BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

LAMONS GASKET COMPANY, A DIVISION OF TRIMAS CORPORATION	)	
Employer	)	
and	)	
MICHAEL E. LOPEZ	)	**Case 16-RD-1597**
Petitioner	)	
and	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION	)	
Union	)	

BRIEF OF *AMICUS*
IN SUPPORT OF PETITIONER

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INTRODUCTION

Americans For Limited Government ("ALG" or "*Amicus*"), through its undersigned counsel, respectfully submit this *amicus* brief urging the National Labor Relations Board ("NLRB" or "Board") to uphold the ruling in *Dana Corporation*, 351 N.L.R.B. 434 (2007). All parties have been served copies of this brief.

INTEREST OF THE *AMICUS*

The *Amicus* is a non-profit corporation dedicated to protecting the rights and liberties of the citizens of the United Sates by working to keep the government and governmental policies within the bounds set by the U.S. Constitution. The *Amicus* works to effectuate changes that are necessary to protect the rights of guaranteed by the United States Constitution. The *Amicus* has on staff several members with significant labor-management experience who have previously held high level positions in the U.S. Department of Labor. The *Amicus* also works to educate the public regarding issues related to activities, structure, and operations of the government.

SUMMARY OF THE ARGUMENT

In the case at hand, the *Amicus* argues that to overturn the decision reached in *Dana Corporation* will not only hamper employees' free choice of representation, but also give unfair advantages to the union representatives though the voluntary recognition process by allowing them to side-step more accurate employee choice through the preferred Board conducted secret-ballot elections.

First, *Amicus* believes that the Board should take a step back and consider the effect that a change in policy would have on employees' First Amendment democratic rights. If *Dana Corporation* is overturned, employees' First Amendment rights of "freedom of association" would be seriously hampered by limiting their freedom of choice to determine who represents them in dealings with their employer. Under current law, employees have a 45 day window in which to challenge a union's presumed majority when it becomes voluntarily recognized by an employer. Remove this and their freedom of association is replaced by a coerced association of significant duration.

Second, while the voluntary recognition-bar doctrine has become part of labor relations law, it is a discretionary policy put forth by the Board and not favored over Board conducted secret-ballot elections. At a minimum, if this doctrine is to hold credibility as a legitimate way for employees to determine their representation, the current policy founded by *Dana Corporation*, that protects employee freedom of choice must stay intact.

Third, *Amicus* argues that the Board has wrongly granted review of *Dana Corporation* since no facts have been presented that give a "compelling reasons for reconsideration of an important Board rule or policy."

Fourth, *Amicus* urges the Board to continue to follow a policy of strict compliance for notice-posting and refuse to entertain a lessened "substantial compliance" policy. The purpose of notice-posting is to protect and inform employees of their rights during a voluntary recognition process. In order to protect those rights, the Board should refuse to find an employer has substantially complied with notice-posting, as it would undermine employees' ability to be duly informed of assumed representation.

Finally, if the Board modifies or overrules *Dana Corporation*, the *Amicus* argues that the new policy should be applied prospectively to avoid disruption of ongoing collective bargain relationships.

The *Amicus* submit that the Board should therefore affirm the policy set forth in *Dana Corporation*. If the Board overturns or modifies such policy, *Amicus* suggests that at least some form of current policy be preserved, particularly as it pertains to notice-posting and maintaining a window of time for employees to challenge the voluntary recognitions of union if not truly representative of its constituents.

ARGUMENT

I. BACKGROUND

The original inquiry that resulted in the Board 's 2007 decision in *Dana Corporation*, was "to strike the 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 relationship on the other'." 351 N.L.R.B. 434 (2007). On August 27, 2010, the Board granted Petitioners' Requests for Review of *Dana Corporation*. By notice dated August 31, 2010, the Board invited interested amici to file briefs on or before November 1, 2010. In a the concurring opinion in *Order Granting Review*, the Board majority seeks to review the decision handed down in *Dana Corporation*, which set the following policy in place:

> [N]o 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 or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of

> notice without filing of a valid petition. If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of this notice, the petition will be processed. …These principals will govern regardless of whether a card-check and/or neutrality agreement preceded the union's recognition.

