

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

In the Matter of:

Building Technology Engineers, Inc.,

Employer,

and

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

Case No. 1-RC-22361

Petitioner,

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,**

Intervenor.

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Case No. 1-RC-22359

Petitioner,

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

Intervenor.

**INTERVENOR/CROSS-PETITIONER'S REQUEST FOR REVIEW OF
DECISION AND DIRECTION OF ELECTION**

Now comes Firemen and Oilers, Chapter 3, Local 615, Service Employees International Union, the Intervenor/Cross-Petitioner in the above referenced and consolidated matters (hereinafter referred to as “Chapter 3”), and requests review of the Decision and Direction of Election issued by the Acting Regional Director of the First Region dated September 18, 2009 (“Decision”). In support of its request, and in accordance with the provisions of Section 102.67 (c) (1) and (4) of the Board’s Rules and Regulations, Chapter 3 states that a substantial question of law or policy is raised because of a departure from officially reported Board precedent, namely *Kroger Co.*, 219 NLRB 388 (1975), and, in the alternative, that there are compelling reasons for reconsideration of an important Board rule or policy, namely that set forth in *Dana Corp.*, 351 NLRB 434 (2007).

Statement of the Case

On August 25, 2009, the Area Trades Council (“ATC”) filed a petition to represent a unit of six (6) employees employed by Building Technology Engineers, Inc. (“Employer or BTE”) at the Boston Scientific facility in Natick, Massachusetts. More than one month earlier, BTE had recognized Chapter 3 as the exclusive collective bargaining representative for the employees in the petitioned-for unit as well as other Boston Scientific sites in New England, namely employees at Boston Scientific sites in Quincy and Marlboro, Massachusetts.¹ As discussed in more detail below, this recognition agreement resulted from a collectively bargained “after-acquired locations”

¹ There is also a Boston Scientific site in Watertown, Massachusetts. The Employer has represented that it has no employees at this site and that employees at the Quincy site service this location.

clause contained in the master collective bargaining agreement between BTE and Chapter 3.

On August 31, 2009, Chapter 3 filed a cross-petition to represent the seventeen (17) employees in the larger unit for which it had already been recognized as the exclusive collective bargaining representative.² The parties stipulated that the larger unit is appropriate for collective bargaining and the Acting Regional Director so found.

Decision at p. 6. The Acting Regional Director directed an election in this unit with both Chapter 3 and the ATC on the ballot. Id. For the reasons set forth below, Chapter 3 maintains that there is a valid recognition bar. Accordingly, the ATC petition should be dismissed and the Chapter 3 cross-petition should be dismissed as moot.

Statement of the Facts

The Employer and Chapter 3 were limited to presenting offers of proof in this matter. The facts set forth below are contained in those offers of proof.

BTE is a facility service maintenance corporation that provides maintenance and facility management services to over 35 clients at more than 120 work sites in New England. BTE and Chapter 3 are parties to a master collective bargaining agreement covering various facilities in the New England area.³

Article II of the master agreement sets forth a procedure for the possible recognition of Chapter 3 at new sites acquired by the Employer.⁴ Pursuant to this

² Chapter 3 filed this cross-petition for the sole purpose of protecting its interests in view of the filing of the petition by ATC.

³ At the time the master agreement was executed, Chapter 3 was known as National Conference of Firemen and Oilers, Local Union No. 3 of Boston, SEIU.

⁴ The master agreement was submitted as part of Chapter 3's offer of proof. *See* Chapter 3 Exhibit 1. Article II appears on pages 4-6. As the evidence in this matter was limited to offers of proof and there are no factual disputes, Chapter 3 has not included citations to the transcript or

negotiated procedure, the Employer is required to notify Chapter 3 of any new sites in the New England area prior to commencement of work at the new site. The procedure contains, among other things, neutrality provisions and permits union access during non-work hours. If the Union requests recognition, there is a procedure for a card check conducted by a disinterested, neutral party. If the card check confirms that a majority of unit employees designate the Union as the exclusive bargaining representative, then the Employer recognizes the Union as such representative. The terms of the master agreement, with a site specific recognition clause and any amendments agreed to by the parties, are then extended to the unit employees as a separate, new collective bargaining agreement.

