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## Comments on Proposed Changes to Captive Audience Speech Rules and Use of Card Checks

RIK LINEBACK\*

### INTRODUCTION

The thoughtful presentations by Professor Secunda and by Professors Moore and Bales raise serious concerns about representation elections under the National Labor Relations Act (NLRA). The mechanics of the National Labor Relations Board's (NLRB or the "Board") election process remain substantially unchanged since the Board's inception some seventy-five years ago.<sup>1</sup> Professor Secunda provides detailed focus on the modern use of captive audience speeches by employers in the "critical period"<sup>2</sup> leading up to an election.<sup>3</sup> He sees captive presentations as an impediment to employee free choice in Board elections and sets forth possible curative responses by the current Board in the representation case arena as well as in the unfair labor practice case forum. Professors Moore and Bales, on the other hand, eschew the Board's election process as undemocratic and

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\* Regional Director, Region 25 Indianapolis, National Labor Relations Board. My thanks to Professor Kenneth G. Dau-Schmidt and the Indiana University Maurer School of Law faculty and staff for taking such good care of us and for inviting me to participate in the Symposium on *Labor and Employment Law Under the Obama Administration: A Time for Hope and Change?* My comments are my own and do not necessarily represent the view of the Acting General Counsel, the National Labor Relations Board, or the United States.

1. See Wagner-Connery Labor Relations Act, ch. 372, § 7, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2006)) (establishing the NLRB). Elections have been conducted in much the same way as the first Board election that was conducted in Fort Wayne, Indiana. See *Wayne Knitting Mills, Inc.*, 1 N.L.R.B. 53 (1935). The large majority of election petitions filed in regional offices seek either Board certification of a labor organization as the majority representative of employees in an appropriate unit or seek removal, that is decertification, of the labor organization in an already represented unit. See NLRB, SEVENTY-FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2009 (2009), available at <http://www.nlr.gov/sites/default/files/documents/119/nlr2009.pdf>. A petition seeking certification of a labor organization as employees' collective bargaining representative is designated an "RC" petition in the Board's case-numbering parlance. *Id.* at 86. An "RD" petition in such system is the Board's designation for a petition seeking decertification of the labor organization as employees' bargaining representative. *Id.* Typically such petitions require a thirty percent showing of interest. NLRB, CASEHANDLING MANUAL, PART TWO: REPRESENTATION PROCEEDINGS (2007), available at <http://www.nlr.gov/sites/default/files/documents/44/chm2.pdf>.

2. The critical period begins with the filing of an election petition and ends with a valid election. NLRB: AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 287–88 (2008), available at [http://www.nlr.gov/sites/default/files/documents/44/rc\\_outline\\_2008\\_full.pdf](http://www.nlr.gov/sites/default/files/documents/44/rc_outline_2008_full.pdf). The critical period is the time frame for assessing whether the conduct of the labor organization or employer or their agents or even a third party's conduct is serious enough to set aside the election. *Id.* at 312.

3. Paul M. Secunda, *The Future of NLRB Doctrine on Captive Audience Speeches*, 87 IND. L.J. 123 (2012).

better replaced by a system of card checks in the context of neutrality agreements. My purpose is to neither support nor condemn such proposals, but to offer comments based on my years of supervising the NLRB's election process at a regional office.

My comments in Part I concern Professor Secunda's article covering captive audience speeches, which addresses possible avenues of modifying the Board's current approach via representation case law, unfair labor practice cases, and Board rules and procedures. In Part II, my comments address Professors Moore's and Bales's essay on neutrality agreements and card checks. Their article explores the meaning of industrial democracy, how Board elections operate in the real world, and their claim of the superiority of neutrality agreements and card checks to Board elections in ascertaining employee free choice.

