

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

**In the Matter of**

**RENZENBERGER, INC.,  
Respondent,**

**and**

**UNITED ELECTRICAL, RADIO AND MACHINE  
WORKERS OF AMERICA (UE),  
Petitioner,**

**Case Nos.: 8-RC-17057  
8-RC-17058  
8-RC-17059  
8-RC-17060  
8-RC-17065**

**and**

**NATIONAL PRODUCTION WORKERS UNION,  
LOCAL 707,  
Intervenor.**

**REQUEST FOR REVIEW ON BEHALF OF PETITIONER UNITED  
ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)**

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Pursuant to Section 102.67 of the National Labor Relations Board (hereinafter “Board”) Rules and Regulations, Petitioner United Electrical, Radio and Machine Workers of America (hereinafter “UE”) submits this Request for Review of the Regional Director’s April 21, 2011 Decision and Order Dismissing Petitions in Cases 8-RC-17057, 8-RC-17058, 8-RC-17059, 8-RC-17060 and 8-RC-17065. For the reasons stated herein, the Regional Director’s Decision should be reversed and the petitions should be remanded to the Regional Director for further processing.

**I. INTRODUCTION AND BACKGROUND**

**A. The parties**

Respondent Renzenberger, Inc. (hereinafter “the Employer”) is a transportation company that primarily services the railroad industry by transporting rail crews to and from their work

locations and other places they may need to go. (Tr. 16<sup>1</sup>). The UE and Intervenor National Production Workers Union, Local 707 (hereinafter “Local 707”) are both labor organizations within the meaning of Section 2(5) of the National Labor Relations Act (hereinafter “the Act”). (B-4, pg.1)<sup>2</sup>.

**B. Procedural history**

On February 10, 2011, the UE filed five separate petitions seeking to represent units of drivers employed by the Employer working at our out of various locations in Ohio. Four of those petitions– for the Mansfield, Cleveland, Bellevue, and Powhattan locations– were filed in Region 8. The petition for the Portsmouth location was filed in Region 9. On the same day, the UE filed five separate petitions in Region 31 seeking to represent units of drivers at various locations in California.<sup>3</sup> These cases pose substantially similar issues.

On March 8, 2011, the Regional Director of Region 8 issued an order consolidating the five Ohio cases<sup>4</sup> and scheduling them for hearing on March 21, 2011. On March 17, 2010, the Regional Director issued an order rescheduling the hearing for March 30, 2011. The hearing

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<sup>1</sup> “Tr. 16” refers to page 16 of the hearing transcript. The testimony upon which the assertion is based can be found on this page of the hearing transcript. Similar notation is used throughout this document.

<sup>2</sup> “B-4, pg. 1” refers to page 1 of Board Exhibit 4. Throughout this document the exhibits will be identified as “B” for Board Exhibits and “J” for Joint Exhibits.

<sup>3</sup> A hearing was held in Region 31 on February 24-25 and March 2-4, 2011. Thereafter, the parties submitted briefs and, on March 23, 2011, the Regional Director of Region 31 issued a Decision and Order Dismissing Petitions in cases 31-RC-8850, 31-RC-8851, 31-RC-8852, 31-RC-8853, and 31-RC-8854.

<sup>4</sup> The petition for the Portsmouth location, Case Number 9-RC-18339, became Case Number 8-RC-17065 and was consolidated with the four petitions originally filed in Region 8.

commenced and closed on March 30, 2011. The parties submitted briefs, and on April 21, 2011, the Regional Director issued a Decision and Order dismissing all five of the UE's petitions, adopting the reasoning of the Regional Director for Region 31. The UE now files a Request for Review of the Regional Director's Decision and Order.<sup>5</sup>

**C. The Regional Director dismissed the UE's petitions because they were not coextensive with the Employer's recent voluntary recognition of Local 707.**

On December 21, 2010, the Employer voluntarily recognized Local 707 as the bargaining representative of the Employer's employees working at or out of nine of its eleven rail yards in the State of Ohio. (B-4, pg. 4). The following yards were included in the represented unit: Cincinnati, Ashtabula, Cleveland, Mansfield, Powhattan, Mingo Junction, Bellevue, Columbus and Portsmouth.<sup>6</sup> (B-4, pg. 4). The Employer's voluntary recognition of Local 707 covered all of the workers petitioned for by the UE in the present matter. (B-4, pg. 4). The Employer's recognition of Local 707 encompassed workers at other yards in Ohio not petitioned for by the UE. The Regional Director dismissed the UE's petitions because the petitioned-for units were not identical to the voluntarily recognized unit.

