UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LAMONS GASKET COMPANY, A
DIVISION OF TRIMAS CORPORATION
Employer
and

MICHAEL E. LOPEZ
Petitioner
and

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

Case 16-RD-1597

BRIEF OF AMICUS CURIAE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES 3

II. INTEREST OF AMICUS CURIAE 4

III. SUMMARY OF ARGUMENT 5

IV. ARGUMENT 7

A. Only Preserving the *Dana Corp.* Precedent Will Effectuate Congressional Intent and Uphold the Statutory Preference for Resolving Questions Concerning Representation Through a Board Secret-Ballot Election.....7

B. Overturning *Dana Corp.* Would Leave Employees With Less Recourse to Challenge the Excesses of Inherently Coercive Card Check Campaigns and Pre-Negotiated Voluntary Recognition Agreements, and Ultimately Undermine Employees' Representational Rights.....9

i. Conduct That Would Be Objectionable and Coercive in a Secret Ballot Election in a Secret Ballot Election Is Inherent in a Card Check Campaign.....9

ii. Pre-Negotiated Voluntary Recognition Agreements between Self-Interested Unions and Employers Do Not Adequately Protect Employees' Section 7 Rights and Leave No Role for the Board in the Representational Process.....11

C. Increased Unionization Places Special Burdens on Small Businesses That Could Put Many Small Bussinesses Out of Business.....14

V. CONCLUSION 15

VI. CERTIFICATE OF SERVICE.....16

I. TABLE OF AUTHORITIES

Cases

Auciello Iron Works v. NLRB, 517 U.S. 781 (1996).....12
Dana Corp., 351 NLRB 434 (20007).....4, 7-8, 10-11
Levitz Furniture Co. of the Pacific, Inc., 333 NLRB 717 (2001).....12
Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974).....7
NLRB v. Cornerstone Blders., Inc., 963 F.2d 1075 (8th Cir. 1992).....7
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).....7, 9-10
NLRB v. Sanitary Laundry, 441 F.2d 1368 (10th Cir. 1971).....12
Majestic Weaving Co., 147 NLRB 859 (1964).....12
Pattern Makers League v. NLRB, 472 U.S. 95 (1985).....11
Rollins Transp. Sys., 296 NLRB 793, 793 (1989).....11

Statutes

29 USC § 157 4

II. INTEREST OF THE AMICUS CURIAE

On August 27, 2010, the National Labor Relations Board ("Board") issued an order in the present case granting review of the Regional Director's Decision and Direction of Election, indicating that it will re-examine voluntary recognition arising under the Board's decision in *Dana Corp.*, 351 NLRB 434 (2007). The Board granted review to consider the experiences of employees, unions, and employers under *Dana Corp.* Pursuant to the Board's invitation to the parties and interested amici to file briefs to address the issues raised in the case, and particularly whether the Board should modify or overrule *Dana Corp.*, the National Federation of Independent Business ("NFIB") hereby files this amicus brief.

NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales

of about $500,000 a year. The NFIB membership is a reflection of American small business.

NFIB opposes efforts to make it easier for unions to organize within small businesses by mandating card-check agreements instead of private-ballot elections. A small business faced with unionization may be seriously impacted by higher wages, business operation and legal costs, as well as the loss of flexibility over employee selection based on business needs. Especially at a time when small businesses are struggling to keep their businesses afloat and their staff employed, the Board must take into consideration the realities that small business owners face.

III. SUMMARY OF ARGUMENT

NFIB respectfully asks the Board to uphold its decision in *Dana Corp.* to modify its voluntary recognition bar principles and to grant employees the right to written notice of an employer's voluntary recognition of a union and to file a decertification petition, or support a representation petition filed by a rival union, within 45 days of such notice. First, in according Board-certified bargaining representatives greater statutory protections under the National Labor Relations Act ("Act"), Congress intended to encourage the use of Board elections as the preferred means for resolving questions concerning representation. Moreover, the Act expressly gives employees the right to petition for a decertification election in many circumstances, including in the case of a union "currently recognized by their employer" that is not "certified." Congress clearly did not intend to shield unions not certified through an election but rather voluntarily recognized by an employer from election petitions expressly authorized under the Act, and instead plainly encourages the use of Board elections. Thus, only by maintaining the voluntary

recognition election bar standards set forth in *Dana Corp.* can the Board effectuate the plain text and intent of the Act.

