

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4**

RENZENBERGER, INC.,)	
)	
Employer,)	
)	
and)	
)	
UNITED ELECTRICAL RADIO AND)	
MACHINE WORKERS OF AMERICA)	
(UE),)	
)	
Petitioner,)	CASE No. 4-RC-21811
)	
and)	
)	
NATIONAL PRODUCTION WORKERS)	
UNION, LOCAL 707,)	
)	
Intervener.)	

EMPLOYER'S REQUEST FOR REVIEW

NOW COMES, Renzenberger, Inc. (“Employer”), by and through its attorneys, and pursuant to §102.67(c)(1) and (4) of the Board’s Rules and Regulations, hereby requests review of the Decision and Direction of Election in the above-captioned matter issued on April 5, 2011. In support of its Request for Review, the Employer states as follows:

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act (“Act”). The United Electrical Radio and Machine Workers of America (UE) (“Petitioner” or “UE”) and National Production Workers Union, Local 707 (“Intervener”) are Labor Organizations within the meaning of the Act.

2. The Petitioner filed a representation petition seeking to represent Included: All full-time and regular part-time road drivers, yard drivers and radius drivers employed by the

Employer at or out of its Allentown location but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, as amended.

3. Prior to the filing of the Petition by the UE, by letter dated December 17, 2010, from the Employer to the National Production Workers Union, Local 707 (“Intervenor”), the Employer voluntarily recognized the Intervenor as the exclusive collective bargaining representative of the Employer’s employees operating at or out of the Allentown, Pennsylvania rail yard. The Employer’s letter acknowledged and granted the Intervenor’s request for recognition for all full-time and regular part-time road drivers, yard drivers and radius drivers currently employed by the Employer at the Allentown, Pennsylvania location, but excluding all office clerical employees, guards, and supervisors as defined by the Act. Thereafter the Employer requested VR notices from Region 4 which the Region provided to the Employer.

4. The Parties in this matter stipulated that the Petition filed by the UE is within the 45 day notice requirement set forth in *Dana Corp.* 351 NLRB 434 (2007).

5. Region 4 of the National Labor Relations Board held a hearing on March 23, 2011, to determine if the Petition filed by the UE is barred by the Employer’s recognition of the Intervener in the unit the UE seeks to represent by its Petition in this matter.

6. On April 5, 2011, the Regional Director issued a Decision and Direction of Election and concluded that the Board’s ruling in *Dana* controls the instant matter and has ordered that an election be held despite the Board’s further review of *Dana* in *Lamons Gasket Co.* 355 NLRB No. 157 (2010) in which the Board granted review of the Regional Director’s Decision to consider issues concerning voluntary recognition arising under *Dana*.

7. The basis for this request is that the Decision and Direction of Election (a) raises a substantial question of law or policy due to its departure from Board precedent prior to *Dana* and

(b) as the Board is aware, based on its review of *Dana*, there are compelling reasons for its reconsideration of the Board's rules or policies set forth in *Dana*.

8. The Employer attaches a Memorandum in Support of the Employer's Request for Review.

WHEREFORE, the Employer requests that the National Labor Relations Board grant the request for review based upon the above compelling reasons.

Dated: April 19, 2011

Respectfully submitted,

RENZENBERGER, INC.



By: _____
One of its Attorneys

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**MEMORANDUM IN SUPPORT OF THE
EMPLOYER'S REQUEST FOR REVIEW**

I. INTRODUCTION AND PROCEDURAL HISTORY

Renzenberger, Inc. (the “Employer”) is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the National Labor Relations Board. (Bd. Ex. 2) Employer is a Kansas corporation with its headquarters located in Lenexa, Kansas. (*Id.*) During the past 12 months, a representative period, the Employer derived gross revenues in excess of \$500,000. (*Id.*) During this same period of time, the Employer purchased and received goods, supplies, and materials valued in excess of \$5,000 directly from enterprises located outside the State of Pennsylvania. (*Id.*)

Both Petitioner and Intervener are labor organizations within the meaning of Section 2(5) of the Act and both are subject to the jurisdiction of the National Labor Relations Board. (Bd.

