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## Proposals to Reinstate the Voluntary Recognition Bar and Rein in Captive Audience Speeches: A Rationale for Change at the National Labor Relations Board

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## **Proposals to Reinstate the Voluntary Recognition Bar and Rein in Captive Audience Speeches: A Rationale for Change at the National Labor Relations Board**

NORA L. MACEY\*

In their excellent articles, Professors Secunda, Moore, and Bales provide thoughtful analyses of two much-debated issues that arise under the National Labor Relations Board's (NLRB) authority to oversee the processes for employee selection of an exclusive bargaining representative. Professor Secunda analyzes captive audience speeches, and Professors Moore and Bales take on voluntary recognition agreements. Both articles make valuable additions to the scholarly work on these controversial issues and persuasively argue for changes in the Board's approach.

My perspective comes from my thirty-plus years representing unions in the labor management field. During that time, I have witnessed growing dissatisfaction with the Board's election procedures from the union side.<sup>1</sup> This dissatisfaction has been fueled by increasingly difficult organizing campaigns and a perceived inability of Board processes to correct what unions perceive to be the worst abuses by employers in organizing situations. The processes themselves, through layers of review and appeals, can so drag out any resolution of the representation issue that even a "successful" election, upheld by the courts, often results in no contract and no representation.<sup>2</sup> In reaction, many unions have abandoned Board procedures altogether in favor of direct pressure on employers to voluntarily recognize a union based on authorization cards showing majority support for union representation.<sup>3</sup> Educated by these experiences, most union-side commentators would generally commend the efforts and analyses offered by Professors Secunda, Moore, and Bales.

Rather than re-tread ground already admirably covered by others,<sup>4</sup> my comments will attempt to look with a wider lens at the Board as an institution and

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\* Of Counsel, Macey Swanson and Allman. The author would like to thank Jeffrey A. Macey of the same firm for his valuable assistance in preparing these comments. Special thanks to Professor Kenneth Dau-Schmidt and the Indiana University Maurer School of Law for inviting me to participate in this Symposium. [Note: This Article was current with respect to Board decisions at the time of its submission on August 23, 2011. Significant relevant decisions issued after submission are noted below.]

1. For scholarly articles cataloguing union-side concerns, see James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 831 & n.57 (2005); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002). See also Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 570 & nn.6–12 (2007) for an insider's view of the diminishing effectiveness of NLRB procedures over time.

2. See Brudney, *supra* note 1, at 819, 831 & n.57.

3. See *id.* at 825–31.

4. See, e.g., *id.* at 831–35; 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. 2060–61 (2009); see also Samuel Estreicher, *Improving the*

consider whether there are ways for the Board to make the changes in Board law and procedures advocated in these papers in a way that enhances, rather than undermines, Board credibility and effectiveness. Although labor management relations has recently taken on a winner-takes-all combativeness, it is worth considering how changes to the law can be made within the framework of labor peace through collective bargaining, the goal behind the passage of the Wagner Act in 1935.<sup>5</sup> The goal of these comments is to consider the balance between precedent and change by focusing not only on what changes are appropriate, but also on the importance of articulating why each change is needed and how the change can best be effected consistent with the Board's important role in the administration of the Act.

### I. A RATIONALE FOR CHANGE

Evolution in implementation of the National Labor Relations Act ("the Act") is inevitable and necessary, and anticipated by the Act itself.<sup>6</sup> If, however, changes in Board law are perceived as arbitrary, erratic, and politically motivated, the Board and the labor management community both suffer. One problem can be a loss of predictability. Labor management relations are heavily regulated and depend on stability. The parties need to be able to conform their conduct to discernible legal standards.<sup>7</sup> This is particularly true when the parties are negotiating a collective bargaining agreement intended to regulate their conduct over a period of years.

Another negative consequence of perceived Board arbitrariness is an increased transfer of key decision making from the Board to the federal courts. Although Board decisions are entitled to deference based on the Board's expertise,<sup>8</sup> appellate court judges may be less likely to accord full deference to Board rules that appear to change from term to term based on the identity of the Board members and not on changed realities in the workplace.<sup>9</sup> In the end, if appellate deference weakens due

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*Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1, 3-4 (2009).

5. See Wagner-Connelly Labor Relations Act, ch. 372, § 7, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2006)). For a discussion of the philosophical underpinnings of the Wagner Act, see Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 501-07 (1993).

