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**Columbus Transit, LLC and Transport Workers Union of Greater New York, Local 100, AFL-CIO, Petitioner and Local 713, United Brotherhood of Trade Unions, IUJAT, Intervenor**

**Columbus Transit, LLC and Local 713, United Brotherhood of Trade Unions, IUJAT and Transport Workers Union of Greater New York, Local 100, AFL-CIO.** Cases 2-CA-39193 and 2-RC-23351

December 21, 2011

DECISION, ORDER, AND CERTIFICATION  
OF REPRESENTATIVE

BY CHAIRMAN PEARCE AND MEMBERS BECKER  
AND HAYES

On October 4, 2010, Administrative Law Judge Raymond P. Green issued the attached decision in this consolidated unfair labor practice and representation proceeding. The Respondent and Intervenor Local 713 filed exceptions and supporting briefs, Petitioner Local 100 filed an answering brief, and the Respondent filed a brief partially opposing the Intervenor's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision, Order, and Certification of Representative.

The Refusal to Bargain

The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by its refusal to bargain with the Intervenor. The Respondent voluntarily recognized the Intervenor on November 10, 2008 and, a week later, posted a notice under *Dana Corp.*, 351 NLRB 434 (2007), notifying employees that it had voluntarily recognized the Intervenor and that they had 45 days to either seek alternative union representation or no representation. The Petitioner filed a representation petition on December 22, 2008.<sup>2</sup> In a February 24, 2009

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> The Region found that the petition had been timely filed under *Dana Corp.*, and the judge determined that the Region properly ordered

letter, the Intervenor requested bargaining with the Respondent. The Respondent declined to bargain, notifying the Intervenor by letter dated March 4, 2009, 2 days before the representation election in this case.

On August 26, 2011, the Board issued its decision in *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), overruling *Dana Corp.*, supra, and thus eliminating the 45-day "window period" for filing a representation petition or a decertification petition. The Board stated in *Lamons Gasket* that its decision would apply retroactively to all pending cases, "except those in which an election was held and the ballots have been opened and counted, consistent with the Board's established approach in representation proceedings." *Lamons Gasket*, supra, slip op. at 10. That exception applies here, as the election was held on March 6, 2009, and the ballots were tallied on June 5, 2009, well before issuance of *Lamons Gasket*. We therefore evaluate the facts of this case under the rule in *Dana Corp.*, on which the Region and the judge also relied.<sup>3</sup>

Applying *Dana Corp.*, we disagree with the judge's conclusion that the Respondent did not violate Section 8(a)(5) and (1) by refusing to bargain with the Intervenor after its voluntary recognition. The judge found that a reasonable period of time for bargaining had passed between the voluntary recognition of the Intervenor and the Intervenor's request for bargaining. The judge explained that the Intervenor "sat on its hands" by delaying its request until after the Petitioner filed its petition and for a period of almost 4 months following recognition.

*Dana Corp.*, however, expressly provides that an employer's obligation to bargain with the union attaches

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the election. The Board denied the Intervenor's Request for Review of that decision by unpublished order dated May 28, 2009.

<sup>3</sup> The results of this election do not, in Chairman Pearce's and Member Becker's view, undercut the validity of *Lamons Gasket*. As the majority in *Lamons Gasket* explained, employees' rejection of a voluntarily recognized union in a small percentage of cases does not invalidate their earlier support upon which recognition was based. Here, employees changed their minds, but as *Lamons Gasket* explained, there is no reason to believe they would not have done so (and that other employees will not do so in a small percentage of cases) even if recognition had followed a Board-supervised election.

Member Hayes agrees with his colleagues that the petition was properly processed under the procedures outlined in *Dana Corp.* He finds, for the reasons explained in his dissent in *Lamons Gasket*—and as this case starkly demonstrates—that *Lamons Gasket* was wrongly decided and that *Dana Corp.* should not have been overruled. In the instant case, the unit employees exercised their *Dana Corp.* right to vote in a secret-ballot election and soundly rejected the union voluntarily recognized by the Respondent in favor of the Petitioner. In Member Hayes' view, that carefully considered and confidential expression of choice is, as both the Board and courts have noted, far more likely to express an employee's actual sentiment than a publicly solicited card. Accordingly, Member Hayes finds that the Petitioner should be certified.

immediately upon voluntary recognition and continues even if a decertification or representation petition is filed during the window period.<sup>4</sup> Here, there is no evidence that the Intervenor waived the Respondent's bargaining obligation.

