

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DENNIS MACLEOD,
Petitioner,

and

THUNDER VALLEY CASINO,
Employer,

Case No. 20-RD-2488

and

UNITE HERE LOCAL 49,
(Union).

PETITIONER DENNIS MACLEOD'S REQUEST FOR REVIEW

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I. **INTRODUCTION:** On June 29, 2010, Acting Regional Director Tim Peck dismissed as “untimely” the Petition for a Decertification Election filed by Petitioner Dennis MacLeod. A Request for Review was filed and, on December 2, 2011, the Board remanded the case for further fact finding.

On January 25, 2011, the Acting Regional Director again dismissed the Petition for a Decertification Election, this time finding that, while the Petition itself (NLRB Form 502) was timely filed under the “mailbox rule,” (see note 3 of the Region’s Jan. 25, 2011 dismissal letter), the showing of interest was untimely under Section 101.17 of the Board’s Rules & Regulations even though it was placed in the mail at the same time as the “timely” Petition Form 502. (A copy of the Region’s dismissal letter is attached for the Board’s convenience).

Pursuant to NLRB Rules & Regulations Section 102.67, Petitioner submits this Request for Review. This Request for Review should be granted because this case presents substantial questions of law and public policy under the Board’s Rules and Regulations, as well as under the Board’s decision in Dana Corp., 351 NLRB 434 (2007). The Board’s Rules and Regulations should be construed to achieve justice and employee freedom of choice, not to create incessant and unnecessary traps and pitfalls for unwary pro se employees.

II. BACKGROUND FACTS:

In Dana Corp., 351 NLRB 434 (2007), the Board recognized that the NLRA's paramount policy is employee free choice, and that such free choice is best protected via secret ballot elections, where, unlike "card checks," employees cannot be intimidated or coerced in the selection (or non-selection) of a union representative. Dana Corp. held that employees have 45 days after notice of the employer's "voluntary recognition" of a union to file for a secret ballot election via a decertification petition (or a certification petition if filed for a rival union).

On a date not currently known to the Petitioner, a "card check recognition" occurred between UNITE HERE Local 49 and the Thunder Valley Casino. In the months after that "card check recognition," hundreds of additional employees were hired into the bargaining unit, thus raising the question of whether the hurried and secret "card check recognition" actually represents (or ever represented) the views of a valid complement of employees.

In any event, on April 29, 2010, a notice to employees was posted at the Thunder Valley Casino, advising employees of their rights under Dana Corp. to petition for an election within 45 days. The Petitioner and his fellow employees did not believe that a representative complement of employees had agreed to union representation under the "card check" process, and were alarmed at the manner in which the union had been thrust upon them. They therefore proceeded to exercise their rights and collect signatures for a

secret ballot election under the principles of Dana Corp.

Through a quirk of the calendar, the 44th day of the Dana Corp. “window period” was Saturday, June 12, 2010, and the 45th day was Sunday, June 13, 2010. Because Region 20 was closed for the weekend, Petitioner did everything he could reasonably do to get his documents into Region 20’s hands. On Saturday, June 12, he faxed NLRB Petition Form 502 to Region 20, which was the 44th day following the posting of the Dana Corp. notice. (It should be noted that Petitioner did not fax the showing of interest forms when he sent his fax to Region 20 on Saturday, June 12, because the bargaining unit is very large and the showing of interest papers were therefore too voluminous to fax.) (See Petitioner Dennis MacLeod’s Declaration, attached hereto).

On that same day (Saturday, June 12), Petitioner deposited in a postal center an envelope, addressed to Region 20, containing: 1) the original NLRB Petition Form 502 and 2) the showing of interest signature pages. Petitioner believed that the postal center employee to whom he handed the envelope would postmark it that day, but apparently that was not done, as the Region asserts that envelope was not formally postmarked until Monday, June 14, 2010. (See Region 20 dismissal letter; Petitioner Dennis MacLeod’s Declaration).

