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Let It Be –

Should We *Let It Be*, or Revisit the Recognition Bar Doctrine – The Board Considers the "Real" World of Neutrality and Card Check Recognition. Should *Dana* Be Revisited? Is Rulemaking Now in Order? – *Lamons Gasket Company*, 355 NLRB No. 157 (2010).

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INTRODUCTION

In 1966, the National Labor Relations Board (the "Board") established the recognition-bar doctrine in *Keller Plastics*, 157 NLRB 583 (1966). Pursuant to *Keller Plastics*, upon the voluntary recognition of a majority representative, the employer and that representative were guaranteed a reasonable time to bargain and to execute the contracts resulting from such bargaining without the potential filing of a decertification petition by employees or rival unions. This holding was left intact until 2007, when the Board decided *Dana Corporation*, 351 NLRB 434 (2007). Under *Dana*, employees or rival unions may file decertification petitions within 45 days of receiving notice of a voluntary recognition if there is at least 30 percent support for the petition. The Board, however, is set to reconsider its decision in *Dana* following its order granting review in *Lamons Gasket*, 16-RD-1597 (2010). As part of the process, the Board has sought feedback on the impact of the *Dana* decision from employees, unions and employers.

BACKGROUND

I. *Keller Plastics*

In *Keller Plastics*, the employer entered into a voluntary recognition agreement with Local 666, Concrete Products and Material Yard Workers Union, Allied Industries Division ("Local 666"). Subsequently, the employer and Local 666 executed a collective bargaining agreement. In response, Local 11, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America filed a charge alleging that Local 666 did not have the support of a majority of the employees at the time the employer entered the collective bargaining agreement, and therefore, the employer violated the National Labor Relations Act. The Board held that the employer did not violate Section 8(a)(2) of the Act because, regardless of majority support, Local 666 remained the statutory bargaining representative at the time the employer and union executed the agreement. As noted in support, "a bargaining status established as the result of voluntary recognition of a majority representative we conclude that, like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining." This holding and reasoning pressed forward relatively unscathed until 2000.

In June 2000, the Regional Director for Region 19 issued a Decision and Direction of Election finding that the Baseball Club of Seattle, LP d/b/a Seattle Mariners' (the "employer") voluntary recognition of the union did not create a recognition bar. *Seattle Mariners*, 335 NLRB 563 (2001). The employer and the union entered into a written neutrality/card check agreement, and subsequently, the union submitted authorization cards for a card check before a neutral arbitrator pursuant to the agreement. At the same time, a group of employees submitted a petition to the arbitrator indicating that they did not desire representation by the union. The arbitrator did not receive the petition until after he completed the card check. The Regional Director relied upon *Smith's Food & Drug Centers*, 320 NLRB 844 (1996), in which the Board held that a rival union is not subject to the recognition-bar if the rival union can demonstrate that it had a 30 percent showing of interest that predates the recognition, to find that the doctrine did not apply in this matter. The Board, however, found *Smith's Food* to be inapplicable as that decision dealt with rival unions simultaneously organizing, and therefore, the Board reversed the Regional Director's decision and reaffirmed *Keller Plastics*.

II. *Dana Corporation*

In *Dana Corporation*, Meltadyne Corporation and Dana Corporations (the "employers") each entered into separate neutrality and card-check agreements with the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO (the "union"). Employees of each of the employers filed decertification petitions, and the Regional Directors dismissed the petitions based on the recognition-bar doctrine. The petitioners filed requests for review, seeking a change in law to overturn *Keller Plastics* and allow for the filing of decertification petitions immediately after an employer's voluntary recognition of a union.

The petitioners argued that questions concerning representation should be resolved through the "preferred method" of a Board election. Alternatively, the petitioners argued that the Board should allow for a "window period" to allow employees to file for decertification within a reasonable time after the voluntary recognition is publicly announced.

The employers and the union urged the Board to maintain the recognition-bar doctrine as applied. They argued that: (1) the recognition-bar doctrine encourages collective bargaining and labor relations; (2) without the recognition-bar doctrine, negotiations will be delayed; and (3) decertification petitions are unnecessary as 8(b)(1)(A) and 8(a)(2) provide adequate safeguards.

