Lamons Gasket Company, A Division of Trimas Corporation *and* Michael E. Lopez, Petitioner and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union. Case 16–RD–001597

August 26, 2011

DECISION ON REVIEW AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER, PEARCE, AND HAYES

"[A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co. v. NLRB,* 321 U.S. 702, 705 (1944). Consistent with that principle, it was settled Board law from 1966 to 2007 that an employer's voluntary recognition of a union, based on a showing of uncoerced majority support for representation, barred the processing of an election petition for a reasonable period of time, in order to permit the employees' chosen representative to serve in that capacity and seek to negotiate a collective-bargaining agreement with the employer. The "recognition bar" applied only after "good-faith recognition of a union by the employer based on an unassisted and uncoerced showing of interest from a majority of unit employees." *Smith's Food & Drug Centers, Inc*., 320 NLRB 844, 846 (1996). During that 41-year period, no member of the Board dissented from the application of the recognition bar under circumstances such as those existing in this case and its application was uniformly sustained in the courts of appeals.

Four years ago, in *Dana Corp.*, 351 NLRB 434 (2007), a sharply divided Board rejected this longstanding principle, established in *Keller Plastics Eastern*, 157 NLRB 583 (1966), in favor of a "modified" recognition bar, under which a minority of employees are permitted immediately to challenge the freely expressed will of the majority. *Dana* established a 45-day "window period" after voluntary recognition during which employees may file a decertification petition supported by a 30-percent showing of interest. *Dana* further required that, in order to start the running of the 45-day window period after voluntary recognition, employers must post an official Board notice informing employees of their newly created right to seek an election within the 45-day period to oust the lawfully recognized union. Id. at 441–443. Wholly absent from the majority decision in *Dana* was any empirical evidence supporting the majority's suspicion that the showing of majority support that must underlie any voluntary recognition is not freely given or is otherwise invalid in a significant number of cases, or that the existing statutory mechanisms for preventing coercion in the solicitation of support and recognition based on coerced support are inadequate.

We granted review to consider the experiences of employers, employees, unions, and the Board under *Dana*. Based on our consideration of the record and the briefs of the parties and amici, as well as of publicly available data concerning the Board's processing of cases arising under *Dana*, we find that the approach taken in *Dana* was flawed, factually, legally, and as a matter of policy. Accordingly, we overrule *Dana* and return to the previously well-established rule barring an election petition for a reasonable period of time after voluntary recognition of a representative designated by a majority of employees. We also define, for the first time, the benchmarks for determining a "reasonable period of time."

I. FACTS

On July 13, 2003, Lamons Gasket (the Employer) and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the Union) entered into an agreement detailing the conditions under which the Employer would voluntarily recognize the Union as the representative of its employees at several facilities, including the facility in Houston, Texas. The agreement provided, inter alia, that the Employer would voluntarily recognize the Union upon presentation of proof of majority support for representation by the Union in the form of authorization cards signed by employees. On November 5, 2009, after presentation of signed cards from a majority of the unit employees to an arbitrator and the arbitrator's verification of the majority, the Employer voluntarily recognized the Union as the exclusive representative of a unit of production, maintenance, and warehouse employees at the Houston facility. As required by *Dana*, the Employer notified the Board's Region 16 that it had recognized the Union, and the Region transmitted a notice to the Employer to post in its facility notifying employees of the recognition and of their right to seek a decertification election within 45 days.

On November 23, the Employer posted the notice. On December 9, Michael E. Lopez (the Petitioner) filed a timely petition for a decertification election, supported by a showing of interest among at least 30 percent of the employees in the unit. On January 20, 2010, the Employer and the Union began bargaining for an initial collective-bargaining agreement. On July 21, the Regional Director issued a Decision and Direction of Election, finding that *Dana* was controlling and that the "voluntary recognition and the timely filed decertification petition raise a question [concerning representation]." The Union filed a request for review.

The Employer and the Union reached a collective-bargaining agreement on August 8. On August 26, the decertification election was held and the ballots were impounded because of the pending request for review. On August 27, the Board granted the Union's request for review and solicited briefs from the parties and amici.[1]

II. POSITIONS OF THE PARTIES AND AMICI

The Union and the amici supporting it argue that the Board should overrule *Dana* and return to the longstanding rule of *Keller Plastics* and *Sound Contractors*,[2] under which an employer's voluntary recognition of a union, based on a showing of majority support for the union, bars a petition for an election for a reasonable period of time. They contend that the notice requirement and 45-day window period interfere with the freedom of the majority of employees to choose their bargaining representative and with that representative's ability to establish a stable bargaining relationship with the employer. The Petitioner and Employer and amici supporting them argue that there is no empirical basis for overruling *Dana;* that a secret-ballot election is the preferred method of assessing employee choice; and that *Dana* provides necessary safeguards, in an era of increasing resort to voluntary recognition, to ensure that a union's majority support is free and uncoerced.[3]

III. DISCUSSION

Congress has expressly recognized the legality of employers' voluntary recognition of their employees' freely chosen representative, as well as the place of such voluntary recognition in the statutory system of workplace representation. Nevertheless, the extraordinary process established in *Dana* was, fundamentally, grounded on a suspicion that the employee choice which must precede any voluntary recognition is often not free and uncoerced, despite the law's requirement that it be so. The evidence now before us as a result of administering the *Dana* decision during the past 4 years demonstrates that the suspicion underlying the decision was unfounded. Without an adequate foundation, *Dana* thus imposed an extraordinary notice requirement, informing employees only of their right to reconsider their choice to be represented, under a statute commanding that the Board remain strictly neutral in relation to that choice. The decision in *Dana* thus undermined employees' free choice by subjecting it to official question and by refusing to honor it for a significant period of time, without sound justification. *Dana* was thus an unwarranted departure from the principle that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros.,* 321 U.S. at 705. Prior to *Dana* and *MV Transportation,* 337 NLRB 770 (2002), which we also overrule today,[4] the Board uniformly implemented that principle in a variety of contexts. The statutory policies that underlie the bars interposed in those contexts extend to voluntary recognition. For these reasons, as fully explained below, we conclude that *Dana* has been shown to be unnecessary and, in fact, to disserve the purposes of the Act.

A. Congress Has Expressly Recognized Employers' Voluntary Recognition of Their Employees' Freely Chosen Representative as a Lawful Element of the System of Representation Created by the NLRA

Federal labor law not only permits, but expressly recognizes two paths employees may travel to obtain representation for the purpose of collective bargaining with their employer. As the Supreme Court observed, a "Board election is not the only method by which an employer may satisfy itself as to the union's majority status." *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72 fn. 8 (1956). In fact, as the *Dana* majority acknowledged, "Voluntary recognition itself predates the National Labor Relations Act and is undisputedly lawful under it." 351 NLRB at 436.

Voluntary recognition must be based on evidence of majority support for representation. Absent majority support, voluntary recognition is unlawful. *Ladies' Garment Workers v. NLRB (Bernhard-Altmann)*, 366

[1] The Petitioner and Employer filed briefs in support of the Regional Director's Decision and Direction of Election (DD&E), the Union filed a brief in opposition to the DD&E, the Employer filed a brief in opposition to the Union's brief, and the Petitioner filed a reply brief. Amicus briefs were filed by the American Federation of Labor and Congress of Industrial Organizations; Americans for Limited Government; Center on National Labor Policy, Inc.; United States Chamber of Commerce; Coalition for a Democratic Workplace et al.; Council on Labor Law Equality, HR Policy Association, National Restaurant Association, and Society for Human Resource Management; Kenneth G. Dau-Schmidt, JD, PhD, Willard and Margaret Carr Professor of Labor and Employment Law, Indiana University; National Association of Manufacturers et al.; National Federation of Independent Business Small Business Legal Center; National Right to Work Legal Defense Foundation; Service Employees International Union; United States Congressmen John Kline and Tom Price; United States Senator Orrin G. Hatch; and United Food and Commercial Workers International Union and its Locals 135, 324, 770, 1167, 1428, and 1442.

[2] *Keller Plastics Eastern*, 157 NLRB 583 (1966); *Sound Contractors*, 162 NLRB 364 (1966).

[3] The Petitioner moves for the recusal of Member Becker based on the fact that, as counsel for an amicus curiae, he signed a brief in *Dana*. The brief was jointly filed by the United Auto Workers (a party to the case) and the AFL–CIO (an amicus curiae and Member Becker's then-employer). For the reasons fully explained in his concurrence in *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, 240 fn. 3 (2010), Member Becker declines to recuse himself from this case.

[4] *UGL-UNICCO Service Co*., 357 NLRB No. 76 (2011).

U.S. 731 (1961). Voluntary recognition based on support that was induced by either union or employer coercion is unlawful, as is the coercion. See, e.g., *Windsor Castle Health Care Facilities*, 310 NLRB 579, 580 (1993), enfd. 13 F.3d 619 (2d Cir. 1994); *Rainey Security Agency*, 274 NLRB 269, 269 fn. 3, 279 (1985); *Gold Standard Enterprises*, 249 NLRB 356, 361 (1982), enfd. 679 F.2d 673 (7th Cir. 1980).