#### I. COMMENTS ON PROFESSOR SECUNDA'S CAPTIVE AUDIENCE ESSAY

Professor Secunda's essay begins with the premise that captive audience speeches during the critical period before an NLRB conducted election are "one of the most effective anti-union weapons that employers currently have in their arsenal."<sup>4</sup> For that reason, he posits that the current Board is likely to revisit the captive audience doctrine and perhaps develop an extra layer of protection for employees in exercising their free choice to decide whether to be represented by a labor organization.<sup>5</sup>

Under the Board's current *Peerless Plywood*<sup>6</sup> rule, neither employers nor unions may make captive audience speeches in the twenty-four-hour period before the start of an election.<sup>7</sup> Citing *Economic Machinery Co., Division of George J. Meyer Manufacturing Co.*,<sup>8</sup> the essay notes that even outside the *Peerless Plywood* twenty-four-hour insulated period, the Board has placed certain limits on an employer's ability to require employees, either individually or in small groups, to submit to campaigning in the employer's office by those in authority.<sup>9</sup> However, those limitations appear to have been eased by the Board's application of the rule set forth in *NVF Co.*<sup>10</sup> and its progeny.<sup>11</sup> Additionally, as the essay notes, under the

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4. *Id.*

5. *Id.* at 124–29.

6. 107 N.L.R.B. 427 (1953).

7. *Id.* Of course, unions are rarely in a position, absent assistance from an employer, to require that employees attend a massed assemblage.

8. 111 N.L.R.B. 947 (1955).

9. *See id.* In *Economic Machinery Co.*, the Board found it unnecessary to determine whether specific threats to discontinue certain benefits were made. *Id.* at 949. Instead, the Board held that the technique of the assistant manager and the personnel manager in calling employees individually into the employer's office to urge employees to vote against the union was in itself conduct calculated to interfere with employees' free choice in the election. *Id.*

10. 210 N.L.R.B. 663 (1974). In *NVF Co.*, the Board rejected the per se rule set forth in *Peoples Drug Stores, Inc.*, 119 N.L.R.B. 634 (1957). *See NVF Co.*, 210 N.L.R.B. at 663. In *Peoples*, the Board found objectionable conduct when the employer called employees, individually or in small groups, into a private area to urge them to reject the union. *Peoples Drug Stores, Inc.*, 119 N.L.R.B. at 636–37. In *NVF Co.*, the Board held that such conduct

Board's current view represented by the *Mead-Atlanta Paper Co.*<sup>12</sup> case, large group meetings like those used today in many elections are not in and of themselves objectionable if conducted outside of the twenty-four-hour period.<sup>13</sup>

In his review of the laboratory conditions approach of *General Shoe*<sup>14</sup> vis-à-vis the realities of modern election campaigns, Professor Secunda suggests that the current Board may expand the *Peerless Plywood* period from twenty-four hours before an election to an insulated period of no such meetings within at least a week or two before the election.<sup>15</sup> His essay justifies such an expansion based on the following factors: the enormous technological changes of modern society and the work place, which results in employees potentially being inundated with vast amounts of complex, work-related information; the increasing mobility of the work force, which means employees may not be at one location or with one employer for long; and the difficulty the union has in meeting with employees who may reside a far distance from the work site.<sup>16</sup> Thus, according to the essay, expansion of the *Peerless Plywood* period would allow unions a meaningful opportunity to craft responses to employer arguments set forth in captive audience meetings.<sup>17</sup>

Expansion of the *Peerless Plywood* period, based on Professor Secunda's application of *General Shoe* to modern realities, could reach the Board by way of an objections case.<sup>18</sup>

Professor Secunda also raises a possible unfair labor practice (ULP) approach to address what he sees as coercive employer communications in captive audience

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would be found objectionable "only where it can be said on reasonable grounds that, because of the small size of the groups interviewed, the locus of the interview, the position of the interviewer in the employer's hierarchy, and the tenor of the speaker's remarks, we are not justified in assuming that the election results represented the employees' true wishes." *NVF Co.*, 210 N.L.R.B. at 664. The *NVF Co.* Board rejected what it deemed the *per se* approach of *Peoples Drug* and its progeny and found no objectionable conduct in the general manager's actions, in the month before the election, of reaching approximately ninety-five percent of the 170 eligible voters by calling in groups of five to six employees to express his opposition to the union. *Id.*

11. In *Flex Products, Inc.*, the Board overruled the hearing officer and certified the results of election where the tally of ballots revealed 42 votes in favor and 106 against the petitioner. 280 N.L.R.B. 1117 (1986). In *Flex*, two days prior to the election, the employer's president held captive audience meetings of all employees and on the day before the election, but outside the twenty-four-hour limitations period, the president held individual meetings over a ten-hour period with approximately 120 of the 164 unit employees. *Id.* Employees were called in one at a time into the plant manager's office where they met with the president alone. *Id.* The record revealed that the president had on previous occasions before the organizational campaign met with employees in that office and throughout the plant. *Id.* Applying the *NVF Co.* factors, the Board found no evidence that employees were being singled out for special pressure in these circumstances. *Id.*

12. 120 N.L.R.B. 832 (1958).

