UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LAMONS GASKET COMPANY,
A DIVISION OF TRIMAS CORPORATION,
Employer,

and

Case 16-RD-1597

MICHAEL E. LOPEZ,
Petitioner,

and

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
Union.

LAMONS GASKET COMPANY'S BRIEF IN SUPPORT OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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I. INTRODUCTION.

Lamons Gasket Company, a Division of TriMas Corporation ("Employer" or "Lamons"), hereby files this Brief in Support of the Regional Director's Decision and Direction of Election. Although Lamons voluntarily recognized the Union at its Houston facility, Lamons supports its employees' right to have their decertification election votes counted as an essential safeguard of their §7 rights. As such, the modified recognition bar first enunciated in *Dana Corp.*, 351 NLRB 434 (2007) should remain the governing standard. This rule provides a valuable check on the proliferation of voluntary recognition while properly balancing the statutory policies favoring industrial stability, employee choice, and collective bargaining. Moreover, experience at the Houston facility corroborates that the *Dana* paradigm has been successful in the industry.

However, Lamons recognizes that the political landscape has changed since the *Dana* decision which may result in the Board modifying the *Dana* rule. If such a change should occur, that decision should be applied prospectively for the following reasons. First, Lamons, the employees, and the Union have operated under the *Dana* paradigm at all times relevant to this case and are entitled to the benefit of their compliance. Second, any retroactive change to *Dana* would entomb the ballots already cast by the Lamons employees and would inequitably stamp out employee §7 rights in favor of other statutory policies. Finally, failure to tally the votes which have already been cast would eviscerate the employees' confidence in the Board, its systems, and the National Labor Relations Act (the "Act"). The employees in question have already cast their ballots and justice certainly requires that their votes be counted. Therefore, regardless of the fate of the *Dana* rule (which should be affirmed), the votes already cast by Lamons employees should be counted and given full weight.

II. RELEVANT BACKGROUND.

On July 11, 2003, Lamons and the Union entered into a Neutrality Agreement at the facility in Houston, Texas ("Houston facility").[2] [Stip. No. 5]. On November 5, 2009, Lamons voluntarily recognized the Union[3] as the exclusive collective bargaining representative of all production, warehouse, and maintenance employees located at the Houston facility. [*Id.* at ¶ 6]. On that same day, Lamons and the Union notified Region 16 of the voluntary recognition. [*Id.* at ¶ 7].

On November 19, 2009, Region 16 transmitted a notice to employees to Lamons for posting pursuant to the Board's decision in *Dana*. [*Id.* at ¶ 8]. A few days later, Lamons posted that notice at its Houston facility. [*Id.* at ¶ 9]. On December 9, 2009, Lamons employee Michael Edward Lopez (the "Petitioner") timely filed a decertification petition. In response, on July 21, 2010, the Regional Director issued a Decision and Direction of Election. The decertification election was held on August 26, 2010 however, those ballots were impounded in light of the Union's previously-filed Request for Review. On August 27, 2010, the Board granted review and invited the parties to brief the relevant issues shortly thereafter.

Notwithstanding the decertification petition and related wrangling, Lamons and the Union began collective bargaining – shortly after the decertification petition was filed – on January 20, 2010. After months of productive bargaining, Lamons and the Union reached a final agreement on August 8, 2010.

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[2] The Neutrality Agreement also covered other Lamons' facilities.

[3] The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

III. ISSUES PRESENTED.

1. Whether the Regional Director Properly Directed a Decertification Election?

2. Whether the Board Should Affirm, Modify, or Overrule *Dana's* Modified Recognition Bar?

3. If *Dana* is Modified or Overruled, Whether the Decision Should be Applied Prospectively to Allow the Employees' Votes to be Counted?

IV. ARGUMENT AND AUTHORITY.

1. While Lamons Appropriately Recognized the Union, It Supports the Employees' Right to an Election as a Safeguard to Their §7 Rights.

