**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 *AMICUS CURIAE* OF UNITED STATES SENATOR ORRIN G. HATCH

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## INTEREST OF THE AMICUS CURIAE

Senator Orrin G. Hatch, a Member of the United States Senate Committee on Health, Education, Labor, and Pensions has a significant interest in this matter as it directly and potentially negates employee rights under the National Labor Relations Act resulting from dealings between and among employers and labor organizations regarding recognition processes other than our nation's hallmark secret ballot election ensuring free choice.

## INTRODUCTION

By notice dated August 31, 2010, the National Labor Relations Board ("NLRB" or "Board") invited interested *amici* to file briefs on or before November 1, 2010 addressing whether the Board should modify or overrule *Dana Corp.*, 351 NLRB 434 (2007). *Rite Aid Store #6473*, Case 31-RD-1578 and *Lamon Gasket Co.*, Case No. 16-RD-1597, *Notice and Invitation To File Briefs*, August 31, 2010 ("*Notice*").[1]

*Amici* respectfully submit that the Board's standards set forth in *Dana* must be upheld to protect and ensure employee rights to a free choice in accepting or rejecting collective bargaining representation. *Dana* affords employees the necessary safeguards of notice and time to exercise their right to seek a Board-supervised secret-ballot election to test the validity of a claimed card-check majority in circumstances involving the voluntary recognition of a union by an employer. *Dana* properly balances the National Labor Relations Act's ("NLRA") goals of protecting employee free choice and promoting the stability of bargaining relationships. There is no doubt that modifying or overruling *Dana* will encourage the use of card check over secret ballot elections to ascertain employee choice, upsetting the proper balance reached under *Dana*.

[1] On September 17, 2010, the employer in Rite Aid Store #6473, cited as the lead case in the Notice and Invitation to File Briefs, withdrew its request for review.

Upholding *Dana* will ensure the continued protection of employees' Section 7 rights to bargain collectively through representatives of their own choosing.

## STATEMENT OF THE CASE

The *Dana* decision modified the Board's voluntary recognition bar doctrine announced in *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966). *Keller Plastics* held that when an employer voluntarily recognizes a union, the parties must be afforded a "reasonable period of time" to negotiate an agreement without challenges to the recognized union by decertification or rival-union petitions. In *Rockwell International Corp.*, 220 NLRB 1262, 1263 (1975), the Board found three weeks reasonable. However, because the Board has "no rules concerning what constitutes a 'reasonable time,'" the Board found 356 days reasonable in *MGM Grand Hotel*, 329 NLRB 464 (1999), effectively converting the limited voluntary recognition bar to the one year certification bar applicable only in cases where union representation is established by a secret ballot election. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 179 (1996); *Brooks v. NLRB*, 348 U.S. 96 (1954).

*Dana* preserved the bar to decertification or rival-union petitions following voluntary recognition but attached two conditions: (1) the affected employees must receive adequate notice of the employer's voluntary recognition and of their opportunity to file an election petition within 45 days of the notice and (2) 45 days must pass from the date of notice without the filing of a valid petition for a Board election.

A secret ballot election is a far more reliable method of determining whether employees want third-party representation than is card-check, a process notorious for its lack of privacy and its susceptibility to group or peer pressure. *NLRB v. Cayuga Crushed Stone*, 474 F.2d 1380, 1383 (2d Cir. 1973); *General Shoe Corp.*, 77 NLRB 124, 127 (1948). By requiring employers to provide their employees notice of a voluntary recognition of a union *and* by affording employees

a limited opportunity to petition for an election before the voluntary recognition bar attaches, the Board struck "the proper balance between two important but often competing interests under the National Labor Relations Act: 'protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other.'" *Dana, supra*, at 434 citing *MV Transportation*, 337 NLRB 770 (2002).

Over the past twenty years, despite a greater incidence of card-check voluntary-recognition agreements with some raising serious questions regarding the circumstances and consideration exchanged between the unions and the employers, secret ballot elections remain necessary to both guarantee and protect employee free choice. As the Board has held, it is undisputed that the conduct of elections should take place "in a laboratory under conditions as nearly ideal as possible to determine the uninhibited desires of employees" providing "an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasonable choice," *Sewell Mfg.*, 138 NLRB 66, 69-70 (1962); *supplemented*, 140 NLRB 220 (1962).

The Board's efforts to "promote" or "facilitate" a negotiated agreement depends upon, and must not take precedence over, the fulfillment of the Board's duty to ensure employee free choice regarding whether to be represented by a third-party or a particular third-party. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 277 (1978); *Dana, supra* at 434. The Board *should not* modify or overrule *Dana, supra*. The cure, if any, for the decline in private sector union density is not the elimination or constriction of employee free choice.

## RESPONSES TO QUESTIONS RAISED

The Board's willingness to consider and rely on misleading data and historical analogies is of particular concern. For example, the Chairman Liebman's focus on the administrative

expense of conducting Board elections that ensure employee free choice is misplaced. *Rite Aid Store #6473*, *supra*, at 3. Chairman Liebman cites as an historical analogue the Board's experience under the 1947 Taft-Hartley amendments in conducting employee referendums to decide whether unions were authorized to negotiate union-security clauses in collective-bargaining agreements. Because authorizations were approved in 97 percent of the elections held, the requirement was rescinded and replaced with a provision allowing employees to seek a Board election to rescind the union's authority regarding an existing union-security clause.