Given these facts, the Region now finds that NLRB Petition Form 502 was timely filed under the mailbox rule (citing Cargill Nutrena, Inc., 344 NLRB 1125 (2005) and John I Haas, Inc., 301 NLRB 300 (1991)). (See note 3 of the Region’s Jan. 25, 2011

dismissal letter). However, for the second time, the Region has dismissed the Petition as defective, this time because the “showing of interest” that accompanied the mailed NLRB Petition Form 502 was not officially postmarked until Monday, June 14 (the 46th day following the posting of the Dana Corp. notice), even though it was placed in the mail on June 12, 2010 in the same envelope as NLRB Petition Form 502.

III. ISSUE: The issue presented is whether the Petitioner’s petition for a secret ballot election should be considered untimely and subject to dismissal because the Board was closed on the 44th and 45th day that the petition could be filed under Dana Corp., despite the fact that the Petitioner, a layman unschooled in the Board’s intricacies, did everything in his power to get his documents in the hands of Region 20 in a timely manner.

IV. ARGUMENT:

A). Dana Corp. fosters a critical part of national labor policy.

The decision in Dana Corp., 351 NLRB 434 (2007), was carefully considered by a five-member Board.¹ After the Board granted the initial Request for Review, Dana Corp., 341 NLRB 1283 (2006), it publicly solicited amicus briefs to assist with its analysis and make sure all interested parties were heard. In response to the Board’s solicitation,

¹ The rationale of the majority opinion in Dana Corp. is adopted herein by reference and will not be repeated at length.

several dozen such briefs were filed.²

Upon reviewing these extensive amicus briefs and the parties' briefs, the Board issued a well-reasoned decision in Dana Corp. that carefully balanced the stability of relationships created by "voluntary recognition" with the need to protect employees' Section 7 rights to join a union or refrain from unionization. The Board properly recognized that, while there may be competing interests at stake, the paramount policy of the NLRA is protecting employees' right to freely join a union or to refrain from unionization under Section 7. See, e.g, Pattern Makers League v. NLRB, 473 U.S. 95 (1985) (paramount policy of the NLRA is "voluntary unionism"); Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers"); " International Ladies Garment Workers v. NLRB, 366 U.S. 731, 738-39 (1961) (deferring to even a "good-faith" determination that a union has majority employee support "would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act--that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives"); Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 304, 307 (1974); NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory--indeed the preferred--method of ascertaining whether a union has majority

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<http://www.nlr.gov/nlr/about/foia/DanaMetaldyne/DanaMetaldyneAmicusBriefs.html>

support”); Brooks v. NLRB, 348 U.S. 96 (1954) (“an election is a solemn and costly occasion, conducted under safeguards to voluntary choice”).

Thus, the Board in Dana Corp. determined that the so-called “voluntary recognition bar” needed to be modified, to give employees a 45-day opportunity to petition for a secret ballot election in the event that their employer’s “voluntary recognition” of a particular union did not actually represent the employees’ free choice. The Board recognized that the “safety value” of a secret ballot election is needed by employees subject to “voluntary recognition agreements” because of frequent employer and union “back room deals” over recognition, whereby employees are pressured or misled to sign union authorization cards. See, e.g., Duane Reade, Inc., 338 NLRB 943 (2003) (employer unlawfully assisted UNITE and unlawfully granted recognition).³