6. See *American Cyanamid Co.*, 131 N.L.R.B. 909, 911 (1961) ("The Board must hold fast to the objectives of the statute using an empirical approach to adjust its decisions to the evolving realities of industrial progress and the reflection of that change in organizations of employees.").

7. Liebman, *supra* note 1, at 587.

8. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) ("We will uphold a Board rule as long as it is rational and consistent with the Act, even if we would have formulated a different rule had we sat on the Board." (citation omitted)).

9. See *Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 869 (D.C. Cir. 1978) (finding Board decision was entitled to little deference based on history of "ad hoc and inconsistent judgments—in which the only determinative elements seems [sic] to be the composition of the NLRB panel"); Paul M. Secunda, *Politics Not as Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FL. ST. U. L. REV. 51, 54 n.11 (2004) (noting that "Board decisions driven by political considerations" undermine the Board's claim to expertise). See generally Liebman, *supra*

to a lack of Board credibility, the rules governing employer and union conduct will be determined by federal judges and not by the Board. Federal judges have very little experience, much less expertise, in the day-to-day concepts of unit determinations, representation proceedings, organizing and picketing, recognition and contract bars, bad faith bargaining, and the myriad other issues regulated by Board decisions.

Observers believe that the current Board majority will try to correct the perceived errors of the “Bush Board,” reinstate key decisions of the “Clinton Board,” and, time and opportunity permitting, provide positive rulings on issues that will promote collective bargaining and employee rights.<sup>10</sup> Anticipated priorities for the current Board include increasing the classes of individuals covered by the Act,<sup>11</sup> expanding concepts of lawful protected activity,<sup>12</sup> expanding employee and union access to twenty-first century methods of communication,<sup>13</sup> and making the road to union representation more open.<sup>14</sup> The respective proposals of Professor Secunda and Professors Moore and Bales for restrictions on employer captive audience speeches and robust card check recognition fit within this broad agenda.

If the Act contemplates that Board law will change over time, the Board must decide when change is warranted.<sup>15</sup> Two strong grounds for overruling past precedent are (1) significant changes in the workplace and (2) negative experiences under existing rules. These two rationales may overlap. Changes in technology, particularly in how work gets done and in how employers and workers communicate, are making old ways of thinking about labor management issues obsolete.<sup>16</sup> At the same time, Board members have the opportunity to observe

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note 1, at 587 n.124.

10. See Tanja L. Thompson & R. Bradley Mokros, *As the Pendulum Swings: The Role of Precedent in National Labor Relations Board Decisions*, 2009 A.B.A. SEC. LAB. & EMP. L. ANN. CLE CONF. 1.

11. See, for example, *New York University*, 356 N.L.R.B. No. 7 (Oct. 25, 2010), in which the Board ordered an evidentiary hearing on petition for election by graduate students who perform teaching duties, indicating the Board’s willingness to reconsider its holding in *Brown University*, 342 N.L.R.B. 483 (2004), that graduate assistants are not employees. See also *Kan. City Repertory Theatre*, 356 N.L.R.B. No. 28 (Nov. 16, 2010) (on-call musicians are covered employees); *Pac. Coast M.S. Indus. Co.*, 355 N.L.R.B. No. 226 (Sept. 30, 2010) (team leaders are employees not supervisors); *Saint Barnabas Hosp.*, 355 N.L.R.B. No. 39 (June 3, 2010) (medical interns are employees).

12. See, e.g., *Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. No. 159 (Aug. 27, 2010) (union’s stationary display of banners near secondary employer’s job site is lawful).

13. See, e.g., *J & R Flooring, Inc.*, 356 N.L.R.B. No. 9, at \*2 (Oct. 22, 2010); see generally Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1 (2000).

14. See, e.g., *Dana Corp. (Dana II)*, 356 N.L.R.B. No. 49 (Dec. 6, 2010) (voluntary recognition of union based on majority card signing and negotiation of framework agreement prior to but conditional on proof of majority support for union is lawful).

15. For contrasting views of the role of precedent and change by representatives of management and labor, see Thompson & Mokros, *supra* note 10, at 1–4, 23–24, and Michael T. Anderson, *Why Bad Law Lasts Forever: The Consequences of Censoring Charging Parties*, 2009 A.B.A. SEC. LABOR & EMP. L. ANN. CLE CONF. 1, 3–5.

16. Malin & Perritt, *supra* note 13, at 11.

situations where old rules applied in a new work setting are no longer achieving their intended results.