The Board modified *Keller Plastics* and the recognition-bar doctrine, and held that no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition, and (2) 45 days pass from the date of notice without the filing of a valid petition. The Board further held that the execution of a collective bargaining agreement after the date of voluntary recognition will not bar a decertification petition unless the employees are given notice of recognition and their right to file decertification petitions, and 45 days pass from the date of notice without the filing of a valid petition. Thus, during the 45-day period, a decertification or rival union petition supported by at least 30 percent of the bargaining unit will be processed. The Board applied its decision prospectively only, acknowledging that the employers had entered into voluntary recognition agreements in reliance on previous law and characterizing its decision as a "significant departure" from those principles.

The primary reason behind the Board's determination to modify the recognition-bar doctrine is the proposition that Board elections are preferred to a card-based recognition. The Board supported this proposition by noting the following: (1) card signings are public; (2) union card-solicitation is often accompanied by misinformation or a lack of information; (3) a Board election presents a clear picture of voter preference (as card signings take place over a protracted period of time); and (4) a Board election provides safeguards against improper electioneering (i.e., elections are to be conducted under "laboratory conditions").

The Board also noted that Board bargaining orders and the settlement bar are distinguishable from voluntary recognition, and therefore, the election restrictions that arise in these contexts provide no support for the recognition-bar doctrine.

In their dissenting opinion, Chairman Wilma B. Liebman and Member Dennis P. Walsh posed four main objections to the majority's holding. First, the decision

undercuts voluntary recognition because employers choose voluntary recognition to avoid time, expense and the disruption of an election; however, these benefits are lost if the employer knows that the decision is subject to second-guessing. Second, knowing of a potential election petition gives the employer little incentive to bargain during the first 45 days following the issuance of the notice. Third, the 45 day window period gives the minority an incentive to work against the majority. Finally, voluntary recognition is regarded as a favored mechanism to support labor relations.

Shortly after the *Dana* decision was issued, the General Counsel issued a memo outlining the compliance procedure.[1] Under this procedure, an employer or union that is a party to a voluntary recognition must "promptly" notify the Regional Office of the Board of the grant in writing. The notification must include a copy of the recognition agreement, which in turn must describe the union and note the date of recognition. Once it receives notice, the Region sends an official NLRB notice to the employer to post in "conspicuous" places at the workplace for the next 45 days.

III. *Lamons Gasket*

On August 27, 2010, the Board issued an order granting review in *Lamons Gasket* (Case 16-RD-1597)[2] to determine if it should modify or overrule *Dana*. *Lamons* arose after the employer entered into a neutrality agreement with and subsequently voluntarily recognized the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "USW"). After receiving notification of the voluntary recognition, an employee timely filed a decertification petition, and the Regional Director directed an election pursuant to *Dana*. The decertification election was held, but the ballots were (and still are) impounded in light of the USW's request for review.

In the order granting review, Chairman Liebman noted that elections had been conducted in less than five percent of cases where notices were requested pursuant to *Dana*, and furthermore, that the recognized union had been rejected in only one percent of total cases. She accordingly surmised that "[i]n 99 percent of the total cases . . . it is

[1] Memorandum OM 08-07 (October 22, 2007).

[2] The Board also granted review in *Rite Aid Store* (Case 31-RD-1578); however, the employer in *Rite Aid* later withdrew its request for review.

arguable that *Dana* did not serve any clear purpose" and questioned "whether the asserted benefits of the *Dana* regime outweigh its costs." Members Schaumber and Hayes dissented, characterizing it as "but a prelude to what will most likely result in the overruling of *Dana*, in derogation of employees' Section 7 free choice rights."