³ The cases where an employer conspired with its favored union to secure “recognition” of that union are legion. See, e.g., Fountain View Care Center, 317 NLRB 1286 (1995), enforced, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other agents of the employer actively encouraged employees to support the union); NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619 (2d Cir. 1994), enforcing 310 NLRB 579 (1993) (employer provided sham employment to union organizers and assisted their recruitment efforts); Kosher Plaza Super Market, 313 NLRB 74, 84 (1993); Brooklyn Hospital Center, 309 NLRB 1163 (1992), aff’d sub nom. Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB, 9 F.3d 218 (2d Cir. 1993) (employer permitted local union, which it had already recognized as an exclusive bargaining representative, to meet on its premises for the purpose of soliciting union membership); Famous Casting Corp., 301 NLRB 404, 407 (1991) (employer actions unlawfully supported union and coerced the employees into signing authorization cards); Systems Mgmt, Inc., 292 NLRB 1075, 1097-98 (1989), remanded on other grounds, 901 F.2d 297 (3d Cir. 1990); Anaheim Town & Country Inn, 282 NLRB 224 (1986) (employer actively participated in the union organizational drive from start to finish); Meyer’s Café & Konditorei, 282 NLRB 1 (1986) (employer invited union it favored to attend hiring meeting with employees);

(continued...)

In short, while so-called “voluntary recognition” may be *an* element of the federal labor policy, it does not trump the elements of federal policy that are actually favored: employee free choice via secret ballot elections, unimpeded by union or employer pressure and misrepresentations. See Dana Corp., 351 NLRB at 439, where the Board made specific findings about union “card check” campaigns:

[U]nion card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees’ representational options. As to the former, misrepresentations about the purpose for which the card will be used may go unchecked in the voluntary recognition process. Even if no misrepresentations are made, employees may not have the same degree of information about the pros and cons of unionization that they would in a contested Board election, particularly if an employer has pledged neutrality during the card solicitation process.

See also Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2414 (2008) (“§ 7 calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization”); HCF, Inc., 321 NLRB 1320 (1996) (recounting union threats to force employees to sign authorization cards). No party can argue with a straight face that “card check” campaigns provide more protection of employee freedom than a secret ballot election, and the Board was correct in Dana Corp. in balancing the competing interests in the way that it did.

³(...continued)

Denver Lamb Co., 269 NLRB 508 (1984); Banner Tire Co., 260 NLRB 682, 685 (1982); Price Crusher Food Warehouse, 249 NLRB 433, 438-49 (1980) (employer created conditions in which the employees were led to believe that management expected them to sign union cards).

B). The Board should construe Dana Corp. in a liberal manner to effectuate employee free choice, not to kill it in its cradle.

Here, through an arbitrary quirk in the calendar, the 44th and 45th day of the Petitioner's 45-day Dana Corp. window period occurred on a Saturday and a Sunday. Petitioner asserts that the Acting Regional Director erred (twice) in calculating the 45 days in such a reflexive and unbending manner, especially since it was the Board that was closed for the 44th and 45th days of the Dana Corp. "window period."

Petitioner MacLeod did everything that a reasonable person would have done to get his papers filed. He faxed the NLRB Petition Form 502 to Region 20 on the 44th day (Saturday, June 12), and mailed the Form 502 and the showing of interest signature forms that same day. (He did not fax the showing of interest because it was too bulky). Through no fault of his, the envelope was not officially postmarked until Monday, June 14, 2010 (the 46th day) despite his handing it to a mail official on Saturday, June 12. (See Petitioner Dennis MacLeod's Declaration). The Petitioner and his hundreds of co-workers who seek a secret ballot election should not be penalized over such technicalities.

Moreover, the Board should liberally apply the "mailbox rule" to the filing of this decertification petition and the showing of interest forms. Under the mailbox rule, Mr. MacLeod's petition was deposited at a mail center on Saturday, June 12, 2010 (even though, apparently, it was not officially postmarked until June 14, 2010), and should be deemed timely filed as of midnight on June 13, 2010. See Pattern Makers (Michigan Model Mfrs.), 310 NLRB 929 (1993). The Board should adopt such a rule as a matter of

fairness and justice.

The Region's constricted reading of Dana Corp. should be contrasted with the decision of Region 19's Director in AT&T Mobility LLC, 19-RD-3854 (Jan. 22, 2010). In that case, the Regional Director held that in cases of inadequate posting of the Dana Corp. notice, the Board had to err on the side of protecting employees' rights and allowing them extra time to file the election petition. See also Building Technology Engineers, 1-RC-22359 (Sept. 18, 2009) (a late filing for a secret ballot election under Dana Corp. was timely when the posting of the notice of rights was inadequate).