The Board has for many years followed the practice of developing rules for interpreting and applying the Act through Board decisions, in the context of live disputes and real facts. Historically, rulings in specific cases have been the mechanism for changing Board rules.<sup>17</sup> Alternatives to case-by-case overruling of past decisions exist, and each of these alternatives has its advantages and drawbacks.

Some observers have proposed that the Obama Board expand the use of its rule-making power under section 6 of the Act as an alternative to announcing new Board rules in case decisions.<sup>18</sup> Although the Board has not often used this mechanism to develop substantive rules,<sup>19</sup> the labor management bar is accustomed to the Department of Labor's use of rulemaking to provide guidance for compliance with important laws like the Fair Labor Standards Act<sup>20</sup> and the Labor Management Reporting and Disclosure Act.<sup>21</sup> Rulemaking would allow the Board to regulate important labor management issues comprehensively, rather than piecemeal through case-by-case adjudication. The process of rulemaking institutionalizes a comment process with input from all constituencies, which could lead to more workable regulatory frameworks and improved buy-in from both sides.

Some obvious disadvantages to the use of rulemaking have impeded movement in that direction.<sup>22</sup> The rule-making process can be time consuming. The Board has competing demands because of its adjudicatory functions, demands that increased as a result of the Supreme Court decision in *New Process Steel*, which required the Board to reconsider decisions that had been previously disposed of by the two-member Board.<sup>23</sup> Another problem with Board rulemaking is the potential threat of congressional de-funding, which derailed Board efforts at rulemaking under then-Chairman William Gould, when the Board proposed a rule favoring single-location bargaining units.<sup>24</sup>

Falling back on traditional Board practice, the Obama Board could follow the opposite path to rulemaking and shape the law through fact-based determinations in individual cases. Under this process, the Board would not expressly overrule prior

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17. Thompson & Mokros, *supra* note 10, at 1 (citing *Auciello Iron Works v. NLRB*, 517 U.S. 781, 787–88 (1996)).

18. See Estreicher, *supra* note 4, at 12–13.

19. *Id.* at 12. The Board's last successful substantive rulemaking occurred in 1989 with the adoption of rules designating appropriate health care bargaining units for acute care hospitals. Thompson & Mokros, *supra* note 10, at 4 n.18. The rules were approved in *American Hospital Ass'n v. NLRB*, 499 U.S. 606 (1991). *Id.* at 4.

20. 29 U.S.C. §§ 201–19 (2006).

21. 29 U.S.C. §§ 401–531 (2006).

22. See additional discussion of Board rule-making disadvantages in James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221 (2005).

23. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2639 (2010).

24. Estreicher, *supra* note 4, at 13 (citing Joan Flynn, "Expertness for What?" *The Gould Years at the NLRB and the Irrepressible Myth of the "Independent" Agency*, 52 ADMIN. L. REV. 465, 501–02 & nn.151–52 (2000)).

decisions but would use fact-based analysis in deciding cases to limit the application of prior decisions or create exceptions to existing rules. This approach plays to the Board's strengths and can produce fair results in many cases without regard to the "rule" that the Board follows. For this reason, parties may be more satisfied with results in individual cases, courts would have fewer issues to review, and the Board could achieve generally fair results with less appearance that its decisions are politically motivated.

But this kind of case-by-case decision making does not always work well in a highly regulated sector like labor management relations. Case-by-case decision making is less predictable and can lead to less protection for statutory rights than bright-line rules.<sup>25</sup> Because both sides in labor relations are prone to pushing the envelope, the absence of clear rules is likely to lead to more litigation and review at every level. Still, the Obama Board may decide to choose its battles strategically, overturning decisions of the Bush Board in some areas and limiting them through case-by-case decision making in others.<sup>26</sup>

Finally, the Board can achieve important objectives through its authority under section 9 of the Act to enforce "laboratory conditions"<sup>27</sup> for union elections and through its remedial power under *NLRB v. Gissel Packing Co.*<sup>28</sup> to issue a bargaining order as a remedy for egregious employer misconduct affecting an election.<sup>29</sup> The NLRB General Counsel's independent authority over investigations, issuance of complaints, and selection of remedies can be used to address dysfunctions in traditional Board election processes. Acting General Counsel Solomon has not hesitated to use the powers of the Office of General Counsel to address employer misconduct in organizing campaigns. For instance, Solomon has adopted procedures for early identification of appropriate cases, strategic use of 10(j) injunctions, and more effective remedies to protect the integrity of the election process in the face of the most serious violations of employee rights.<sup>30</sup>

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25. Anderson, *supra* note 15, at 11–15.

