated at the hearing that it filed the petition to protect its interests in view of the filing of the rival petition.

The Area Trades Council, in its petition, sought to represent certain employees at the Employer's Boston Scientific facility in Natick, Massachusetts. The Firemen and Oilers, in its petition, sought to represent various classifications of employees at all Boston Scientific sites in the New England area. At the hearing, the Employer and both unions stipulated to the appropriateness of a unit covering various classifications of employees at all Boston Scientific properties in Marlborough, Quincy, Natick, and Watertown, Massachusetts, as set forth in detail below.

⁴ 351 NLRB 434 (2007).

The Employer won a bid to provide facilities services to Boston Scientific Corporation at three Boston Scientific sites in Marlborough, Natick, and Quincy, Massachusetts. Pursuant to Article II, by letter dated July 6, 2009, the Employer's vice president of operations, James Lane, notified Edmund "Ike" Gabriel of the Firemen and Oilers, that, effective July 13, 2009, the Employer would be adding 17 technicians to the three new properties.

The Firemen and Oilers solicited cards from the employees at the new sites. On July 15, 2009, the Employer and the Firemen and Oilers executed a Voluntary Recognition Agreement, based on a certification by the American Arbitration Association that a majority of employees in the unit indicated their desire to be represented by the Firemen and Oilers.⁵

By letter dated July 20, 2009, the Firemen and Oiler's attorney notified the NLRB Regional Office of the voluntary recognition agreement (encompassing the Employer's employees at three sites in Quincy, Natick, and Marlborough, Massachusetts) and asked the Region to provide three copies of the notices required by *Dana Corp.*, for posting by the Employer.

By letter dated July 23, 2009, the Regional Office sent three copies of the *Dana* notices to Lane, to be posted at each of the three sites for 45 days.⁶

Lane posted the notices at the Boston Scientific locations but, immediately after he posted them, the Employer's customer, Boston Scientific, advised Lane that it would not permit the posting of the notices.

The Employer and the Firemen and Oilers began to negotiate for a contract. On August 11, 2009, the parties reached a tentative agreement that received the negotiating committee's unanimous recommendation. When Gabriel began to talk to bargaining unit employees about contract ratification, he discovered an issue concerning vacation and the crediting of seniority that needed to be addressed. The parties then addressed that issue and, on August 26, 2009,

⁵ The voluntary recognition agreement describes a unit that includes maintenance technicians, master craftsmen, master crafts/lead persons, plumbers, electricians, carpenters, and painters employed by the Employer at all Boston Scientific properties in the New England area.

I note that the voluntary recognition agreement includes carpenters and painters, and the parties originally petitioned for units that included carpenters and painters, but the stipulated unit does not include those categories.

⁶ I note that both the Employer's letter to the Firemen and Oilers notifying it of new sites and the Employer's letter to the Regional Office requesting *Dana* notices both referred to three locations in Quincy, Natick, and Marlborough, and the Employer asserted at the hearing that the card check included employees at those three locations. The voluntary recognition agreement itself, however, is written more broadly to include Boston Scientific properties in the New England area, and at the hearing the parties stipulated to the appropriateness of a unit that includes a fourth location in Watertown, Massachusetts. Although not evident from the record, the Firemen and Oilers assert in its post-hearing brief that the Employer has represented that it has no employees in Watertown and that employees at the Quincy site service the Watertown location.

reached a tentative agreement on a revised contract, subject to ratification. Gabriel was prepared to present the revised offer to the membership for ratification, and the Employer was prepared to sign it, when the Area Trades Council filed its petition on August 25.⁷

Conclusion

In *Dana Corp.*,⁸ the Board held that no election bar will be imposed after a card-based recognition unless 1) the affected unit employees receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and 2) 45 days pass from the date of notice without the filing of a valid petition. The required notice is an official NLRB notice that the employer shall post in conspicuous places at the workplace throughout the 45-day period. The 45-day period for filing a petition after a card-check recognition runs from the posting of the official NLRB notice. I find that there is no valid recognition bar in this case, because the notice required by the Board's decision in *Dana Corp.* was not posted for the requisite 45-day period.

The Firemen and Oilers contend that *Dana Corp.* can be distinguished from the instant case on various grounds. First, it is argued that *Dana Corp.* should not be applied where, as here, an employer voluntarily recognizes and bargains with a union pursuant to a valid after-acquired clause, a circumstance that was not present in *Dana Corp.* There simply is nothing in the *Dana* decision to suggest, however, that the Board does not intend to apply it to voluntary recognition agreements reached pursuant to an after-acquired clause.⁹

Second, the Firemen and Oilers argue that *Dana Corp.* should not be applied in circumstances where, as here, negotiations for a contract have been completed, subject only to ratification by its members. In this regard Firemen and Oilers contend that part of the Board's rationale in *Dana* seems to be its belief that a 45-day window period "would not interfere with collective-bargaining negotiations because in most cases (including the cases at hand) negotiations have not even started at that point."¹⁰ There is nothing in *Dana* to suggest, however, that there is an exception to the posting requirements where a voluntarily recognized union and an employer are close to reaching a contract. In fact, the Board specifically modified its contract bar rules in *Dana*, such that even a collective-bargaining agreement executed on or after the date of voluntary recognition will not bar a decertification or rival union petition unless

⁷ The collective bargaining agreement had not been ratified or executed when the Area Trades Council's petition was filed, and no party claims there is a contract bar to an election.