Moreover, contrary to the judge, we find that the Intervenor's 4-month delay in requesting bargaining is reasonable under the uncommon circumstances of this case. In assessing what constitutes a "reasonable time," the Board does not rely strictly on the passage of time or the number of meetings between the parties, but instead looks at what transpired during that period. See *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 179 (1996), *enfd.* in relevant part 117 F.3d 1454, 1459 (D.C. Cir. 1997). Here, the Intervenor and the Respondent were faced with the unusual circumstance (permitted by *Dana Corp.*) of having a rival union file a representation petition shortly after voluntary recognition. Thus, during the period preceding the Intervenor's request to bargain, the parties were also involved in organizing campaigns and preelection proceedings, including a hearing, in addition to preparing to bargain for an initial contract. Contrary to our colleague's assertion, that the Intervenor requested bargaining approximately 10 days before the election does not render that request unreasonable.

In finding a period just shy of 4 months to be reasonable, we acknowledge the "Catch-22" position that voluntarily recognized unions faced under *Dana Corp.* As the dissent in that case explained, the rule in *Dana Corp.* placed a union in "limbo" for at least the first 45 days of the bargaining relationship, and employers had little incentive to devote time to bargaining during this period. *Dana Corp.*, 351 NLRB at 447. Thus, the Intervenor's delay in requesting bargaining may well have reflected its anticipation that the Petitioner—which was actively attempting to organize employees at the time the Respondent voluntarily recognized the Intervenor—would file a petition. Given these circumstances, we find that the Intervenor's request to bargain was made within a reasonable period of time and that the Respondent's refusal to bargain with the Intervenor violated Section 8(a)(5) and (1) of the Act.<sup>5</sup>

<sup>4</sup> As stated in *Dana Corp.*, "The employer's obligation to bargain with the union attaches immediately. For instance, during this 45-day period, the union can begin its representation of employees, its processing of their grievances, and its bargaining with the employer for a first contract." *Supra* at 442.

<sup>5</sup> Contrary to his colleagues, Member Hayes agrees with the judge that the Respondent did not violate the Act by refusing the Intervenor's belated bargaining demand, which came essentially on the eve of the scheduled election. Like the judge, he agrees that the Intervenor "sat on its hands," and failed to request bargaining within a reasonable period. The fact that all parties were involved with other matters hardly

### The Objections

The revised tally of ballots from the March 6 election showed 24 votes for Petitioner Local 100, 5 votes for Intervenor Local 713, 9 votes for no representation, and 9 challenged ballots.<sup>6</sup> The Respondent and the Intervenor filed timely objections to the election. The judge overruled the Respondent's and Intervenor's election objections, finding they lacked merit. For the reasons set forth by the judge, and as further stated below, we agree.<sup>7</sup>

In its objections, the Intervenor contends that the Respondent's refusal to bargain with it warrants overturning the election. We disagree. Despite the general policy of directing a new election whenever an unfair labor practice occurs during the critical period, the Board does not set the election aside "where it is virtually impossible to conclude that the misconduct could have affected the election results." *Clark Equipment Co.*, 278 NLRB 498, 505 (1986), overruled in part on other grounds in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); see also *Bon Appétit Mgt. Co.*, 334 NLRB 1042, 1044 (2001). In assessing unfair labor practices during the critical period, the Board weighs a number of factors to determine if the violations could have affected the outcome, such as the number of violations, their severity, the extent of their dissemination, the number of employees affected, the size of the bargaining unit, the closeness of the election, and the violations' proximity to the election. *Bon Appétit Mgt. Co.*, *supra* at 1044.<sup>8</sup>

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excuses a failure to make a simple request; no "Catch-22" exists as to that. Member Hayes therefore finds that with the election imminent, the Respondent reasonably declined the Intervenor's last minute request to bargain until after the election resolved who the employees' bargaining representative actually would be.