Second, given the increased use of coercive and inherently unreliable union authorization cards and private neutrality agreements with employers, employees need *Dana Corp.*'s 45-day window period to test the majority status of a voluntarily recognized union and remove unwanted unions. Although creating a 45-day window period after voluntary recognition is announced constituted only a slight change in the Board's voluntary recognition election bar policy, it has already served to more adequately protect employees' Section 7 right to choose their bargaining representatives. As the dissenting Board members point out, workers across the country have already used *Dana Corp.*'s decertification elections to remove unwanted unions and voice their true representation preferences. Moreover, in carrying out its duty to protect employee rights under Section 7 of the Act, the Board cannot permit employers and unions to privately determine representational issues as they please, and must reaffirm its role in the representational process by deciding for itself whether a union has majority support in a secret-ballot election.

Finally, as mentioned above, without the rigorous safeguards provided by Board-conducted elections, neutrality and card check agreements make it easier for unions to organize employees using pressure, coercion, and manipulation. Expanding unionization presents a significant burden to small businesses in the form of potentially higher costs of union labor and additional costs of hiring legal and human resource specialists, among others. The Board should continue to allow employees to insist on a secret-ballot

election to test the majority status of a voluntarily recognized union in order to provide a check against unfettered union organizing efforts.

IV. ARGUMENT

A. Only Preserving the *Dana Corp.* Precedent Will Effectuate Congressional Intent and Uphold the Statutory Preference for Resolving Questions Concerning Representation Through a Board Secret-Ballot Election.

In *Dana Corp.*, the Board based its decision to modify the recognition bar doctrine in large part on the need to give proper effect to the Act's preference for resolving questions concerning representation through a Board secret-ballot election.[1] The Board stated that its administration of the Act "should similarly reflect that preference by encouraging the initial resort to Board elections…," which its voluntary recognition election bar policy failed to do.[2] The Board was correct in choosing to modify its recognition bar principles and ensure that employees receive written notice of an employer's voluntary recognition of a union and of their right to file a decertification petition within 45 days of such notice, as only such a policy effectuates the plain text and intent of the Act.

There is a clear statutory preference for employee majority representation based upon the secret ballot process administered by the Board.[3] The Act gives employees the right to petition for an election in many circumstances, including in order to "assert that the individual or labor organization, which has been certified or is being currently recognized

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[1] *Dana Corp.*, 351 NLRB 434, 437 (2007).

[2] Id. at 438 ("The current policy fails to give adequate weight to the substantial differences between Board elections and union authorization card solicitations as reliable indicators of employee free choice on union representation….").

[3] Moreover, the Supreme Court and lower courts have long recognized that Board supervised secret ballot elections are the preferred method for determining whether employees want union representation. *See 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"); *NLRB v. Cornerstone Blders., Inc.*, 963 F.2d 1075, 1078 (8th Cir. 1992).

by their employer as the bargaining representative, is no longer a representative."[4] Importantly, Congress only prohibits such elections when "within a twelve month period, a valid election shall have been held."[5] That is, a certified union's majority status cannot be challenged for a full year after it prevails in a Board election. The election year bar and the greater statutory protections accorded to a Board-certified bargaining representative clearly reflect the Congressional intent to encourage the use of Board elections for resolving questions concerning representation.[6]

However, unions that gain power through a neutrality agreement and voluntary recognition enjoy no such statutory protection. In fact, Congress expressly granted employees the right to request a decertification election in the case of a union "currently recognized by their employer" that was not "certified."[7] Clearly, Congress did not intend that unions not certified through an election, but rather voluntarily recognized by an employer, be shielded from election petitions authorized under § 9(c)(1)(A)(ii). Thus, only by affirming the recognition bar principles announced in *Dana Corp.* and ensuring that employees receive written notice of an employer's voluntary recognition of a union and of their right to file a decertification petition, can the Board effectuate the plain text and intent of the Act. To hold otherwise would frustrate Congressional intent and be directly inconsistent with the plain text of the Act.

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[4] *See* §§ 9(c)(1), 9(e)(1), and 8(b)(7)(c); § 9(c)(1)(A)(ii).
[5] § 9(c)(3).
[6] *Dana*, supra at 438, n.16.
[7] § 9(c)(1)(A)(ii).

B. Overturning *Dana Corp.* Would Leave Employees With Less Recourse to Challenge the Excesses of Inherently Coercive Card Check Campaigns and Pre-Negotiated Voluntary Recognition Agreements and Ultimately Undermine Employees' Representational Rights.