13. See Secunda, *supra* note 3, at 127.

14. 77 N.L.R.B. 124 (1948).

15. See Secunda, *supra* note 3, at 126–27.

16. *Id.* at 141.

17. *Id.*

18. The Board has not yet addressed the issue of expanding the *Peerless Plywood* period as proposed by Professor Secunda. *Id.* at 136–41.

meetings.<sup>19</sup> He proposes that the current Board reexamine its over sixty-year-old *Babcock & Wilcox Co.* decision that held captive audience speeches permissible.<sup>20</sup> Instead, employing the teachings of *Gissel*<sup>21</sup> and *Exchange Parts*,<sup>22</sup> Professor Secunda asserts that the current Board may be more willing to “recognize how the power disparities between the parties and the lack of equal union access to the workplace make these employer speeches hypercoercive.”<sup>23</sup> He suggests that a modified *Struksnes*<sup>24</sup> approach to captive audience meetings be employed with the burden on the employer to demonstrate the lack of coercion.<sup>25</sup> Under this approach, the employer would be required to prove that the purpose of the session was to noncoercively inform employees of the employer’s views, that employees were informed about the purpose of the meeting and assured that no reprisals would be taken against them for raising questions or expressing pronoun views, and that employees were allowed to speak during the meeting and permitted to leave the meeting without reprisal to avoid a coercive environment.<sup>26</sup>

While Professor Secunda’s modified *Struksnes* approach<sup>27</sup> may be worthy of exploration, the Board’s recently proposed amendments to existing rules and regulations governing procedures in representation cases<sup>28</sup> may provide an additional method of reducing employees’ exposure to captive audience meetings by shortening the time for election. Key features of the Board’s proposed rulemaking designed to “better insure ‘that employees’ votes may be recorded

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19. *Id.* at 142.

20. 77 N.L.R.B. 577 (1948).

21. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

22. NLRB v. Exch. Parts Co., 375 U.S. 405 (1964).

23. Secunda, *supra* note 3, at 143 (footnotes omitted).

24. *Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967).

25. *See* Secunda, *supra* note 3 at 145.

26. *Id.*

27. *Id.*

28. On June 22, 2011, the Board with Member Hayes dissenting, published in the Federal Register a Notice of Proposed Rulemaking. 76 Fed. Reg. 36,812 (proposed June 22, 2011) (to be codified at 29 C.F.R. pts. 101–03). The Board stated in the summary, in part, as follows:

The Board believes that the proposed amendments would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation. The proposed amendments would simplify representation-case procedures and render them more transparent and uniform across regions, eliminate unnecessary litigation, and consolidate requests for Board review of regional directors’ pre- and post-election determinations into a single, post-election request. The proposed amendments would allow the Board to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret ballot election.

*Id.* at 36,812.

The matter was open for public comment and will be before the Board for resolution. For Member Hayes’ dissenting comments as well as the comments by Chairman Liebman, see *Board Proposes Rules to Reform Pre- and Post-Election Representation Case Procedures*, (June 21, 2011), <http://www.nlr.gov/news/board-proposes-rules-reform-pre-and-post-election-representation-case-procedures>.

accurately, efficiently and speedily’ and to further ‘the Act’s policy of expeditiously resolving questions concerning representation’<sup>29</sup> include:

- Allowance of electronic transmission to the parties of election petitions, election notices, and voter lists instead of paper transmission of such documents.<sup>30</sup>
- Provision of a statement of position form to assist parties in identifying issues they may want to raise at a pre-election hearing.<sup>31</sup>
- Setting pre-election and post-election hearings promptly; generally, pre-election hearings to begin seven days after notice of hearing and post-election hearings fourteen days after the tally of ballots.<sup>32</sup>
- Requirements that parties “state their positions no later than the start of the hearing, before any other evidence is accepted.”<sup>33</sup>
- Parties may choose not to raise voter-eligibility issues via the challenge procedure during the election; and litigation of voter-eligibility issues raised by a party involving less than twenty percent of the bargaining unit would be deferred until after the election.<sup>34</sup>
- Production of a “preliminary voter list, including names, work location, shift, and classification,” by the non-petitioning party “by the opening of the pre-election hearing.”<sup>35</sup>
- Parties are able “to seek review of all Regional Director rulings through a single, post-election request.”<sup>36</sup>
- Pre-election requests for review would be eliminated, which routinely delay elections twenty-five to thirty days, to allow parties to seek Board review of regional director decisions and rulings.<sup>37</sup>
- Discretion retained by the Board “to deny review of post-election rulings—the same discretion now exercised concerning pre-election rulings—permitting career Regional Directors to make prompt and final decisions in most cases.”<sup>38</sup>
- Final voter lists, in addition to including names and addresses of employees in the voting unit would, under the new rules, require within two days: production in electronic form, when possible; inclusion of phone numbers and email addresses, when available; and to be produced to the union.<sup>39</sup>

In summation, the representation case arena and the ULP arena may be fruitful avenues to address changes in the Board’s captive audience rules as suggested by

29. 76 Fed. Reg. at 36,816 (quoting *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946)).

30. *Proposed Amendments to NLRB Election Rules and Regulations Fact Sheet* (2011), <http://www.nlr.gov/node/525>.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

Professor Secunda.<sup>40</sup> Additionally, it will be interesting to see whether the Board actually institutes significant changes in its election rules and procedures<sup>41</sup> so as to reduce employees' exposure to captive audience meetings by shortening the time for election.

## II. COMMENTS ON PROFESSORS MOORE'S AND BALES' ESSAY ON NEUTRALITY AGREEMENTS AND CARD CHECKS

The essay of Professors Moore and Bales asserts that employee free choice to select or reject a bargaining representative is best served by expanding the use of neutrality agreements and card checks.<sup>42</sup> The essay acknowledges that both the Board and the courts favor certified NLRB elections in determining employee free choice.<sup>43</sup> The essay further acknowledges that recent polling of the U.S. populace substantially favors the election process over the use of representation cards as the best method to determine employee choice of or rejection of a collective bargaining representative.<sup>44</sup> In fact, voters in four states approved state constitutional amendments that purport to guarantee or require the use of secret-ballot elections to determine questions concerning union representation of employees.<sup>45</sup>

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40. See Secunda, *supra* note 3, at 136–46. Chairman Liebman is reported to have expressed interest in scholars' involvement in revitalizing the Board and its processes and procedures by use of the newly created Employment Policy Research Network. Ken May, *NLRB Chairman Liebman Requests Scholars' Help in Revitalizing Board*, 9 Daily Lab. Rep. (BNA), at B-1 (Jan. 13, 2011).

41. Notice of Proposed Rulemaking, 76 Fed. Reg. 36,812 (proposed June 22, 2011) (to be codified at 29 C.F.R. pts. 101–03).

42. James Y. Moore & Richard A. Bales, *Elections, Neutrality Agreements, and Card Checks: The Failure of the Political Model of Industrial Democracy*, 87 IND. L.J. 147 (2012).

43. *Id.* at 147.

44. *Id.* at 148.