355 N.L.R.B. No. 157, 16 (2010) (Members Schaumber and Hayes, dissenting). The Board contends that this process needs to be revisited, in order to find out what the "members of the labor-management community" have to say about the effects of *Dana Corp's." Id.* at 7. It is the position of the *Amicus* that the Board should uphold its policy laid down in *Dana Corporation* in order to preserve employee freedom of choice in selecting their representative. To that end, *Amicus* submits the following arguments.

II. IF DANA IS OVERTURNED EMPLOYEES' FUNDAMENTAL FIRST AMENDMENT RIGHTS OF FREEDOM OF ASSOCIATION WILL BE HINDERED BY DELAYING THEIR FREEDOM OF CHOICE IN CHOSING REPRESENTATION

Among the principles our nation was founded upon, the right of an individual to speak freely and to decide which individuals and what organizations they wished to be associated with have been paramount. Such individual freedoms were the very catalysts that caused our forefathers to leave England and the national church and establish a new nation. These freedoms have been firmly rooted in our history. For instance, Thomas Jefferson who later became the third President of the United States composed the following statement, later codified as a statute, which is as true today as it was then:

> [T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical. *The Virginia Act for Establishing Religious Freedom*, VA. CODE ANN. § 57-1.[1]

[1] Thomas Jefferson drafted *The Virginia Act for Establishing Religious Freedom* in 1779. It was passed by the General Assembly of the Commonwealth of Virginia in 1786.

Three years after Virginia passed this statute, the 1st Congress on September 25, 1789, proposed the first set of amendments to the Constitution, of which ten were quickly ratified as the Bill of Rights. Recognized first in this list is statement protecting, *inter alia*, the rights of freedom of speech and freedom of association:

> Congress shall make no law…*abridging the freedom of speech*, or of the press; *or the right of the people peacefully to assemble*, and to petition the government for a redress of grievances. U.S. CONST. amend. I. (Emphasis added.)

Unfortunately, in the over 220 years since the proposal of the First Amendment, various restrictions on its unequivocally guaranteed rights have been upheld. These First Amendment rights are thus not deemed by the courts to be incapable of restriction, given a compelling government interest. Most unfortunately, limitations on the associational rights of workers by statutes allowing or imposing compulsory unionism have been upheld by the Supreme Court. *See, e.g., Railway Employes' Dept. v. Hanson,* 351 U.S. 225 (1956). However, this is not to say that Congress did not provide oversight to unions in carrying out their duties of representing workers. In 1935, Congress enacted the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. ("NLRA"), to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy. The Supreme Court has described the purpose of the National Labor Relations Act as one of "industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees." *YWCA of W. Mass. & Int'l Union,* 349 N.L.R.B. 762, 763 (2007) (*quoting Auciello Iron Works v. N.L.R.B.*, 517 U.S. 781, 785 (1996)). The *Dana Corporation* minority summed up the NLRA best in a footnote by saying "the goal of industrial peace is to be

achieved by 'encouraging the practice and procedure of collective bargaining' as well as by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." *Dana Corporation, supra*, at 444 fn. 3 (Members Lieberman and Walsh, dissenting) (internal citation omitted). "When those goals conflict, the Board's job is to strike a sensible balance between them." *Stanley Spencer v. N.L.R.B.*, 712 F.2d 539, 566 (D.C. Cir. 1983). The *Amicus* believes that preserving employees' First Amendment right of freedom of speech and association, particularly within the context of choosing union representation is key to that "sensible balance." A ruling to overturn the policies laid down in *Dana Corporation*, not only impinges employee freedom of choice in representation, but also forces employees to associate with a union that does not reflect their views and desires, and are left to tolerate it for the remainder of the contract.

Today, there are two primary means by which union representation may be established. Once selected, they then enjoy exclusive collective bargaining rights, barring the entertaining of any alternative representation for a time. The first, and preferred method, is a Board secret ballot election.[2] The second, method that has become accepted is an employer voluntary recognition process. This is what is at issue before the Board today.

> According to this doctrine, an employer's voluntary recognition of a union, in good faith and based on a demonstrated majority status, immediately bars an election petition filed by an employee or rival union for a reasonable period of time. A collective-bargaining agreement executed during this insulated period generally bars Board elections for up to 3 years of the new contract's term.