Lamons believed that it was acting in the best interest of the employees and the Company when it voluntarily recognized the Union as the representative for unit employees at the Houston facility. However, Lamons' perception was altered when the Petitioner exercised his *Dana* rights and timely filed a decertification petition to challenge the voluntary recognition. From that point, Lamons, the Union, and the employees (the "Parties") proceeded under, and relied upon, the *Dana* rule. The Parties' reliance resulted in a secret ballot decertification election. In light of these facts, Lamons maintains that tallying the votes from the secret ballot decertification election is the best way to confirm its decision to voluntarily recognize the Union.[4] Accordingly, the Regional Director properly directed a decertification election. Therefore, Lamons urges the Board to affirm the rule in *Dana* or, in the alternative, to prospectively apply any change to the *Dana* paradigm so that the ballots cast by Lamons employees can be counted and given full weight.

[4] Lamons joins the Board's majority opinion which granted review in the *Dana* case when it reasoned that "the secret-ballot election remains the best method for determining whether employees desire union representation." ORDER GRANTING REVIEW OF DANA, 341 NLRB No. 150, *slip op.* at 1 (June 7, 2004) (emphasis added).

2. The *Dana* Rule Should Be Affirmed.

A. *Dana* Harmoniously Balances the Bedrock Policies of the National Labor Relations Act.

In *Dana*, the Board modified the recognition bar to include a limited 45-day window – following the voluntary recognition of a union – during which employees are permitted to file a petition to decertify the Union. If a decertification petition is not filed during this time period, then the recognition bar takes effect just as it did before the *Dana* decision.

While voluntary recognition is a permissible and legitimate right of employers and labor organizations, the Board-supervised, secret ballot election remains the preferred method of employee choice. Indeed, the U.S. Supreme Court holds 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, 602 (1969) (emphasis added). Elections reinforce the paramount policy of the Act which is to protect the employees' right to unionize or, in the alternative, to refrain from unionization. *See, e.g., Pattern Makers League v. NLRB*, 473 U.S. 95, 115 (1985) (paramount policy of the Act is "voluntary unionism").[5]

The nuanced decision in *Dana*, which carefully created the modified recognition bar solidifies the Act's paramount policy through secret ballot elections. When looked at from that perspective, *Dana* is yet another decision in a long line of decisions that recognizes the importance of elections when determining union representation. Indeed, by statute, the Board is charged with the responsibility of protecting employee rights through a policy of encouraging secret ballot elections. *Linden Lumber Div. v. NLRB*, 419 U.S. 301 (1974). Even prior to the

[5] *See also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers. . . ."); *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 304, 307 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support"); *Brooks v. NLRB*, 348 U.S. 96, 99 (1954) ("an election is a solemn and costly occasion, conducted under safeguards of voluntary choice").

1947 Taft-Hartley Act amendments, the Board expressed preference for secret ballot elections in determining questions of union representation. *Joe Harris Lumber*, 66 NLRB 1276, 1283 (1946) (the Board stated that it did "not feel . . . that a card check reflects employees' true desires with the same degree of certainty" as a secret ballot election). The Board has maintained that preference for the subsequent six decades. *See, e.g., Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 723 (2001) ("[W]e emphasized that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions.").

Lamons believes that the *Dana* rule delicately holds employee choice and industrial stability – bedrock objectives of the Act – in harmonious balance. Indeed, the *Dana* rule does not detract from the stability of labor-management relationships created by "voluntary recognition." As explained below, Lamons and the Union have enjoyed a stable relationship. Moreover, as further demonstrated by the facts of this case, the *Dana* rule has not destabilized or hindered the collective bargaining process. Put simply, *Dana* is the best of all worlds. Labor and management enjoy industrial peace – corroborated by employee consent – if voluntary recognition occurs and no decertification petition is timely filed. However, if the employees file a timely decertification petition, then the employees — who are the true beneficiaries of the Act — get to make their own decision regarding union representation through the time-honored "gold standard" secret ballot election. Moreover, the statutory goal of promoting collective bargaining is not compromised by a *Dana* decertification petition/election.