26. A Board practice against overruling precedent with fewer than three votes in favor may also lead to fact-based decisions instead of outright overruling of precedent. *See* Hacienda Resort Hotel & Casino, 355 N.L.R.B. No. 154, at 2 n.1 (Aug. 27, 2010) (collecting cases). *See generally* Letter from Wilma B. Liebman, Chairman, NLRB, to Phil Roe, Chairman, House of Representatives, Subcomm. on Health, Educ., Labor, and Pensions, Comm. on Educ. and the Workforce (Feb. 25, 2011), <http://www.nlr.gov/sites/default/files/documents/379/chairmancommitteeletter.pdf>.

27. *See* General Shoe Corp., 77 N.L.R.B. 124 (1948).

28. 395 U.S. 575 (1969).

29. Estreicher, *supra* note 4, at 14–15, 19–20.

30. General Counsel Memorandum No. 11-01 from Lafe E. Solomon, Acting NLRB General Counsel, to All Regional Directors, Officers-in-Charge, and Resident Officers (Dec. 20, 2010), <http://mynlrb.nlr.gov/link/document.aspx/09031d458042ba39>; General Counsel Memorandum No. 10-07 from Lafe E. Solomon, Acting NLRB General Counsel, to All Regional Directors, Officers-in-Charge, and Resident Officers (Sept. 30, 2010), <http://mynlrb.nlr.gov/link/document.aspx/09031d45803afc6f>. The first contract initiative of former General Counsel Ronald Meisberg similarly made use of the powers of that office to remedy practices that undermined core purposes of the Act. *See* General Counsel Memorandum No. 07-08 from Ronald Meisberg, NLRB General Counsel, to All Regional Directors, Officers-in-Charge, and Resident Officers (May 29, 2007),

While these initiatives can have a powerful impact in deterring misconduct and shaping the Board's agenda, the General Counsel has no power to change underlying Board law.

## II. OPTIONS FOR ADDRESSING CARD CHECK AND CAPTIVE AUDIENCE ISSUES

With these strategies in mind, we can begin to analyze existing and projected Board approaches to the issues raised by Professor Secunda and Professors Moore and Bales.

### A. *Voluntary Recognition and the Dana Decision*

The Obama Board has already taken steps to reconsider the 2007 decision in *Dana Corp.*,<sup>31</sup> which restricted voluntary card check recognition by deferring any recognition bar until an approved notice of recognition and description of rights is posted and until employees or rival unions have an opportunity to file a petition for a Board-supervised election challenging the majority status of the recognized union. The 2007 *Dana* decision overturned a forty-year-old Board precedent in *Keller Plastics Eastern*,<sup>32</sup> which accorded a voluntarily recognized union a "reasonable time" to negotiate a collective bargaining agreement with the employer free from election challenges to its majority status.<sup>33</sup>

In August 2010, the Board, in two cases decided under the *Dana* framework, issued a formal Notice and Invitation to File Briefs,<sup>34</sup> asking the parties and amici to address several questions, including:

- What are their experiences under *Dana*?
- In what ways has *Dana* furthered or hindered employee choice?
- In what ways has *Dana* furthered or de-stabilized bargaining?
- Should *Dana* apply in cases of "after-acquired" neutrality/card check clauses or in merger cases?

The Board's Notice signaled its intention to rely on its own experience in reviewing 1000 requests for voluntary recognition in the three years since the *Dana* decision and the experience of parties to voluntary recognition agreements to determine whether the *Dana* procedures "have advanced or hindered" the statutory goals of employee free choice and collective bargaining.<sup>35</sup>

In their analysis of the "failure of the political model of industrial democracy," Professors Moore and Bales persuasively argue that the assumptions underlying the *Dana* decision are unsupported by industrial experience. Their article cites studies which show that fears by the *Dana* majority about the power of "group pressure" are unsupported, based on evidence that employer pressure on employees to oppose

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<http://mynlrb.nrb.gov/link/document.aspx/09031d4580031365>.

31. 351 N.L.R.B. 434 (2007). After this article was submitted, the Board in *Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (Aug. 26, 2011), reversed the 2007 decision in *Dana Corp.*, restoring the voluntary recognition bar. 357 N.L.R.B. No. 72 at \*10.