Dana Corporation, *supra*, at 434. The current policy up for review in *Dana Corporation* applies an important limitation to the recognition-bar doctrine. It encourages employee freedom of

[2] Supreme Court makes the statement that "secret ballot elections are generally most satisfactory, indeed preferred method of determining employee free choice." *See, N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

choice by instituting a requirement that notice be given to employees when an employer voluntarily recognizes a union, and provides a 45-day window in which employees can exercise that freedom by bringing a challenge to the current representation. If then, under the 45-day rule, a petition is not filed backed by a minimum of 30 percent of eligible employees, the union can rest assured they carry majority support. Certainly, unions would want this confirmation. Furthermore, it prevents workers from showing up to work one day to find they are all of a sudden locked into a representation by the voluntary recognition-bar for a 3-year period.

It appears that the opposition to *Dana Corporation* wants to do away with the 45-day window, and in effect, hamper employee choice on representation for a period of at minimum 3-years. The *Amicus* contend that is an impingement on employees' First Amendment rights. Forced association with a union even for purposes of collective bargaining significantly infringes on "an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). *See Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984). The minority in *Dana Corporation* argues that the pre-Dana recognition-bar policy protected employee free choice by extending the bar for "a reasonable period *only*." *Dana Corporation*, *supra*, at 446 (Members Lieberman and Walsh, dissenting) (emphasis added). This same minority continues to downplay employee choice in other contexts, favoring union control in the name of the bargaining relationship. "That employees who oppose union representation *may be required to wait* to express their views, as a means of furthering the Act's other policies, is neither unreasonable, nor unfair." *Truserv Corp.*, 349 N.L.R.B. 227, 238 (2007) (Members Lieberman and Walsh, dissenting) (court affirmed the submission of decertification petition to remove a union in an unfair labor practice charge before execution of a settlement) (emphasis added); *see also*, *MV Transportation*, 337 N.L.R.B. 770,

779 fn. 10 (2002) (Member Lieberman, dissenting) (question of whether employees of a newly acquired company should be barred from decertifying an incumbent union for a period of time until union had opportunity to negotiate a collective-bargaining agreement with the new employer). Some apparently believe that it is okay to make employees wait up to 3 years to voice their opinion, but it is unjust to make a union wait 45 days to confirm it has full consent of the employees to negotiate uncontested on their behalf. *Amicus* contends that denying employees the 45 day window is an unacceptable encroachment on their First Amendment rights.

III. WHILE A CONTRACT RECOGNITION-BAR IS A RECOGNIZED MECHANISM OF LABOR RELATIONS, IT IS NOT A MANDATE OF THE NATIONAL LABOR RELATIONS ACT AND CURRENT LAW SHOULD KEEP AN AVENUE OPEN FOR EMPLOYEE CHOICE

The question presented for review of this Court focuses on application of the Board's recognition-bar doctrine, introduced in *Keller Plastics Eastern, Inc.* Here, the Board held that "parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining." *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583, 587 (1966). It is contended that the adopted *Dana Corporation* policies undermine collective-bargaining stability, by granting a 45-day period after a union has been voluntarily recognized by an employer, whereby employees may challenge "the union's claim of majority support through a statutorily preferred Board-conducted secret-ballot election." *Rite Aid Store # 6473,* 355 N.L.R.B. No. 157, 10 (2010) (Members Schaumber and Hayes, dissenting). However, it is important to note, as did the majority in *Dana,* that the recognition-bar doctrine is not a "mandate". *Dana Corporation, supra,* at 438. The Board originally developed the concept for representation elections in dealing with unfair labor practice cases, finding that absent exceptional circumstances, "the Board will

not entertain a representation petition seeking a new determination of employees' bargaining representative during the middle period of a valid outstanding collective-bargaining agreement of reasonable duration." *Nott Co. Equip Div.*, 345 N.L.R.B. 396, 403 (2010) (Member Lieberman, dissenting) (*quoting*, *Hexton Furniture Co.*, 111 N.L.R.B. 342, 344 (1955)). However, the *Dana Corporation* Board recognized that since its inception in *Keller Plastics*, the Board has "broadly applied the recognition bar and dismissed petitions in circumstances that raise serious questions whether employee free choice was given adequate weight." *Dana Corporation*, *supra*, at 437. As has been stated elsewhere:

> Maintenance of stable collective-bargaining relationships is important, *but only when employees have freely chosen, whether and by whom, to be represented.* The peaceful settlement of disputes is also important—but not so important that it should be obtained at the expense of abrogating employees' Section 7 rights to reject or retain a union as their collective-bargaining representative.