In recent years, employees have increasingly voted against unionization. In response, unions have attempted to increase their ranks through coercive card-check instant organizing campaigns and by signing voluntary recognition agreements with employers. As the dissenting Board members point out, workers across the country have already used *Dana Corp.* decertification elections to remove unwanted unions granted recognition by employers, often without the involvement, consent, or knowledge of the employees to be organized. The steady growth of card-check campaigns and voluntary recognition agreements makes continued Board scrutiny and enforcement of *Dana Corp.*'s notice and window-period requirements increasingly more necessary. Whether the method by which an employer voluntarily recognizes a union is pursuant to a card check or otherwise, the Board cannot know what employees' true representational desires are without further Board proceedings. To now remove the limited protection of the secret ballot after voluntary recognition would deny workers the ability to vote according to their true preferences and remove an unwanted union from their workplace.

1. Conduct That Would Be Considered Objectionable and Coercive in a Secret Ballot Election is Inherent in a Card Check Campaign.

Throughout the Act's history, union authorization cards have proven to be an inherently unreliable indicator of true employee preferences. In *NLRB v. Gissel Packing Co.,* the Court observed that "the unreliability of the cards is not dependent on the possible use of threats....It is inherent...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."[8] Unions support the card-check system because it stacks the deck completely in their favor. In fact, research shows that while secret ballot voting produced a union victory an average of 58 percent of the time since 2000, the card-check system produces a union victory 90 percent of the time.[9]

The mere fact that an employer and a union went through the motions of a card check procedure tells the Board nothing about the circumstances under which authorization cards were solicited or whether the result reflects the uncoerced sentiment of employees. In *Dana Corp.*, the Board enumerated several reasons why authorization cards are "admittedly inferior to the election process."[10] Among other things, unlike votes cast in privacy by secret Board election ballots, card signings are public actions that are susceptible to group pressure.[11] Often, card signings in such circumstances do not accurately reflect employees' true choices concerning union representation, and are instead a result of intimidation and coercion, and even misrepresentations about the purpose for which the cards will be used.[12] In fact, workers could be asked to sign a card almost anywhere, including at their homes after work hours, and union organizers could go back to any worker who declines to sign until they get the desired result. Moreover, unlike in contested Board elections, union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options and the pros and cons of unionization.[13]

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[8] *Gissel,* supra at 602, n.20.
[9] http://www.nfib.com/issues-elections/issues-elections-item/cmsid/48840/v/1.
[10] *Gissel*, supra at 603.
[11] *Dana*, supra at 438.
[12] *Id.* at 439.
[13] *Id.*

Dana Corp.'s notice and window-period requirements act as a countervailing force against card check campaigns that rely on aggressive or deceptive tactics. Notice to employees of voluntary recognition and their right to file an election petition with the Board provides critical assurance that employees will have adequate information about their electoral rights and an opportunity to discuss and weigh the pros and cons of choosing collective bargaining representation. And more importantly, it provides them the opportunity to test such recognition through a secret-ballot election. Absent intervention by the Board to check the use of these tactics, the fundamental value protected by the Act, employee free choice, can no longer be guaranteed.[14]

2. Pre-Negotiated Voluntary Recognition Agreements between Self-Interested Unions and Employers Do Not Adequately Protect Employees' Section 7 Rights and Leave No Role for the Board in the Representational Process.

The Board held that *Dana Corp.'s* notice and window-period requirements should apply irrespective of whether voluntary recognition is preceded by a card-check or neutrality agreement.[15] Unions and employers are striking pre-recognition agreements with increasing frequency. These agreements undoubtedly diminish employee Section 7 rights by among other things, limiting robust debate, favoring one particular union, and denying secret-ballot elections. Without the additional protections imposed by *Dana Corp.,* the increased usage of recognition agreements would permit employers and unions to deprive employees of their statutory right to a decertification election and the Board of any role in the process of employees selecting or rejecting a union. The Board should

[14] *Pattern Makers League v. NLRB*, 437 U.S. 95, 104-107 (1985) (The fundamental and overriding principle of the Act is "voluntary unionism."); *see also Rollins Transp. Sys.*, 296 NLRB 793, 793 (1989) ("The paramount concern...must be the employees' right to select among two or more unions, or indeed to choose none.").
[15] *Dana*, supra at 441.

affirm its holding that voluntary recognition agreements between employers and unions should not serve as a bar to employees' exercise of their own rights under the Act.

An employer's recognition of a union pursuant to a voluntary recognition agreement is not an "arm's length" determination that necessarily reflects the free choice of employees. Instead, employers and unions have self-interested motivations for entering into such agreements, none of which accurately reflect employees' interests. In fact, neutrality agreements can be negotiated with an employer without the involvement, consent, or even knowledge of the employees to be organized. As such, the Board must retain the ability to test such recognition through a secret-ballot election and determine for itself whether the employer-recognized union actually commands the support of a majority of employees.

