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November 1, 2010

VIA ELECTRONIC FILING

Mr. Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

RE: *Lamons Gasket Company, A Division of Trimas Corporation, et.al.*, Case 16-RD-1597
Letter Brief *Amici Curiae* of Members of the United States House of Representatives

Dear Mr. Heltzer:

We are writing in response to the Notice dated August 31, 2010, in which 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*"). Please accept this Letter Brief in response to the Notice.

As Members of Congress, we have a substantial and critical interest in these proceedings because the matters at issue concern the relationship between employers, employees, and labor organizations, pursuant to the National Labor Relations Act, which fall within the jurisdiction of the House Committee on Education and Labor.

We 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 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.[1]

There is little question that modifying or overruling *Dana* will encourage the use of union authorization card counts ("card check") over secret ballot elections to ascertain employee choice, upsetting the proper balance reached under *Dana*. Upholding *Dana* will ensure the continued protection of employees' NLRA Section 7 rights to bargain collectively through representatives of their own choosing, free of coercion and intimidation.

The Board, which is charged with administering, interpreting, and enforcing the NLRA, must balance and protect the rights of employees and other participants in labor relations. In furtherance of that goal, secret ballot elections are the most reliable method of determining whether employees want third-party representation. Indeed, the Board's 2009 Annual Report states:

> In its statutory assignment, the NLRB has two principal functions: (1) to determine and implement, through secret-ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union; and (2) to prevent and remedy unlawful acts, called unfair labor practices, by either employers or unions or both.[2]

Further, numerous federal courts and the Board have acknowledged that a secret ballot election is the most reliable and preferable method of assessing whether a majority of employees support union representation. *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Ray Brooks v. NLRB*, 348 U.S. 96 (1954); *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001); *Underground Services Alert of Southern California* 315 NLRB 958 (1994).

Secret ballot elections are preferable to other methods of determining union support, including card-check, which is a process notorious for its lack of privacy and its susceptibility to group pressures that "may induce an otherwise recalcitrant employee to go along with his fellow workers." *NLRB v. Cayuga Crushed Stone*, 474 F.2d 1380, 1383 (2d Cir. 1973); *see also, General Shoe Corp.*, 77 NLRB 124, 127 (1948).

There also exists a clear statutory preference for Board-conducted elections. *Dana* appropriately referenced the 1947 Taft-Hartley amendments to Section 9 of the NLRA, which reflected "the preference for Board elections by limiting Board certification of exclusive collective-bargaining representatives, and the benefits that inure from certification, to unions that prevail in a Board election." *Dana, supra*, at 438. Congressional intent arguably favoring the use of Board-conducted elections should help guide the Board's deliberations regarding measures that could restrict employee free choice to request Board-conducted elections.

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[1] We note that Members of the United States House of Representatives submitted an *Amicus Curiae* Brief in the *Dana* case on July 15, 2004 that addressed many of the issues raised by the *Notice*. In that Brief, *Amici* maintained, *inter alia,* that employees must have an uncoerced right to choose or request a collective bargaining representative to protect their statutory right of free choice. The 2004 Brief can be accessed at: http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/_Final%20Final%20CONGRESS%20BRIEF.pdf

[2] *See*, http://www.nlrb.gov/shared_files/Annual_Reports/NLRB2009.pdf, at 3.

Although it is undisputed that employee choice is best measured through secret ballot elections, an employer may seek to voluntarily recognize a union. Prior to the *Dana* decision, employer voluntary recognition immediately barred any election petition or rival-union petitions for "a reasonable period of time" to give the employer and union the opportunity to negotiate a collective bargaining agreement. *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966). 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).

Pursuant to *Dana,* the bar to a decertification election does not immediately attach upon an employer's voluntary recognition of an exclusive bargaining representative. *Dana* affords employees the following protections before the recognition bar attaches: (1) the affected employees must receive adequate notice of the employer's voluntary recognition; (2) the notice must advise employees of their opportunity to file a decertification (election) petition (or support a rival union petition) within 45 days of the notice; and (3) 45 days must pass from the date of notice without the filing of a valid decertification/election petition for a Board election.

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).

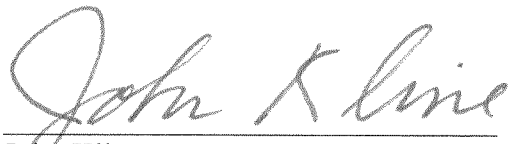
While changing conditions in the labor relations environment have led to an increased use of card-check voluntary-recognition agreements, secret ballot elections are critical to ensuring and protecting employee free choice. Indeed, as the Board has held, it is irrefutable that the conduct of elections 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). NLRB elections are among the "crown jewels of this nation's practice of industrial democracy." *Sir Francis Drake Hotel*, 330 NLRB 638, 639 (2000) (Hurtgen dissenting). Card-check fails to be a reliable method of determining employee choice, especially when compared to Board-conducted secret ballot elections that protect employee privacy and ensure the integrity of election ballots and results.

In the three short years since *Dana*, there have not been any relevant changes in workplace circumstances, data, or court decisions that would justify revisiting the ruling in *Dana*. In fact, circumstances support the continuation of *Dana.* The number of Board-conducted elections continues to decline. Further, the Board maintains discretion in determining the "reasonable period" protecting card-based voluntary recognition.

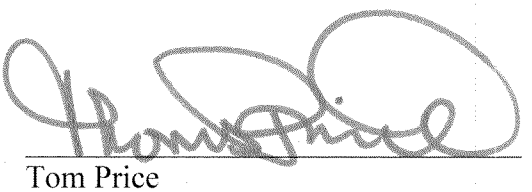
See, *MGM Grand Hotel, supra.* Even if only one percent of *Dana* notices lead to decertifications, employee free choice remains a real and vital interest worth protecting. Efforts by the Board to "promote" or "facilitate" a negotiated agreement depend upon, and must not take precedence over, the fulfillment of the Board's duty to ensure an employee's freedom to choose whether to be represented by a third-party. *See*, *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1978); *Dana*, *supra* at 434.

In the interest of ensuring free and informed employee choice regarding third-party representation, *Dana, supra,* should remain Board law. The Board in *Dana* properly balanced the interests of employee free choice and promoting the stability of bargaining arrangements, and nothing since *Dana* indicates that the Board should proceed to modify or overrule that case. Any attempt to modify or reject *Dana* notice and secret ballot opportunity rules will only serve to undermine employee free choice. Secret ballot elections remain the superior, and therefore preferred, method of ascertaining majority support regarding the question of representation, the pre-condition to pursue collective bargaining. The effort to slow, if possible, the decline in private sector union membership cannot be carried out by eliminating or constricting employee free choice.

Respectfully Submitted,



John Kline
Ranking Member
Committee on Education and Labor



Tom Price
Ranking Member
Subcommittee on Health, Employment, Labor and Pensions

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LAMONS GASKET COMPANY, A
DIVISION OF TRIMAS CORPORATION
Employer

and

MICHAEL E. LOPEZ
Petitioner

Case 16-RD-1597

and

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *amicus* letter brief has been served by way of electronic filing upon the following case participants and counsel of record:

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November 1, 2010