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NLRB Decision Permits Representation Elections After 'Card Check' Recognition

On September 29, 2007, the National Labor Relations Board ("NLRB" or the "Board") issued its long-awaited decision in *Dana Corp*., 351 NLRB No. 28 (2007), holding that the Board's long-standing recognition-bar doctrine would no longer immediately and irrebuttably apply to an employer's recognition of a union as the representative of its employees based upon a so-called "card-check," i.e., a union's presentation of employee signed authorization cards as evidence of its support by a majority of the employer's employees.

Under its recognition-bar doctrine, the Board for more than 40 years generally held that it would not process any form of representation petition, whether filed by employees seeking to decertify the newly recognized union or by a rival labor organization claiming to represent the majority of the employer's employees, for a "reasonable period of time" following an employer's voluntary recognition of another union on the basis of a card-check.[1] A collective bargaining agreement reached in negotiations during this insulated period then usually barred any Board election for an additional three years.

In *Dana Corp*., a majority of the Board held that the recognition-bar to an election will no longer be immediate when an employer voluntarily recognizes a union as its employees' bargaining representative based upon the union's presentation of authorization cards signed by a majority of the employees in the bargaining unit. Instead, in the case of recognition based upon such a card check, the recognition-bar doctrine now will apply *only* if and after (1) the employees first are informed, through the posting of Board-provided notice, of the employer's recognition of the union as their representative, and of their right to file within 45 days either a petition for an election in which they may vote to decertify the newly recognized union or a rival representation petition for a different union; and (2) the 45 days then passes without the filing of a valid petition – which can be based on signatures obtained either before or after the recognition.[2] Thus, the employer and/or union must notify the Board's Regional Office of the grant of voluntary recognition and obtain the official NLRB notice to be posted through the 45-day period.

[1]The exception was a rival union petition filed after the recognition, but supported by a 30 percent showing of interest obtained prior the recognition. *Smith's Food & Drug Centers*, 320 NLRB 844 (1996).

[2]The Board expressly did not address circumstances in which employers may file post-recognition petitions or unilaterally withdraw recognition. Slip op. at 3-4.

During this period, however, the employer and the recognized union will be obligated to bargain and can agree on a collective bargaining agreement, If, however, a first contract is reached during the 45 days following voluntary recognition, under *Dana Corp*., the contract will not serve as a bar to the processing of a petition filed during the 45 days. Following the 45 days, if an initial collective bargaining agreement has not yet been agreed to, the NLRB's traditional rule that voluntary recognition bars the processing of a new representation or decertification petition for a "reasonable period of time" will apply.

The Board majority sought to balance its interest in stability in labor relations, with the Act's stated preference for Board-conducted secret ballot elections as the most reliable indicators of employee free choice concerning matters of union representation. In particular, the majority found that Board elections have greater reliability than card checks as an indicator of employee choice, particularly because of the election's reliance on the use of a secret ballot to determine majority preference. In this regard, the majority took note of the fact that "union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options;" that a Board election "presents a clear picture of employee voter preference at a single moment," rather than over a protracted period of time; and that the Board election process contains safeguards for a fair election process. Slip op. at 5-7. They also differentiated voluntary recognition from the imposition of recognition bar following certification, during a reasonable period after an unfair labor practice dissipated a card majority, or following settlement agreements. Slip op. at 7.

Notably, the Board majority expressly recognizes that unions, with employer acquiescence, have increasingly turned to voluntary card checks in lieu of Board elections, but asserts that the new rule does not interfere with this voluntary activity. Rather, they assert that the new rule will better assure that employee free choice is not impaired by such voluntary recognition. Slip op. at 8. The dissenters, however, contend that by creating uncertainty as to whether the recognition will be overturned through a subsequent election petition, the new rule will remove the incentive for an employer to grant voluntary recognition and disrupt the new relationship between the employer and the union pending the expiration of the 45 day period during which a petition may be filed. They further argue that the possibility that a petition might be filed during that period will remove incentives an employer might otherwise have to engage in meaningful bargaining during the 45 day period, and, conversely, pressure the union to produce results quickly or else be voted out. Slip op. at 14.

As the dissenters note, the Board's new rule likely will significantly affect strategies for bargaining during the initial period following voluntary recognition. A union likely will be torn between trying to obtain significant wage increases or other improvements in order to show its strength, and trying to reach a quick agreement to show that it can actually obtain a collective bargaining agreement. An employer may be reluctant to make any concessions until it knows whether the union will remain or it will have to start over at the bargaining table with a second union that may soon displace that which it voluntarily recognized; or it may feel compelled to reach a quick and more generous agreement in order to forestall any interest in such a rival union.

More significantly, however, the Board's decision is likely to become a significant factor in the already strong effort, now underway by organized labor and its political allies, to amend the National Labor Relations Act to *require* employers to agree to card-check recognition. In all likelihood, such legislative efforts will now seek, as well, to reverse *Dana Corp.* and to impose a statutory recognition bar following card-check based recognition. With this decision and the modification of the forty year old recognition bar doctrine, the Board's majority has clearly thrown its support behind the position of the General Counsel that Board-conducted secret ballot elections are the "gold standard." They have made it clear that they continue to adhere to the view that, while recognition based on a voluntary card-check is both lawful and valid, it is inherently less reliable and

subject to various forms of misuse and coercion that cannot be reached through the unfair labor practice process. Consequently, they see the new rule as guarding against "sweetheart" recognition agreements and allowing greater employee freedom of choice. Thus, management is likely to cite the decision as providing further support for maintaining the current voluntary process. Unions, however, are likely to cite the decision as providing further evidence that legislative change is necessary to provide support for the card-check process.

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If you have any questions about the NLRB's decision, please contact Steven Swirsky at (212) 351-4640 or sswirsky@ebglaw.com, or Brian Steinbach at (202) 861-1870 or bsteinbach@ebglaw.com.