45. See *Voters in Four States Approve Preemptive Strikes at EFCA*, 212 Daily Lab. Rep. (BNA), at C-1 (Nov. 3, 2010). The four states are Arizona, South Carolina, South Dakota, and Utah. In response to the measures enacted in these four states, the NLRB's Acting General Counsel ("Acting GC"), by letters dated January 13, 2011, wrote to the attorneys general of each state. *NLRB Advises Four States that Constitutional Amendments Conflict with Federal Labor Law* (Jan. 14, 2011), <https://www.nlr.gov/news-media/backgrounders/state-amendments-and-preemption>. The Acting GC's letters advised each of the attorneys general that his or her particular state's amendments to its constitution was in conflict with rights afforded employees under the NLRA under *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974) and *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1968), and accordingly were preempted by operation of the Supremacy Clause of the U.S. Constitution. Letter from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to Attorneys General of Ariz., S.C., S.D. & Utah (Jan. 13, 2011), available at [https://www.nlr.gov/sites/default/files/documents/234/april\\_22\\_letter\\_from\\_gc\\_to\\_states.pdf](https://www.nlr.gov/sites/default/files/documents/234/april_22_letter_from_gc_to_states.pdf). The Acting GC's letters further noted that he had been authorized by the Board to bring a civil action in the appropriate federal court to seek to invalidate the respective amendments to the extent they conflicted with federal law. *Id.* In a letter dated April 22, 2011, the Acting GC apprised all four Attorneys General that he planned to initiate lawsuits in federal court seeking to invalidate article 2, section 37 of the Arizona Constitution and article 6, section 28 of the

Although acknowledging that there is strong support for Board-conducted elections by the Board, courts and the public,<sup>46</sup> Professors Moore and Bales contend in their essay that neutrality agreements and card checks are superior to existing Board elections in guaranteeing employee free choice.<sup>47</sup> They present this superiority in three ways: by an examination of the industrial democracy model vis-à-vis political elections; by exploration of how the Board election mechanism actually works compared to the mechanism of neutrality agreements and card checks; and by a careful analysis of the various arguments that support or oppose Board elections.<sup>48</sup>

In contrast to the essay's contention of the superiority of neutrality agreements with a card check mechanism, the Board majority in the *Dana*<sup>49</sup> representation case espoused the greater reliability of Board elections in determining employee free choice regarding whether to select a bargaining representative.<sup>50</sup> However, a new Board majority in *Lamons Gasket Co.*<sup>51</sup> overruled *Dana*. In *Lamons Gasket Co.* the Board returned to its prior rule, which the Board termed its "recognition bar" rule, which bars election petitions for a "reasonable period of time" if the union is designated by a majority of employees and the employer voluntarily granted recognition based on such majority status.<sup>52</sup>

Quite frankly, Board-conducted elections and card checks are both valid mechanisms in ascertaining employee free choice regarding employees' desire for or rejection of representation by a labor organization. The Board with court approval has long recognized both Board elections and card checks as valid

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South Dakota Constitution as preempted by operation of the NLRA and the Supremacy Clause of the U.S. Constitution. Letter from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to Attorneys General of Ariz., S.C., S.D. & Utah (Apr. 22, 2011), *available at* <http://amlawdaily.typepad.com/1/1/1/1%20see%20you%20in%20in%20court.pdf>. Thereafter, on May 6, 2011, the NLRB filed a complaint for declaratory judgment in the U.S. District Court for the District of Arizona. Complaint for Declaratory Judgment, NLRB v. Arizona, No. CV11-0913-PHX-FJM (D. Ariz. May 6, 2011). On October 13, 2011, a federal district court judge denied Arizona's motion to dismiss the NLRB action. NLRB v. Arizona, No. 1:11-cv-00913 (D. Ariz. Oct. 13, 2011). Although no further action has been taken in these matters as of the time of this writing, the NLRB's website may be monitored for further developments. *NLRB Advises Four States that Constitutional Amendments Conflict with Federal Labor Law*, (Jan. 14, 2011), <https://www.nlr.gov/news-media/backgrounders/state-amendments-and-preemption>. In addition, Indiana is now the fifth state to pass a secret ballot law. *See* IND. CODE § 22-6-5 (2011).

46. Moore & Bales, *supra* note 42, at 147.

47. *Id.* at 148.

48. *Id.*

49. *Dana Corp.*, 351 N.L.R.B. 434 (2007).

50. *Id.* at 438–39. The Board majority in *Dana* stated that unlike the privacy ensured by secret Board election ballots, card signings are public actions that are susceptible to outside pressure such as trying to avoid offending a fellow employee or seeking to get such employee(s) to leave the card signer alone. *Id.*

51. 357 N.L.R.B. No. 72 (Aug. 26, 2011).