<sup>6</sup> The election was conducted in a unit of the Respondent's drivers pursuant to a February 5, 2009 Decision and Direction of Election.

<sup>7</sup> The Respondent's Objection 4 contends that the Regional Director's Decision and Direction of Election precluded a fair and valid election by directing that the Petitioner could be certified if it won the election but, if the Intervenor won, its certification would be held in abeyance pending the resolution of an 8(a)(2) charge (which was later withdrawn) alleging that the Respondent had illegally assisted the Intervenor. We agree with the judge that the above direction does not constitute grounds for overturning the election. In doing so, we do not pass on the judge's finding that the direction "reflects the legal procedure governing the case at the time the decision was issued." Rather, we find that the Regional Director's "conditional" certification had no effect on the employees' choice of representative because there is no credited evidence that unit employees were aware of the direction when they voted.

<sup>8</sup> Compare *Longview Fibre Paper Packaging, Inc.*, 356 NLRB No. 108, slip op. at 1 (2011) (numerous 8(a)(1) violations, including threats of loss of benefits, warranted new election); *Borum Bros., Inc.*, 257 NLRB 156, 156 fn. 2 (1981) (directing a new election where the employer violated Sec. 8(a)(1) by, inter alia, maintaining an unlawful no-solicitation rule and threatening, interrogating, and polling employees); *Han-Dee Pak, Inc.*, 249 NLRB 725, 735 (1980) (numerous 8(a)(1) violations, including interrogating employees and threatening them

Considering these factors, we find that it is virtually impossible to conclude that the Respondent's refusal to bargain in this case could have affected the result of the election.<sup>9</sup> As noted above, the Petitioner won the election by a considerable margin, receiving 24 votes compared to 5 votes in favor of the Intervenor. Further, it is unlikely that the Intervenor had been deprived of a possible campaign platform, as it made its request to bargain approximately a week before the election, the Respondent's refusal occurred only 2 days before the election, and there is also no evidence that employees were aware of the Intervenor's request or the Respondent's refusal. Thus, we find that the Respondent's unlawful conduct could have had no impact on the on the election results. Accordingly, we overrule the objection.

#### CONCLUSIONS OF LAW

1. Respondent Columbus Transit, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Intervenor Local 713, United Brotherhood of Trade Unions, IUJAT and Petitioner Transport Workers Union of Greater New York, Local 100, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act.
3. The Respondent, by failing and refusing to recognize and bargain with the Intervenor as the exclusive representative of bargaining unit employees since March 4, 2009, engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
4. The Intervenor's and the Respondent's objections to the election have no merit.

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with plant closure and discharge, warranted new election if union did not receive a majority of votes cast); with *Coca-Cola Bottling Co.*, 232 NLRB 717, 718 (1977) (declining to set aside an election where an 8(a)(1) violation affected only 2 employees out of a unit of 106 employees); *Recycle America*, 310 NLRB 629, 629 (1993) (declining to set aside an election where employer interrogation and solicitation of grievances affected only one employee in 45-employee unit and occurred 1 month before election); *Empresas Inabon, Inc.*, 309 NLRB 291, 293 (1992), petition for review dismissed sub nom. *Union de la Construccion de Concreto y Equipo Pesado v. NLRB*, 10 F.3d 14 (1st Cir. 1993) (declining to set aside an election despite a meritorious 8(a)(5) charge, because the affected union requested to proceed to the election, participated in the representation proceedings, and then lost by a significant margin despite employees knowing about the refusal to bargain).

<sup>9</sup> Even assuming arguing that the Respondent's election eve refusal to bargain violated the Act, Member Hayes agrees with his colleagues that the refusal did not affect the election results and that the objection should be overruled under either the "virtually impossible" standard, which he does not endorse, or that articulated by the majority in *Safe-way, Inc.*, 338 NLRB 525, 526 fn. 3 (2002) (finding that each case must be evaluated on its particular facts to determine whether, under all the circumstances, the conduct was such as to preclude a fair election).

