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In a decision that will have a monumental impact on card-check, neutrality and other organizing agreements, the NLRB modifies its recognition bar doctrine to allow employees and rival unions to file election petitions upon notice that a union has been voluntarily recognized as the employees' bargaining representative.

Labor Management | A Littler Mendelson Newsletter

NLRB Modifies "Recognition Bar" Doctrine to Permit Employees and Rival Unions to File Election Petitions

By Mark W. Robbins and Noah G. Lipschultz

Employers faced with a union demand for voluntary recognition, or to enter into a "card-check," "neutrality" or other organizing agreement leading to voluntary recognition, need to be aware of a new decision by the National Labor Relations Board (NLRB or "the Board") affecting the legal and practical implications of these arrangements.

In its long-awaited ruling in *Dana Corp.,* 351 NLRB No. 28 (Sept. 29, 2007), the Board, by a 3 to 2 margin, held that no election bar will be imposed after an employer voluntarily recognizes a union unless: (1) employees in the bargaining unit receive official notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition with the Board or to support the filing of an election petition by a rival union; and (2) 45 days pass from the date of notice without the filing of a validly supported petition.

To implement the notice requirement, the Board will now require the employer or the union to promptly notify the Board's Regional Office, in writing, of the grant of voluntary recognition. To serve as an election bar, the voluntary recognition itself also must be in writing, describe the unit and set forth the date of recognition. A copy of the written recognition must accompany the party's notice to the Regional Office. Upon receipt of such notice, the Board's Regional Office will send an official NLRB notice for the employer to post in conspicuous workplace locations throughout the 45-day period alerting employees to the recognition and, among other things, informing employees of their statutory right to be represented by a union of their choice or by no union at all and of their right, within 45 days of the notice being posted, to file a decertification petition supported by at least 30% of the unit employees or to support another union's election petition based upon a similar 30% or more showing. If the notice requirement is satisfied, and no petition is filed during the 45-day window period, the recognized union's majority status will be irrebuttably presumed for a reasonable period of time to enable the parties to negotiate a collective bargaining agreement.

To accommodate this ruling, the Board also modified its "contract bar" doctrine to hold that a collective bargaining agreement executed on or after the date of voluntary recognition will not bar a decertification or rival union petition unless adequate notice of recognition has been given and 45 days have passed without a valid petition being filed. In an interesting twist, the Board decided to apply these new rules prospectively, only to voluntary recognition agreements that postdate its decision.

Although this case involved voluntary recognition based solely upon a showing of a card check majority by the union, the Board's opinion expressly states that "the notice and window-period requirements should apply irrespective of whether voluntary recognition is preceded by a card-check/neutrality agreement."

Background

Under the "recognition bar" doctrine, which the Board first articulated 40 years ago in *Keller Plastics Eastern, Inc.,* 157

NLRB 583 (1966), an employer's good faith, voluntary recognition of a union based upon a demonstrated majority status immediately barred an employee or rival union from filing an election petition with the Board "for a reasonable period of time" after recognition had been granted. In tandem with imposition of an election recognition bar, the Board's "contract bar" doctrine provided that a collective bargaining agreement executed during the post-recognition insulated period generally barred a Board-conducted election for up to three years of the contract term.

Neutrality, card-check and other forms of organizing agreements have become increasingly popular union-organizing tools. Such agreements seek to circumvent the time-tested NLRB secret-ballot election process and make it substantially easier for unions to organize employees. Typically, these agreements require an employer to remain "neutral" in its stance toward unionization during an organizing campaign and to voluntarily recognize the union upon a showing that a majority of its employees in an appropriate bargaining unit have signed cards authorizing the union to represent them in collective bargaining with the employer without the union's majority status being confirmed in a traditional secret ballot election conducted by the Board. These agreements often further provide for the union to receive a list of employee names, home addresses and telephone numbers and access to the employer's facility to solicit authorization cards from the employees. In many industries, particularly where unions have tremendous bargaining power, political clout or economic muscle, employers are forced to agree to neutrality and card-check agreements to obtain labor peace and, sometimes, even as a condition of continuing to do business.

The issue has taken on such significance for unions seeking new members that earlier this year Congress came very close to passing the "Employee Free Choice Act," which would have made the card-check procedure the preferred and accepted manner for validating a union's claim of majority representative status instead of a Board election. The increasing prevalence of card-check, neutrality and other organizing agreements and the specter of legislative action on the subject set the stage for the Board's re-examination of its voluntary recognition bar doctrine in *Dana Corp*.

Dana Corp. actually involved two cases in which two different employers, Dana Corp. and Metaldyne Corp., independently entered into separate neutrality and card-check agreements with the same union, the United Auto Workers (UAW). After the agreements were signed, the UAW eventually obtained signed authorization cards from a majority of unit employees at each employer. Voluntary recognition was granted after a neutral third party verified that the UAW had obtained majority card support in each respective bargaining unit. Shortly thereafter, employees at each employer filed election petitions with the Board to decertify the union. However, the two NLRB Regional Directors in whose Regions the decertification petitions were filed dismissed the petitions based upon application of the Board's recognition bar doctrine. The employees petitioned the Board for review, asking the Board to change its recognition bar rule. The Board granted review in each case to reexamine its recognition bar doctrine and, in its own words, "to strike the proper balance between two important but often competing interests under the National Labor Relations Act: 'protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other.'"