This historical example, however, does not support overruling *Dana*. The question whether a union should have the authority to negotiate a union-security clause necessarily arises only *after* the pre-condition of employee choice regarding third-party representation is satisfied. While Agency expense to conduct an election regarding a union security clause authorization may be a legitimate consideration, where the necessary precondition to any collective negotiation is individual employee free choice of whether to be represented at all or by a particular third-party, Board efforts to ensure free choice must not be deemed a discretionary cost. Given the Board's discretion in determining the "reasonable period" protecting card-based voluntary recognition - extending, in at least one case, to 356 days followed by a three year contract bar – even if only one percent of *Dana* notices lead to decertifications, employee free choice remains a real and vital interest worth protecting. *Rite Aid Store #6473, supra, at 2; MGM Grand Hotel, supra.*

The following responds to the questions raised in the *Notice*, *supra*:

Question 1: What has been the experience under *Dana* and what have other parties to voluntary recognition agreements experienced under *Dana*?

Response: Despite the limited three year experience since the *Dana* decision, the newly constituted Board majority decided to revisit the case. In the absence of robust experiential data

for voluntary recognitions, *Dana*-notice, and non-*Dana*-notice, qualitative analysis is subject to challenge. *Rite Aid Store 6473-Lamon Gasket Co.*, supra, fn. 2. It is unlikely that evidence regarding one or a few *Dana* experiences or remarks from a single employer, union, and/or industry sector can yield relevant, reliable information on which to construct a rule that would restrict an employee's opportunity to make an informed and free choice. *Id.* And, to the extent the NLRB's request for information is really an informal approach to informal rulemaking, a notice compliant with applicable administrative law may yield more information from additional interest persons and/or entities.

The NLRB's reported *Dana*-notice information, *see, e.g. Rite Aid Store #6473, supra, at 3, fn 5; Notice,* fn. 4., is deficient. The NLRB's data fail to provide, for example, the number of employees/eligible voters in the prospective bargaining units, the duration of each card-signing campaign, whether a neutrality agreement applied, the number of signed cards, the number of votes cast for and against representation, the length of time for contract bargaining, the number of bargaining sessions, whether a contract was consummated, and whether contract terms or consideration were agreed-to or exchanged in advance.

A review of the limited data that does exist indicates *Dana* should not be modified or overruled. The Board's data reveal that 7.65 percent or 85 of the 1,111 reported *Dana* notices resulted in petitions for elections.[2] Of the 85 petitions, the Board conducted 54 elections, a 63.5 percent validation of the 30 percent minimum showing of interest filing requirement. Notably, 13 of the 54 elections conducted, nearly 25 percent, resulted in the employees' *rejection* of the voluntarily recognized unions. It is also noteworthy that 15.4 percent of the requests for voluntary recognition notices involved one company, one union accounted for 17.6 percent of all notice requests, and only two industry sectors – transportation and restaurant/hospitality -

[2] http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/Dana.xls.

accounted for 36.1 percent of 1,111 notice requests. Moreover, data reporting attempts and successes in obtaining voluntary recognition without demonstrating the minimum showing to acquire recognition bar protection is non-existent. Drawing conclusions from anecdotal and incomplete data to formulate policy for general application that would compromise or defeat the statutory goal of employee free choice would be both unacceptable.

Question 2: In what ways has the application of *Dana* furthered or hindered employees' choice of whether to be represented?

Response: *Dana* has furthered, not hindered, employees' free and informed choice regarding third-party representation. By definition, and as demonstrated by the reported experience to date under *Dana, supra,* employee choice is enhanced by providing employees notice and an opportunity to have a secret ballot election. Without *Dana*, employees are left, as before, with the likelihood of peer pressure and/or coercion, lack of information, no measurement of unit-wide employee sentiment at the same point in time, and no assurance that the alleged, resulting majority is an accurate reflection of free choice.

Question 3: In what ways has the application of *Dana* destabilized or furthered collective bargaining?

Response: Free and informed employee choice is a necessary precondition to third-party representation and the then-required statutory obligation to bargain in good faith. Collective bargaining that flows from intimidation (if not coerced signatures) enabling voluntary recognition or that results from pre-recognition bargaining, neutrality, and/or other consideration unknown to the employees in the targeted unit, undermines employee free choice. The National Labor Relations Act (Act), *29 U.S.C. §§151 et. seq.*, does not encourage collective bargaining based on the recognition of a union that affected employees would not vote for or support. Such a policy would compromise industrial peace and negate employees' statutory Section 7 rights to

choose for themselves whether representation or representation by a particular union is desired. The current 45 day *Dana* notice posting requirement and option for a Board conducted secret-ballot election does not destabilize collective bargaining. Parties routinely take time following union recognition to conduct research, prepare proposals, and get ready for initial bargaining. Without robust data facilitating comparative analysis regarding the passage of time and whether agreements were reached in *Dana*-notice and non-*Dana*-notice situations, any conclusion regarding the stability of collective bargaining based on anecdotal information is suspect.