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order the Respondent to cease and desist from engaging in such conduct. Because the Intervenor is no longer the exclusive bargaining representative of the unit employees, the remedy shall not include an affirmative bargaining order. See *Empresas Inabon, Inc.*, supra, 309 NLRB at 293.

#### ORDER

The National Labor Relations Board orders that the Respondent, Columbus Transit, LLC, Mount Vernon, New York, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Mount Vernon, New York facility, copies of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.<sup>11</sup> Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2009.

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<sup>10</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>11</sup> For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Transport Workers Union of Greater New York, Local 100, AFL-CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All full-time and regular part-time drivers employed at the Employer's facility at 701 So. Columbus Avenue, Mount Vernon, NY.

Excluded: All other employees, and guards, professional employees and supervisors as defined in the Act.

Dated, Washington, D.C. December 21, 2011

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Mark Gaston Pearce, Chairman

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Craig Becker, Member

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Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

##### NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

#### COLUMBUS TRANSIT, LLC

*Robert Guerra, Esq.*, for the General Counsel.

*Stuart Weinberger, Esq.*, for the Employer.

*Polly Halfkenny, Esq.*, for the Petitioner.

*Bryan McCarthy, Esq.*, for the Intervenor.

#### DECISION

##### STATEMENT OF CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case<sup>1</sup> in New York City, New York, on August 24, 2010.

The petition in Case 2-RC-23351 was filed on December 22, 2008, by Transport Workers Union of Greater New York, Local 100, AFL-CIO, herein called Local 100. At the same time, Local 100 filed an unfair labor practice charge in Case 2-CA-39377, alleging that the Employer had unlawfully recognized Local 713, United Brotherhood of Trade Unions, IUJAT, herein called Local 713.

Pursuant to a Decision and Direction of Election issued by the Regional Director on February 5, 2009, a secret ballot election was held on March 6, 2009. In addition to Local 100 and the employer, Local 713 also participated in the election as the Intervenor.

The unit of employees that voted in the election was as follows:

Included: All full-time and regular part-time drivers employed at the Employer's facility at 701 So. Columbus Avenue, Mount Vernon, New York.

Excluded: All other employees, and guards, professional employees and supervisors as defined in the Act.

Because the Board had not yet ruled on the Employer's request for review of the Regional Director's Decision and Direction of Election, the ballots were impounded.

On March 12, 2009, Local 100 withdrew its unfair labor practice charge and on March 20, the Director issued a Supplemental Decision and Order directing that the ballots be opened and counted. The tally of ballots showed that of about 55 eligible voters, 24 cast ballots for Local 100, 5 cast votes for Local 713, and 9 cast votes against any union representation.

Both the Employer and Local 713 filed timely objections to the election and these will be discussed below.

The charge in the consolidated unfair labor practice case, Case 2-CA-39193 was filed by Local 713 on March 10, 2009,

<sup>1</sup> The caption is hereby amended to reflect that at the hearing I permitted Transport Workers Union of Greater New York, Local 100 to intervene in the unfair labor practice case, it already being a party to the related and consolidated representation case.

and the complaint based on this charge was issued by the Regional Director on May 29, 2009. This alleged that the Employer has since March 4, 2009, refused to bargain with that Union as the exclusive bargaining representative in the above described unit.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

#### Findings and Conclusions

##### A. Procedural History

The evidence in this case shows that both Local 100 and Local 713 began organizing the employees of the Company at its Mount Vernon location in or about September 2008. In this regard, Local 100 represents certain other employee of the Company at a different location and learned about Local 713's organizing efforts through people at its represented facility.