32. 157 N.L.R.B. 583 (1966).

33. *Id.* at 587.

34. Notice and Invitation to File Briefs, NLRB (Aug. 31, 2010), [https://www.nlr.gov/sites/default/files/documents/236/rite-aid\\_lamons-gasket\\_notice\\_conf.pdf](https://www.nlr.gov/sites/default/files/documents/236/rite-aid_lamons-gasket_notice_conf.pdf).

35. *Id.* at 2.

unionization is “significantly greater” than pressure from co-workers, and that any pressure exerted by union organizers was no greater during card signing campaigns than during an election.<sup>36</sup> The *Dana* majority also expressed concern that the quality of information provided to employees, especially on the disadvantages of unionization, is diminished in card signing campaigns, but Professors Moore and Bales find the empirical evidence on employee access to pro-employer views somewhat mixed. Professors Moore and Bales point out, as a matter of law and policy, that there is a statutory right for employers to express their opinions, but there is no statutory requirement that employees hear that message. More tellingly, they point out that the anti-union message is readily available to employees from a number of sources and in a number of formats, absent an employer campaign against the union. They add that the employees’ access to the anti-union message during a card signing campaign is comparable to the opportunities unions have to communicate a pro-union message under the current system.<sup>37</sup> These and other key points in their textured analysis are responsive to the Board’s expressed concern that reconsideration of *Dana* be based on the reality of experience in the workplace.

The Board’s Notice of Hearing and Request for Briefs showed the Board majority’s consciousness of its responsibility to articulate a principled basis for reconsideration of *Dana*—in other words, a reason to re-examine the kinds of arguments made by Professors Moore and Bales and by those with opposite views. The Board’s broad solicitation of briefs sought information on the experience of the labor management community under the *Dana* framework, especially in key areas of the law such as protecting employee choice, collective bargaining, and continuity of representation. Although the *Dana* decision is less than four years old, the Board expressed its view that the number of cases decided under the *Dana* framework is sufficient to allow the Board to now make some evaluation of its impact.<sup>38</sup> This is especially true because *Dana* changed rules and practices that had been in effect for more than forty years. It seems reasonable for the Board to decide to look at whether the *Dana* framework limiting voluntary recognition is yielding better results than the longstanding rules and practices upended by the *Dana* decision.

Professors Moore and Bales, like many commentators, focus on voluntary recognition issues in the context of an organizing drive against an unorganized employer. But a complete consideration of these issues requires at least some discussion of voluntary recognition in the context of established bargaining relationships, including successorship, sales, and transfers of work or employees. Unions and employers in the manufacturing sector have been negotiating provisions intended to encourage union cooperation during workplace dislocation in exchange for job security, continued union representation, and assured continuation of core benefits under existing collective bargaining agreements. To

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36. 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, 159 (2012).

37. *Id.* at 159–60 (citing Adrienne E. Eaton & Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. REL. REV. 157, 170–71 (2009)); Brudney, *supra* note 1, at 848, 855–56.

38. Notice and Invitation, *supra* note 34, at 2.



achieve their joint objectives, the parties to these agreements need guidance from the Board on the proper scope of these agreements.

In its recent *Dana II*<sup>39</sup> decision, the Board provided some needed guidance. *Dana II* clarified Board law to allow broad, though not unlimited, rights for parties in existing collective bargaining relationships to negotiate neutrality/card check agreements governing unorganized facilities, which include a basic framework for collective bargaining. In so doing, it distinguished its longstanding decision in *Majestic Weaving*,<sup>40</sup> which held that an employer violated section 8(a)(2) by recognizing and negotiating a complete collective bargaining agreement with a union prior to and contingent upon the union's subsequent proof of majority support. The *Dana II* decision refused to read *Majestic Weaving* as providing "a per se rule that negotiation with a union 'over substantive terms and conditions of employment' is unlawful if it occurs before the union has attained majority support."<sup>41</sup> Instead, it found controlling distinctions between the facts of the two cases, in particular the fact that *Majestic Weaving* granted exclusive recognition to the union before proof of majority status, while *Dana* expressly withheld recognition until majority support was established.<sup>42</sup>

Also in contrast to *Dana*, *Majestic Weaving* negotiated a complete collective bargaining agreement, subject only to execution, while the Letter of Agreement between *Dana* and the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) created a bare framework for future bargaining requiring extended substantive negotiations before it could be executed.<sup>43</sup> The Board also noted that, in *Majestic Weaving*, accompanying unfair labor practices included supervisor solicitation of union support, which supported the finding of a section 8(a)(2) violation.<sup>44</sup>