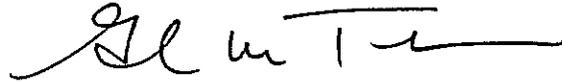
Indeed, the practice of counting the 44th and 45th days as any part of the employees' "window period" even though the Board is closed for business is archaic, unfair and wrong. The Board's own rules take Saturdays, Sundays and holidays into account when computing almost every deadline under the NLRA. See Section 102.111 of the Board's Rules and Regulations. The same result should be allowed in this case.

Finally, it must be noted that the lower federal courts and the United States Supreme Court never count deadline dates that fall on Saturdays, Sundays and federal holidays. See Rule 6, Federal Rules of Civil Procedure; Rule 26, Federal Rules of Appellate Procedure; Rule 30, Rules of the United States Supreme Court.

In short, this case demonstrates precisely why so many employees become baffled by, and lose respect for, the Board and its processes. They see the Board's rules and regulations as pitfalls for the unwary. Such unfair results should not be allowed to occur.

CONCLUSION: This Request for Review should be granted, and the Region should be ordered to process the Petition and proceed rapidly to an election.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Glenn M. Taubman". The signature is fluid and cursive, with a long horizontal stroke at the end.

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Counsel for Petitioner Dennis MacLeod

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Request for Review was e-filed with the NLRB Executive Secretary and sent via e-mail and the U.S. Postal Service, as follows, to:

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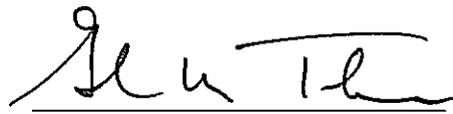
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and via NLRB e-filing to:
Regional Director, National Labor Relations Board, Region 20

this 7th day of February 2011.


Glenn M. Taubman

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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Case No. 20-RD-2488

UNITE HERE LOCAL 49,
(Union).

PETITIONER DENNIS MACLEOD'S DECLARATION

Dennis MacLeod, pursuant to Section 1746 of the Judicial Code, 28 U.S.C. §1746, declares as follows:

1) I am the Petitioner in this case, and I have personal knowledge of all of the facts and circumstances surrounding this case.

2) When I was ready to file my decertification petition in this case, Region 20 was closed for the weekend. Therefore, on Saturday, June 12, 2010, I faxed NLRB Petition Form 502 to Region 20. I did not include the showing of interest signature forms with that fax to Region 20 because the bargaining unit is very large and the showing of interest papers were approximately 50 pages in length, far too voluminous to fax.

3) On that same day (Saturday, June 12, 2010), I went to Bel Aire, a supermarket in Rocklin, California, that contains a postal annex from which letters and packages can be shipped. On that date I personally handed the postal clerk an envelope, addressed to

Region 20, containing: 1) the original NLRB Petition Form 502 and 2) the showing of interest signature pages. I believed that the clerk to whom I handed the envelope would postmark it that day, and I left it with him.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on February 5, 2011.


Dennis MacLeod



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Region 20

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January 25, 2011

Dennis MacLeod
2480 Casa Dell Oro Way
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Re: Thunder Valley Casino
Case 20-RD-2488

Dear Mr. Macleod:

On June 29,¹ as Acting Regional Director, I dismissed the Petition in this matter as untimely filed.

As noted in my June 29 dismissal letter, after voluntarily recognizing UNITE HERE Local 49 (Union)² as the collective-bargaining representative of certain of its employees, Thunder Valley Casino (Employer) posted a Notice to Employees (Notice) on April 29 in Case 20-VR-27 advising its employees of their right under *Dana Corporation*, 351 NLRB 434 (2007) to petition for an election within 45 days from the date of the posting of the Notice to test the Union's majority status

The Petition first arrived in the Regional Office (Region) as a facsimile on Saturday, June 12, when the Region was closed. Accordingly, the Region did not docket the Petition until it reopened on Monday, June 14, 46 days following the posting of the Notice. In this circumstance, I concluded that a recognition bar had become operative and precluded for a reasonable period of time any challenge to the Union's status as the unit employees' bargaining representative.³

¹ All dates refer to 2010 unless otherwise specified.