**D. Basis for this Request for Review**

Under Section 102.67(c) of the Board's Rules and Regulations, the Board will only grant a request for review for "compelling reasons." 29 C.F.R. § 102.67(c). In the present matter, the Board should grant the UE's Request for Review because "a substantial question of law or policy is raised

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<sup>5</sup> The UE also has a Request for Review pending before the Board on the Decision and Order Dismissing Petitions in Region 31.

<sup>6</sup> At hearing the employer explained that the Conneaut yard no longer has employees; therefore, it was removed from the list of yards at which Local 707 is recognized. (Tr. 81-82).

because of the absence of, or a departure from, officially reported Board precedent,” and because the Regional Director’s decision “is clearly erroneous on the record and such error prejudicially affects the rights of” the UE. 29 C.F.R. § 102.67(c)(1) and (2). Specifically, the Regional Director’s Decision that the UE could not petition for units that were smaller than the voluntarily recognized statewide unit contradicts the Board’s holding in *American National Can, Inc.*, 321 NLRB No. 159 (1996), and its progeny.

## **II. THE UE WAS NOT REQUIRED TO PETITION FOR A UNIT THAT WAS IDENTICAL TO THE VOLUNTARILY-RECOGNIZED STATEWIDE UNIT**

Notwithstanding the Regional Director’s Decision and Order, the UE was not required to petition for a unit that was coextensive with the voluntarily-recognized unit. The Board has consistently held that, in situations where a voluntary recognition does not bar an election, a rival union is free to petition for *any appropriate unit*. See *Am. Nat’l Can, Inc.*, 321 NLRB No. 159 (1996); *Smith’s Food & Drug Ctrs.*, 320 NLRB 844 (1996); *Rollins Transp. Sys.*, 296 NLRB 793 (1989). In the present matter, as the Regional Director recognized, the Employer’s voluntary recognition of Local 707 was not a bar to the UE’s petition under *Dana Corp.*, 351 NLRB 434, 441 (2007). See *Regional Director’s Decision and Order*, pg. 5. As such, the UE was free to petition for a unit different than the voluntarily recognized unit. *Am. Nat’l Can, Inc.*, 321 NLRB No. 159 (1996); *Smith’s Food & Drug Ctrs.*, 320 NLRB 844 (1996).

In *American National Can*, the employer voluntarily recognized a union as the bargaining representative of a large unit of 397 production, maintenance and skilled craft employees. 321 NLRB at 1164. The Board held that the recognition was not a bar to a petition filed by a rival

union seeking a smaller unit of just 24 mold makers.<sup>3</sup> *Id.* The Board specifically noted that the fact “that the Petitioner seeks a smaller unit than that urged by the [recognized union] does not alter our conclusion” that the recognition did not constitute a bar. *Id.* As long as the other circumstances required to limit the recognition bar are present, a rival union can petition for “a separate appropriate unit for bargaining.” *Id.* As such, in this matter, the UE’s petitions should not have been dismissed merely because they sought units different than the voluntarily recognized unit.

Despite the plain holding in *American National Can*, the Regional Director’s Decision and Order from Region 31, as adopted by the Regional Director for Region 8, cited certain passages in *Dana Corp.*, 351 NLRB 434 (2007), as standing for the proposition that a rival union may only petition for a unit that is coextensive with a recently recognized unit. The Regional Directors’ Decisions misread *Dana* and improperly discounts *American National Can*.