The evidence of majority support that must underlie voluntary recognition may take many forms. The *Dana* majority referred to voluntary recognition as "card-based recognition," 351 NLRB at 434, but that is an inaccurate or, at least, a drastically underinclusive characterization.[5] Voluntary recognition may be, and has been, based on evidence of majority support as informal as employees walking into the owner's office and stating they wish to be represented by a union, see *Brown & Connolly, Inc.*, 237 NLRB 271, 276 (1978), enfd. 593 F.2d 1373 (1st Cir. 1979), and as formal as a secret-ballot election conducted by a third party such as the American Arbitration Association, see *Casale Industries*, 311 NLRB 951, 951 (1993).

Clear evidence of Congress' intentions concerning the relationship between voluntary recognition and Board-supervised elections is contained in Section 9(c)(1)(A)(i) of the Act. In that section, Congress provided that employees could file a petition for an election, alleging that a substantial number of employees wish to be represented and "that their employer declines to recognize their representative." That language makes it unmistakably clear that Congress recognized the practice of voluntary recognition and strongly suggests that Congress believed Board-supervised elections were necessary only when an employer had declined to recognize its employees' chosen representative.[6]

Congress was well aware of the practice of voluntary recognition when it adopted the Act in 1935, because the practice long predated the Act.[7] That is significant because Congress not only expressly recognized the practice in Section 9(c)(1)(A)(i), but also gave no indication anywhere in the Act that it intended to supplant that process with or subordinate it to Board-supervised elections. Importantly, Section 8(a)(5) of the Act requires an employer to bargain collectively with "the representatives of his employees," but does not specify that such representatives must be chosen in a Board-supervised election. Rather, Section 8(a)(5) states that the employer's obligation to bargain with its employees' representative is "subject to the provisions of section 9(a)." Section 9(a) similarly does not limit the exclusive representative of employees to representatives chosen in a Board-supervised election. Rather, Section 9(a) provides that "[r]epresentatives *designated or selected* for the purposes of collective bargaining by the majority of the employees" shall be the exclusive collective-bargaining representatives (emphasis supplied). In enacting the Taft-Hartley amendments in 1947, Congress considered, but rejected, an amendment to Section 8(a)(5) that would have permitted the Board to find that an employer had unlawfully refused to bargain only with "a union 'currently recognized by the employer or certified as such [through an election] under section 9.'" *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 598 (1969) (citing H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41 (1947)). The purpose of the rejected amendment was to prevent the Board from issuing a bargaining order in favor of a union that had been *neither* voluntarily recognized nor selected in a Board-supervised election. Significantly, the proposed amendment did not so much as question the practice of voluntary recognition, but, in fact, equated voluntary recognition with certification after an election.

As the legislative history of the Taft-Hartley amendments demonstrates, voluntary recognition is not simply permitted under the Act, but its grant imposes statutory duties on the part of both the employer and the union, which have for over 75 years been enforced by the Board. "Once voluntary recognition has been granted to a majority union," the Board explained in *Brown & Connolly, Inc*., supra, 237 NLRB at 275, "the Union becomes [the] exclusive collective-bargaining representative of the employees, and withdrawal or reneging from the commitment to recognize before a reasonable time for bargaining has elapsed violates the employer's bargaining obligation." In other words, voluntary recognition, no

[5] Despite the fact that signed cards authorizing the union to represent the signer are only one form of evidence of majority support that may underlie lawful, voluntary recognition, we use that example throughout our opinion here in order to more clearly state our disagreement with the *Dana* majority.

[6] The Board has not found that the language in Sec. 9(c)(1)(A)(i) creates a jurisdictional requirement that employees first seek voluntary recognition for their chosen representative and be refused before filing a petition. *Seaboard Warehouse Terminals*, 123 NLRB 378 (1959); *Plains Cooperative Oil Mill*, 123 NLRB 1709 (1959); *Advance Pattern Co*., 80 NLRB 29 (1948). Furthermore, despite the language in Sec. 9(c)(1)(A)(i), the Board has permitted unions to petition for an election after being voluntarily recognized in order to obtain certification and the attendant statutory advantages flowing therefrom. *General Box Co.*, 82 NLRB 678 (1949).

[7] See, e.g., H. R. Rep. No. 74-969, at 4 (1935), reprinted in 2 Legislative History of the National Labor Relations Act 1935, at 2914 (1949) (an election is appropriate "[w]hen an employee organization has built up its membership to a point where it is entitled to be recognized . . . and the employer refuses to accord such recognition").

less than certification, creates a legally recognized and enforceable relationship between the employer and the recognized representative.

To be sure, the Act provides that the Board can *certify* a representative, with the attendant legal advantages thereof (including a 12-month bar) only after a Board-supervised election**.** Nevertheless, far from being the suspect and underground process the *Dana* majority characterized it to be, voluntary recognition has been woven into the very fabric of the Act since its inception and has, until the decision in *Dana,* been understood to be a legitimate means of giving effect to the uncoerced choice of a majority of employees.[8] The *Dana* majority's express aim to "encourag[e] the initial resort to Board elections to resolve questions concerning representation" is inconsistent with the express terms of Section 9(c)(1)(A)(i) and the animating spirit of a statute that was enacted because of "the refusal by some employers to accept the procedure of collective bargaining" and that seeks to "encourag[e] . . . the friendly adjustment of industrial disputes." 351 NLRB at 438; sec. 1.

B. Experience Has Demonstrated that the Dana Procedures Are Unnecessary

In the 41 years between *Keller Plastics* and *Dana*, although individual Board members occasionally disagreed over the application of the recognition bar in particular cases, no Board Member challenged the existence of the bar itself. During those 41 years, there were no changes in the language of the Act or in its interpretation that would support limiting application of the recognition bar. As the majority in *Dana* essentially conceded when it granted review, the only change was the perception that unions were increasingly seeking voluntary recognition and doing so successfully.[9]

Without some reason to think that Board doctrine was failing to promote statutory policies, the increased use of a recognition method that predates the Act itself and is not only lawful, but woven expressly into the Act's representation procedures, was a dubious basis for reexamining precedent. Yet, *Dana* did that and more: through adjudication, the *Dana* Board created an entirely new category of representation case and new filing and notice-posting requirements.[10]

Four years ago, when *Dana* was decided, the majority stated, "There is good reason to question whether card signings . . . accurately reflect employees' true choice concerning union representation." *Dana*, 351 NLRB at 439. The majority cited no empirical evidence for that sweeping statement. Now, however, we have considerable empirical evidence, and it establishes that the *Dana* majority's assertion was wrong.

As of May 13, 2011, the Board had received 1333 requests for *Dana* notices. In those cases, 102 election petitions were subsequently filed and 62 elections were held. In 17 of those elections, the employees voted against continued representation by the voluntarily recognized union, including 2 instances in which a petitioning union was selected over the recognized union and 1 instance in which the petition was withdrawn after objections were filed. Thus, employees decertified the voluntarily recognized union under the *Dana* procedures in only 1.2 percent of the total cases in which *Dana* notices were requested.[11] Those statistics demonstrate that, contrary to the *Dana* majority's assumption, the proof of majority support that underlay the voluntary recognition during the past 4 years was a highly reliable measure of employee sentiment.

The Petitioner and supporting amici argue that the percentage of cases in which the recognized union was rejected is not insignificant. But whenever voters are given a chance to revisit their choice—whether that choice was expressed in an election or by signing cards—some individuals will likely change their minds. There is no reason to think that the same small degree of "buyer's remorse" would not occur after a secret-ballot election–and, in fact, it has. *Brooks v. NLRB*, 348 U.S. 96, 97 (1954), illustrates that very point. In *Brooks*, the union won a Board election by a vote of 8 to 5, but a week lat-

[8] See, e.g., *NLRB v. Lyon & Ryan Ford*, 647 F.2d 745, 750 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981) (deeming voluntary recognition a "favored element of national labor policy"); *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978) (same).

[9] See *Dana Corp.*, 341 NLRB 1283, 1283 (2004). Our dissenting colleague contends that "change taking place in union organizing practices" provided empirical support for overruling precedent in *Dana*, but neither the *Dana* majority nor our colleague cites any evidence that the change threatened employee free choice or any other statutory policy.

[10] See *Dana*, 351 NLRB at 442–443; Office of General Counsel, Division of Operations Management, Memorandum OM 08-07 (Oct. 22, 2007) (discussing Regional Office procedures for implementing *Dana*), available at http://www.nlrb.gov/publications/operations-management-memos.

[11] For supporting data, see "Voluntary Recognition Case Processing," available at www.nlrb.gov/what-we-do/conduct-elections.