52. *Id.* at 1. The Board in *Lamons Gasket Co.* defined a reasonable period of time to be no less than six months and no more than one year depending on the circumstances. *Id.* at 10. For further discussion of the *Dana* and *Lamons Gasket Co.* cases, see notes 63–89 and accompanying text.

mechanisms to express employees' choice of a representative for purposes of collective bargaining with their employer in an appropriate unit.<sup>53</sup> In fact, four Justices of the Supreme Court were convinced that a card majority was sufficient to *require* an employer to recognize and bargain with a union who could demonstrate majority representative status.<sup>54</sup> Writing for the four dissenting Justices, Justice Stewart rejected the majority's approval of what he termed the Board's "recently adopted policy" that an employer has an absolute right to refuse bargaining with a union selected by a majority of employees until the union petitions for and wins a Board-supervised election.<sup>55</sup> He noted that when faced with an offer of convincing proof of majority status, which included cards signed by a majority of employees, an employer may elect one of four alternatives: (1) recognize the union and thereby satisfy the NLRA's section 8(a)(5) obligation, (2) file an RM<sup>56</sup> petition for a Board supervised election under section 9(c)(1)(B), (3) agree to be bound by the results of an expedited consent election based on a union petition, or (4) refuse to recognize the union and face ULP charges under section 8(a)(5).<sup>57</sup> In fact, the five majority Justices agreed with the four dissenting Justices, as well as with the Board, in recognizing that a card majority may adequately reflect the union's majority status.<sup>58</sup> However, the majority placed the burden on the union to go forward with a Board election if the employer did not agree to recognition based on cards alone.<sup>59</sup> Accordingly, in the absence of serious unfair labor practices as was found in *Gissel*,<sup>60</sup> the majority in *Linden Lumber* agreed with the Board that an employer has

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53. *See Linden Lumber Div., Sumner & Co. v. NLRB*, 419 U.S. 301 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

54. *Linden Lumber*, 419 U.S. at 311 (Stewart, J., dissenting).

55. *Id.* at 310–17. For a fascinating account of the Board's ultimate adoption of the policy of refusing to find an unfair labor practice (absent other serious ULPs), even if the employer did not have a good faith doubt as to the union's majority status, see Laura J. Cooper & Dennis R. Nolan, *The Story of NLRB v. Gissel Packing: The Practical Limits of Paternalism*, in *LABOR LAW STORIES* 191, 213–17, 219–22, 229 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

56. A petition filed with the Board by an employer who seeks an election to ascertain whether a union's claim of majority status is valid is designated an "RM" petition in Board case-numbering parlance. *See NLRB, SEVENTY FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2009* 87 (2009) available at <http://www.nlr.gov/sites/default/files/documents/119/nlr2009.pdf>.

57. *Linden Lumber*, 419 U.S. at 312–13 (Stewart, J., dissenting).

58. *Id.* at 304 (majority opinion).

59. *Id.* at 309–10.

60. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614–15 (1969). *Gissel Packing* involved serious employer violations including discharge, various threats to discharge employees, and threats to close the workplace because of employees' union activity. *Id.* at 582–83. Accordingly, the Court found that the Board appropriately ordered bargaining based on employee sentiment expressed through cards since cards were a sufficient indicator of employee choice. *Id.* at 614–15. In *Linden Lumber*, the union contended that it was a violation of section 8(a)(5) of the NLRA for the employer, not otherwise engaged in any unfair labor practices, to deny recognition of a union who had gained majority by card signings. *Linden Lumber*, 419 U.S. at 302–03. As noted, the majority of the Court rejected such an outcome in the absence of serious unfair labor practices and held that the employer

an absolute right to refuse bargaining with a union selected by a majority of employees until the union petitions for and wins a Board-supervised election.<sup>61</sup>

In the area of evidence necessary to determine employee free choice as to whether a union has gained or lost majority status, Board decisions may take divergent paths as witnessed, for example, in the *Levitz*<sup>62</sup> withdrawal of recognition case and the Board's varied approaches in the *Dana*<sup>63</sup> and *Lamons Gasket Co.*<sup>64</sup> representation cases.<sup>65</sup> In *Levitz*, the Board held that when an employer withdraws recognition from an incumbent union, no Board election is required.<sup>66</sup> Rather, the Board's test under *Levitz* is whether the employer can overcome the presumption of the union's continuing majority status by establishing that the union has actually lost the support of the majority of employees in the bargaining unit.<sup>67</sup> On the other hand, in the *Dana* representation case, the Board established additional requirements in voluntary recognition situations before a presumption of the union's majority status was firmly established.<sup>68</sup> Now in *Lamons Gasket Co.*, the Board has returned to its recognition bar rule.<sup>69</sup>