B. Lamons' Houston Facility: A Case Study in the Application of *Dana*.

By its own words, the Board wants to "consider the actual experience of employees, unions, and employers under *Dana Corp.* before arriving at any conclusions." *See* ORDER GRANTING REVIEW OF LAMONS GASKET, 355 N.L.R.B. No. 157, *2 (Aug. 27, 2010). Specifically, Chairman Liebman stated that she was interested in "the impact of *Dana* on the

course of collective bargaining after voluntary recognition." *Id.* at *7 (Liebman, concurring). In response, Lamons offers its experience at the Houston facility.

The *Dana* paradigm worked exactly as it was intended at the Houston facility (until the Union filed its Request for Review which significantly complicated an otherwise smooth process). Following Lamons' voluntary recognition of the Union, an employee filed a decertification petition which ultimately led to a secret ballot election. Notwithstanding the decertification election, Lamons and the Union had numerous collective bargaining sessions and ultimately reached a final contract even before the Board granted review in this matter. Simply put, *Dana* has succeeded in the modern workplace. First, as a result of voluntary recognition, the goal of stability was realized. Second, the employees were given a voice through the petition and subsequent election which operated as an essential check on the voluntary recognition process. Finally, collective bargaining continued unabated despite the decertification petition and election. This case is the proof positive – which the Board is seeking – that *Dana* works in the industry.

Notwithstanding the Parties' success under *Dana* at the Houston facility, Chairman Liebman's concurring opinion asserts that only 1% of *Dana* petitions result in a decertification election which removes a union and asks "whether the asserted benefits of the *Dana* regime outweigh its costs."[6] *Id.* at *7 (Liebman, concurring). The answer is a resounding "yes." An employee's §7 rights cannot be allocated based upon such a cost/benefit analysis. These rights – particularly to a secret ballot election – are akin to a citizen's right to vote. The latter is not measured according to percentage of likelihood of success. Rather, the right to vote – a core principle of the Constitution – is afforded freely to all citizens and not curbed based upon its

[6] Lamons joins in the mathematical rebuttal to this statistic presented in the *amicus* brief of the United States Chamber of Commerce.

likelihood of victory. Similarly, an employee's right to a file a timely petition and vote in a decertification election should be provided regardless of likelihood of success.

Moreover, Chairman Liebman's concerns about adverse effects on collective bargaining have been allayed by the experience at the Houston facility. Indeed, the parties continued to come to the bargaining table and ultimately reached an agreement even after the Petitioner exercised his *Dana* rights.[7] Put another way, as demonstrated by the facts of this case, permitting the employees to exercise their *Dana* rights does not adversely affect industrial stability or collective bargaining.

For all of the foregoing reasons, Lamons respectfully asks the Board to refrain from jettisoning a rule that protects and promotes the "gold standard" of employee free choice – the secret ballot election – while balancing the statutory policies of industrial stability and collective bargaining. *Gissel Packing Co.*, 395 U.S. at 602 ("secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support").

3. If *Dana* Is Modified or Overruled, the Board's Decision Should Apply Prospectively to Avoid Inequitable Results.

The Board's decision in *Dana* should be upheld. However, if the Board modifies or overrules the *Dana* decision, such an order should only be applied prospectively for the following reasons. First, Lamons, the employees, and the Union have operated under the *Dana* paradigm at all times relevant to this case and are entitled to the benefit of their compliance. Second, any retroactive change to *Dana* would entomb the ballots already cast by the Lamons employees and would inequitably stamp out employee §7 rights in favor of other statutory

[7] Moreover, since *Dana*, the employees who successfully voiced their disfavor towards representation or voted for representation by rival unions have surely had their §7 rights vindicated in a way that no unfair labor practice charge could ever do.

policies. Finally, failure to tally the votes which have already been cast would eviscerate the employees' confidence in the Board, its systems, and the Act.

A. The Parties Have Complied with *Dana* and Are Entitled to the Benefit of Their Compliance; Failure to Prospectively Apply Would be Inequitable.