Along with its order granting review, the Board issued a notice inviting the parties and any interested amici to file briefs addressing the issues raised in its reconsideration of *Dana*, and specifically requested that the briefs address some or all of the following questions:

1) What has been their experience under *Dana* and what have other parties to voluntary recognition agreements experienced under *Dana*?
2) In what ways has the application of *Dana* furthered or hindered employees' choice of whether to be represented?
3) In what ways has the application of *Dana* destabilized or furthered collective bargaining?
4) What is the appropriate scope of application of the rule announced in *Dana*, specifically, should the rule apply in situations governed by the Board's decision regarding after-acquired clauses in *Kroeger Co*., 219 NLRB 388 (1975), or in mergers such as the one presented in *Green-Wood Cemetery*, 280 NLRB 1359 (1986)?
5) Under what circumstances should substantial compliance be sufficient to satisfy the notice-posting requirements established in *Dana*?
6) If the Board modifies or overrules *Dana*, should it do so retroactively or prospectively only?

***LAMONS* BRIEFING**

In response to the Board's notice, the parties and 14 amici submitted briefs. Every brief contains some discussion about whether *Dana* honors the core goals of the Act—though there are varying viewpoints on what those goals are. Those parties in favor of overturning *Dana* (the "anti-*Dana*" parties) contend that encouragement of collective bargaining and preservation of industrial peace are most important. They argue that *Dana* has undermined these goals by destabilizing bargaining relationships following a voluntary recognition. Those in favor of preserving *Dana* (the "pro-*Dana*"

parties) argue that employee rights are the paramount goal of the Act, and that *Dana* furthered that goal by ensuring employees' rights to an election.

The briefs also contain allegations of misconduct from all angles—by employers who engage in self-interested "top-down organizing" at the expense of their employees, to employers who voluntarily recognize a union only to turn around and support employee decertification efforts, to unions who use pressure tactics to solicit authorization cards.

Additional elements of the parties' positions will be summarized pursuant to the six questions above.

I. Experiences Under *Dana*

Anti-*Dana* Position:

The anti-*Dana* parties generally argue that statistics establish that *Dana* has been an unnecessary roadblock. The statistics show that in the period between when *Dana* was decided and the invitation to file briefs was issued:

- The Board received 1,111 requests for voluntary recognition notices;
- 85 petitions were filed in connection with those requests;
- The Board conducted 54 elections;
- In 39 of those elections, the voluntarily recognized union prevailed; and
- In 15 elections, employees voted against the voluntarily recognized union (including two instances where a petitioning union won instead).

The anti-*Dana* parties essentially echo Chairman Liebman's comments in the order granting review and argue that, given the low number of occurrences where employees actually voted out the voluntarily recognized union, these statistics establish that the *Dana* process is a waste of time.

More specifically, the USW highlights its experiences since *Dana* and states that they have led it to "largely forsake[e] the voluntary-recognition process." It has obtained 11 voluntary recognitions since the *Dana* decision was issued, but faced four subsequent elections—and ultimately lost only one in a tie vote, demonstrating the "wastefulness" of the *Dana* process. The union also alleges that Lamons, though voluntarily recognizing the USW, "actively instigate[d] employee support for a decertification petition shortly after the recognition," such that the USW had to file unfair

labor practice charges. It states that "negotiations proceeded at a snail's pace" until an agreement was finally reached, but argues that even then, Lamons campaigned for decertification by telling employees that the USW had negotiated an inferior contract. While not directly characterizing the agreement as inferior, the USW does imply that it felt rushed to complete an agreement prior to the election.

The SEIU similarly argues that *Dana* has slowed down the bargaining process and "encouraged mischief by employers." It highlights an instance where a group of nursing home employees filed a decertification petition after a voluntary recognition, but the vast majority voted to retain the SEIU in the subsequent election. It asserts that the mere existence of the petition created tension in the workplace, and ultimately caused delay in contract negotiations so that they were not ultimately completed until nine months after recognition.

Pro-*Dana* Position:

The pro-*Dana* parties emphasize the same statistics as the anti-*Dana* groups, but instead note that in 28% of cases where elections were held, employees rejected the recognized union. They further assert that given the supremacy of employee choice under the Act, *Dana* rights should not be measured based on likelihood of success.

Additionally, the pro-*Dana* parties point out that the decision is only three years old, and argue that this is an insufficient period of time by which to draw conclusions as to *Dana*'s success. They state that during this time, there have been no changes in organizing tactics which would justify another policy change only a few years after the first. Specifically, while the *Dana* decision was compelled by the increasing use of voluntary recognition agreements, there is no indication that *Dana* has since chilled the utility of this option. On that point, the pro-*Dana* parties highlight the large number of *Dana* notice requests the Board has received, the still-declining number of Board-conducted elections, and the corresponding lack of increase in refusal-to-bargain charges.