Our dissenting colleague suggests that we should consider only those cases in which, after voluntary recognition and the posting of a *Dana* notice, a petition for an election was filed. He suggests that this is appropriate because we "know nothing" about the cases where no petition was filed. But we do know something about those cases: no petition was filed in any of them despite the posting of an official government notice informing employees of their right to file a petition if they do not wish to be represented. The 1-percent change in employee sentiment reflected in the data simply cannot be understood, as the dissent posits, as a 25-percent change.

er, the employees presented the employer with a petition signed by nine employees stating that they no longer wanted union representation. The Court nevertheless held that the employer could not question the certified union's majority status for a period of 1 year. See also *Gissel*, supra, 395 U.S. at 604 (recognizing that a voter "may think better of his choice" shortly after an election). Thus, the fact that in a small percentage of cases, a vote held a month or two after a majority of employees have expressed their desire to be represented produces a contrary result says little about the validity of those employees' initial choice to vote yes or sign a card.[12]

The *Dana* decision itself has produced the data that was absent from the majority's opinion, and that data demonstrates that the empirical assumption underlying the decision was erroneous. As the Supreme Court has explained, the "constant process of trial and error . . . differentiates perhaps more than anything else the administrative from the judicial process." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265 (1975), quoting *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 349 (1953). The "process of trial and error" has been followed here, and it supports overruling *Dana*.

C. Dana Compromises the Neutrality of the Board and Undermines the Purposes of the Act

Although *Dana* rhetorically aimed for a "finer balance" of interests, the procedures it created to achieve that balance actually placed the Board's thumb decidedly on one side of what should be a neutral scale. *Dana* subjected the majority's choice to an extraordinary, mandatory notice informing employees of their right to seek a decertification election—a notice that casts doubt on the majority's choice by suggesting that voluntary recognition is inherently suspect. The "Act is wholly neutral when it comes to [employees'] basic choice" of whether to be represented, *NLRB v. Savair Mfg. Co*., 414 U.S. 270, 278 (1973), but the notice scheme established in *Dana* is not.

Setting to one side the remedial notices that the Board requires be posted after an employer or labor organization violates the Act and the balanced notice informing employees about the details of an upcoming election,[13] after *Dana*, the Board required that employees be notified of only two of their many rights under Section 7: (1) their right not to join and to limit their financial support of their lawfully chosen representative;[14] and (2) their newly created right to file a petition seeking to decertify their recently chosen and lawfully, voluntarily recognized representative. Moreover, the Board required that an official Board notice be posted *only* for the latter purpose.[15] This notice scheme is starkly at odds with both the express terms of Section 7, which vest in employees the right "to form, join, or assist labor organizations" and the right "to refrain from any or all such activities," as well as with the Board's statutory role as an impartial "referee" administrating Federal labor law. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

In no other context does the Board require that employees be given notice of their right to change their minds about a recent exercise of statutory rights. For example, when an employer withdraws recognition from employees' representative based on objective, but non-electoral evidence that the majority of employees no longer desire to be represented,[16] the Board does not require that the employer post notice of employees' right to file a petition for an election to compel the employer to once again recognize the representative. This is the case even when the choice may have future consequences employees may not be fully aware of. Using the same example, when an employer withdraws recognition, the Board does not require that the employer post a notice informing employees that if they do not file a petition for an election to compel the employer to once again recognize the representative, the employer will be free to unilaterally change their terms and conditions of employment.[17]

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[12] As more fully explained below, the *Dana* procedures, if anything, create a scenario that encourages a change of mind. An employee who does not see immediate results from the union within the first 45 days may reconsider his decision. Moreover, the *Dana* notice itself implicitly suggests to employees that they may want to revisit their choice.

[13] See *J. Picini Flooring*, 356 NLRB 11, 12 (2010); 29 CFR § 103.20(a) and NLRB Forms 707 and 4910.

[14] Before a union may seek to obligate newly hired nonmember employees to pay dues and fees under a union-security clause, it must inform them of their right under *NLRB v. General Motors*, 373 U.S. 734 (1963), and *Communications Workers v. Beck*, 487 U.S. 735 (1988), to be or remain nonmembers and that nonmembers have the right to object to paying for union activities unrelated to the union's duties as the bargaining representative and to obtain a reduction in dues and fees for such activities. *California Saw & Knife Works*, 320 NLRB 224, 233 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998). The same notice must also be given to union members if they did not receive it when they entered the bargaining unit. *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349, 350 (1995), rev'd. on other grounds sub nom. *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), vacated sub nom. *Paperworkers v. Buzenius*, 525 U.S. 979 (1998).

[15] The dissent cites *Excelsior Underwear*, 156 NLRB 1236, 1240 (1966), but that decision did not require that any form of notice of rights be given to employees, much less any official Board notice.

[16] See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001) (permitting such withdrawal of recognition).

[17] Our dissenting colleague suggests that when a majority of employees express their choice to reject an incumbent union and their employer voluntarily recognizes that choice without an election, an (un)recognition bar should exist, parallel to the recognition bar, for a

The *Dana* notice, understood in context, clearly suggests to employees that the Board considers their choice to be represented suspect and signals to employees that their choice should be reconsidered through the filing of a petition. Such administrative action is not appropriate under the Act.

D. The Statutory Policies Underlying the Board's System of Bars Extend to Voluntary Recognition

As we noted above, the Supreme Court recognized more than half a century ago that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros.*, supra, 321 U.S. at 705. Underlying that principle is the recognition that "[a] union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out." *Brooks*, supra, 348 U.S. at 100. Taken together, the *Franks* and *Brooks* decisions provided the underlying foundations for the "general Board policy of protecting validly established bargaining relationships during their embryonic stages." *NLRB v. Cayuga Crushed Stone, Inc*., 474 F.2d 1380, 1384 fn. 5 (2d Cir. 1973).

In accordance with the logic of *Franks* and *Brooks*, the Board, with court approval, gradually developed a coherent body of jurisprudence—of which the recognition bar was but one element prior to *Dana*—barring election petitions or other challenges to a union's representative status for a reasonable period after a legally recognized and enforceable bargaining relationship was established. Such bars applied in the following circumstances.

First, after a duty to bargain is imposed on an employer as a result of Board certification after an election, a petition for a new election is barred for a period of 1 year, as is withdrawal of recognition by the employer. The former result is compelled by the Act and the latter is the result of Board precedent. See Section 9(c)(3); *Brooks*, supra, 348 U.S. 96.

Second, the Board precludes any challenge to the union's representative status for a reasonable period of time after the Board has issued a bargaining order against an employer as a remedy for unfair labor practices or when the employer has unlawfully withdrawn recognition or wholly refused to bargain. See *Franks Bros.*, supra, 321 U.S. 702; *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002); *Caterair International*, 322 NLRB 64 (1996).[18]

Third, prior to *Dana*, the Board precluded any challenge to a union's representative status for a reasonable period of time after an employer voluntarily recognized the union based on a showing of majority support outside a Board-supervised election. *Keller Plastics*, supra, 157 NLRB 583; *Sound Contractors*, 162 NLRB 364 (1966).

Finally, prior to *MV Transportation*, which we also overrule today, when a new employer assumed an operation and the conditions for successorship were satisfied[19] so that the new employer also assumed a legally enforceable duty to recognize and bargain with a union that represented its predecessor's employees, the Board barred any challenge to the union's representative status for a similar reasonable period of time. *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999).

Although the decisions cited above arose in different contexts—certification following a Board-supervised election, remedial bargaining orders, voluntary recognition, and successorship—they share the same animating principle: that a newly created bargaining relationship should be given a reasonable chance to succeed before being subject to challenge. "The common thread running through these decisions is that when a bargaining relationship has been initially established, or has been restored after being broken, it must be given a reasonable time to work and a fair chance to succeed." *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 178 (1996), affd. in part and remanded on other grounds, 117 F.3d 1454 (D.C. Cir. 1997).[20] The recognition bar was thus not an anomaly.

reasonable period of time. This is an interesting suggestion, but the dissent's further suggestion that we have "no concern" about protecting the majority's choice in that hypothetical situation is unfounded. So far as we know, the Board has not ruled on that question since the standard for withdrawal of recognition was clarified to be parallel to that for the grant of voluntary recognition in *Levitz*, supra, 333 NLRB at 717, 723–726, and it is not before us in this case.

[18] Thus, *Dana* created an anomaly because, if an employer agrees to recognize a union upon presentation of evidence that a majority of its employees desired such representation, but then refuses to honor such evidence or withdraws recognition shortly after granting it, the Board will order the employer to bargain and the order will still, post-*Dana*, bar both withdrawal of recognition and a petition for decertification for a reasonable period of time.

[19] Generally, an employer succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a 'substantial and representative complement' in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations show a '"substantial continuity" between the enterprises.'" *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 43, 52 (1987), citing, inter alia, *NLRB v. Burns Security Services*, 406 U.S. 272, 280 fn. 4 (1972).

[20] Indeed, the dissent concedes that respect for employee free choice justifies uniform application of an election bar, arguing not that the bar jurisprudence is overinclusive, but rather that it is underinclusive, explaining, "A neutral and holistic approach would seem to warrant Board imposition of an election bar for a reasonable period of at least six months after *any* free and uncoerced majority choice on the question of representation."