⁸ 351 NLRB 434 (2007).

⁹ The Firemen and Oilers union argues, citing *Verizon Information Systems*, 335 NLRB 558 (2001), that a union which avails itself of a collectively bargained agreement establishing a procedure for voluntary recognition outside of the Board's processes may be barred from petitioning for an election. The Board specifically noted in that case, however, that it was not finding that a voluntary recognition agreement bars an election petition filed by another union. *Id.* at 560.

¹⁰ 351 NLRB at 435. I note that the above-quoted statement was set forth in the Board's summary of the positions of the parties and amici in *Dana*, rather than in the Board's explanation of its own rationale for its decision.

notice of recognition has been given and 45 days have passed without a valid petition being filed.¹¹

Third, Firemen and Oilers argue that *Dana Corp.* is distinguishable because, in that case, the decertification petitions were supported by over 50 percent of the employees (suggesting a loss of majority support) in one unit and over 35 per cent of the unit employees in the other unit. Here, in contrast it is claimed, the bargaining relationship between the Employer and the Firemen and Oilers has been disrupted by a showing of interest at only one of the three sites in the stipulated unit, and that the rival petition was originally seeking only a portion of the recognized unit. There is nothing in *Dana* that specifically states, however, that only petitions in a unit identical to the voluntarily recognized unit may be processed. Indeed, the Board held in *Dana* that “any properly supported petition filed within the 45-day period will be processed...”¹² (emphasis added) and the language of the decision is to permit petitions by or on behalf of “affected” employees; these broad terms do not suggest the limitation urged by the Firemen and Oilers.

Fourth, the Firemen and Oilers argue that the *Dana* requirement should be disregarded here because of the refusal of the Employer’s customer to allow the Employer to post the *Dana* notices at its premises. Concededly, the Employer was not at fault for its failure to post the notices for 45 days, but that does not waive the requirement that employees receive actual notice of their rights under *Dana*. I take administrative notice of the fact that, in light of the refusal of the Employer’s customer to permit posting of the notices at the workplace, the parties and the Region were considering mailing the notices directly to individual employees instead, when the need to do so was obviated by the filing of the Area Trades Council’s petition. Thus, while there may be an alternative method of fulfilling the *Dana* requirement in circumstances such as this, I do not find that the circumstances justify dispensing with the *Dana* requirement altogether.¹³ Finally, I note that, even if Boston Scientific had permitted the Employer to post the notices for 45 days, the Area Trades Council’s petition was filed well before 45 days had passed.

Beyond trying to distinguish *Dana Corp.*, both the Employer and the Firemen and Oilers argue in their post-hearing briefs that the Board should reconsider the wisdom of its decision in *Dana Corp.*, for the reasons advanced in the dissenting opinion in that case. They urge the Board to return to the principles established by *Keller Plastics Eastern, Inc.*¹⁴ under which a union that has been voluntarily recognized can rely on its representative status for a reasonable period of time, during which it may bargain and achieve a contract. In this regard, the Employer

¹¹ 351 NLRB at 435.

¹² 351 NLRB at 443.

¹³ I note that, in the section of the Casehandling Manual for Representation Proceedings devoted to Notices of Election, Section 11314.7(b), entitled “Additional Distribution,” provides that “Notices should be distributed by mail or in person to eligible or disputed eligible voters if the Regional Director thinks this advisable; e.g. to person who are not actually working during the posting period.” This is a similar situation where by analogy, Regional Directors, may be able to mail *Dana* notices when they think it advisable.

¹⁴ 157 NLRB 583 (1966).

argues that the policy established in *Dana Corp.* has destabilized the collective bargaining in this case and will do so in similar cases. It asserts that the 45-day notice requirement creates an environment in which a minority of employees may destabilize a nascent relationship and that an employer has little incentive to voluntarily recognize a union if it understands that recognition and any tentative agreements could be trumped by the filing of an election petition during the 45-day period with only a showing of minority support. This is a matter that can only be resolved by the Board. Therefore, in accordance with existing Board precedent, I shall process the petitions.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time maintenance technicians I and II, master craft persons, master craft/lead persons, plumbers and electricians employed by the Employer at all Boston Scientific properties in Marlborough, Quincy, Natick, and Watertown, Massachusetts, but excluding office clerical employees, managerial employees, professional employees, confidential employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by either of the following unions:

Area Trades Council, a/w IUOE Local 877; IBEW Local 103; Plumbers Union (UA) Local 12; Carpenters Union (NERCC) Local 51; Painters Union (IUPAT) DC #35,

or

Firemen and Oilers, Chapter 3, Local 615, Service Employees International Union.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*;¹⁵ *NLRB v. Wyman-Gordon Co.*¹⁶ Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. *North Macon Health Care Facility*.¹⁷ In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before September 25, 2009. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Service*.¹⁸ Failure to do so estops employers from filing objections based on non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by the close of business on October 2, 2009, at 5:00 p.m. EDT, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations

¹⁵ 156 NLRB 1236 (1966).

¹⁶ 394 U.S. 759 (1969).

¹⁷ 315 NLRB 359 (1994).

¹⁸ 317 NLRB 349 (1995).

precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.¹⁹ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab and then click on the E-filing link on the pull-down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

/s/ Ronald S. Cohen

Ronald S. Cohen, Acting Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 18th day of September, 2009.

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¹⁹ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.