Truserve Corp., 349 N.L.R.B. 227, 232 (2007) (emphasis added). If the voluntary recognition process is to be as reliable as Board conducted secret-ballot elections, it must maintain an avenue for all employees, not just those approached by the union, to chose before locking in a union as their representative.

Therefore, the voluntary recognition-bar is not a mandate of the National Labor Relations Act. It should be tempered against employees' freedom of choice in representation. *Amicus* submits that the current policy, which better protects the employee's freedom of choice, should be left intact.

IV. THE REASONS FOR GRANTING OF REVIEW IN THE CASE DO NOT RISE TO THE LEVEL OF COMPELLING REASONS FOR RECONSIDERATION OF AN IMPORTANT BOARD POLICY, AND AS SUCH, THE BOARD SHOULD WITHDRAW ITS GRANT OF REVIEW

Under the Board's Rules and Regulations, Section 102.67(c) we find that a review of regional director decisions will only be granted in proceedings where "compelling reasons" exist, including the following grounds:

> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
>
> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in the prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. § 102.67 (2010). Some of the very Members ruling in favor of granting review of *Dana Corporation* recently labeled these grounds as "stringent requirements." *St. Barnabas Hospital*, 355 N.L.R.B. No. 39 slip op. at 1 (2010) (Board denied an employer's request for reexamination of precedent based on factual analysis of a more recent and apparently relevant Board decision). Elsewhere, the Board has described petitioners seeking a granting of review as carrying a "significant burden of demonstrating a 'compelling reason'." *Transcare New York, Inc.*, 355 N.L.R.B. No. 56, 9 (2010) (also criticizes Petitioner's Request for Review of Supplemental Decision for failing to cite Sec. 102.67 or state grounds upon which, pursuant to the Board's Rules and Regulations, a grant of review is warranted in fn. 6). Furthermore,

> Board procedure requires that a party seeking review of a Regional Director's Decision under Section 102.67(c) of the Board's Rules and Regulations, Series 8, as amended, must show convincingly that the Decision violated one or more of the carefully circumscribed grounds set forth in that section.

Parson Investment Co., 152 N.L.R.B. 192, 195 (1965).

The *Amicus* believes that the threshold has not been met. In this case, those seeking a review of *Dana Corporation* are heavily relying on Sec. 102.67(c)(4) as their justification for a review. Completely discounting data provided by the General Counsel, the majority granting review of *Dana Corporation* seems to now be fishing for convincing and significant evidence to justify revisiting the issue.

V. SINCE THE PURPOSE OF NOTICE-POSTING IS TO PROTECT AND INFORM EMPLOYEES OF THEIR RIGHTS, *AMICUS* BELIEVES THAT STICT COMPLIANCE WITH 103.20 IS THE BEST SOLUTION, AND THAT ARGUMENTS OF SUBSTANTIAL COMPLIANCE SHOULD NOT BE ENTERTAINED

It has been stated that the express purpose of the notice-posting requirement set forth in Section 103.20 of the Board's Rules and Regulation, 29 C.F.R. § 103.20 is "to protect employees by ensuring that they would be informed of their rights, and to decrease litigation on matters pertaining to an employer's obligation to post the notice of election." *Terrace Gardens Plaza, Inc.*, 313 N.L.R.B. 571, 572 (1993) (Member Devaney, dissenting). In light of that, *Amicus* believes that the Board should continue to follow its trend and "strictly enforce the Section 103.20 notice-posting rule." *St. Agnes Med. Ctr.*, 2009 N.L.R.B. LEXIS 7, 17 (2009).