In *Keller Plastics*, supra, the Board applied the principles found in *Franks* and *Brooks* to hold that a legally enforceable bargaining relationship born out of voluntary recognition was also entitled to be insulated for a reasonable period of time from challenge to the union's majority status. The Board held that the parties' "negotiations can succeed . . . and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time." 157 NLRB at 587. In *Keller*, the Board held that an employer could not withdraw recognition, even if it had a good-faith doubt about the union's continued majority support, for a reasonable period of time.[21] In *Sound Contractors*, supra, 162 NLRB 364, the Board extended *Keller Plastics* to representation cases, holding that a petition seeking to challenge the recognized union's status is barred for a reasonable period of time following the recognition.[22] Id. at 365. Between *Keller Plastics* and *Dana*, the Board, repeatedly and without dissent, applied the recognition bar in cases like this one.[23] The appellate courts also uniformly and repeatedly endorsed the recognition bar, relying on the Supreme Court's decisions in *Franks* and *Brooks* in doing so.[24]

Dana did not wholly eliminate the recognition bar. Rather, it provides for a suspension of the bar pending confirmation of the employees' original, uncoerced choice through either a Board-supervised decertification election or a failure of at least 30 percent of employees to support a petition for such an election following what amounts to an official Board invitation to file such a petition. *Dana*'s holding thus rests on the notion that the policy underlying the system of bars does not extend to voluntary recognition based on an uncoerced showing of majority support for representation, unless that majority support is confirmed by either an election or a form of knowing waiver of the right to request an election. That notion was erroneous.

The *Dana* majority focused narrowly on a comparison of the moment an employee signs an authorization card[25] with the moment an employee marks a ballot and drops it in the ballot box. But the important policy choice at issue here requires a broader focus, considering the place of employees' choice in the statutory scheme and the existing means of protecting the integrity of the procedures used to register employees' choice. First, and most importantly, we must consider the purpose of the employees' choice and its place in the statutory scheme. Employees are choosing whether to be represented "for the purpose of collective bargaining" with their employer. In deciding whether to insulate the uncoerced choice of employees to be represented for that statutorily protected purpose for a reasonable period of time, it is surely relevant that their employer, the party that will sit on the other side of the table in bargaining with their chosen

[21] *Keller Plastics* was an unfair labor practice case. The Board held that the employer did not violate Sec. 8(a)(2) by executing an agreement with a union that had lost majority support, because a reasonable period of time had not elapsed since the time of recognition, when the union did have majority support. Id. at 587.

[22] The recognition bar is temporary and limited. If the parties have not reached a collective-bargaining agreement after a reasonable period of time, an election petition is no longer barred. Moreover, voluntary recognition of one union will not bar a petition by a competing union if the competing union was actively organizing the employees and had a 30-percent showing of interest at the time of recognition. *Smith's Food & Drug Centers*, supra, 320 NLRB 844 (1996).

If the parties reach a collective-bargaining agreement during the reasonable period of time allowed by the recognition bar, that agreement, if it meets certain criteria, will bar an election for the duration of the agreement, but in no event for more than 3 years. See, e.g., *General Cable Corp*., 139 NLRB 1123, 1125 (1962). *Dana* modified the contract bar in addition to the recognition bar, holding that if the 45-day window and notice requirements have not been met, a contract reached after voluntary recognition will not bar an election. 351 NLRB at 441.

[23] See, e.g., *Universal Gear Service Corp*., 157 NLRB 1169 (1966), enfd. 394 F.2d 396 (6th Cir. 1968); *Blue Valley Machine & Mfg. Co.*, 180 NLRB 298 (1969), enfd. in relevant. part 436 F.2d 649 (8th Cir. 1971); *Montgomery Ward & Co.*, 162 NLRB 294 (1966), enfd. 399 F.2d 409 (7th Cir. 1968); *Broad Street Hospital & Medical Center*, 182 NLRB 302 (1970), enfd. 452 F.2d 302 (3d Cir. 1971); *Timbalier Towing Co.*, 208 NLRB 613 (1974); *Whitemarsh Nursing Center*, 209 NLRB 873 (1974*); Brown & Connolly, Inc.*, 237 NLRB 271 (1978), enfd. 593 F.2d 1373 (1st Cir. 1979) *Rockwell International Corp*., 220 NLRB 1262, 1263 (1975); *Ford Center for the Performing Arts*, 328 NLRB 1 (1999); *MGM Grand Hotel, Inc*., 329 NLRB 464 (1999); *Seattle Mariners*, 335 NLRB 563, 565–567 (2001). During that entire period, only one Board Member suggested that the recognition bar be modified in any manner. See *Seattle Mariners*, 335 NLRB 563, 565–567 (2001) (Chairman Hurtgen dissenting on the grounds that he would have extended the *Smith's Food & Drug* exception, proving for no bar where rival union has 30-percent showing of interest at time of recognition, to situations where, at the time of recognition, the employees demonstrated a 30-percent showing of "disinterest" in the union).

[24] See *Cayuga*, supra, 474 F.2d at 1383 ("The rationale of *Brooks*, as well as the holdings in other circuits, in fact compel the conclusion that the Unions' status must be recognized for a reasonable period" after voluntary recognition) (citations omitted); *NLRB v. San Clemente Publishing Corp.,* 408 F.2d 367, 368 (9th Cir. 1969) ("The Company contends that the *Brooks* case should be limited to cases where the union has been chosen by a Board-conducted election. We disagree."); *NLRB v. Montgomery Ward,* 399 F.2d 409, 411–413 (7th Cir. 1968); ("[a]lthough neither *Franks* nor *Brooks* is binding precedent here, both are useful in resolving the issue before us"); *NLRB v. Universal Gear Service Corp.,* 394 F.2d 396, 398 (6th Cir. 1968) (two of the factors set forth in *Brooks* "have relevance to the problem presented in the instant case and support [the Board's] determination. . . ."). Our dissenting colleague notes that none of the court of appeals cases we cite involved employee or rival union petitions. But this is merely a function of the fact that the Board's dismissal of an election petition is not appealable.

[25] Which, as we pointed out above, is not the only means by which employees can demonstrate majority support for a union in order to obtain voluntary recognition.

representative, has voluntarily agreed to recognize the employees' representative and engage in such bargaining. In other words, both the statutory protection of employees' choice concerning representation and the provision of a government-supervised, but non-exclusive means of making that choice—the Board-supervised election—are merely elements in a Federally sanctioned system of private ordering. "The object of th[e] Act," the Supreme Court observed in *H.K. Porter*, supra, 397 U.S. at 103, "was not to allow governmental regulation of the terms and conditions of employment, but rather to insure that employers and their employees could work together to establish mutually satisfactory conditions." This congressional "solicitude for the collective-bargaining process," the Board recognized in *International Paper Co*., 319 NLRB 1253, 1270 (1995), enf. denied on other grounds, 115 F.3d 1045 (D.C. Cir. 1997), "reflects a recognition that the process and the promotion of an autonomous relationship between the parties is the fundamental construct of the National Labor Relations Act." We believe that the fact that the parties to the congressionally created system of private ordering have entered into it voluntarily is highly relevant to the policy question of whether we should bar any challenge to employees' representative in that system for a reasonable period of time. This is because imposition of such a bar following voluntary recognition is more likely to advance the statutory purpose of preventing "industrial strife or unrest" and "encouraging the practice and procedure of collective bargaining." Sec. 1. We find this to be true both as a matter of logic and experience.[26] Indeed, we find statutory support for this position both in the terms of Section 9(c)(1)(A)(i) discussed above and in section 1 where Congress made express the statutory aim of "encouraging practices fundamental to the friendly adjustment of industrial disputes." The simple fact is that bargaining after voluntary recognition is more likely to achieve the underlying "purpose" of the statutory "promotion of collective bargaining as a method of defusing and channeling conflict between labor and management." *First National Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981).[27] "The establishment of a successful collective-bargaining relationship is best accomplished by the parties themselves—the employer, the union, and the unit employees." *Smith Food & Drug*, supra, 320 NLRB at 847 (Chairman Gould, concurring).

Second, the policy choice before us requires consideration not simply of the means through which individual employees register their choice (signing an authorization card v. marking a ballot), but also of the rules used to aggregate those choices. In this regard, a more demanding standard is imposed on voluntary recognition than on certification following a Board-supervised election. In the latter, the ordinary rule universally used in elections for political office governs, i.e., a majority of the votes cast determines the outcome. *RCA Mfg. Co.*, 2 NLRB 159, 177–178 (1936). In order for voluntary recognition to be lawful, however, it must be based on a showing that a majority of *all* employees in the unit wish to be represented. See *Bernhard-Altmann*, supra, 366 U.S. at 734 fn. 4, 737–738. In fiscal year 2010, turnout in Board-supervised elections was 80.7 percent.[28] In other words, on average, the choice of only 40 percent plus one of employees in a unit could bind all of their coworkers for a period of at least 12 months after an election while it took at least 50 percent to obtain representation pursuant to voluntary recognition.