Although the dissenting Board member asserted that the *Dana II* decision effectively overruled *Majestic Weaving*,<sup>45</sup> the Board majority was explicit in its view that the *Dana II* decision instead distinguished *Majestic Weaving* based on the facts before the Board.<sup>46</sup> In so doing, the Board declined to adopt a bright-line rule governing permissible pre-recognition negotiations.<sup>47</sup>

From my perspective, the Board could do more to enable labor and management to effectively bargain in these unsettled times. A reversal of the *Dana* decision and restoration of the full recognition bar for voluntary recognition would help parties

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39. 356 N.L.R.B. No. 49 (Dec. 6, 2010).

40. 147 N.L.R.B. 859 (1964), *enforcement denied* 355 F.2d 854 (2d Cir. 1966).

41. 356 N.L.R.B. No. 49 at \*6.

42. *Id.* at \*8.

43. *Id.* at \*6-7.

44. *Id.* at \*6.

45. *Id.* at \*10.

46. *Id.* at \*9.

47. *Id.* at \*4 ("As the Supreme Court has observed, there are issues of labor law where the 'nature of the problem, as revealed by unfolding variant situations,' requires 'an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.'" (citing *Eastex, Inc. v. NLRB*, 477 U.S. 556, 575 (1978))).

to negotiate useful transition agreements.<sup>48</sup> A return to the successor bar rule under *Saint Elizabeth Manor*<sup>49</sup> would be of even more help to unions and represented workers who would benefit from stability in bargaining and union representation in spite of instability of ownership.<sup>50</sup> We will have to await decisions on these issues to see whether the Board will adopt the kind of bright-line rule in those cases that it eschewed in *Dana II*.

Whatever approach the Board adopts, the idea of developing a set of guidelines to fairly regulate labor management agreements, and particularly bargaining on the issue of continuing recognition and representation, would make life more predictable and allow parties to negotiate with some certainty for a system they can live with.

### B. Captive Audience Speeches and Section 8(c)

Professor Secunda is a frequent writer and speaker on the issue of captive audience speeches. His article canvasses the history of court and Board protection of employer rights, the countervailing authority supporting limitations on the coercive nature of the contemporary captive audience speech, and the impact on fairness of Board elections given the current imbalance between employers' and unions' relative access to employees and ability to effectively convey their messages.

Unlike the voluntary recognition issues, which the Obama Board has taken steps to address, the limitations on captive audience practices recommended by Professor Secunda have not yet been addressed by the current Board. This may be partly because limitations on captive audience speeches implicate broadly read employer free speech rights under section 8(c), and Board law has long recognized employers' rights to engage in captive audience speeches as a regular part of their response to union organizing. Professor Secunda presents a strong argument for reframing the Board's view, and the reframing may happen if the appropriate case arises in the near term. But for now, no change in substantive law on captive audience speeches is anticipated.

It is more likely, as Professor Secunda suggests, that any change will occur around the edges, through the Board's authority under *General Shoe* to assure "laboratory conditions" for Board elections,<sup>51</sup> and outside the context of unfair labor practices where the 8(c) protections for employer speech apply. Or, if the

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48. Since submission of this Article, the Board has done exactly that in *Lamons -Gasket Co.*, 357 N.L.R.B. No. 72 (Aug. 26, 2011). See note 31, *supra*.

49. On the same day as the Board's *Dana* notice, it also invited briefs by parties and amici on the successor bar issue. See *Saint Elizabeth Manor*, 329 N.L.R.B. 341 (1999), *overruled by MV Transportation*, 337 N.L.R.B. 770 (2002). After this Article was submitted, the Board overruled *MV Transportation* in *UGL-UNICCO*, 357 N.L.R.B. No. 76 (Aug. 26, 2011), restoring the successor bar.

50. The issue of employer withdrawal of recognition based on "good faith doubt" of union majority status (and without invoking the Board's election mechanism) is also part of the equation. See Rik Lineback, *Comments on Proposed Changes to Captive Audience Speech Rules and Use of Card Checks*, 87 IND. L.J. 165, 172-73 (2012).

