

LABOR BOARD ANNOUNCES NEW PROCEDURE FOR VOLUNTARY RECOGNITION CASES

By Judd Lees

In another recent decision angering unions, the National Labor Relations Board announced that it will implement a new procedure giving employees notice of their right to set aside their employer's voluntary recognition of a union. The need for such a procedure was created by the National Labor Relations Board's 2007 decision of Dana Corporation. This decision modified the current rule blocking employee decertification petitions for a reasonable period of time following an employer's voluntary recognition of a union. Since voluntary recognitions are occurring more frequently as a result of so-called "neutrality agreements" which typically include card-check provisions, the decision and the resulting procedure are very important. Let's sort out what has occurred and what will occur under the procedure.

First, a union may come to represent your employees in one of two ways: (1) a Board-sponsored secret ballot election or (2) a voluntary decision by you to recognize the union after reviewing bona fide evidence that a majority of your employees want the union to represent them. This evidence usually consists of union authorization cards. If the majority of the employees sign authorization cards and the employer reviews the cards, the employer has "voluntarily recognized" the union and there is no need for a secret ballot election.

Second, unions obviously favor voluntary recognition since this cuts back on the cost and effort associated with a traditional union election campaign and is far easier than obtaining a "yes" vote in a secret ballot election -- especially if the employer is unaware that authorization cards are being solicited. Normally an employer can refuse to review such cards and thereby

force the union to proceed to a secret ballot election. In a surprisingly high number of cases, the card majority evaporates when employees hear both sides of the union-nonunion debate, and the union loses the election vote.

Third, for this reason, unions have incorporated so-called “card check” provisions in neutrality agreements offered to employers. Such agreements not only require the employer to remain neutral during a union organizing drive but require the employer to automatically recognize the union in the event more than 50 percent of the employees sign authorization cards.

In Dana Corporation, the employer signed such an agreement and, not unexpectedly, the union obtained a majority of authorization cards. The employer was therefore contractually obligated to recognize the union. However, the employees took issue with the employer’s action and over half the unit employees filed a decertification petition with the National Labor Relations Board shortly after the employer’s voluntary recognition. The union asked the National Labor Relations Board to dismiss the decertification petition since it was barred under the legal doctrine known as the “recognition bar” for a reasonable period of time -- typically one year after voluntary recognition.

The Board disagreed and, in doing so, threw itself directly into the debate over recent federal legislation proposed by unions called the “Employee Free Choice Act.” One of the key provisions of this proposed legislation is to mandate voluntary recognition based upon card-check majorities (versus the current system which allows the employer to insist that the union file a petition with the Board and proceed to a secret ballot election). The proponents of this legislation argue that card checks are a far more accurate and democratic representation of how employees feel about a union versus a secret ballot election where employees are allegedly

subject to a barrage of employer threats, promises and intimidation prior to entering a polling booth.

In Dana Corporation, the National Labor Relations Board took obvious issue with this characterization and championed the secret ballot election process for several reasons. According to the Board, the card check process renders the employee subject to group pressure unlike a secret ballot election. The Board also held that the card check process has “been accompanied by misinformation or a lack of information about an employee’s representational options.” This is especially the case, the Board pointed out, if the employer does not participate and provide counterbalance to the union’s sales pitch. The card check procedure may also take place over a long period of time when “employees can and do change their minds about union representation.” A Board election, on the other hand, presents a “clear picture of employee voter preference at a single moment.” Finally, the Board argued that it provides sufficient protection from illegal employer tactics.

In order to protect the interests of employees, the Board held that, in the future, there would be no bar to decertification petitions filed after voluntary recognition under the following new procedure. First, the union and/or the employer engaged in the voluntary recognition must promptly notify the appropriate NLRB regional office in writing of the voluntary recognition and provide a copy of the agreement setting forth the scope of the unit and the date of the recognition. Second, the regional office will then send the employer an official NLRB notice to be posted in conspicuous places in the workplace for 45 days. Third, any decertification petition which is filed during the 45-day period must be supported by at least 30 percent of the bargaining unit. If such a petition is filed it will be processed. If one is not filed during the time

period, there will be a recognition bar for a reasonable period of time. The process will be applied prospectively.

Letters will be prepared and sent by the Board to employers explaining the new process. Obviously, critics of the Board, including the two strong dissenters on the Board itself, may seek to overturn this decision and resulting process. However, if the process remains in effect, it will help reduce the downside of neutrality agreements containing card check provisions since employees may still file decertification petitions and overturn them. The best advice, of course, is to not enter into such agreements since they deprive employers of their constitutional and Board-mandated rights to participate in a free and fair election. However, at least now employers and, more importantly, employees, have potential redress in the event an employer is forced to agree to a card-check provision and the union manages to convince a majority of the employees to sign authorization cards.