² The Petition identifies the *Recognized or Certified Bargaining Agent* as "UNITE HERE Local 49/Teamsters 150," but lists only one address for the labor organization(s), a location that corresponds to the Union's facility. The Region's investigation disclosed that Gerald McKay, the neutral observer who conducted the card check verification on December 2, 2009, determined that a majority of employees had indicated that it wished to be represented by the Union. His verification made no mention of Teamsters 150. Similarly, the March 31 correspondence from the Union that notified Region 20 about the Employer's voluntary recognition did not name Teamsters 150. Additionally, the Employer has since confirmed that it recognized only the Union as exclusive bargaining representative, and that it continues to do so. Finally, the Union indicated that while it may seek to involve Teamsters 150 to help it service some portion of the unit because of Teamsters 150's expertise with those job classifications, it has been and remains the sole recognized representative.

³ In retrospect, it appears that the Board will construe the Petition as timely if it treats the facsimile of the Petition as the equivalent of submission with a postmark on or before the due date. In *Cargill Nutrena, Inc.*, 344 NLRB 1125 (2005), the Board reiterated that in *John I Haas, Inc.*, 301 NLRB 300 (1991), it had "clearly stated its intention to apply the postmark rule to representation petitions, and no longer to require that the timeliness of representation petitions be governed by the date on which they are received in the Regional Office." Thus, the fact that you appear not to have mailed the Petition until the 46th day after posting of the Notice in Case 20-VR-27 may not prove fatal to the document.

You requested that the Board review my decision to dismiss the Petition, and on December 2, the Board remanded the case to the Region for further consideration.

Pursuant to the Board's Order, the Region investigated the timeliness of the showing of interest that you submitted in support of your Petition. That investigation disclosed that you mailed your showing of interest in an envelope that bears a postmark of June 14, 46 days after the Employer posted the *Dana* Notice in 20-VR-27. The Region received this envelope on June 15, 47 days following the Employer's posting.⁴

In pertinent part, Section 101.17 of the Board's Rules and Regulations states that,

If a petition is filed by a labor organization seeking certification, or in the case of a petition to decertify a certified or recognized bargaining agent, the petitioner must supply, within 48 hours after filing but in no event later than the last day on which the petition might timely be filed, evidence of representation.

If your Petition was untimely when docketed on June 14, your evidence in support thereof that arrived in the Region one day later would not change that fact. If, on the other hand, the Board were to deem your Petition as timely filed, because of the Region's receipt earlier of the facsimile of the Petition on a date when the Region was closed, the timeliness of your support for the Petition would come into play. In that event, pursuant to Section 101.17, you had to supply your showing of interest by Monday, June 14, the last date on which you could timely file the Petition. In fact, you did not mail your showing of interest until June 14, and the Region did not receive it until June 15, 47 days following the posting of the *Dana* Notice. Thus, you caused your support for the Petition to be delivered to the Region on a date that clearly fell beyond the "last day on which the petition might timely be filed." In this circumstance, I must hereby dismiss your Petition because whether you timely filed it or not, you failed timely to submit the requisite evidence to support it.

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business February 8, 2011, at 5 p.m. (ET), unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer

⁴ Apparently this envelope also contained the original Petition, as that bears a date stamp of "June 15 P 12:10," one minute earlier than the date stamp that appears on the first page of the enclosed showing of interest.

period within which to file.⁵ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, click on E-Filing, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Very truly yours,

/s/ Tim Peck

Tim Peck
Acting Regional Director

wc

cc: Office of the Executive Secretary

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⁵ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.