Third, the policy choice before us requires consideration of both the contents of the rules preventing coercion of employees' choice and their enforcement mechanisms. In this regard, an employee who believes that a voluntarily recognized union lacks majority support, or that such support was not voluntary, is not without recourse. As pointed out in the dissent in *Dana*, recognition of a minority union violates Section 8(a)(2) and 8(b)(1)(A), and the remedy is to order the employer not to recognize or bargain with the union, and the union not to accept recognition, until the union is certified by the Board fol-

[26] In a recent study, Professor John-Paul Ferguson of the MIT Sloan School of Management found that between 1999 and 2004, representatives chosen by employees in a Board-supervised election subsequently reached a collective-bargaining agreement with the employees' employer within 2 years in only 56 percent of the cases. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 Indus. & Lab. Rel. Rev. 3, 5 (2008). In contrast, a recent study by Professors Adrienne Eaton and Jill Kriesky of Rutgers and West Virginia Universities of 118 agreements in which employers agreed to recognize unions voluntarily, based on nonelectoral evidence of majority support, found that such voluntary recognition was followed by a collective-bargaining agreement in close to 100 percent of cases. *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 52 (2001). Part of the reason for this difference in outcomes is obviously attributable to the good faith with which employers take up their voluntarily assumed versus legally imposed obligation to bargain. In fact, the NLRB General Counsel recently observed that "our records indicate that in the initial period after election and certification, charges alleging that employers have refused to bargain are meritorious in more than a quarter of all newly-certified units (28%)." GC Memorandum 06-05 (April 19, 2006).

[27] See also *NLRB v. San Clemente Publishing Corp*., 408 F.2d 367, 368 (9th Cir. 1969) (recognizing that "less formal procedures" than Board-supervised election may be "more conducive to amicable industrial relations").

[28] Calculated by dividing the total number of valid votes cast by the total number of employees eligible to vote. See www.nlrb.gov/election-reports for supporting data.

lowing a Board-supervised election. See *Bernhard-Altmann*, supra, 366 U.S. 731; *Dairyland USA Corp.*, 347 NLRB 310, 313–314 (2006), enfd. 273 Fed. Appx. 40 (2d Cir. 2008). If an employer that has violated Section 8(a)(2) by recognizing a union absent uncoerced majority support subsequently enters into a contract with the union and deducts dues or fees pursuant to a union-security clause, it is jointly and severally liable along with the union to repay such deductions. See, e.g., *Dairyland*, supra, 347 NLRB at 314.[29] Coercion by an employer or a union during the organizing campaign violates Section 8(a)(1) and 8(b)(1)(A). Significantly, anyone—including any employee—may file an unfair labor practice charge alleging such conduct. The Board's General Counsel then investigates and, if probable cause is found, prosecutes. Moreover, employees have 6 months following any unlawful coercion or improper recognition to file a charge, while objections to conduct affecting the results of an election must be filed within 7 days of the tally. See Sec. 102.69(a) of the Board's Rules. The majority in *Dana* did not explain why these existing safeguards, which, in critical respects, are more protective of freedom of choice than those used in Board-supervised elections, are inadequate to insure that voluntary recognition truly rests on employees' free choice. For these reasons, we conclude that the policies underlying the Board's system of bars extend to a new collective-bargaining relationship lawfully established by voluntary recognition without the imposition of the extraordinary procedures created by *Dana*.

Dana characterized its modifications of the recognition bar as the result of a balance of free choice and stability in bargaining relationships. See 351 NLRB at 434. However, the modifications have proved unnecessary to protect free choice and thus unnecessarily undermine the Act's purpose of encouraging collective bargaining with employees' freely chosen representative. As the dissent in *Dana* observed, "Although the parties will technically have an obligation to bargain upon recognition, the knowledge that an election petition may be filed gives the employer little incentive to devote time and attention to bargaining during the first 45 days following recognition." 351 NLRB at 447.[30] Our experience under *Dana* makes clear that this period of uncertainty ordinarily extends beyond the 45 days expected by the dissent. Our records reveal that the average time between an employer informing the Regional Office of voluntary recognition and the employer posting the *Dana* notice is 18.7 days.[31] Adding the 45 days the window for filing a petition must remain open, this means that meaningful bargaining is likely to be delayed at least 63 days, not including the time between recognition and when the employer informs the Regional Office that recognition has been granted. If an employer refused to agree on dates for bargaining to begin for that length of time, we likely would find a failure to bargain in good faith.[32] Yet *Dana* virtually guarantees such a delay in serious bargaining and the resulting undermining of the "nascent relationship between the employer and the lawfully recognized union." *Smith's Food*, supra, 320 NLRB at 845–846. The lengthy period of uncertainty created by *Dana* thus unnecessarily interferes with the bargaining process, rendering successful collective bargaining less likely.[33]

[29] In contrast, the sole remedy available for coercion that affected the results of an election is a rerun election.

[30] Several of the amicus unions' descriptions of their experiences under *Dana* validate this concern, as does the game-theoretical model of collective bargaining proposed by amicus Kenneth G. Dau-Schmidt. Professor Dau-Schmidt proposes, based on theoretical and empirical studies of games, that when parties know their bargaining relationship will continue for a reasonable period of time, each party has an incentive to bargain cooperatively, rather than to seek benefits only for itself at the expense of the other party. In such a stable relationship, each party would reasonably believe that its cooperation in the short term might be rewarded by future cooperation from the other party. By contrast, if there is no reasonable certainty that the bargaining relationship will continue for a reasonable period of time, each party has an incentive to pursue its short-term self-interest and the parties may thus act in a manner that makes both less well off than they would be had they cooperated.

[31] Based on voluntary recognition notifications and notice postings from October 2007 through mid-April 2011. See "Voluntary Recognition Case Processing," available at www.nlrb.gov/what-we-do/conduct-elections, for supporting data.

[32] See, e.g., *McCarthy Construction Co.*, 355 NLRB 50, 50 fn. 2 (2010) (employer unlawfully failed to respond to union's request for bargaining dates for 2-1/2 months), incorporated by reference in *McCarthy Construction Co*., 355 NLRB 365 (2010); *Marion Hospital*, 335 NLRB 1016, 1018 (2001) (employer's failure to meet and bargain for 6 weeks, and its subsequent withdrawal of recognition, were unlawful), enfd. 321 F.3d 1178 (D.C. Cir. 2003). Moreover, we likely would find that any dissipation of majority support that occurred during that period was attributable to the employer's action. See *Lee Lumber & Building Material Corp*., 322 NLRB 175, 178 (1996), affd. in relevant part and remanded 117 F.3d 1454 (D.C. Cir. 1997) (when an employer unlawfully fails or refuses to recognize and bargain with an incumbent union, any employee disaffection from the union that arises during that time is presumed to result from the unlawful conduct). In *Lee Lumber*, the Board observed, "Lengthy delays in bargaining deprive the union of the ability to demonstrate to employees the tangible benefits to be derived from union representation. Such delays consequently tend to undermine employees' confidence in the union by suggesting that any such benefits will be a long time coming, if indeed they ever arrive." Id. at 177.

[33] The dissent's suggestion that this is incorrect based on a sample consisting of the 16 cases currently pending before the Board cannot be credited because of the small sample size. Moreover, even in this small sample, bargaining did not result in an agreement in nearly 40 percent of the cases, when, according to the very study cited in the dissent, voluntary recognition almost uniformly resulted in a first contract prior to *Dana*. See Eaton & Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 52 (2001).

The potential for uncertainty and delay in serious bargaining created by *Dana* actually disserves the very employee free choice the majority sought to protect, because employees who support the union do so because they want meaningful representation as soon as practicable. The recognition bar "effectuates rather than impedes employee free choice." *Smith's Food & Drug*, supra, 320 NLRB at 848 (Chairman Gould, concurring). This is because, "[w]hen employees execute authorization cards during a union organizing drive, their hope is to obtain union representation as soon as possible. The Board provides no benefit to these employees by delaying the implementation of their designation in order to reconfirm through an election the desires they have already expressed." Id.

E. A Return To Formerly Settled Law Is Warranted

Dana represented a major change in Board law, one that was based on the majority's suspicion of voluntary recognition—suspicion that, based on the empirical evidence acquired since 2007, we conclude was unwarranted. We therefore overrule *Dana* and return to the previously settled rule that an employer's voluntary recognition of a union, based on a showing of the union's majority status, bars an election petition for a reasonable period of time.