In connection with the unfair labor practice case, it was stipulated that on or about November 10, 2008, the employer voluntarily recognized Local 713 as the exclusive bargaining agent of the company's drivers at the location in question. It was also stipulated that by letter dated February 24, 2009, Local 713 notified the employer of its desire to meet and negotiate for a collective-bargaining agreement and that by letter dated March 4, 2009, the employer stated that it was declining to bargain. That is the sum and substance of the General Counsel's unfair labor practice proof and no other evidence was offered by any of the other parties.

There are, however, a few things worth noting. For one thing, Local 100 had filed at one point, an unfair labor practice charge alleging that the Employer's recognition of Local 713 was illegal under Section 8(a)(1) and (2) of the Act. That charge was later withdrawn and so there is no present contention in this case that the recognition of Local 713 was illegal because that union did not represent, at the time of recognition, an uncoerced majority of the employees in the bargaining unit. Nor is there any current allegation that the recognition of Local 713 was tainted by any assistance or other improper conduct by the employer. So, for purposes of this case, I must conclude that the recognition accorded to Local 713 was legally granted and therefore, under Board law, the employer had an obligation to bargain with that union for a "reasonable period of time." *Royal Coach Lines*, 282 NLRB 1037, 1038 (1987).

The second thing worth noting is that notwithstanding the fact that recognition was granted on or about November 10, 2008, it was not until after Local 100 filed its representation petition in the same bargaining unit that Local 713 asked the company to bargain. Thus, whatever a reasonable period of time might be, Local 713 sat on its hands for almost 4 months and did nothing to commence negotiations after its recognition.<sup>2</sup>

<sup>2</sup> I note that there was no evidence presented to show that at any time after the initial grant of recognition, Local 713 representatives met with or communicated with employees as to the kinds of negotiations. There was no evidence that any representatives met with employees to discuss their issues, problems, or grievances. Indeed there was no evidence to show that any representatives of Local 713 even notified the employees

In the meantime, Local 100 filed its petition for an election on December 22, 2008, and a hearing was held on that petition. At the hearing, Local 713 intervened and contended that its recognition agreement dated November 10, 2008 should act as a bar to an election. Moreover, the employer contended that the election process should be blocked because there was then pending an unfair labor practice charge filed by Local 100 which alleged, inter alia, that the recognition agreement was unlawful under Section 8(a)(2) of the Act. It argued that holding an election would only be proper if Local 100 withdrew or waived its 8(a)(2) allegations irrespective of the outcome of the election.

On February 5, 2009, the Regional Director issued a Decision and Direction of Election. In her decision, the Regional Director concluded that in accordance with *Dana Corp.*, 351 NLRB 434 (2007), Local 100's election petition was timely filed and that an election should be held. In pertinent part, *Dana* held that where an employer voluntarily recognizes a union, it must notify the employees of the recognition and notify them that they have 45 days to either seek alternative union representation or no representation. In ordering that an election should be held, the Regional Director stated that she did so "without prejudice and shall expressly condition any certification resulting from such election with respect to the status of the intervenor on any subsequent determinations made in the pending unfair labor practice case and shall take such action as may be deemed necessary to effectuate the policies of the act with respect thereto."

On March 6, 2009, an election was held but the ballots were impounded because the Board had not yet ruled on the Employer's request for review.

On March 20, the Regional Director issued a Supplemental Decision directing that the ballots be opened and counted. She held, inter alia, that the withdrawal by Local 100 of its unfair labor practice charge rendered moot any question regarding the potential taint from the alleged 8(a)(2) conduct and the previous Direction of Election wherein she stated that a certification that would issue to Local 713, in the event it won the election, would be held in abeyance pending completion of the alleged 8(a)(2) unfair labor practice charge.

On April 8, 2009, the Employer filed a request for review of the Regional Director's March 20 Supplemental Decision.

On May 28, 2009, the Board issued an Order rejecting the requests for review and allowed the ballots to be counted. However, at that time there were only two members on the Board and the Employer contends that this Order was without statutory authority pursuant to the Supreme Court's decision in *New Process Steel, LP v. NLRB*. I do note, however that unlike the case before the Supreme Court which involved a final order in an unfair labor practice case, an order rejecting a request for review is not a final order. Moreover, the granting of a request for review in a representation case is purely a matter of discretion by the Board.<sup>3</sup>

in the unit that it had been recognized by the employer as the bargaining representative.

