A Timely Analysis of Legal Developments

ASAP®

In This Issue:

December 2010

With its December 6 decision in Dana Corp., 356 NLRB No 49, the National Labor Relations Board (NLRB or "the Board") has given its approval to broader use of agreements between employers and unions designed to encourage the organization of an employer's non-represented workforce.

Board's Dana Decision Approves Broader Scope for Card Check and Neutrality Agreements

By Jeffrey Place

With its December 6 decision in *Dana Corp*., 356 NLRB No 49, the National Labor Relations Board (NLRB or "the Board") has given its approval to broader use of agreements between employers and unions designed to encourage the organization of an employer's non-represented workforce. The decision represents a step forward in the Board's agenda for changing existing interpretations and applications of U.S. labor law in ways that labor organizations hope will ensure its continuing relevance and vitality in the twenty-first century. For some, the decision suggests that the NLRB may be privileging the institutional interests of labor unions over the individual or even collective interests of the employees whom federal labor law was designed to protect.

The United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) represents Dana Corporation's employees in nine bargaining units covering some, but not all of the company's facilities. In 2003, Dana and the UAW entered into an agreement wherein Dana committed that it would remain neutral if the union launched an organizing drive at any of the unorganized plants, provide the union with a list of the names and addresses of employees working at the plant upon request, provide union organizers with access to the non-working areas of the plant for the purpose of organizing employees, and recognize the union without an election if the union presented authorization cards signed by a majority of the employees at the plant, as verified by a neutral fact-finder. This type of sweeping neutrality and card-check agreement, though uncommon, has generally survived legal challenges.

The remainder of the Dana/UAW agreement, however, broke new ground. The parties specified that if the union was recognized at any new facility, the company and the union would negotiate a collective bargaining agreement with a duration of at least four years. The union promised that the health care provisions of the new CBA would not impede the company's cost-control measures, including premium sharing, increased deductibles, and increased out-of-pocket maximums. The union further agreed that the CBA would allow for mandatory overtime, and other employer-friendly concepts such as flexible compensation and team-based approaches to work. Finally, the parties agreed that if they were unable to reach a comprehensive agreement after bargaining for five months, the open items would be submitted to a joint UAW/Dana committee for resolution. If the committee was unable to resolve the remaining matters within six months, the final offers from each side would be submitted to a neutral arbitrator who would be empowered to select either Dana's final offer or the union's final offer to become the initial labor agreement between the parties.

Section 8(a)(2) of the National Labor Relations Act prohibits employers from "interfer[ing] with the formation … of any labor organization or contribut[ing] … other support to it." Section 8(b)(1)(A) of the Act prohibits unions from restraining or coercing employees in making their decision about whether to select a union to represent them. In *Majestic Weaving Co.*, 147 NLRB 859 (1964), the Board held that an employer and a union negotiating the terms of a collective bargaining agreement when the union does not yet represent a majority of the company's employees is a violation of the Act, because this conduct has a tendency to coerce employees into selecting the union as their representative.

In *Dana*, the NLRB's General Counsel issued a complaint asserting that Dana and the UAW had violated Sections 8(a)(2) and 8(b)(1)(A), respectively, by entering into and maintaining their neutrality and card check agreement, which included specific terms for an eventual collective bargaining agreement between them. A majority of the three-member panel hearing the case disagreed. Chairman Liebman and Member Pearce likened the Dana/UAW recognition agreement to an after-acquired stores agreement, wherein a retailer may lawfully agree that a collective bargaining agreement in force at one location will be applied to future locations upon proof of majority support for the union at those stores. The majority characterized the portion of the agreement that addressed the terms for an eventual collective bargaining agreement as a mere "framework" for future bargaining, as opposed to an actual collective bargaining agreement. The majority declined to adopt any specific standard for determining when an employer's negotiation of a "framework" for future bargaining with a union would cross the line to become an actual collective bargaining agreement in violation of *Majestic Weaving.*

Member Hayes, dissenting, argued that the decision "facilitate[s] the preemptive practice of top-down organizing of employers by unions, thereby subordinating the statutory rights of employees to the commercial self-interests of the contracting parties." He warns that the decision opens the door for unions to surrender substantive employment terms to an employer, in exchange for the employer's willingness to ease the union's entry into the workplace. Hayes points out that the resulting collusion between employers and unions may be detrimental to the very employees the law is intended to protect.

The policy implications of *Dana* are significant. Over the past decade, unions have expressed deep dissatisfaction with the Board's election processes and have sought both legislative and practical avenues for organizing through other means. The Board majority expressly justified its decision in *Dana* based in part on its "policy view" about "the importance of permitting employers to engage in at least some preliminary substantive discussions with a union," so that employers will more accurately be able to "predict the consequences" of voluntarily recognizing a union, rather than opposing an organizing drive. In short, the majority crafted its decision with an eye toward making it more palatable for employers to enter into neutrality and voluntary recognition agreements.

In the wake of *Dana*, employers should expect increased interest among unions in seeking neutrality and voluntary recognition agreements. The *Dana* decision may provide unions with additional bargaining chips they can use to entice employers to enter into these agreements. Employers who receive such proposals from unions should proceed with caution, keeping in mind that a decision to voluntarily recognize a union will fundamentally alter the relationship between the company and its employees for the long term. Indeed, once a union is recognized, the duty to continue that recognition often survives for the lifetime of the corporate enterprise. Short-term benefits, in the form of union concessions that may be of limited term, should not cause an employer to lose sight of potential long-term costs.

At the same time, employers who find it necessary because of union leverage to enter into neutrality and voluntary recognition agreements should be aware that the *Dana* decision changes the rules for negotiating such an agreement. Before signing any neutrality or voluntary recognition agreement, employers should consider identifying key objectives they would likely pursue at the bargaining table, should the union eventually obtain majority status. Most unions will consider a binding neutrality and voluntary recognition agreement highly desirable, and employers should insist upon favorable ground rules for later bargaining that will protect the company's key interests.

Jeffrey Place is a Shareholder in Littler Mendelson's Kansas City office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Place at jplace@littler.com.