As in *UGL-UNICCO*, supra, also decided today, which defined the reasonable period of bargaining during which the "successor bar" will apply, we alter the rule of *Keller Plastics* in one respect. Drawing on the Board's decision in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), we define a reasonable period of bargaining, during which the recognition bar will apply, to be no less than 6 months after the parties' first bargaining session and no more than 1 year. In determining whether a reasonable period has elapsed in a given case, we will apply the multifactor test of *Lee Lumber* and impose the burden of proof on the General Counsel to show that further bargaining should be required.[34]

While we overrule *Dana*, we have made no changes to established law regarding secret-ballot elections. An election remains the only way for a union to obtain Board certification and its attendant benefits.[35] Neither the pre-*Dana* law nor the law after today equates the processes of voluntary recognition and certification following a Board-supervised election. We merely restore settled law on the recognition bar, from which *Dana* was a brief and unwarranted detour. Our decision reflects important values: fidelity to congressional purpose, the neutrality of the Board, and the consistency and coherence of Board doctrine. Each of these obligations strongly supports overruling *Dana* and we do so today. Our dissenting colleague repeatedly asserts that our decision reflects "ideological bias." We will not respond in kind because the statutory, doctrinal and policy grounds for our decision are fully set forth above. The rule that we return to today was adopted by the Board in 1966 and was repeatedly reaffirmed by Board Members appointed by Republican and Democratic Presidents during the subsequent 41 years until it was reversed in *Dana.* Notwithstanding the dissent's heated rhetoric, we take some comfort in aligning ourselves with this long line of distinguished public servants.

We will apply this new rule retroactively in all pending cases, except those in which an election was held and the ballots have been opened and counted, consistent with the Board's established approach in representation proceedings.[36]

MEMBER HAYES, dissenting.

Today, my colleagues overrule *Dana Corp.*[1] in this case and *MV Transportation*[2] in *UGL-UNICCO*.[3] Thus, they restore an immediate bar to a secret ballot election in all voluntary recognition and successorship situations. Such a bar will preclude employees or rival unions from filing Board election petitions for a minimum of 6 months and for a maximum of 4 years. Theirs is a purely ideological policy choice, lacking any real empirical support and uninformed by agency expertise. They have failed to provide any reasoned explanation why the policies they advocate are preferable to the reasonable policies established in the precedent they now overrule. As

[34] Under *Lee Lumber*, supra, the determination of whether a reasonable period of bargaining has elapsed after 6 months depends on a "multifactor analysis," which considers "(1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse." 334 NLRB at 402. The burden is on the General Counsel to prove that a reasonable period of bargaining had not elapsed after 6 months. Id. at 405.

[35] Such benefits include a 12-month bar to election petitions under Sec. 9(c)(3) as well as to withdrawal of recognition; protection against recognitional picketing by rival unions under Sec. 8(b)(4)(C); the right to engage in certain secondary and recognitional activity under Sec. 8(b)(4)(B) and 7(A); and, in certain circumstances, a defense to allegations of unlawful jurisdictional picketing under Sec. 8(b)(4)(D).

[36] See, e.g., *UGL-UNICCO,* supra, slip op. at 8, citing *Crown Bolt, Inc.*, 343 NLRB 776, 779 (2004). The *Dana* decision itself was applied only prospectively, because the Board there concluded that retroactivity would have destabilized many existing collective-bargaining relationships that were predicated on prior law. 351 NLRB at 443–444. No comparable concerns apply here.

[1] *Dana Corp.*, 351 NLRB 434 (2007).

[2] *MV Transportation*, 337 NLRB 770 (2002).

[3] *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011).

such, their holdings are not entitled to deference and should be put to strict scrutiny upon judicial review.[4]

In the present case, my colleagues fail to show that the *Dana* modification of the Board's discretionary election bar policy was anything other than what the majority in that case said it was: a moderate change to effect a "'finer balance' of interests that better protects employee free choice."[5] Bereft of substantial evidence, empirical or otherwise, to support the *Dana* dissenters' prediction of apocalyptic effects, the majority here must, for the most part, resuscitate arguments from the *Dana* dissent. Thus, they contend that *Dana* was wrongly decided in the first place because it represented a departure from longstanding precedent, established what they view as a biased notice procedure, and disrupted what they contend must be the statutory paradigm for labor relations stability, i.e., a unionized workplace. In my view, most of these arguments were properly rejected by the *Dana* majority and the few additional contentions they make here simply do not hold water. They fundamentally fail to persuade that the *Dana* rule is not the more reasonable, balanced approach to assuring both labor relations stability and employee free choice.

I have previously stated my approval of *Dana* and my objection to review of this decision.[6] Rather than plow the same ground, I believe it is sufficient to summarily reaffirm my endorsement of the justifications given by the *Dana* majority for review and modification of the recognition and contract bar rules.[7] Instead, I specifically address only a few aspects of my colleagues' opinion: their misleading depiction of the status of voluntary recognition in the statutory scheme and of the reliability of indicia of majority support in the voluntary recognition process; their contention that statistics compiled by the Board since *Dana* undercut the premises for a change in bar rules; their contention that the notice procedure conveys a Board bias in favor of decertification; and, finally, the degree to which their own considerable ideological bias manifests itself in this and numerous other actions taken or under consideration by them.

I.

To begin, the majority mischaracterizes *Dana* as an assault on voluntary recognition. On the contrary, the *Dana* decision was not intended to interfere with the establishment of collective-bargaining relationships through voluntary recognition,[8] and, as discussed below, it has not been shown to have had such an effect. *Dana* focused on if and when an election bar and corollary contract bar should apply in the wake of lawful voluntary recognition.

The majority also mischaracterizes statutory and judicial support for imposition of an election bar following voluntary recognition. The Act itself does not impose such a bar in the wake of voluntary recognition. It imposes an election bar *only* after there has been a valid Board election. In the same manner, the Act provides that certification of a union's representative status must be based on Board election results. In other words, in the Taft-Hartley Act, Congress, undisputedly cognizant of the practice of voluntary recognition that the majority portrays as "fully woven into the very fabric of the Act" since its inception, chose not to give voluntary recognition either election bar quality or the special protections of 9(a) certification status. The choice was not surprising, inasmuch as Senator Wagner, leading proponent of the original Act bearing his name, contemplated employee votes in a Board election as the seminal reflection of workplace democracy.[9] Based on this statutory scheme,

[4] See *S & F Market Street Healthcare, LLC v. NLRB*, 570 F.3d 354, 358 (D.C. Cir. 2009), citing *Mail Contractors of America. v. NLRB,* 514 F.3d 27, 31 (D.C. Cir. 2008) (court will set aside Board order that departs from established precedent without reasoned justification).

[5] *Dana*, 351 NLRB at 434. I note that the notice and open period modifications of the recognition bar were a variant of procedures proposed by the General Counsel as amicus in that proceeding. Id. at 436. By contrast, the Acting General Counsel did not join in asking the Board to reconsider, modify, or overrule *Dana* in the present case.

[6] *Rite Aid Store #6473*, 355 NLRB 777, 779–782 (2010) (joint dissenting opinion of Members Schaumber and Hayes).

[7] I would note in passing that, just as my colleagues mischaracterize *Dana*'s impact on the voluntary recognition process, the role of that process in the statutory scheme, and *Dana*'s treatment of authorization cards, so too do they mischaracterize the absence of empirical evidence warranting *Dana's* review of the recognition bar. Contrary to their claim, when review was granted in *Dana*, there was an abundance of empirical study supporting the view that a fundamental change had taken place in union organizing practices, including change in the nature of voluntary recognition campaign practices, resulting in a substantial reduction in the number of statutorily preferred Board elections. See, e.g., Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 832 (2005); Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. Rev. 125, 136 (2003); Eaton and Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 43 (2001). The *Dana* majority thought review warranted because of the impact on Board elections and employee free choice. The *Dana* dissenters and my colleagues (Chairman Liebman stands in both) thought review inappropriate as long as the documented change promoted greater success in unionization.

[8] The Board expressly stated that it was not questioning the legality of voluntary recognition agreements or of card-check and/or neutrality agreements preceding recognition. *Dana*, 351 NLRB at 436.

[9] "[A]s to . . . representation of the workers you cannot have any more genuine democracy than this. We say under Government supervision let the workers themselves . . . go into a booth and secretly vote, as they do for political representatives in a secret ballot, to select their choice." Address Before the National Democratic Forum (May 8, 1937), Senator Robert F. Wagner quoted in Leon H. Keyserling, *Why the Wagner Act?*, in *The Wagner Act: After Ten Years* 5, 13 (Louis G. Silverberg ed., 1945).

voluntary recognition is clearly not so privileged as to assume that an immediate postrecognition bar to a Board election is required.

Similarly, none of the Supreme Court precedents that the majority expansively read represents an implicit, much less explicit affirmation of the discretionary imposition of an immediate bar to employee or rival union election petitions following voluntary recognition. *Brooks*[10] affirms the existence of such a bar after a valid Board election. *Franks*[11] affirms the existence of a bar to an employer's unilateral withdrawal of recognition after its unfair labor practices have eroded a voluntarily recognized union's majority support. *Gissel*[12] affirms the propriety of imposing a card-based remedial bargaining order in circumstances where an employer's unfair labor practices preclude the exercise of employee free choice through the statutorily preferred means of a Board election.