Generally, the Board applies its decisions to all parties regardless of the stage in the case. However, the Board has a history of prospective application of decisions which significantly depart from the preexisting rule of law. In fact, the Board succinctly summarized this area of law when it handed down the *Dana* decision:

> The Board's general practice is to apply policies and standards to "all pending cases in whatever stage." However, the Board will make an exception in cases where retroactive application could, on balance, produce "a result which is contrary to a statutory design or to legal and equitable principles." We find an exception warranted here on equitable grounds. Our decision today marks a significant departure from preexisting law. In reliance on that law, the parties in the present cases entered into voluntary recognition agreements with the understanding that the established recognition bar would immediately preclude the filing of Board petitions for a reasonable period of time. Other unions and employers have also entered into voluntary recognition agreements, and subsequently executed collective-bargaining agreements, that would not bar election petitions under our new policy because employees did not receive the notice of recognition that has not heretofore been required. Moreover, although retroactive application would further employee free choice, it would also destabilize established bargaining relationships. Thus, retroactivity would produce mixed results in accomplishing purposes of the Act, while the reliance interests of the parties and those similarly situated would be unequivocally and substantially frustrated.

Id. at 443-44 (emphasis added). Because *Dana* was a "significant departure from preexisting law," and employers, unions, and employees alike relied on that preexisting law, the Board reasoned that it would be inequitable to apply the new *Dana* rule retroactively. Therefore, the *Dana* decision was applied prospectively. Symmetrically, if the Board should overrule *Dana*, it would represent the same "signature departure" which would require prospective application so as to avoid inequities to employers, unions, and employees. For purposes of the matter at hand,

this would mean allowing the decertification election to proceed and lending full weight to the outcome of that election.

Dana is not the only example of prospective applications of Board elections. In *Levitz Furniture Co. of the Pacific, Inc.*, the Board "ruled that employers may withdraw recognition unilaterally only by showing that unions have actually lost majority support" and had to "decide whether to apply the new rule retroactively, *i.e.*, in all pending cases, or only prospectively." 333 NLRB 717, 729 (2001). Much like *Dana*, the *Levitz* Board cited the standard: "[t]he propriety of retroactive application . . . is determined by balancing any ill effects of retroactivity against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." The Board reasoned that the parties' reliance upon the previous standard was a factor in favor of prospective application of the new rule. The Board further reasoned that:

> In our view, the Respondent and other similarly situated employers did not leave adequate warning that the Board was about to change its standard for withdrawing recognition at the time of the events in the pending cases. Therefore, we shall decide all pending cases involving withdrawals of recognition under existing law.

Levitz Furniture Co. of the Pacific, Inc., 333 NLRB 717, 729 (2001).

Even more compelling is a federal Court of Appeals' review of the Board's decision to retroactively apply a new rule in *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001). In that case, the U.S. Court of Appeals for the District of Columbia Circuit held that the Board erred in giving retroactive effect to its new rule. *Id.* at 1102-1103. The court held that the Board's rule had to be applied prospectively only, because it was such an abrupt departure from settled law. *Id.; see also SNE Enters.*, 344 NLRB 673, 675 (2005) (departure from settled law requires prospective application); *Crown Bolt, Inc.*, 343 NLRB 776, 780 (2004) ("In light of these considerations, we will apply the rule we announce

today prospectively only"); *CNN Am., Inc.,* 352 NLRB 265, 267 (2008) (applying order prospectively); *Dresser Industries,* 264 NLRB 1088, 1089 (1982) (applying new requirement that employers bargain with incumbent union pending outcome of decertification election prospectively only because employer in that case acted in reliance on extant law); *Excelsior Underwear,* 156 NLRB 1236, at 1246 fn. 5 (1966) (applying new requirement that employers provide names and addresses of employees to petitioning union prospectively only because the employer in that case had no such obligation under extant law).