Ex. 2) Neither Petitioner nor Intervener have been certified by the National Labor Relations Board to represent any of the employees of the Employer at the facilities at issue. (Bd. Ex. 2)

By letter dated December 17, 2010, the Employer voluntarily recognized Intervener as the collective bargaining representative for all full-time and regular part-time road drivers, yard driver and radius drivers currently employed by the Employer at the Allentown, Pennsylvania location, but excluding all office clerical employees, guards and supervisors as defined in the Act. (Bd. Ex. 2)

Following the voluntary recognition of Intervener, Employer's attorney on December 20, 2010, notified the Regional Offices 4 in writing, of the grant of voluntary recognition and requested *Dana* Notices. (Bd. Ex. 2) In response to Employer's request, the Regional Offices issued *Dana* Notices notifying employees of their right to file a petition within a 45-day window, pursuant to the Board's decision in *Dana Corp.*, 351 NLRB 434 (2007). (Bd. Ex. 2) The unit described on the *Dana* notices is coextensive with the unit described in the voluntarily recognized unit as described in Employer's December 20th letter to Intervener. (Bd. Ex. 2) The Employer thereafter properly posted the *Dana* Notices. (Bd. Ex. 2)

The Petitioner filed a representation petition on March 10, 2011 seeking to represent employees in the unit represented by the Intervener and previously recognized by the Employer. The Petitioner claims that it has the right to petition the Board for an election within the *Dana* 45-day window period and to seek an election for the employees in the unit described in its amended representation petition despite the fact that Employer recognized the Intervener as the collective bargaining representative of employees in the petitioned for unit on December 17, 2010. (Bd. Ex. 2)

On April 5, 2011, the Regional Director issues a Decision and Direction of Election ordering an election in this matter as the Director concluded that the Board's ruling in *Dana* controls. The Regional Director noted the Board's further review of *Dana* in *Lamons Gasket Co.* 355 NLRB No. 157 (2010) in which the Board granted review of the Regional Director's Decision in that matter to consider issues concerning voluntary recognition arising under *Dana*.

II. LAW AND ARGUMENT

A. Employer Argues that *Dana* Should Be Reversed and, Accordingly, Petitioner's Petition Should Be Dismissed and the Regional Director's Decision Should be Set Aside

Forty years before *Dana*, the Board implemented the recognition bar doctrine, giving employers and voluntarily recognized unions a reasonable time to bargain after an employer voluntarily recognized a union upon a showing of majority support by employees. The Board's recognition bar decisions were strengthened by the U.S. Supreme Court's acknowledgement that voluntary recognition of a union by an employer predated the National Labor Relations Act (the "Act") itself. *See NLRB v. Gissel Packing Co.*, 395 NLRB U.S. 575, 595, 600 (1969). In *Gissel*, the Supreme Court explained, "Almost from the inception of the [NLRA], that it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation" and that a union may invoke a bargaining obligation by a possession of card signed by a majority of the employees. *Id.* at 595-598. The majority in *Dana* likewise acknowledged that, "voluntary recognition has been embedded in Section 9(a) from the [NLRA's] inception." In re *Dana Corp.*, 351 NLRB 434, 438 (2007).

More recently, the Board held that a voluntarily recognized union is prohibited from filing a representation petition for the same period as a Board-certified union representative. *See MGM Grand Hotel*, 329 NLRB at 465-466 (1999). A mere eight years before *Dana*, the Board in *MGM Grand Hotel* affirmed its continued support for the voluntary recognition bar doctrine:

“It is a long-established policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability in labor-management relations.” *Id.* at 466.

The principle of stare decisis in Board decisions is an important aspect of promoting industrial peace by maintaining consistency and reliability in labor relations. Members of this very Board recently recognized that the principles of stare decisis remain relevant and apply to the Board’s decisions. *Rite Aid Store*, 355 NLRB No. 157, at *7 (NLRB Aug. 27, 2010). Changes in Board precedent generally result from: (1) intervening judicial precedent; (2) substantial changes in business or union practices; or (3) changes in Board membership. *Id.* While more than one factor may motivate the Board’s review of precedent, members of this Board acknowledged, “...the more that the political factor weighs on the reexamination and reversal of precedent, the greater detriment is likely to be for labor relations stability.” *Id.*