Notably, *Dana* addressed only the filing of employee and rival union petitions during the 45-day open period. None of the decisions by the courts of appeals cited by the majority represents an express endorsement of a discretionary recognition bar to such petitions. Consistent with *Keller Plastics*,[13] an unfair labor practice case, they enforce Board orders against *employers* for unilaterally withdrawing recognition from a union. These decisions are based on the equitable premise that the employers waived the right to insist on an election by voluntarily recognizing the union and must therefore bargain for a reasonable period of time without challenge to the union's majority status. None of these cases states that the Board must have a corresponding immediate bar against *employee* or *rival union* election petitions, particularly if there are substantial justifications for delaying the imposition of a bar for a short while to better protect employee free choice.[14]

The majority also grossly mischaracterizes *Dana*'s treatment of the reliability of card showings in the voluntary recognition process. *Dana* did not deem authorization cards to be unreliable. Had it done so, it would have directly contradicted *Gissel*'s holding that cards are not inherently unreliable. The *Dana* majority did say there was good reason to question whether a card showing was as accurate a measure of employee preference as a Board election. This observation has been continuously reaffirmed for years in judicial and Board precedent. The *Gissel* Court accepted without question the Board's view that cards were "admittedly inferior to the election process," but found them "reliable enough to support a bargaining order where a fair election probably could not be held or an election that was held was set aside."[15] In *Cayuga Crushed Stone*, which the majority here cites as approving the imposition of a voluntary recognition bar, the Second Circuit observed that "*[t]here is no doubt* but that an election supervised by the Board which is conducted secretly and presumably after the employees have had the opportunity for thoughtful consideration, provides a more reliable basis for determining employee sentiment than an informal card designation procedure where group pressures may induce an otherwise recalcitrant employee, to go along with his fellow workers."[16] In *Levitz*, a Board majority including current Chairman Liebman categorically stated that "Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions."[17]

II.

In granting review of *Dana*, the majority plainly sought empirical evidence in order to legitimize a purely ideological reversal of policy. Unfortunately, the majority's invitation for parties and amici to provide external empirical evidence of experience under *Dana* yielded a goose egg. Only five respondents sought to overturn *Dana*,[18] and only two of them supported their arguments for doing so with the barest of anecdotal evidence.[19]

[10] *Brooks v. NLRB*, 348 U.S. 96 (1954).

[11] *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944).

[12] *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 596–597 (1969).

[13] *Keller Plastics Eastern, Inc*., 157 NLRB 583 (1966).

[14] For example, the Board requires a lesser showing of employee disaffection in support of employers' election petitions testing an incumbent union's continuing majority status, than it does for permitting employers unilaterally to withdraw recognition. See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723, and 727 (2001).

[15] 395 U.S. at 603.

[16] *NLRB v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (1973) (emphasis added). The court's decision is one of those previously mentioned in which the holding, consistent with *Keller Plastics*, supra, is that an employer, having voluntarily recognized a union based on a card showing, cannot shortly thereafter unilaterally determine that the union no longer represents a majority and withdraw recognition on that basis.

[17] 333 NLRB at 723, citing, inter alia, *Gissel*. Contrary to the majority, the well-established presumption that Board election results are a more reliable indicator of employee choice than a card showing is not founded primarily on concerns about union coercion and intimidation in the card solicitation process. As indicated in *Brooks*, *Gissel*, and *Cayuga Crushed Stone*, there are a number of factors supporting this presumption. See also, Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 Harv. L. Rev. 655, 662–663 (2010), discussing potential concerns about openness in the card solicitation process.

[18] International Unions AFL–CIO, SEIU, UFCW, and Steelworkers, plus Indiana University Law School Professor Kenneth G. Dau-Schmidt.

[19] Steelworkers and SEIU. The Steelworkers' opposition to giving an employee minority the opportunity to question majority choice is apparently not universal. In a recent speech to membership, Steelworkers President Leo Gerard quoted Samuel Adams in declaring "It does not take a majority to prevail, but rather an irate, tireless minority keen

Thus, the only real empirical evidence of experience, and the only evidence to which my colleagues refer, is the Board's own statistical compilation. As summarized by the majority, these statistics show that as of May 13, 2011, the Board had received 1333 requests for *Dana* notices. In those cases, 102 election petitions were subsequently filed and 62 elections were held. In 17 of those elections, the employees voted against continued representation by the voluntarily recognized union, including two instances in which a petitioning union was selected over the recognized union and one instance in which the petition was withdrawn after objections were filed.

In the majority's view, these statistics show both that the alleged premise in *Dana* about the reliability of cards was faulty and that, in any event, the *Dana* process is unnecessary. I disagree. The statistics show that in one of every four elections held, an employee majority voted against representation by the incumbent recognized union. While that 25-percent rejection rate is below the recent annual rejection rate for all decertification elections,[20] it is nevertheless substantial and supports the need for retention of a notice requirement and brief open period.

As for the 1231 cases in which *Dana* notices were requested, but no petitions were filed, we know *nothing* about the reasons for this outcome. To be more specific, we do not know anything about the reliability of the proof of the majority support that underlay voluntary recognition in each of these cases, nor do we know the reasons why no petition was filed. It is plausible that in many instances, even if a certain number of card signings or other showing of support did not accurately reflect the views of some employees, there remained a majority favoring representation by the recognized union. This is particularly likely where the parties have an agreement requiring the union to make a supermajority showing in order to gain recognition. It is also possible that in some cases a majority of employees would have voted against the recognized union in an election but, in spite of the Board notice, felt that the choice on union representation was a fait accompli. The majority holding in a different *Dana* case, overturning well-established precedent, that an employer and union can negotiate substantive terms and conditions of employment even prior to majority-based recognition will no doubt encourage this perception.[21] Yet another possibility is that employees in a particular case may have been inclined to petition for an election but were persuaded by the results of collective-bargaining not to do so. This, of course, is an outcome that *Dana* facilitates by requiring that the usual Section 8(d) bargaining obligation should apply during the open period for filing.

The Board's statistics do provide further information. We know that at least 1333 collective-bargaining relationships were established through voluntary recognition under the *Dana* regime. While the statistics do not indicate in how many instances the parties negotiated a collective-bargaining agreement, a review of the record of 16 *Dana*-related cases now pending before the Board reveals that the parties already reached agreement in at least 10 of them, including the present case. Further, as the majority notes, the most extensive empirical study on the subject indicates that voluntary recognition was followed by collective-bargaining agreement in close to 100 percent of cases reviewed.[22] One would expect that if there were empirical evidence that the rate of voluntary recognition or negotiation of contracts following recognition has declined in the 4 years since *Dana* was decided, opponents of that decision would fall over each other in the scramble to bring this information to our attention in the present case. No one has. Not any union. Not any academic. Not any economist. No one.

In sum, here is what we really know from the *Dana* experience: (1) *Dana* has served the intended purpose of assuring employee free choice in those cases where the choice made in the preferred Board electoral process contradicted the showing on which voluntary recognition was granted; (2) in those cases where the recognized union's majority status was affirmed in a *Dana* election, the union gained the additional benefits of 9(a) certification, including a 1-year bar to further electoral challenge; (3) there is no substantial evidence that *Dana* has had any discernible impact on the number of union voluntary recognition campaigns, or on the success rate of such campaigns; and (4) there is no substantial evidence that *Dana* has had any discernible impact on the negotiation of bargaining agreements during the open period or on the rate at which agreements are reached after voluntary recognition.

on setting brush fires of freedom in the minds of men." 157 DLR C-1 (Aug. 15, 2011).

[20] According to statistics maintained by the General Counsel, 530 decertification petitions were filed in 2010; 238 were subsequently withdrawn and another 43 were dismissed. In the 233 elections that were held, unions lost 149. Notably, the number of decertification petitions filed has decreased in every year since *Dana* was decided. See http;//www.nlrb.gov/decertification-elections.

[21] *Dana Corp.*, 356 NLRB 256 (2010) (Member Hayes dissenting).

[22] Eaton and Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 52 (2001). The majority contends that the small sample of *Dana*-related cases pending before us is inconsistent with this pattern. I disagree. It shows that bargaining agreements had *already* been reached in at least 10 of 16 cases. We do not know, and have no objective reason to believe, that contracts were not subsequently concluded in the other cases.

The majority's solicitation of empirical evidence with respect to the *Dana* experience was ostensibly based on the premise that such information was necessary to decide whether or not to adhere to the modified recognition bar policy established there. That premise has been exposed as false. We have received no meaningful information from external sources. Our own statistics confirm *Dana's* benefits and reveal no negatives in the effectuation of statutory goals. Yet the majority concludes that *Dana* must be overruled.

III.

Lacking any empirical basis for overruling *Dana*, the majority resorts to the contention that the *Dana* notice compromises Board neutrality. It does no such thing.