In this case, BTE entered into a contract with Boston Scientific to provide services at its sites. After hiring 17 employees to staff the Boston Scientific sites, BTE provided notice to Chapter 3 as required by Article II of the master agreement. Chapter 3 proceeded with organizational efforts and, after obtaining cards from a majority of the employees and submitting to the card check procedure set forth in the master agreement, entered into a voluntary recognition agreement with BTE dated July 15, 2009.

From there, the parties engaged in collective bargaining negotiations and, by August 11, 2009, Chapter 3's negotiating committee had reached a tentative agreement with the Employer. When Edmund Gabriel, the Chapter 3 Business Agent, began talking to bargaining unit members about the tentative agreement, he learned that there was an issue pertaining to the accrual of seniority for vacation purposes. Mr. Gabriel went back

other exhibits. *See* Section 102.67 (d) of the Board's Rules and Regulations. All such citations appear in the Brief of the Intervenor/Cross-Petitioner filed with the Regional Director on September 16, 2009.

to the Employer and this issue was resolved. By August 26, 2009, the Chapter 3 negotiating committee had reached a new tentative agreement which reflected the change in the seniority/vacation issue. Mr. Gabriel was prepared to take the tentative agreement to the unit membership when he learned of the filing of the petition by the ATC. From the Employer's perspective, the agreement was ready to sign but for the filing of the ATC petition.

In the proceedings below, Chapter 3 argued that there is a valid recognition bar as BTE and Chapter 3 entered into a voluntary recognition agreement pursuant to a negotiated "after-acquired locations" clause and the parties were engaged in productive negotiations prior to the filing of the ATC petition. Chapter 3 argued that the *Dana Corp.* doctrine should not apply as the imposition of the *Dana Corp.* requirements in a situation such as this disregards the contractual commitments of the parties and "would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements." *Kroger*, 219 NLRB at 389. In the alternative, Chapter 3 proposed a reconsideration of the *Dana Corp.* decision.

In his decision, the Acting Regional Director rejected the argument that *Dana Corp.* should not apply in cases where voluntary recognition results from compliance with a lawful "after acquired locations" clause in a collective bargaining agreement. Decision at p. 4. With respect to the request of Chapter 3 (and the Employer) that the *Dana Corp.* decision be reconsidered, the Acting Regional Director stated that "(t)his is a matter that can only be resolved by the Board." Id. at pp. 5-6.

Argument

I. THE DECISION RAISES A SUBSTANTIAL QUESTION OF LAW OR POLICY BECAUSE IT DEPARTS FROM THE LAW PERTAINING TO RECOGNITION PURSUANT TO AFTER-ACQUIRED LOCATIONS CLAUSES.

The “leading case” involving “after-acquired store clauses” is *Kroger, supra. Pall Biomedical Products Corp.*, 331 NLRB 1674, 1675 (2000). In *Kroger*, the Board stated that clauses requiring an employer to recognize a union at future locations “are valid in situations where the Board is satisfied that the employees affected are not denied their right to have a say in the selection of their bargaining representative.” *Kroger*, 219 NLRB at 388. Provided there is proof of majority support, such clauses constitute a waiver of an employer’s right to demand an election. *Id.* at 389.

The Board went on to state:

As we have interpreted them, these clauses are contractual commitments by the Employer to forgo its right to resort to the use of the Board’s election process in determining the Unions’ representation status in these new stores. To permit the Employer to claim the very right which it has foregone, perhaps in return for concessions in other areas, would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements.

Id.