The Board Majority's Decision

At the outset of their analysis, the Board majority (Chairman Battista and Members Schaumber and Kirsanow) made clear their decision would not address the larger issues of: (1) the legality of voluntary recognition agreements based upon a union's showing of majority support, as they acknowledged that voluntary recognition itself is "undisputedly lawful" under the National Labor Relations Act; (2) the legality of card-check and neutrality agreements preceding recognition, as there was no contention that the agreements or subsequent recognitions in this case were unlawful; (3) the circumstances in which employers may file post-recognition election petitions or unilaterally withdraw recognition from a union; or (4) whether the "reasonable period" standard for determining the length of a voluntary recognition bar period should be modified or replaced by a time-specific standard (such as a maximum of 6 months as Chairman Battista suggested).

The Board majority further emphasized its modified approach to recognition bar was intended to "provide greater protection for employees' statutory right of free choice and to give proper effect to the court- and Board-recognized statutory preference for resolving questions concerning representation through a Board secret-ballot election." While the Board majority reaffirmed in principle the legality of voluntary recognition based upon a union's showing of majority support despite the absence of a Board election, it was blunt in its assessment regarding its preferred method for employees' choice of bargaining representative, noting: "[B]oth the Board and courts have long recognized that the freedom of choice guaranteed employees by Section 7 is better realized by a secret election than a card check," and "[f]or a number of reasons, authorization cards are 'admittedly inferior to the election process.'"

With respect to the latter observation, the Board majority noted that, unlike votes cast in privacy in secret-ballot Board elections, "card signings are public actions, susceptible to group pressure exerted at the moment of choice." It also noted that union card-solicitation campaigns have been accompanied by misinformation or lack of information about employees' representational options, the purpose of the cards or the consequences of voluntary recognition. It further observed that, "like a political election, a Board election presents a clear picture of employee voter preference at a single moment," whereas "card signings take place over a protracted period of time," rendering a card check a less accurate barometer of actual employee preference for union representation. Finally, it expressed concern that the voluntary recognition process does not carry with it any guarantee that procedural safeguards will be observed to preserve employee free choice or that employees will not be subjected to improper electioneering tactics, whereas the Board's election process provides such safeguards and assures greater regularity, fairness and certainty in the final outcome.

The Dissenting Opinion

Board Members Liebman and Walsh dissented.

They believe this ruling allows a 30% minority of unit employees to "hijack the bargaining process" and "subvert" the will of the unit majority by filing a decertification petition that will leave a voluntarily recognized union's status unresolved for more than 3 months after recognition, or much longer if election objections are filed. They further believe that this decision "cuts voluntary recognition off at the knees" as employers and unions will have little incentive to opt for voluntary recognition if their decision will be subject to "second-guessing through a decertification petition." In response, the Board majority pointed out that "[e]mployers and unions agree to voluntary recognition for any number of reasons, economic or otherwise, that will remain unaffected" by this decision and that the 45-day window "merely postpones the recognition bar; it does not abolish it or destroy its benefits." The Board majority further observed that if a valid election petition is not timely filed, a union's majority status will not be subject to challenge during the ensuing recognition bar period or under the contract bar doctrine if the parties subsequently sign a collective bargaining agreement.

The Board's Ruling Is Prospective Only

Finally, the Board decided that because employers and unions, including Dana Corp., Metaldyne and the UAW, have entered into voluntary recognition agreements with the understanding that the Board's recognition bar doctrine would immediately preclude the filing of Board petitions for a reasonable period of time, and that other unions and employers have also entered into such agreements and subsequently executed collective bargaining agreements without providing the notice to employees now required under the Board's new policy, the modified recognition bar requirements will be applied only to voluntary recognition agreements that postdate its decision in *Dana Corp.* Thus, the Board affirmed the dismissal of the employee petitions filed in this case, leaving the UAW as the representative of the unit employees at Dana Corp. and Metaldyne.

Although the Board did not expressly address this issue, a reading of its opinion suggests that it may apply the new modified recognition bar requirements to voluntary recognitions granted after the date of its decision in *Dana Corp.* even where the employer and the union entered into a card-check, neutrality or other organizing agreement before the decision issued. In other words, the date voluntary recognition is granted may be the controlling date in determining whether these new requirements apply, not the date of the underlying card-check, neutrality or other organizing agreement.

Impact of the Board's Decision

The Board's decision will have a monumental impact on voluntary recognition agreements and the continuing effort by labor unions across the country to bypass the Board's election processes altogether through the use of card-check and neutrality agreements. No longer will employers and unions be able to establish a bargaining relationship and sign a collective bargaining agreement based merely upon an informal card check. Now, affected employees will receive formal notice of recognition and their right to a Board-conducted, secret-ballot election if supported by at least 30% of the unit.

Although the Board in *Dana Corp.* does not specifically discuss whether its new requirements apply when an employer grants voluntary recognition after its employees select a union as their bargaining representative in a secret-ballot election conducted by a neutral third party other than the Board, as noted above, the Board's opinion states that its modification of the recognition bar doctrine applies to voluntary recognition agreements that postdate its decision regardless of whether a card-check or neutrality agreement preceded the union's recognition. Moreover, the decision is replete with references to the statutory preference for, and the advantages and protections provided by, a Board-conducted election.

Despite the new 45-day window for challenging a voluntary recognition, an employer is still obligated to begin bargaining with a union it voluntarily recognized, and a recognized union may begin processing employee grievances and bargaining for a first contract. However, as the Board observed, during the 45-day window, the parties are both free "to express their non-coercive views about the perceived benefit of a collective bargaining relationship" to employees.

Although *Dana Corp.* leaves a number of important questions unanswered, the decision should breathe new life and vitality into the Board itself, which for many in organized labor had become an increasingly irrelevant institution. It remains to be seen whether the Board takes further steps to recapture its historical role as the primary arbiter of the organizing process in the private sector and whether this decision will survive whatever court challenges, congressional response and political action may come its way.

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