The concept of "recognition bar," that is a presumption of majority status that cannot be challenged for a reasonable period of time based on cards or petition signings by a majority of employees, was established in *Keller Plastics*.<sup>70</sup> Thus, before the *Dana* representation case, a voluntarily recognized union was afforded an initial insulated period under *Keller Plastics* free from challenge to its majority status.<sup>71</sup> Such a recognition bar afforded the union, for a reasonable period, the ability to focus its energies on conducting and possibly completing collective bargaining without interference.<sup>72</sup>

However, under *Dana*, the recognition bar was withheld unless and until the following process was completed: (1) notification to the appropriate NLRB

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could insist that a union prove its majority status through a Board conducted election. *Id.* at 309–10.

61. *Linden Lumber*, 419 U.S. at 309–10.

62. *Levitz Furniture Co. of the Pacific*, 333 N.L.R.B. 717, 725–26 (2001).

63. *Dana Corp.*, 351 N.L.R.B. 434 (2007).

64. *Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (Aug. 26, 2011).

65. For an interesting review of the decision-making process in both cases, see Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013 (2009).

66. *Levitz*, 333 N.L.R.B. at 725–26.

67. *Id.* Interestingly, the General Counsel, at the time of this decision, along with the union and the AFL-CIO as amicus curiae, urged in *Levitz* that employers should not be allowed to withdraw recognition absent the results of a Board-conducted election. *Id.* at 717. As noted, the Board rejected the requirement of a Board election. *Id.* at 725–26. The Board stated that objective evidence of actual loss of majority could be based on an untainted employee petition or cards that clearly declared that employees who signed no longer wanted the union to represent them, as well as by unsolicited evidence of direct employee statements expressing loss of support for the union. *Id.* at 725.

68. *Dana Corp.*, 351 N.L.R.B. at 434, 442–43.

69. 357 N.L.R.B. No. 72, slip op. at 1.

70. *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583 (1966).

71. *See id.* at 587.

72. *Id.*

regional office for preparation of a notice to employees regarding the recognition, (2) the posting by the employer for forty-five days of the NLRB notice to employees alerting employees of the grant of recognition to the union in the particular unit, and (3) no valid petition being filed during the posting period challenging the union's majority status.<sup>73</sup> If a valid petition was filed, a Board-conducted election would be held with an appropriate certification issuing a certification of representatives if a majority of those voting in a valid election select a union or a certification of results if no union gains a majority of those votes cast in a valid election.<sup>74</sup> If no valid petition is filed, then the recognized union was afforded a reasonable period of time to bargain without challenge.<sup>75</sup> However, in the absence of the forty-five-day NLRB notice procedure, the union's majority status that was based on cards or a petition signing, and not a Board election, remained subject to challenge whether or not the parties entered into a collective bargaining agreement.<sup>76</sup>

The *Dana* majority advanced several reasons for placing limitations on granting a recognition bar as well as a contract bar if a collective bargaining agreement was reached pursuant to voluntary recognition based on cards.<sup>77</sup> Those reasons included: the greater reliability of Board elections, misinformation and the lack of information in card-solicitation campaigns, a clearer picture of employee voter preference at a single moment in a Board election, and greater safeguards in the Board election process.<sup>78</sup> Member Liebman along with Member Walsh, in partial dissent, challenged the majority's assumptions as undercutting long-held precedent at a critical time in Board history when labor unions have increasingly turned away from the Board.<sup>79</sup> They emphasized that the *Keller Plastics* rule effectuates the NLRA's interest in the stability of labor-management relations especially at the critical time of first contract bargaining, that group pressures to withdraw support from the newly recognized union can be just as onerous as group pressures for support of the union in a card campaign, that Board remedies for coercion are no less adequate for conduct in favor of recognition than for conduct opposed to recognition, that information is just as available to both sides during a card campaign, and that voluntary recognition has been a favored element of national labor policy for years.<sup>80</sup>

The current Board granted review of the *Dana* case<sup>81</sup> and in *Lamons Gasket Co.* overruled *Dana* and returned to the recognition bar rule.<sup>82</sup> The *Lamons Gasket Co.*

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73. *Dana Corp.*, 351 N.L.R.B. at 434, 442–43.