Question 4: What is the appropriate scope of application of the rule announced in *Dana*, specifically, should the rule apply in situations governed by the Board's decision regarding after-acquired clauses in *Kroger Co.*, 219 NLRB 388 (1975), or in mergers such as the one presented in *Green-Wood Cemetery*, 280 NLRB 1359 (1986)?

Response: The *Dana*-notice rule should apply in after-acquired, merger, and successor fact patterns. In *Kroger, supra*, the Board found negotiated "after-acquired" clauses to be valid waivers of the employer's right to demand an election in determining union representation at newly added stores where the unions had valid card majorities in the units involved. For the reasons discussed above concerning card solicitation, notice to all unit employees, and the need for full exchange of information to ensure informed choice, the *Dana*-notice rule should be applied to *Kroger, supra,* fact patterns. Where new stores or additional facilities, for example, are added to a bargaining unit by contractual agreement with signed cards offered as proof of majority, absent the *Dana*-notice protocols, there is no assurance that every unit employee was informed of the card solicitation/card signing opportunity and/or that the choice to sign or not was free and informed.

In *Green-Wood Cemetery, supra,* the unit scope for a decertification election was at issue. A unit of field employees was certified following a secret ballot election specifically excluding

office clerical employees. Subsequently, the employer voluntarily recognized the union as the representative of the office clerical employees pursuant to a card check. The Board found that the parties negotiated a contract with a merged recognition clause and, over several years, operated with the intent to merge the two units. Consequently, the Board held that the petitioned-for decertification election, exclusively for office clerical employees, was inappropriate. *Green-Wood Cemetery, supra,* is a good example of the need for the *Dana*-notice protocols. The parties' effective merger of units was in stark contradiction to the prior election for field employees only, the initial contract specifically excluding office clericals, and the subsequent voluntary recognition of office clericals. The office clericals' decertification petition reflects the damage done by ignoring employee free and informed choice. The Board's refusal to process the decertification petition denied employees any choice. Unit mergers should be conditioned on employee choice through the application of *Dana*-notice.

Question 5: Under what circumstances should substantial compliance be sufficient to satisfy the notice-posting requirements established in *Dana*?

Response: The Board should continue to follow its standards applicable to official notice-posting: NLRB Casehandling Manual Part One-Unfair Labor Practice Proceedings §10132, Casehandling Manual Part Two-Representation Proceedings §11314.7, and/or NLRB Compliance Manual §10518.

Question 6: If the Board modifies or overrules *Dana*, should it do so retroactively or prospectively only?

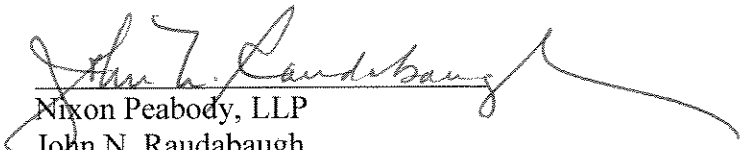
Response: The Board *should not* overrule *Dana, supra*. Should the Board inadvisably proceed to overrule *Dana*, it should do so prospectively only for the same reason it did so in announcing the recognition-bar modifications. *Dana, supra* at 435. The Board *should* modify the *Keller Plastics, supra,* voluntary recognition bar "doctrine" and define "a reasonable period

of time" for the voluntary recognition bar to not exceed six (6) months to avoid the abjectly politicized result in *MGM Grand Hotel, supra.*

## CONCLUSION

In the interest of ensuring free and informed employee choice regarding third-party representation, *Dana, supra,* should not be overturned but remain Board law. The *Dana* Board properly balanced the interests of employee free choice and promoting the stability of bargaining arrangements. Nothing since the passage of *Dana* indicates that the Board should proceed to modify or overrule *Dana*. Any attempt to modify or reject *Dana* notice and secret ballot opportunity rules will only serve to undermine employee free choice and raise questions regarding the Board's presumed expertise. The use of secret ballot elections are the preferred and superior method of ascertaining majority support regarding the question of representation, the pre-condition to pursue collective bargaining.

Respectfully submitted,



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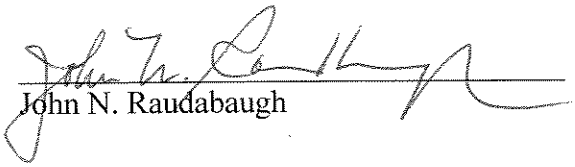
## CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amicus Curiae Senator Orrin G. Hatch was filed electronically with the Executive Secretary, National Labor Relations Board and served electronically to Region 16, National Labor Relations Board; Keith White, Barnes & Thornburg LLP; Glenn Taubman, National Right to Work Legal Defense Fund; Richard Brean, United Steelworkers AFL-CIO; and Brad Manzolillo, United Steelworkers AFL-CIO; and served by overnight express mail to Lamons Gasket and Michael Lopez this 1st day of November, 2010.



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