An objective analysis of the Board’s reasoning in *Dana* demonstrates that the reasons given by the Board simply did not justify modifying a forty-year old policy. According to the Board in *Dana*, modification of the recognition bar doctrine was necessary due, in part, to the “increased usage of recognition agreements...” 351 NLRB at 437. Thus, the Board’s main reasoning behind *Dana* was its belief that substantial changes in business or union practices justified the drastic modification of the voluntary recognition bar doctrine (i.e., increased use of recognition agreements), one of the reasons for disregarding stare decisis identified in *Rite Aid*. However, the Board did not provide any evidence that there was an increased use of recognition agreements, or, more importantly, that the increased use somehow upset the balance between free choice and encouraging collective bargaining in a detrimental way.

Rather, it is more likely that the *Dana* decision was a product of the politically appointed individuals who sat on the Board in 2007. In fact, each of the reasons espoused by the Board in *Dana* did not justify the drastic modification of the voluntary recognition bar doctrine. Moreover, if the Board's goal was to safeguard employee free choice, in practice, *Dana* has done little to achieve that goal. Importantly, even if an employer voluntarily recognizes a union, the voluntary recognition bar (as it existed pre-*Dana*) is not indefinite, the bar is only in effect for one year. *Frick Co.*, 423 F.2d at 1332; *MGM Grand Hotel*, 329 NLRB 464. The contract bar doctrine would not come into effect until after a contract is signed, which does not happen overnight. And even the contract bar doctrine would not be indefinite, the bar is only in effect for three years. *NLRB v. Arthur Sarnow Candy Co.*, 40 F.3d 552, 557 (2d Cir. 1994).

Additionally, *Dana* creates more potential for instability and uncertainty in labor-management relations during the 45-day period following an employer's voluntary recognition. On the one hand, an employer has the immediate obligation to bargain with a union after recognition and during the 45-day period; however, the parties have no incentive to bargain during the 45-day period when another representation petition or decertification petition could be filed. On the other hand, a newly-recognized union must be able to show its value to employees by immediately representing employees' interests; yet, it is likely that nothing will be achieved during the 45-day period, thereby undermining the union's value to employees because employers and unions are stuck in limbo waiting for time to pass. In practice, *Dana* has created an inefficient voluntary recognition process that has increased instability in labor relations.

In practice, *Dana* has not achieved the "finer balance" or promoted stability in labor relations as the Board had hoped. This is precisely why the Board should overturn *Dana* and return to the pre-*Dana* voluntary recognition Board doctrine that was developed over forty years

of labor law. It is this collective contribution of Board and federal court decisions that strengthened the voluntary recognition bar doctrine and why it worked for so many years. The sudden need to modify this long-standing and effective doctrine was simply not necessary in 2007, and even less so today.

Obviously, this very issue is before the Board presently and, at least for the purposes of the instant case, it is Employer's position that the Board should reverse *Dana* and return to the voluntary recognition bar doctrine that was in effect for over 40 years prior to *Dana*.

Accordingly, the Employer respectfully requests the Board to grant review of the Regional Director's Decision to overturn *Dana* and to dismiss the Petitioner's petition in this matter. Finally, the Employer further request that the Board direct the Regional Director to hold the petition in this matter in abeyance and not to hold the election in this matter (scheduled for May 5, 2011) pending the Board's decisions in this matter as well as *Lamont Gasket*. Should the Board overturn *Dana*, it would nullify any election in this case and therefore unnecessarily waste the Region's scarce assets.

III. CONCLUSION

Based on the above facts, law, reasoning and analysis, the Employer respectfully requests the Board to grant its Request for Review, to direct the Regional Director to hold the instant case in abeyance until the Board rules on this matter and *Lamont Gasket*, to overturn *Dana* and to dismiss the petition in this matter.

Dated: April 19, 2011

Respectfully submitted,

RENZENBERGER, INC.

By:  _____
One of its Attorneys

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CERTIFICATE OF SERVICE

Scott A. Gore, an attorney, certifies that on the 19th day of April, 2011, he electronically filed this Request for Review along with its Memorandum in Support of its Request for Review with the National Labor Relations Board and overnight mailed 8 copies to the Board and also served upon the following parties by email and by overnight mail to:

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