More specifically, both Lamons and Michael Lopez, the employee who filed the decertification petition, state that their experiences under *Dana* have been positive, but for far different reasons. Lamons asserts that "[t]he *Dana* paradigm worked <u>exactly</u> as intended" aside from the complications created by the USW's request for review. It

notes that the parties commenced bargaining in January 2010, shortly after the decertification petition was filed, and ultimately reached an agreement prior to the election in August 2010. Lopez, on the other hand, implies that Lamons engaged in "top-down organizing" by entering into a secret neutrality and card check agreement with the USW, and providing the union with assistance and advantage prior to its solicitation of authorization cards. He argues that the *Dana* protections were integral to ensuring that his opinion regarding union representation was heard at some point during the process.

II. Effect of *Dana* on Employee Choice

Anti-*Dana* Position:

The anti-*Dana* parties argue that the *Dana* decision has hindered employees' choice to be represented through voluntary recognition. They state that voluntary recognition has long been a favored element of labor relations, and that furthermore, card authorizations are a valid and trusted method of ascertaining employee sentiment. As evidence, these parties point to the low number of instances post-*Dana* where employees actually voted out the voluntarily recognized union. They note that, to the extent any impropriety occurs during the authorization card process, employees can file unfair labor practice charges.

Pro-*Dana* Position:

The pro-*Dana* parties argue that the *Dana* decision protects employee rights to accept or reject union representation by giving them the right to an election. These parties point out that the NLRB and courts have frequently expressed a preference for secret ballot elections as the preferred method for ascertaining whether employees support a union, but argue that prior to *Dana*, the Board had erroneously extended the *Keller Plastics* bar to accord voluntary recognitions the same deference.[3] As to the superiority of elections, these parties note that: (1) while cards may be obtained over a period of time, during which employee views can fluctuate, an election provides a snapshot of those views at a particular moment, (2) employees may not hear arguments

[3] On this point, the parties point to *MGM Grand Hotel*, 329 NLRB 464 (1999), where the Board found a period of 356 days following voluntary recognition to be "reasonable," as improperly mirroring the one-year certification bar in election cases.

both for and against union representation in the absence of an election, especially where an employer pledges to be neutral during the card solicitation process, (3) elections are conducted according to laboratory-type conditions and thus contain more safeguards against coercion or undue influence, including the secret ballot, and (4) voluntary recognition agreements are executed privately without any Board involvement or knowledge of whether authorization cards were properly procured.

Additionally, the pro-*Dana* parties argue that unfair labor practice proceedings are an improper method of remedying unlawful conduct during the authorization card process. They note that such proceedings can take months to resolve, and furthermore, that the standard of conduct required in an election is higher than in an unfair labor practice proceeding.

III. Effect of *Dana* on Collective Bargaining

Anti-*Dana* Position:

The anti-*Dana* parties generally assert that the decision has destabilized bargaining relationships and caused unnecessary delays. They describe unnamed instances where an employer grants voluntary recognition but then subtly assists with decertification efforts, or is reluctant to bargain during the 45-day period where there is uncertainty regarding the union's status. These parties also argue that the mere possibility of a decertification petition requires union staff to spend the majority of their time campaigning, leaving little energy for tasks related to bargaining. More specifically, the USW emphasizes its experience in the *Lamons* case, asserting that Lamons' conduct after the recognition forced it to file unfair labor practice charges, and ultimately delayed the election and bargaining process as a whole.

Pro-*Dana* Position:

These pro-*Dana* parties note that as a preliminary matter, the Act does not encourage collective bargaining based on anything less than majority support. Therefore, they argue that if a decertification petition is filed, this is merely evidence that the bargaining relationship was already unstable, because there can be no stability without majority support.