First, the *Dana* notice requirement was narrowly drawn to serve exactly the same purpose as the *Excelsior* notice requirement. In *Excelsior*, the concern was that employee free choice might be impeded by a lack of sufficient information about the positive aspects of representation by the petitioning union. In *Dana*, the concern was that employee free choice might be impeded by a similar lack of information about the negative aspects of representation by the recognized union, As stated in *Excelsior*,

> [W]e regard it as the Board's function to conduct elections . . . that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice. Accordingly, we think it is appropriate for us to remove the impediment to communication to which our new rule is directed.[23]

Second, the language of the *Dana* notice, while it might benefit from revision, neither discourages employees from adhering to their previously exercised choice on the question of representation, nor encourages them to file an election petition. It simply informs them of their right to petition within a 45-day period and of the consequences if no petition is filed.

Third, the posting of a *Dana* notice is entirely voluntary. There is no penalty for failing to post a notice to employees. Posting is merely the Board's quid pro quo for securing the discretionary imposition of a bar to employee or rival union election petitions. Employers and unions that enter into voluntary collective-bargaining relationships may choose for a variety of reasons not to request and post the *Dana* notice.[24] Their circumstances would be no different than for those construction industry employers and unions in voluntary bargaining relationships governed by Section 8(f) of the Act who are regularly able to negotiate contracts and conduct their affairs without the benefit of an election bar.

In assailing the *Dana* notice, it is interesting that the majority refers to the situation where an employer unilaterally withdraws recognition from an incumbent union bargaining representative based on majority free choice exercised through a signed petition or comparable objective evidence. It is true that the Board does not provide for notice to employees in the affected bargaining unit that a 30-percent minority has the right to challenge the majority choice by petitioning for an election. Perhaps there should be such a notice, but the need for it is not as apparent when the ousted union is readily able and presumably willing to provide such information, unlike in voluntary recognition situations where the union will certainly not do so and the employer frequently has contracted not to do so for business reasons unrelated to employees' preferences.

What is curious is that my colleagues seemingly have no concern that this exercise of majority choice to decertify does not receive the same protection from challenge by an employee minority as in voluntary recognition. Could it be that they regard the reliability of the employees' showing with suspicion, believing that it is often not free and uncoerced, despite the law's requirement that it be so? If that is the case, then by their own reasoning, the Act provides the union and employees with adequate recourse through the filing of appropriate unfair labor practice charges by any person. There is no basis for also subjecting this free choice by an employee majority, once exercised, to immediate electoral challenge by a 30-percent employee minority without temporal limitation, not just for a *Dana*-like 45-day open period. A neutral and holistic approach would seem to warrant Board imposition of an election bar for a reasonable period of at

[23] *Excelsior Underwear,* 156 NLRB.1236, 1240 (1966).

[24] In marked contrast, my colleagues have proposed a mandatory requirement, enforceable through Sec. 8(a)(1) and the tolling of the 10(b) limitations period, that all employers post a notice emphasizing employees' rights to organize, with bare mention of the right to refrain, and no mention whatsoever of the decertification election process. Apparently, this is not biased. See Notice of Proposed Rulemaking—Notification of Employee Rights under the National Labor Relations Act, 75 Fed. Reg. 80410 (Dec. 22, 2010).

least 6 months, after *any* free and uncoerced majority choice on the question of representation.[25]

IV.

I make the comparison to the withdrawal of recognition situation because it focuses on the heart of the matter. It is the majority's action here, in *UGL-UNICCO*, supra, and elsewhere, that conveys a pronounced ideological agency bias disfavoring the statutory right of employees to refrain from supporting collective bargaining, to receive adequate information about the election process, and to have the option of resolving questions concerning representation through the preferred method of a Board-supervised election.

My colleagues are concerned with policies of adherence to longstanding precedent, employee free choice, and labor relations stability only when those policies further unionization, which they believe in good faith must be the paradigm for the American work force. If a decades-old recognition bar policy serves this aim, then it is unassailable regardless of a dramatic, empirically established change in union organizational tactics that impacts the statutorily preferred practice of resolving questions concerning representation through a Board election. If not, then longstanding election policies may be sua sponte reviewed for elimination.[26] If employee free choice means a vote for unionization, it must be nurtured like a newborn babe. If not, it should be suspected and exposed to immediate challenge. If labor relations stability means the establishment or maintenance of a collective-bargaining relationship, then a wall of legal protections should be erected to that end. If labor relations stability means the neutral continuation of a status quo in which over 90 percent of the private work force is unrepresented, then lines must be radically redrawn to change the status quo.[27] In any event, labor relations stability clearly does not mean consistency and coherence in the interpretation and application of Federal labor relations law in order to facilitate the ability of employees, unions and employers to order their relationships.

I need not and do not profess that protection of employee free choice is the only goal of the Act we administer. However, the Taft-Hartley Act mandates such protection and requires equal consideration in conjunction with the Wagner Act's original aim of promoting collective-bargaining.[28] It is at times a most difficult task reconciling these two statutes, which "arose under diametrically opposed historical circumstances, and were aimed at correcting diametrically opposed abuses of power."[29] Many have argued that the Board is intrinsically ill-equipped to do so.[30] Nevertheless, we must make the attempt.

My colleagues fail to do so. Borne back ceaselessly into the past, and taking the agency with them, they purport to engage in policymaking that so inflates the Wagner Act paradigm of a unionized workforce as to make the Taft-Hartley Act an afterthought. How else to construe their suggestion that the statutory provision for Board elections was a mere corrective option if employers did not voluntarily recognize a union? This kind of policymaking, no matter how slickly packaged, makes no attempt to reconcile competing interests in the Act and to draw a fair balance between them. It warrants strict scrutiny and no deference upon judicial review.[31]

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[25] The majority distorts this observation into advocacy of an election bar following lawful unilateral withdrawal of recognition. It is not, and they know it is not. They simply mean to distract from the point that the protection of majority choice they advocate in nonelectoral voluntary recognition situations does not exist in nonelectoral withdrawal of recognition situations.

[26] See *Specialty Healthcare & Rehabilitation Center of Mobile*, 356 NLRB 289 (2010) (inviting briefs on whether to overrule 20-year old precedent in *Park Manor Care Center*, 305 NLRB 872 (1991), and to revise the Board's longstanding community-of-interests test for determining appropriate bargaining units). I note that the majority here complains that no individual Board Member dissented from application of the voluntary recognition bar prior to *Dana*. Just so, no individual Board Member dissented from application of *Park Manor* prior to *Specialty Healthcare*. Apparently, I may take some comfort in aligning myself with this long line of distinguished public servants when dissenting from any change in that precedent.

[27] See, e.g., Notification of Employee Rights Under the National Labor Relations Act, 29 CFR Part 104 (Aug. 25, 2011), and Notice of Proposed Rulemaking on Election Procedures, 76 Fed. Reg. 36812 (June 22, 2011).

[28] As one commentator recently stated, the Wagner Act

> regards employee collective action as a benefit for not only employees, but society as a whole. Indeed, the Wagner Act's preamble explicitly states that collective action can equalize bargaining power in the workplace and reduce industrial strife, thereby improving the national economy. . . . This view of collective action as a social good was soon joined by another, often countervailing, approach. In the 1949 (sic) Taft-Hartley amendments to the NLRA,
>
> Congress acted on an alternative policy goal that stresses employees' individual freedom to choose whether or not to engage in collective action. Under this view, the right to collective action focuses on individual choice, rather than the outcome of that choice.

Hirsch, Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action, 44 U.C. Davis L. Rev. 1091, 1131–1132 (2011).

[29] Fisk & Malamud, The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform, 58 Duke L. J. 2013, 2033–2034 (2009).

[30] See, for instance, the extensive discussion of this issue in Fisk & Malamud, supra.

[31] This is not mere heated rhetoric, as the majority suggests. It is a concern shared by the same scholars cited by Chairman Liebman in her concurring opinion in *Rite Aid Store #6473*, 355 NLRB 771, 771–772. They caution that

[a]s much as Democrats wish it were otherwise, sooner or later the Republican party will win back the White House and will have the chance to appoint its own NLRB majority. If past experience is any guide, that Board will be fully able to sweep away precedents from the Obama Board, just as the Bush II Board swept away the policies of the Clinton Board. Is there anything that an Obama Board can or should do to anticipate yet another swing of the pendulum? In the nearer term, when the Obama Board goes about reversing the Bush II Board decisions, are there ways that the Board could make its decisions more likely to survive appellate review in federal courts dominated by Bush II judges? If the Obama Board simply says, as Member Liebman put it in her congressional oversight hearing testimony in 2007, that the Bush II Board has overvalued individual anti-union employee freedom at the expense of encouraging collective bargaining, there is no reason to believe that story line will appeal to the current majority of the federal appellate bench.

Fisk & Malamud, supra at 2077–2078.

The notice and open period requirements promulgated in *Dana* did represent an attempt to balance competing statutory interests. Empirical evidence of *Dana's* application in the past four years indicates that it has served its purpose without adverse impact on voluntary recognition. I dissent from its overruling.