“(T)he Board has repeatedly followed *Kroger* and found that an employer waives its right to an election by agreeing to an additional stores clause.” *Shaw’s Supermarkets*, 343 NLRB 963, 966 (2004)(Member Walsh, dissenting).⁵ In *Verizon Information Systems*, 335 NLRB 558 (2001), the Board also determined that a *union* which avails itself of a collectively bargained “agreement establishing a procedure for voluntary

⁵ In *Shaw’s, supra*, the Acting Regional Director dismissed the employer’s petition for an election without a hearing on the basis of an after-acquired store clause in the parties’ collective bargaining agreement. The Board granted the employer’s request for review and ordered a hearing. *Id.* at 963-964.

recognition outside of the Board’s processes,” may also be barred from petitioning for an election. *Id.* at 559-561.⁶

The instant case presents the classic example of an after-acquired locations clause. It is a carefully negotiated, comprehensive clause that establishes “a procedure for voluntary recognition outside of the Board’s processes.” *Id.* The clause safeguards the rights of employees by providing for a card check conducted by a neutral third party, in this case the American Arbitration Association. The parties to the agreement complied with the negotiated procedures and a voluntary recognition agreement was entered. From there, the parties expeditiously moved forward with negotiations for the new unit, a unit comprised of employees at the three new Boston Scientific sites. In fact, the parties had reached tentative agreement when they learned of the filing of the petition by the ATC, a petition which sought to represent employees at only one of the three sites.

The *Dana Corp.* decision did not involve voluntary recognition extended pursuant to a negotiated after-acquired locations clause set forth in a collective bargaining agreement. The *Dana Corp.* decision does not, by its terms, necessarily apply to such situations. Indeed, as discussed above, there is a separate body of law governing cases in which the recognition arises from contractual after-acquired location language. These cases emphasize the sanctity of the collective bargaining agreement and hold the parties to their bargain.

⁶ In the Decision, the Acting Regional Director notes that the Board’s decision in *Verizon Information Systems, supra*, may not bar a rival union from filing a petition. *Decision* at p. 4, n. 9. In *Verizon*, however, this issue was not before the Board as no rival petition was filed. Further, in *Verizon*, there was a dispute between the employer and union over the positions in question. Thus, unlike the instant case, there was no recognition agreement covering the petitioned-for unit and no clear recognition bar.

In this case, the parties agreed to a contractual recognition procedure that included the necessary legal safeguards to protect employee choice, specifically a card check and certification conducted by a neutral third party. The application of the *Dana Corp.* doctrine in these circumstances would deprive the parties of their bargained-for recognition procedure by engrafting new and, at the time, unforeseen requirements that must be met in order to obtain a recognition bar. The negotiated “after-acquired locations” clause is rendered meaningless if the parties are not also afforded a reasonable time to negotiate an agreement without interference from a rival labor organization. As it is, if the Board applies *Dana Corp.* to this case, BTE and Chapter 3, having agreed to forego Board procedures as part of their negotiated master agreement, will nonetheless be subjected to an election as a result of a petition from a third party that sought to represent only six of the seventeen employees at only one of the four locations described in the appropriate unit.⁷ In short, the application of *Dana Corp.* to this case “would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements.” *Kroger*, 219 NLRB at 389.

If not for the application of *Dana Corp.*, a recognition bar would certainly block the petition filed by the ATC. See *Keller Plastics*, *supra*. Such a bar applies for a “reasonable time.” *Dana Corp.*, 351 NLRB at 437 n. 11. The time “is not measured only by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions.” *Id.* [citing *Royal Coach Lines*, 282 NLRB 1037, 1038 (1987)]. Here, the parties entered into the voluntary recognition agreement on July 15, 2009 and had completed negotiations on a tentative contract by the time the

⁷ The ATC petition seeks a unit of only six employees at the Natick site.

petition was filed approximately six weeks later. Clearly, the voluntary recognition agreement and the productive negotiations which occurred thereafter would bar the petition if, as Chapter 3 urges, *Dana Corp.* does not apply.

II. THERE ARE COMPELLING REASONS FOR RECONSIDERATION OF THE DECISION IN DANA CORP.

On September 29, 2007, the Board, in a 3-2 decision, cast aside the well-established recognition bar doctrine first announced over forty years earlier in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). *Dana Corp.*, 351 NLRB 434 (2007). Under *Dana Corp.*, it is not enough that a labor organization prove its majority status through a card check or some other means in order to obtain a recognition bar for a reasonable period. The labor organization and/or employer must also notify the Board that voluntary recognition has been extended and the employer must then post notices to employees informing them that they have the right to petition for an election. It is only after the notices have been in place for forty-five days, and no petition for an election has been filed, that the recognition bar applies. Id.