Furthermore, these parties state that any delay is minimal—in most cases, only 45 days, which is especially insubstantial given that first contracts typically take longer

to negotiate. Regardless of whether a decertification petition is filed, this period is often spent making internal strategic and logistical decisions prior to sitting down at the bargaining table. Once the 45-days expire, the recognition bar still attaches for a "reasonable time" if no *Dana* petition is filed, and the Board maintains discretion to determine the appropriate length of this period. Lamons specifically notes that in its case, the parties negotiated productively and ultimately reached an agreement despite the pending decertification election.

IV. Application of *Dana* in *Kroger* or *Green-Wood* Situations

The Board analyzed the propriety of after-acquired clauses in collective bargaining agreements in *Kroeger Co.*, 219 NLRB 388 (1975). There it held that if an employer, pursuant to the terms of a collective bargaining agreement, agrees to voluntarily recognize all newly acquired employer divisions during the course of the agreement, that employer must honor the after-acquired provision. In turn, the employer forgoes the right to resort to the Board's election process.

Additionally, in *Green-Wood Cemetery*, 280 NLRB 1359 (1986), the Board held that once two or more employee units merge under a single bargaining representative, the appropriate unit for a decertification petition should encompass all of the merged units.

Anti-*Dana* Position:

While this issue is scarcely addressed in the anti-*Dana* parties' briefs, it can be assumed that these parties do not support application of *Dana* to agreements which contain after-acquired stores or merger clauses, for the general reason that the potential of an election could destabilize bargaining relationships.

Pro-*Dana* Position:

The pro-*Dana* parties argue that decertification petitions should be accepted within the 45-day window notwithstanding the presence of an after-acquired stores or merger clause. They argue that *Dana* protections are equally applicable under all circumstances, notwithstanding the fortuity that there may be an after-acquired stores or merger clause in the particular contract at issue.

V. Sufficiency of Substantial Compliance with Notice-Posting Requirements

Anti-*Dana* Position:

The anti-*Dana* parties contend that substantial compliance should be sufficient. They argue that a strict notice-posting requirement places the union at the mercy of the employer, where the employer could potentially extend the 45-day period indefinitely by failing to post the required notice.

Pro-*Dana* Position:

The pro-*Dana* parties argue that the Board should follow its standard procedures with respect to notice-posting, and more generally argue that substantial compliance is insufficient to protect employee rights.

VI. Retroactive or Prospective Application in Event of *Dana* Modification/Overruling

Anti-*Dana* Position:

The anti-*Dana* parties contend that retroactive application is appropriate. These parties argue that retroactive application is standard Board procedure, and there are no equitable reasons warranting a departure from that procedure. Furthermore, they contend that retroactive application is really just a return to the status quo as it existed prior to *Dana*. They also analogize *Lamons* to other cases where the Board lengthened the contract bar and applied the respective policies retroactively, noting that in both situations, the Board sought a return to the Act's purpose of furthering industrial stability.

Pro-*Dana* Position:

The pro-*Dana* parties argue that any changes should be made prospectively only. They remind the Board that retroactive application would mean destroying the impounded ballots that Lamons employees have already cast, and note that employers and unions have relied on *Dana* when confronting voluntary recognitions and should be entitled to the benefit of their compliance. Furthermore, these parties note that *Dana* was applied prospectively only, given that it was a "significant departure" from then-existing law. Modification or overruling of *Dana*, they argue, would thus constitute the same significant departure from current law.

OUR PREDICTIONS AND SUGGESTIONS

The Board's order granting review indicates that it is inclined to overturn the *Dana* recognition-bar doctrine—an assessment that is bolstered by the Board's most recent *Dana Corp.* decision.[4] In this decision, issued in December 2010, the Board held that Dana Corp. did not violate federal law by entering into a detailed letter of agreement with the United Auto Workers (the "UAW"). Among other things, the agreement set forth: (1) ground rules for organizing activity, including a pledge of company neutrality and an agreement that there would be no strikes or lockouts until the parties reached a first contract; and (2) principles that the Board said "would form future bargaining on particular topics," including agreements that any future collective bargaining agreement would be effective for four years, and future disputes would be submitted to a joint UAW/Dana committee or, if necessary, an arbitrator. While acknowledging that employers may not recognize a minority union under the Act, the Board held that the Dana/UAW agreement was no more than a "framework for future collective bargaining," as it explicitly required a showing of majority support before the UAW would be recognized. In dissent, Member Hayes argued that the decision endorsed "top down organizing of employers by unions, thereby subordinating the statutory rights of employees to the commercial self-interests of the contracting parties."