51. *General Shoe Corp.*, 77 N.L.R.B. 124, 126 (1948).

current Board sees an appropriate case, it may consider setting some outer limits for employer conduct associated with captive audience speeches, either as an unfair labor practice or as objectionable conduct warranting a new election.<sup>52</sup> Professor Secunda suggests that the standards for employer conduct in polling may be adapted to limit employer conduct in connection with captive audience speeches. This is a creative approach and may find appeal with the Board because the proposal calls for a surgical extension of existing law to curb coercive effects of captive audience speeches rather than a wholesale rejection of longstanding law broadly protecting employers' use of this weapon.

Another approach to captive audience speeches could be through the General Counsel's supervision of elections and selection of appropriate remedies. The Acting General Counsel's 10(j) initiative focuses on curbing coercive employer tactics in the pre-election period, with an emphasis on quick remedies for discriminatory discharges.<sup>53</sup> As part of this comprehensive approach to curing the effects of employer misconduct in this context, the Acting General Counsel issued a second memo in December 2010 on effective remedies.<sup>54</sup>

Under the GC Memorandum, regional offices are directed to include enhanced communication remedies as part of their 10(j) submissions and in complaints based on multiple unfair labor practices, including discharges and "serious ancillary unfair labor practices."<sup>55</sup> In cases where a Region determines that the impact of employer unfair labor practices cannot be mitigated by traditional and enhanced communication remedies, the Region is directed to submit a request for additional remedies which may include:

granting a union access to nonwork areas during employees' nonwork time; giving a union notice of, and equal time and facilities for the union to respond to any address made by the company regarding the issue of representation; and affording the union the right to deliver a speech to employees at an appropriate time prior to any Board election.<sup>56</sup>

Consistent with many of Professor Secunda's recommendations, these remedies respond to the effects of employer captive audience speeches, when accompanied by other serious unfair labor practices, by expanding access for unions rather than restricting employer speech protected by section 8(c). But, contrary to Professor Secunda's view that captive audience speeches are inherently coercive, these access remedies are reserved only for those cases where "an employer makes multiple

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52. See Estreicher, *supra* note 4, at 14–16 (advocating expanded access for union organizers to counterbalance employer captive audience speeches as an extension of *Peerless Plywood*, 107 N.L.R.B. 427 (1953) and *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966)).

53. General Counsel Memorandum No. 10-07, *supra* note 30.

54. General Counsel Memorandum No. 11-01, *supra* note 30.

55. Enhanced remedies include orders that the NLRB Notice be read publicly to all employees, that unions be given access to employer bulletin boards, and that unions have expanded access to *Excelsior* lists of employees names and addresses.

56. *Id.* at 10.

unlawful captive audience speeches<sup>57</sup> or where the employer is a recidivist and has shown a proclivity to violate the Act.”<sup>58</sup>

The Board’s most recent rule-making initiative, revising Board election procedures, may indirectly impact the use of captive audience speeches by somewhat shortening the pre-election period and by enhancing union ability to directly contact employees.<sup>59</sup> The Board, with Member Hayes dissenting, proposes to amend its rules and procedures governing Board-supervised elections, to require electronic filing and transmission of election petitions, notices, and voter lists; expand employee information included on *Excelsior* lists (including email addresses, where available); “streamline pre- and post-election procedures”; and reduce litigation.<sup>60</sup> In spite of the concerns expressed in the Dissenting View of Member Hayes,<sup>61</sup> any impact of these amended procedures on the effectiveness of employer captive audience speeches will be minimal in comparison to the more sweeping legal reforms recommended by Professor Secunda.

Whatever further approaches the Board and General Counsel decide to pursue in this area, I agree with Professor Secunda’s prediction that the law governing captive audience speeches will be reshaped with a scalpel, rather than a buzz saw, and leave the basic legal landscape permitting captive audience speeches in place.

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57. Unlawful captive audience speeches are those that include threats and promises unprotected by section 8(c) or which occur within the twenty-four-hour period prior to an election which is insulated under *In re Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953).

58. General Counsel Memorandum No. 11-01, *supra* note 30, at 10–11.

59. See NLRB Notice of Proposed Rulemaking, 76 Fed. Reg. 36812 (proposed June 22, 2011) (to be codified at 29 C.F.R. pts. 101–03).

60. *Proposed Amendments to NLRB Election Rules and Regulations Fact Sheet*, NAT’L LAB. REL. BOARD, <http://www.nlr.gov/Proposed%20Amendments>.

61. 76 Fed. Reg. at 36831.