In *Smith's Food and Drug*, 295 N.L.R.B. 983 (1989), the Board held that an employer did not substantially comply with the 3-day notice posting requirement when

the election notices were inadvertently mailed to a wrong address, causing the posting to be up for only two days, despite the fact that 30 out of 31 eligible employees voted. The Board reasoned that though the employer had substantially complied, the notice contained important information for the employees voting, and should "be conveyed…far enough in advance of the election so that employees will be adequately apprised of their rights." *Id.* In *Terrace Gardens*, supra, the Board found that the 3-day notice posting was not satisfied when the notice of election was included with a mailed ballot, despite the fact that mail ballot election was held because of an Employer's failure to respond and after a majority of the eligible employees voted.

While these two examples deal with Board-conducted secret ballot elections, the same strict enforcement notice-posting principles should be applied to the voluntary recognition scenarios, and even more so. In a private voluntary recognition process, a union collects card signatures of employees. Upon presentation, an employer may recognize a union upon the showing of card-check majority. It is important to note, that this process of gathering signatures is under no time constraints, and as such may be conducted over an extended period of time. The posting of notice puts employees on alert who may have signed the cards on a much previous date, or who chose not to sign the cards that now a certain union is about to represent them. Strict compliance to the 3-day notice-posting requirement will provide employees adequate time to evaluate their options and protects their freedom of choice. As already noted, "The language of Section 103.20 does not provide for any exceptions to the rule… that failure to post the election notices as required by the rule "shall be grounds for setting aside the election." *Ass'n of Parcel Workers of America*, 2008 N.L.R.B. Reg. Dir. Dec. LEXIS 72, 7 (2008). *Amicus*

believes the Board should apply this same policy to the voluntary recognition process and refuse to entertain arguments allowing substantial compliance.

VI. THE BOARD SHOULD APPLY THEIR DECISION ON DANA PROSPECTIVELY ONLY IN ORDER TO AVOID THE DISRUPTION OF BARGAINING RELATIONSHIPS

If the Board modifies or overrules *Dana Corporation*, the *Amicus* believes that it should be done prospectively.

It is typically the Board's practice "to apply all new policies and standards to 'all pending cases in whatever stage'." *Levitz Furniture Co. of Pacific, Inc.*, 333 N.L.R.B. 717, 729 (2001) (quoting *John Deklewa & Sons*, 282 N.L.R.B. 1375, 89 (1987) (citations omitted)). However, the Board has noted that before the retroactive application of a rule, it will consider whether such action will result in a manifest injustice – "the Board will consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." *SNE Enters*, 344 N.L.R.B. 673 (2005). And, "furthermore, the courts have refused to enforce Board orders based upon the retroactive application of Board policy, where to do so would punish those who, in good faith, conducted themselves in accordance with the law as previously interpreted." *Pioneer Div., The Flintkote Company*, 109 N.L.R.B. 1273, 8 (1954) (Member Murdock, dissenting (quoting *N.L.R.B. v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952)). That is not to say that the retroactivity is overreaching, as it does not affect cases already closed.[3]

[3] "It is a rule of statutory construction that amended provisions of a statute which are intended to be applied prospectively will not affect a proceeding which has been entirely closed before the change became effective." *American Can Co.*, 123 N.L.R.B. 438, 439 (1950). *See also, Dunlap v. United States*, 43 F.2d 999 (D. Idaho 1930).

Three years ago, the Board refused to apply these policies now in question retroactively so as "to avoid inequitable disruption of bargaining relationships established on the basis of the former voluntary recognition-bar doctrine." *Dana Corporation* 351 N.L.R.B. at 435. *Amicus* urge the Board to take the same approach here if it decides to modify or overrule *Dana Corporation*.

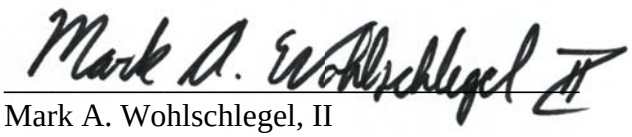
CONCLUSION

For all of the foregoing reasons, the *Amicus* urges the Board affirm the policy set forth in *Dana Corporation*.

Dated this 22nd day of October, 2010.

Respectfully submitted,

Nathan Paul Mehrens



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