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NLRB Will Revisit Dana Corp. and MV Transportation Decisions

By Allen Smith

The National Labor Relations Board (NLRB) granted review on Aug. 27, 2010, in two groups of cases, indicating that it will re-examine voluntary recognition arising under the Board's decision in *Dana Corp.*, 351 NLRB 434 (2007), and the successor bar doctrine, which was overruled in *MV Transportation*, 337 NLRB 770 (2002).

The grant of review, released Aug. 31, 2010, "signals a real likelihood of significant change to a number of precedents," Joshua Waxman, an attorney with Akin Gump in Washington, D.C., told *SHRM Online*. He said the Board was expected to overturn a number of decisions with the new administration and that *Dana* was "high on everyone's list" of vulnerable decisions.

Recognition Bar

In *Rite Aid Store #6473,* No. 31-RD-1578, and *Lamons Gasket Co.,* No. 16-RD-1597, the NLRB granted review to consider the experiences of employees, unions and employers under *Dana Corp.*

In *Dana Corp.,* No. 06-RD-01518 (Sept. 29, 2007), the NLRB modified the recognition bar and contract bar doctrines. It held that no bar on an election will be imposed after a card-based recognition of a union unless 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 45 days pass from the date of notice without the filing of a valid petition.

Dana overturned almost 40 years of precedent, Waxman remarked, noting that one of the dissenters to *Dana,* Wilma Liebman, now is chairwoman of the Board.

Under the old rule before *Dana,* if there was voluntary recognition, that was the end of it and there would be no election, Leslie Silverman, an attorney at Proskauer Rose in Washington, D.C., and a member of the SHRM Labor Relations Special Expertise Panel, added.

"The grant of review is a clear signal of the Board's interest in reversing precedent," said John Raudabaugh, an attorney with Nixon Peabody in Washington, D.C., and a member of the SHRM Labor Relations Special Expertise Panel.

Dissenting from the grant of review in *Rite Aid Store #6473* and *Lamons Gasket Co.,* Board members Peter Schaumber and Brian Hayes wrote that prior to *Dana,* under the immediate recognition bar rule, even an employee majority could not petition for a Board election for up to one year, or three years in the event of a contract's execution, to test the representative status of the voluntarily recognized union.

They cautioned that if *Dana* is overruled, there will be destabilizing effects. "Frequent, politically-driven, back-and-forth changes in the rules by which parties are expected to conduct their affairs under the act can only engender confusion and frustration among employees, unions and employers, as well as substantially lessen the deference federal courts of appeals accord Board 'expertise' in reviewing our legal pronouncements on questions concerning representation," they wrote.

Writing a concurrence to the grant of review, Liebman responded that "the decision to revisit long-established legal rules in *Dana* itself was premised on the *Dana* majority's belief that 'changing conditions in the labor relations environment can sometimes warrant a renewed scrutiny of extant doctrine.' That belief is surely correct. Whether the *Dana* Board's ultimate policy choice was correct or not, the decision, by its own terms, cannot stand for the

proposition that the Board rules are meant to last forever."

Successor Bar

Members Schaumber and Hayes also dissented from the grant of review in *UGL-UNICCO Service Co.,* No. 1-RC-22447, and *Grocery Haulers Inc.,* 3-RC-11944.

Three NLRB members—Chairwoman Liebman and members Craig Becker and Mark Gaston Pearce—granted review to question whether *MV Transportation* applies in a "perfectly clear" successor situation and, if it does, whether it requires a showing that the presumption of the incumbent union's exclusive representational status has been rebutted.

Waxman noted that before *MV Transportation,* under the successor bar doctrine, if a successor employed a majority of predecessor employees represented by a union, then the union's majority status could not be challenged for a reasonable period to allow the new company and union to have a period to negotiate. *MV Transportation* overruled *St. Elizabeth Manor Inc.,* 329 NLRB 341 (1999), which revived the successor bar doctrine. *MV Transportation* instead gave the union a presumption of majority status but made that presumption rebuttable and open to challenge by employees, another union or an employer, he added.

In dissenting from the grant of review, Schaumber noted on his last day on the Board that in *UGL-UNICCO Service Co.,* the incumbent union requested that the Board overrule *MV Transportation* and bar a rival union's representation petition filed one month after a successor commenced operations. "The union, however, has represented the unit in question for 20 years, and its relationship with its unit employees is well-established. The union offers no new or compelling justification for requiring the additional protection of a 'successor bar,' " he wrote.

In a separate dissent, Hayes also opposed the grant of review of "the well-reasoned doctrine that there should be no election bar to an immediate challenge of a union's continuing majority support among unit employees of a successor employer."

However, Liebman wrote in a concurrence that "elimination of the successor-bar doctrine has made it possible for successor employers unilaterally to withdraw recognition from a union without ever engaging in bargaining and without employees ever having voted in a secret-ballot election to decertify the union."

Waxman said that the grant of review might be just the beginning and predicted that "there may be broad changes" beyond these two groups of cases.

The fact that the Board now is down to four members won't prevent it from overturning Bush administration decisions, Silverman said, noting that three of the remaining Board members are Democrats. "That's enough of a quorum," she remarked.

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