There has been little guidance on exactly how *Dana* should work, especially in the case of a rival union’s representation petition. The facts in *Dana* itself involved a decertification petition. The case simply states that “any properly supported petition filed within the 45-day period will be processed according to the Board’s normal procedures.” *Dana Corp.*, 351 NLRB at 443. Under normal Board procedures, a union can petition for any unit with a 30% showing of interest from that unit, and the Board can certify any appropriate unit in which a majority of the workers support

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<sup>3</sup> Under *Smith’s Food & Drug*, a rival union’s petition was barred unless it was supported by the requisite 30% showing of interest which had been obtained *prior to* the recognition. The modification of the recognition bar in *Dana* overruled *Smith’s Food & Drug* only insofar as it barred rival union petitions where the showing of interest was gathered within 45 days after a recognition notice posting. *See Dana*, 351 NLRB at n. 33.

the union. See *An Outline of Law and Procedure in Representation Cases*, §§ 5-100, 5-700, 12-100. As such, the UE's petitions would be appropriate.

The Regional Director for Region 31 cited certain passages in *Dana* that he contended overturned *American National Can* and somehow establish that a rival union must petition for a unit identical to a recognized unit. All of the cited passages vaguely indicate that a rival union's petitions must be supported by 30 percent or more of "the unit" employees. Likewise, the Regional Director for Region 8 noted that the *Dana* notices requested for the recognized unit in this case referred to "the unit." The Regional Directors's Decisions conclude that when referring to "the unit," the Board must have been referring to the voluntarily recognized unit. However, under another possible reading of the cited passages, which would be consistent with Board precedent, "the unit" would refer to the petitioned-for unit—not the recognized unit. As such, the Board would process a rival union's petition for any appropriate unit so long as it had a sufficient showing of interest.

This conclusion is also supported by the requirement that the Board only certify an appropriate unit. It is entirely possible that an employer could recognize a union as the bargaining representative of a unit that would not be found appropriate by the Board. Generally, where an employer and union have agreed on a unit, the Board will not intercede. However, in the case of a petition filed under *Dana*, the Board necessarily becomes involved. In a case where the newly-recognized unit was not an appropriate unit, the Board would have to either hold an election in an inappropriate unit, or disallow the petition on the grounds that the recognized unit was not appropriate, rendering *Dana* completely ineffective. In this case, a unit of 9 of the 11 rail yards in the state of Ohio is not an appropriate unit.

The decision in *Dana* simply added to the Board's already existing limitations on the recognition bar. The fact that the Board did not articulate any specific limitation on the units that may be petitioned for during the 45-day window implemented by *Dana*, suggests that these cases should be treated like any other petition filed in the face of a voluntary recognition. The Board has consistently taken the position that, where a petition is supported by a showing of interest in an appropriate unit and is not blocked by a recognition bar, the fact that it seeks a smaller unit than the one recognized will not invalidate it. Therefore, since the UE has petitioned for separate appropriate bargaining units and the petitions are not barred by the recognition (pursuant to *Dana*), the fact that the petitioned-for units are smaller than the recognized unit, does not invalidate the petitions.

#### **IV. CONCLUSION**

For all of the foregoing reasons, the UE respectfully requests that the Board grant the UE's Request for Review, rule that the UE's petitions should not have been dismissed because they are not coextensive with the voluntarily-recognized unit, and remand the instant petitions to the Regional Director for further processing.

Dated at Pittsburgh, Pennsylvania, this 3rd day of May, 2011.

Respectfully submitted,

/s/ Valerie Woodruff /s/

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing REQUEST FOR REVIEW ON BEHALF OF PETITIONER UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) has been sent this 3<sup>rd</sup> day of May 2011 by email and overnight delivery to: Scott Gore, Counsel for the Respondent at <[sgore@lanermuchin.com](mailto:sgore@lanermuchin.com)> and Laner, Munchin, Dombrow, Becker, Levin and Tominberg, Ltd., 515 N. State Street, Suite 2800, Chicago, IL, 60654; Patrick Calihan, Counsel for Intervenor at <[pcalihan@sbcglobal.net](mailto:pcalihan@sbcglobal.net)> and 53 W. Jackson Blvd., Suite 1534, Chicago, IL, 60604; and Federick Calatrello , Regional Director of Region 8 at <[frederick.calatrello@nrb.gov](mailto:frederick.calatrello@nrb.gov)> and 1240 East 9<sup>th</sup> Street, Room 1695, Cleveland, OH, 44199-2086; and by overnight mail to John Oliverio at 2210 Midwest Rd., Suite 310, Oak Brook, IL 60521.

\_\_\_\_\_/s/ Valerie Woodruff /s/\_\_\_\_\_  
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