<sup>3</sup> It is noted that on September 15, 2010, a three-member Board issued an Order denying the Employer's requests for review without

On June 5, 2009, the ballots were counted and an initial tally of ballots was served on the parties to the election.

On June 10, 2009, the Regional Director approved a Stipulation regarding three of the challenged ballots and it was agreed these individuals were not eligible voters.<sup>4</sup> Accordingly, the challenges were no longer determinative of the outcome of the election and the Regional Director issued a revised tally of ballots pursuant to which Local 100 received a majority of the valid votes counted.

On June 10, 2009, the Intervenor, Local 713, filed Objections to the Election. In substance Local 713 alleged that the Employer interfered with the election by (a) refusing to bargain with it as alleged in the complaint issued in Case 20-CA-39193; and (b) that the Regional Director made a number of rulings in the representation case that were either incorrect or undermined Local 713 in the eyes of prospective voters. In this regard, Local 713 alleged that the Regional Director erred by issuing a Decision and Direction of Election notwithstanding the "recognition bar" issue and by failing to require the Petitioner to agree to waive any contention that a certification should not be granted to Local 713 in the event that the Intervenor won the election. Local 713 alleged that the wording of the original Decision and Direction of Election indicated a preference for Local 100 by stating that if Local won the election, it would be certified but that if Local 713 won the election, any certification would be held in abeyance pending the outcome of an 8(a)(2) charge. Further, Local 713 contends that the Regional Director should not have gone forward with the election in the face of the unresolved outstanding unfair labor practice complaint filed on its behalf in Case 2-CA-39193. (Alleging that the Employer refused to bargain with Local 713 during the period after it received voluntary recognition).

On June 10, 2009, the Employer also filed Objections to the Election. These raised essentially the same issues as raised by Local 173. However, the Employer additionally asserted that (a) Local 100 promised and gave benefits to employees including promising to obtain jobs for them; and (b) Local 100 intimidated, restrained, and coerced employees by photographing, recording, and taking videos of them. Finally, the Employer contends that the Board had no jurisdiction to issue the May 28, 2009 Order denying a request for review of the Regional Director's Supplemental Decision directing that the ballots be opened and counted since there was no quorum on the Board at the time.

#### *B. The Alleged Promise of Benefits by Local 100*

In support of its Objections, the Employer offered the testimony of Willie Colon, who during the election campaign was employed by Local 100 and was one of a crew of four organizers for that union. It is noted that at some point after the election, Colon was discharged by Local 100 and became an employee of Local 713. He is, to my mind, an interested witness with an ax to grind against Local 100.

prejudice to the employer right to raise its contentions in the objections case.

<sup>4</sup> These were Nelson Navarro, Santos Poggi, and Augustin Massallo.

Colon testified that during the campaign, he told employees on various occasions that if they became members of Local 100 they would get preference for a jobs program that might be set up by the Metropolitan Transit Authority in conjunction with that Union. No employees testified about this alleged offer of benefits.

Dylan Valle, a representative of Local 100 testified that a company called American Transit whose employees were represented by Local 100 lost its contract with the MTA and that because so many drivers had been displaced, the Union and the MTA talked about the possibility of setting up a pilot program pursuant to which a depot would be opened in Greenpoint and where the drivers would be directly employed by the MTA. According to Valle, there were about seven drivers of Columbus Transit who originally came from American Transit and he testified that at some meetings, these former American Transit employees asked about the pilot program. He states that he explained that if the program was agreed to by the MTA and Local 100, the former American Transit drivers would get preferential treatment. Valle credibly denied that either he or any other representatives from Local 100 ever told employees that if they joined Local 100 they would be given preferential hiring opportunities. I note that this program was never implemented.

No employees testified about the alleged promise and there is nothing in Local 100's campaign literature that could be construed as containing such a promise. In light of the above, and based on demeanor considerations, I am going to credit the testimony of Valle and recommend that this Objection be dismissed.