Much like the parties in *Dana, Levitz, Epilepsy Foundation of Northeast Ohio,* and the other cases cited above, the Parties in the current matter have relied on the *Dana* rule throughout the decertification process. Indeed, they have done everything required under the governing law. The Regional Director was notified of the voluntary recognition and the proper notice was posted. The Petitioner, following the mandate of *Dana*, filed a timely decertification petition. An election was held and the employees cast their votes regarding representation of the Union. Pursuant to Board rules, those votes have been impounded and the outcome of the election remains unknown. Those votes must be counted.[8] If the Board were to overrule *Dana* and retroactively apply the new rule, it would certainly result in the same inequities which the Board and courts warned against in the cases above. *See Dana*, 351 NLRB at 443-444 ("Thus, retroactivity would produce mixed results in accomplishing the purposes of the Act, while the reliance interests of the parties and those similarly situated would be unequivocally and substantially frustrated."). Here, the Parties have followed the governing rules and are entitled to

[8] Going past this matter, unions, employers, employees and the public have learned the rule in *Dana* and have followed it well. Hundreds of unions or employers have filed the necessary papers with NLRB Regional offices noting the voluntary recognition, and hundreds of employers have posted a simple *Dana* notice appraising employees of their rights.

the benefit of their compliance – to know the outcome of their election.[9] Anything short of allowing these votes to be counted would be inequitable to the Parties.

B. Without Prospective Application of a Change in *Dana*, Employee Choice Would Be Stamped Out in Favor of Other Statutory Policies.

The Board is empowered to protect the policies of the Act and the paramount policy of the Act is to protect employees' §7 rights. If the Board does not allow the votes to be counted, the employees' §7 rights would be trampled by the very entity entrusted to protect these rights. Simultaneously, the statutory policies of industrial stability and furthering collective bargaining relationships would be elevated high above employee choice. Such a result is counterintuitive. Moreover, retroactive application of a change to the *Dana* rule would not further labor relations or collective bargaining. Employees, angered by their silenced voices, will likely take their anger to the collective bargaining table or exercise that anger in the form of grievances. Labor-management relations will be destabilized and the statutory goal of collective bargaining and industrial peace will be thwarted. It is, therefore, in the best interest of the employees, employer, and the Union to prospectively apply any change in *Dana* so as to count the already-cast votes of the employees.

C. Failure to Prospectively Apply a Change in *Dana* Would be Detrimental to Labor-Relations at the Houston Facility (and Beyond).

Any retroactive change to the *Dana* rule would eviscerate employee free choice by deleting the already cast votes. If a majority of votes have not been cast for the Union, but those votes are never counted, then the Lamons employees are stuck with a representative that the majority of them do not want and their §7 rights have certainly been denied. Employees would no doubt resent the Board for silencing their voice and sticking them with representation that

[9] Indeed, a failure to tally those votes would mean that the financial costs – described by Chairman Liebman in her concurrence – would be for naught. Such costs would be borne by the parties without the finality of knowing the outcome of the election.

they did not choose. Employees would lose all confidence in the Board's ability to govern the workplace. It is not difficult to imagine these employees becoming seriously disenchanted with the Board if it were to tell them that their votes did not count after months of working towards the goal of exercising their §7 rights. Indeed, if the Board pulled out the rug from under the employees, it would create additional employee resentment towards the Union, the Board, and Lamons. Such internal strife could affect Lamons' productivity and relationship with the Union. Going further, retroactive application in the current case could destabilize the already established (and amicable) bargaining relationship between Lamons and the Union.

Put simply, entombing the votes cast in decertification election creates a situation where everyone loses – Lamons, its employees, the Union, and the Board. Moreover, none of the foregoing would further the statutory policy of collective bargaining. For these reasons, it is imperative that any change to the *Dana* rule be applied prospectively.

V. CONCLUSION

For the foregoing reasons, the Board should affirm the *Dana* rule. However, if the rule in *Dana* is modified or overturned, the effects of such change should be applied prospectively to avoid inequitable results.

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The undersigned hereby certifies that service of the foregoing Lamons Gasket Company's Brief in Support of Regional Director's Decision and Direction of Election was made on the following via certified first class mail, postage prepaid, return receipt requested at Fort Wayne, Indiana on this 28th day of October, 2010:

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