74. *Id.* at 442–43.

75. *Id.* at 445.

76. *Id.* at 434–35.

77. *Id.* at 438–39.

78. *Id.*

79. *Id.* at 444–50.

80. *Id.*

81. *Rite Aid Store #6473-Lamons Gasket Co.*, 355 N.L.R.B. No. 157 (Aug. 20, 2010), with Chairman Liebman concurring separately at 1–3, and past Member Schaumber and current Member Hayes dissenting at 3–6. After the Board's grant of the request for review, *Rite Aid Store #6473*, the first employer listed in the case, withdrew its request for review. The withdrawal left only the *Lamons Gasket Co.* case up for review.

majority found the *Dana* approach to be flawed in terms of the statutory scheme of the NLRA,<sup>83</sup> experience,<sup>84</sup> and as a matter of policy.<sup>85</sup> The majority noted that the NLRA itself as well as the Board's and courts' long history of representation case law sanctioned voluntary recognition based on employees' designation of a majority representative by cards, petitions, or oral declarations.<sup>86</sup> The majority also noted that voluntary recognition was a highly reliable measure as a matter of empirical evidence.<sup>87</sup> The majority further found that the *Dana* requirements also compromised the neutrality of the Board and was contrary to important policies under the NLRA.<sup>88</sup>

In sum, the validity and vitality of both Board elections and neutrality agreements coupled with voluntary recognition based on cards are likely to continue to undergo serious review by the Board.<sup>89</sup> It will also be interesting to see if mechanisms proposed by the Board's rulemaking efforts<sup>90</sup> to afford speedier Board-conducted elections are possible and/or desirable. Additionally, it will be interesting to see whether the Board will develop a more uniform approach for both withdrawals of recognition and the granting of recognition outside of the Board election process.<sup>91</sup>

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82. 357 N.L.R.B. No. 72, slip op. at 1 (Aug. 26, 2011).

83. *Id.* at 2–4.

84. *Id.* at 4–5.

85. *Id.* at 5–10.

86. *Id.* at 2–4.

87. *Id.* at 4. The majority noted that in the four years of experience under *Dana*, voluntarily recognized unions were decertified in only 1.2% of total cases when *Dana* notices were requested.

88. *Id.* at 5–10.

89. *See e.g., Dana Corp.*, 356 N.L.R.B. No. 49 (Dec. 6, 2010). There, the Board found that the pre-recognition agreement between Dana Corporation and the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) AFL-CIO covering an unrepresented unit, was not a violation of section 8(a)(1) or (2) of the NLRA by the employer or a violation of section 8(b)(1)(A) by the union. *Id.* at 1. The letter of agreement established ground rules for additional union organization at the facility in question, procedures for voluntary recognition premised upon proof of majority support, and it addressed substantive collective bargaining issues between the parties, including if and when Dana recognized the UAW at the unorganized facility. *Id.* at 2. The Board majority found the agreement between the UAW and Dana Corporation was well within the boundaries of the Act since the agreement was reached at arm's length in a context free of ULPs; disclaimed any recognition of the union and created a lawful mechanism for determining if and when the union had achieved majority support; had no immediate effect on employees' terms and conditions of employment; and had both a limited potential future effect contingent on substantial future negotiations. *Id.* at 8.

90. *See, e.g.,* 76 Fed. Reg. 36,812 (proposed June 22, 2011) (to be codified at 29 C.F.R. pts. 101–03).

91. Interestingly, in *Lamons Gasket*, both Member Hayes, 357 N.L.R.B. No. 72, slip op. at 14–15 (Aug. 26, 2011), and the majority, 357 N.L.R.B. at 6 n.17, suggest that a mechanism might be developed to provide employees with notice and opportunity to obtain a Board-conducted election when their employer withdraws recognition from an incumbent union. Could such a Board election mechanism be applied to both voluntary recognition and withdrawal of recognition situations in the future?