#### *C. The Alleged Surveillance by Local 100*

Colon testified that on the day of the election, he was outside the facility in the early morning and used his cell phone to take pictures of employees as they went to work. He testified that he was about 100 feet away and across the street from the entrance. Colon also testified that on other unspecified occasions during the election campaign, he used his cell phone and a camera to take pictures of employees. No employees were presented to corroborate this testimony.

Valle testified that on the day of the election, he, Colon and two other organizers together came to the employer's premises for the preelection meeting. He testified that when the election was about to begin, all of the organizers, including Colon, stood outside the facility. He testified that although Colon was near to him, he never saw Colon take any pictures.

I do not credit Colon's testimony in general. And in the absence of any employee corroboration, I do not credit his testimony about taking photographs, either on the day of the election or on any other day.<sup>5</sup> I therefore shall overrule this objection.<sup>6</sup>

<sup>5</sup> Even assuming that Colon used his cell phone to take photographs, that would not be readily apparent to employees if they were 100 feet away and across the street. From the distance described, I doubt that any employee would have noticed that Colon was taking a picture and therefore would not be intimidated by such an action.

<sup>6</sup> The Employer's objections included allegations that Local 100 agents videotaped employees and that they intimidated, restrained, and coerced employees by trespassing and related conduct. No evidence

*D. The Recognition Bar Contention and Related Claims That the Election Should Not Have Been Held Because of an Unresolved 8(a)(2) Unfair Labor Practice Charge*

As noted above, the Employer and Local 713 contend that the election should not have been held because the employer had lawfully recognized Local 713. They contend that the Board should overrule retroactively *Dana Corp.*, 351 NLRB 434 (2007), and that the election should be set aside even though Local 100 obtained the votes of a majority of the employees. In this case, having overruled the other objections described above, there is no reason to doubt that a majority of the eligible employees voted to be represented by Local 100 in an election that was untainted by any other coercive conduct. The argument of the Employer and Local 713 boils down to a contention that in these circumstances, the employees' choice manifested in a secret ballot election, is simply not relevant.

In this case, the Decision and Direction of Election was issued under the rationale of *Dana* and that is still the current law. It is not up to me to overrule the Board on this or any other policy or legal issue. If the Board decides to change its policy on the subject of recognition bars, that is a matter for the Board and not for me. I therefore shall overrule this objection.

The Employer also contends that the election should be set aside because in the Regional Director's Decision and Direction of Election, she stated that Local 100 could be certified if it won the election but that if the election was won by Local 713, then a certification would be held in abeyance pending the resolution of an 8(a)(2) charge alleging that the Employer had illegally assisted Local 713.

This statement in the Regional Director's Decision accurately reflects the legal procedure governing the case at the time that the decision was issued. Therefore, I see no basis for concluding that such a statement can be grounds for setting aside an election. I therefore conclude that this allegation has no merit and is not a basis for setting aside the election.

Finally, the Employer contends (in a number of different formulations), that the election should not have been conducted because at the time it was held, there was an unresolved and still pending unfair labor practice charge and that Local 100 refused to execute a waiver to filing objections based on evidence supporting that charge. This too, as described by the Director in her Decision and Direction of Election, is a procedural question inextricably connected to the *Dana* rationale. As *Dana* is the current law, it is my opinion that this contention should be addressed to the Board and not to me.<sup>7</sup> I therefore

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was presented to support these allegations and they are therefore found to be without merit.

<sup>7</sup> I note that before *Dana*, the Board had a policy of holding an election in abeyance if the petitioning union filed an 8(a)(2) unfair labor practice charge. But there is nothing in the statute itself that compels such a procedure. That is, the Act does not forbid a Regional Director, in a representation case, from determining that a recent recognition agreement executed with an intervening union should not bar an election where there is evidence tending to throw substantial doubt on the Intervenor's claim that it represented an uncoerced majority at the time of its recognition. That need not be the equivalent of making an affirmative determination, in the representation case, that an unfair labor practice has been committed; but simply a determination that the inter-

conclude that this allegation cannot be the basis for setting aside the allegation.