"There could be no clearer abridgment of §7 of the Act" than for a union and employer to enter a collective bargaining relationship when a majority of employees do not support union representation.[16] This honorable Board cannot simply rely on employer and union determinations regarding employees' representational preferences that are not independently verified by the Board.[17] Under §§7 and 9 of the Act, Congress has vested the Board with the duty to direct and administer secret ballot elections and determine whether employees support or oppose representation by a particular union.[18] As such, the Board cannot abdicate its statutory responsibility to protect employee representational rights by permitting employers and unions to privately determine

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[16] *Majestic Weaving Co.*, 147 NLRB 859, 860-861 (1964) (employer negotiating with minority union unlawful even if conditioned upon union obtaining majority support in the future).

[17] *Auciello Iron Works v. NLRB*, 517 U.S. at 790 ("There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom."); *see also Levitz Furniture*, 333 NLRB 717 (employer determinations as to employee support or opposition to union representation are disfavored).

[18] *NLRB v. Sanitary Laundry*, 441 F.2d 1368, 1369 (10th Cir. 1971) (Section 9 of the Act imposes on the Board "the broad duty of providing election procedures and safeguards"). *See* §§ 9(b) and (c) of the Act.

representational issues as they please. To do so would jeopardize employee rights, as well as render the Board's role in the representational process obsolete.

Although creating a 45-day window period after voluntary recognition is announced constituted only a slight change in the Board's voluntary recognition election bar policy, it has already served to more adequately protect employees' Section 7 right to choose their bargaining representatives. In fact, dissenting from the grant of review in *Rite Aid Store #6473* and *Lamons Gasket Co.*, Board members Peter Schaumber and Brian Hayes argued that the Board already possesses the only relevant, and also telling, empirical evidence as to whether the Board should modify or overrule *Dana Corp.*[19] The members recounted statistics showing that since *Dana Corp.* was issued, the regional offices have received 1,111 requests for voluntary recognition notices, 85 election petitions were filed, 54 elections were conducted, and in 15 of those elections employees voted against the voluntarily recognized union, including 2 elections in which a petitioning union was selected over the recognized union.[20] Thus, in approximately 25% of these elections, the employees voted to reject the union. Citing these statistics, the dissent concluded that "we already have empirical evidence showing that *Dana* has served its purpose of protecting employees' free choice without discouraging voluntary recognition or the overall process of collective bargaining."[21] In view of the demonstrated importance of permitting employees a mere 45-day period to vindicate their statutory right to a Board secret-ballot election, the Board should uphold the law as it currently exists and continue to work towards an even better policy to protect employees' representational rights.

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[19] Order Granting Review (August 27, 2010) at 5.
[20] *Id.*
[21] *Id.*

C. Increased Unionization Places Special Burdens on Small Businesses That Could Put Many Small Bussinesses Out of Business.

Since labor unions have historically struggled to win workplace elections, organized labor has increasingly sought recognition outside of the protected private-ballot process. The use of card check, neutrality, and voluntary recognition agreements has become a critical component of labor's organizing strategy. Moreover, since 2007, labor unions have been trying to pass the Employee Free Choice Act, which they claim is necessary to make it easier to organize and to combat their declining membership. Allowing union organizers unrestricted access to the workplace has the potential to be extremely disruptive to small businesses and would take away their flexibility to remain competitive, especially during these challenging economic times. As such, the Board must preserve the procedural safeguard of a post-recognition window period for filing decertification or rival election petitions, which serves as a limited check against unfettered union organizing efforts.

Expanding unionization presents a significant burden on small businesses. Negotiating costs are high for smaller businesses, many of which do not have collective bargaining specialists in house or specialized human resources staff to deal with labor disputes and union organization. The additional costs of hiring legal and human resource specialists, together with the costs of potentially higher wages from unionization, may be the death knell for many small businesses. That employees can currently insist on a secret-ballot election serves as a higher hurdle to union organizing efforts. Without such a hurdle, the Board would be exposing already struggling small businesses to even more demands on their limited resources.

V. CONCLUSION

For the reasons set forth above, the NFIB Legal Center respectfully asks the Board to uphold its decision in *Dana Corp.*

Respectfully submitted,

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Certificate of Service

I certify that on November 1, 2010 I caused a true and correct copy of the foregoing Amicus Curiae Brief of the National Federation of Independent Business to be served on the following counsel by E-mail or Federal Express overnight delivery:

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

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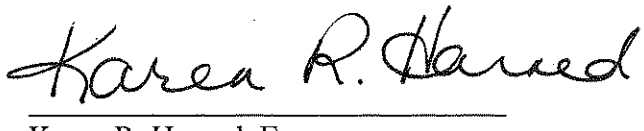

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