I. Pat's Thoughts:

I think the Board will abandon *Dana* and return to the voluntary recognition doctrine primarily because the undisputable evidence derived from the Board's own experience with elections prompted by the 45-day notices has confirmed the fears expressed in the *Dana* dissent: that groups of less than a majority of the employees have been able to hijack the bargaining process and stymie the majority's free choice to have a particular union represent them to obtain a first contract. The arguments of the anti-*Dana* union and employer briefs that the notice requirement and prospect of a potential Board election discourages the use of card check/voluntary recognition process, although perhaps harder to establish by clear evidence, tend to underscore what critics of *Dana* have been saying all along, "If it ain't broke, don't fix it."

[4] 356 NLRB No. 49 (December 6, 2010) (hereafter referred to as *Dana II*).

What the majority in *Dana* and the *Dana* supporters fail to recognize is that the voluntary recognition and card-check agreement process developed within the framework of Board protections provided by Sections 8(a)(2) and 8(b)(1)(A) such that there has always been an avenue to ensure that the Act's interest in preserving employees free choice to select a representative will be protected. Prior to *Dana*, there was little evidence to suggest, much less establish that these safeguards were inadequate or that the recognition doctrine somehow skewed the bargaining process. In fact, the safeguards provided for in most neutrality agreements were designed to provide adequate assurances to the Board if the majority status of the union was later challenged by a rival union, the employer or disgruntled employees after voluntary recognition was made and a collective bargaining agreement was reached.

Returning to the voluntary recognition bar doctrine, perhaps with some clarification as to what factors the Board will consider in deciding what amounts to a reasonable period of time for the voluntarily-recognized union to reach a first contract would be a good first step towards ensuring that employees free choice, not just the right to choose their representative, but also their free choice to collectively bargain to a contract with their employer, is protected. The *Dana* notices, and elections that have resulted from those postings, only underscore the problem.

The current Board policy gives undue deference to the election process as the best way to preserve the employees' right to choose a representative, without appreciating that what employees are really choosing when they sign a recognition card is to exercise their right to have the majority negotiate a contract. What *Dana* has done in nearly all cases is allow a minority of those employees to unnecessarily delay the collective bargaining process. What it has done in at least some instances, as evidenced by the pending case, is provide employers with another vehicle to undermine the collective bargaining process by encouraging decertification elections that only serve to undermine the employees' freely-chosen representative and delay negotiation towards a first contract.

II. Nelson's Thoughts:

The Board's decision in *Dana II* suggests that *Dana*, in its current form, is short-lived. However, returning to the *Keller* recognition-bar doctrine of affording the parties a reasonable period of time to bargain and to execute the contracts resulting from such bargaining would not serve to protect an employee's right to free choice. Whenever I would explain to a client that after recognition they had an obligation to bargain with the union for a "reasonable period of time" before employees could have an election, their eyes would glaze over. When asked how long that would be, I had to give the lawyer answer which they all hate: "It depends." In my opinion employees, employers, and unions are all better served when there is a "bright line" rule to guide them.

Instead of returning to *Keller* outright, the Board could modify the recognition-bar doctrine, either in its *Lamons* decision, or through rulemaking, to address several of the concerns voiced by the anti-*Dana* parties. For example, the Board could impose an up-front bargaining period of 60 to 90 days after a voluntary recognition. During this period the union could devote its energy on bargaining and not be distracted by the possibility of a decertification petition.

Following the expiration of the bargaining period, there would be a 45-day period in which a decertification petition could be filed. Such a procedure would provide a reasonable period of time for employers and unions to engage in productive bargaining without regard to a potential decertification petition, while still protecting employees' right to an election.

In conclusion, I can't think of anything that is more American than secret ballot elections, and isn't an election the only way both the employer and the union really know their relative strength in bargaining?