Unlike the Employer and Chapter 3, the two employers and the union in *Dana Corp.* did not have existing master agreements containing after-acquired location language. As discussed above, there is a separate body of law governing cases in which the recognition arises from contractual after-acquired location language. See *Kroger Co.*, *supra*. For all of the reasons set forth above, the *Dana Corp.* decision should not apply to an after-acquired locations case such as this one. In the event this argument is rejected, Chapter 3 respectfully requests reconsideration of the *Dana Corp.* decision.

Chapter 3 hereby adopts and incorporates by reference all of the arguments and points raised by the dissent in *Dana Corp.* *Dana Corp.* 351 NLRB at 444-450. Beyond

this, the facts of the instant case also raise questions about the validity of the assumptions and philosophical underpinnings set forth in the *Dana Corp.* decision. Part of the Board's rationale for the 45 day "window period" in which employees may seek to decertify a recognized bargaining representative seems to be the notion that such a 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." *Dana Corp.*, 351 NLRB at 435. As discussed above, however, in the instant case, negotiations were not only started, they were *completed*, subject only to ratification by the bargaining unit members, within this period.

Additionally, in *Dana Corp.*, the decertification petitions were supported by over 50 percent of the unit employees (suggesting a loss of majority support) in one unit and over 35 percent of the unit employees in the other unit. *Id.* at 434. In the case at bar, the bargaining relationship between Chapter 3 and the Employer has been disrupted by a showing of interest at only one of the four sites in the stipulated unit.

Finally, as the Employer pointed out at the hearing in this matter, the facts of this case reveal a practical problem with the *Dana Corp.* posting requirements, namely the refusal of a host company to allow an employer to post the required Board notices on the work premises. Such unanticipated and unavoidable events further complicate an already complicated process and further thwart the efforts of an employer and union to enter into a voluntary recognition agreement that will permit them to have the stability created by a recognition bar and/or contract bar.

The *Dana Corp.* decision has been the law for approximately two years now. As the dissent in *Dana Corp.* points out, the decision relegates voluntary recognition, long

considered “a favored element of national labor policy” to “disfavored status by allowing a minority of employees to hijack the bargaining process just as it is getting started.” *Id.* at 450 (citations omitted). That is precisely what has happened here.

Chapter 3 submits that *Dana Corp.* is a misguided “solution” to a non-existent problem. As shown by the facts of this case, it has only served to complicate and destabilize legal bargaining relationships. Further, the refusal of Boston Scientific, BTE’s customer, to allow the Board’s notices to be posted on its premises underscores yet another problem created by this intrusive, meddlesome decision. For all of these reasons, Chapter 3 respectfully requests that the Board reconsider the *Dana Corp.* decision.

Conclusion

For all of the foregoing reasons, Chapter 3 respectfully requests review of the Decision as (1) it raises a substantial question of law or policy because of a departure from officially reported Board precedent pertaining to voluntary recognition pursuant to “after-acquired locations” clauses in collective bargaining agreements and; (2) there are compelling reasons for the reconsideration of the decision in *Dana Corp.*, 351 NLRB 434 (2007).

Respectfully submitted,

FIREMEN AND OILERS CHAPTER 3.
LOCAL 615 SEIU
By its attorney

October 2, 2009
Date

/s/Randall E. Nash
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CERTIFICATE OF SERVICE

I, Randall E. Nash, counsel for Firemen and Oilers Chapter 3, Local 615 SEIU in Case Nos. 1-RC-22359 and 1-RC-22361, certify that I have served a copy of the Intervenor/Cross-Petitioner's Request for Review of Decision and Direction of Election upon all parties of record in this case and the Regional Director for the First Region via e-mail and first class mail this 2nd day of October, 2009.

/s/Randall E. Nash_____

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