Parenthetically, I do not comprehend why the failure of the agency to *first* resolve a somewhat related unfair labor practice charge (alleging that Local 713 was illegally assisted in obtaining recognition) would, by itself, have any possible impact on the potential electorate. Nor do I understand why the employees would know or care if Local 100 waived any right to file objections to the election based on evidence supporting an 8(a)(2) charge. What the Employer seems to be arguing is that the employees' interest in having their own choice in selecting a bargaining representative would be better served by postponing the election for an indefinite period of time, while an unfair labor practice charge alleging unlawful assistance to Local 713 wends its way through the prolonged procedure required to determine unfair labor practice allegations. I really don't understand why that is a preferable procedure than one pursuant to which a secret ballot election is conducted in an expeditious manner that would, in the absence of interfering or intimidating conduct by any of the parties, objectively resolve which union if any, the employees prefer.

*E. The Refusal to Bargain Allegation*

The evidence in this case shows that recognition was granted to Local 713 on November 10, 2008. Nevertheless, the evidence shows that Local 713 did not request bargaining until after Local 100 filed its representation petition in the same bargaining unit. Thus, the record in this case shows that Local 713 sat on its hands for a little less than 4 months and did nothing to commence negotiations after the employer granted it recognition.

In cases involving voluntary recognition, the Board required the party to bargain for a reasonable time after the granting of recognition. But there is no arithmetical standard as to what constitutes a reasonable amount of time. *Royal Coach Lines*, 282 NLRB 1037, 1038 (1987).

In *AT Systems West, Inc.*, 341 NLRB 57 (2004), the Board applied a multifactor test and found that reasonable period of bargaining had not elapsed when the employer withdrew recognition 5-1/2 months after bargaining had commenced. The Board found that the most probative facts were that the parties were bargaining for a first contract, that they were not at an impasse, and that they held just three, 2-hour, bargaining sessions. In the Board's opinion, those facts outweighed the countervailing considerations that the parties neither experienced any particular bargaining complexities nor were on verge of an agreement.

In my opinion, the facts in this case show that a reasonable time had passed. As noted above, the Union was recognized on November 10, 2008, but failed for a significant time, to request bargaining. There is no explanation for this delay and even assuming that employees had designated Local 713 as their bargaining representative, they had nothing to show for that authorization. From the employer's point of view, it could simply sit, wait and do nothing.

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vening union's claim that its recognition should prevent the employees from having a right to an election should not be honored.

Moreover, Local 713, having done nothing to represent the people in the unit finally woke up *only after* another union came onto the scene and filed a petition for an election. And when an election was ultimately held, it was objectively demonstrated that the employees in the bargaining unit did not (even if they ever did), want to have Local 713 as their representative.

These circumstances may be somewhat *sui generis* and are unlikely to recur in the future. But based on the circumstances described here, I find that the Employer did not have any further obligation to bargain with Local 713 after it had failed to request bargaining for a substantial period of time and after a question concerning representation had been raised by the filing of a representation petition by Local 100. I therefore recommend that the complaint in Case 2-CA-39193 be dismissed in its entirety. I also conclude that Local 713's Objections to the extent that they allege a refusal to bargain, are without merit and should be overruled.

Accordingly, based on the above and the record as whole, I conclude that the complaint should be dismissed and that the Objections to the election should be dismissed.

#### ORDER

The representation case in Case 29-RC-11769 is being remanded to the Regional Director for Region 2, for the purpose of issuing the appropriate certification. And the complaint in Case 2-CA-39293 is dismissed in its entirety.<sup>8</sup>

Dated, Washington, D.C. October 4, 2010

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<sup>8</sup> Any party may, within fourteen (14) days from the date of issuance of this recommended Decision, file with the Board in Washington, DC, an original and eight (8) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director for Region 2. If no exceptions are filed, the Board will adopt the recommendations set forth herein. Exceptions must be received by the Board in Washington by October 19, 2010.