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Unions were dealt two major blows in decisions issued recently by the National Labor Relations Board. The decisions significantly impact union recognition and broaden employers' ability to replace economic strikers ... [more](#) 



Latest News

S-Chip Bill, vetoed by President Bush, contained amendment to the Family and Medical Leave Act

The amendment to the FMLA, known as the Support for Injured Servicemembers Act (SISA), would have allowed family members of military personnel who are injured in combat to take 26 weeks of unpaid leave to care for the injured personnel. Although the bill was vetoed, recent news media reports indicate continuing efforts to pass a modified version of the defeated S-Chip Bill. The SISA is sponsored by Senator Chris Dodd (D-Conn).

National Labor Relations Board Upholds Employee Free Choice and Modifies Recognition Bar Doctrine

By: [Wilson Eaton](#)

Do affected employees have a realistic opportunity to challenge a union's claim of representation when the employer voluntarily allowed the union to represent the employees based only on the union having represented that a majority of employees signed authorization cards and support the union?

The National Labor Relations Board provided additional safeguards to employee free choice in the recent case of *Dana Corporation*, 351 NLRB No. 28 (2007). In *Dana Corporation*, two employers, Dana Corporation and Metaldyne Corporation, entered into neutrality and card-check agreements with the International Union, United Automobile, Aerospace, and Agricultural Implement

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Workers of America, AFL-CIO ("UAW"). The Employers agreed that the UAW would represent their employees based on a showing of majority support of employees, which was premised on signed authorization cards. Shortly after the Employers recognized the UAW as their employees' representative, each company's employees filed a petition with the NLRB for a decertification election. The NLRB's Regional Director rejected the petitions, claiming that the decertification elections were barred by the Board's recognition-bar doctrine. Under that doctrine, an employer's voluntary recognition of a union, in good faith and based on a demonstrated majority status, immediately bars an election petition filed by an employee or a rival union for a reasonable period of time. If a collective bargaining agreement is executed during this "reasonable period," the Board generally bars elections for up to three years of the contract's term. The employees appealed to the National Labor Relations Board.

On appeal, the Board reversed the Regional Director's dismissal of the decertification election petitions and substantially revised the recognition-bar doctrine. The Board found that "the immediate post-recognition imposition of an election bar does not give sufficient weight to the protection of the statutory rights of affected employees to exercise their choice on collective bargaining representation through the preferred method of a Board-conducted election." To achieve a "finer balance" of interests to better protect employees' free choice, the Board will no longer impose an election bar after a card-based recognition unless: (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition. If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed. The requisite showing of interest in support of a petition may include employee signatures obtained before as well as after the recognition. These principals will govern regardless of whether a card check and/or neutrality agreement preceded the union's recognition.


Do Employers Really Voluntarily Recognize A Union?

While many employers question the strategy of voluntarily recognizing a union, an increasing number of employers are bypassing elections for union recognition when union authorization cards reflect a majority of support for unions. In certain parts of the United States and in certain industries, such as healthcare, some companies have made the business judgment that the cost of opposing a union through the election process and the threat of disruption in services do not outweigh the benefit of remaining union-free.

When employers recognize a union based on a card check majority, employees who previously signed authorization cards in support of the union but changed their minds (either because of education on the issues or union intimidation) had very few options to officially voice their union opposition. To officially revoke their union authorization cards, employees are required to strictly follow detailed procedures outlined in union documents that many employees may never have seen. If employees cannot validly revoke their authorization cards prior to the union's official

recognition as collective bargaining representative, under the law as it stood prior to *Dana Corporation*, the employees lost their freedom of choice. After *Dana Corporation*, if a valid petition for a decertification election supported by 30 percent or more of the employees in the bargaining unit is filed within 45 days of notice of the union's recognition, the petition will be processed. Employees can submit a document containing signatures obtained both before and after the recognition notice in support of the decertification petition.

Future Implications of Decision in Dana Corporation

The Board's decision in *Dana Corporation* is important also for its potential future application. The United States Congress recently considered the Employee Free Choice Act ("EFCA," H.R. 800, S. 1041) which would allow unions **in all cases** to bypass secret ballot elections and become the bargaining agent for workers based only on a majority of signed authorization cards. While it appears the EFCA will not be passed in this legislative session, it is likely that the bill will be introduced again next session. While we hope that the EFCA will never become law, the Board's holding in *Dana Corporation* at least preserves the secret ballot election process by allowing employees, after making a 30-percent showing, to participate in a decertification election. [back to top](#) 

National Labor Relations Board Makes It Easier to Permanently Replace Strikers

By: [Jessica Neal](#)

It has long been established that an employer can refuse to reinstate economic strikers by showing it was necessary to permanently replace the strikers to continue business operations. Under the National Labor Relations Act ("NLRA"), a permanent replacement has been interpreted to mean a replacement that will not be replaced by a returning economic striker when a strike ceases. In a prior decision, the National Labor Relations Board ("NLRB") had held that at-will employment was inconsistent with the status of permanent replacement. However, in the recent case of *Jones Plastic & Engineering Company (Camden Division)*, the majority of the NLRB overruled precedent and held that under the facts presented, employment at-will does not undermine permanent replacement status.

In April 2001, the United Steelworkers of America, AFL-CIO, was certified as the collective-bargaining representative of a unit consisting of 75 production and maintenance employees at Jones Plastic in Camden, Tennessee. The union engaged in negotiations with the employer for an initial collective bargaining agreement but contract negotiations failed. On March 20, 2002, approximately 53 of the unit employees commenced an economic strike.

Soon after the economic strike began, Jones Plastic started hiring replacement workers. The replacement workers were required to complete job applications which stated that the employment would be for "no definite period" and could be "terminated at any time


without any previous notice." Employment handbooks were also distributed to the replacement employees that contained a provision for at-will employment. After being hired and beginning work, the replacement workers signed a form stating that they were accepting employment with Jones "as a permanent replacement" for a specific striker. On April 5, 2002, Jones Plastic sent a letter to each striking employee warning that it had "begun to hire permanent replacement employees" and risked being permanently replaced if the employee failed to return immediately to work.

More than four months after the strike began, the union made an unconditional offer to return the strikers to work but Jones Plastic refused the offer because the positions had been filled. Jones Plastic placed the strikers on a preferential recall list and later made offers of reinstatement to 46 of the strikers which were accepted by only 18 of the strikers. The union filed an unfair labor practice charge with the NLRB alleging that by failing to reinstate the strikers, Jones Plastic violated the NLRA.

The Board's Change in Philosophy

In considering the merits of the union's charge, the NLRB analyzed a prior Board decision (*Target Rock*) which concluded that economic strike replacements considered at-will employees were not "permanent" and therefore refusal to reinstate strikers violated the NLRA. The Board majority in *Jones Plastic* noted that it disagreed with the prior ruling on the issue and likened at-will status to probationary employees who have been found to be permanent replacements. In overruling the prior decision, the Board in *Jones Plastic* held that the "at-will disclaimers" found in the application and employment handbook "do not detract" from the showing by Jones Plastic that the economic strikers' jobs were filled with permanent replacements and therefore it did not have to reinstate the economic strikers.

Practical Impact of Jones Plastic

This ruling significantly affects employers and employees. Employers now have more options for replacing those who are on an economic strike. Most importantly, an employer can hire replacements on at-will basis and the employee may still be considered a permanent replacement. For union employees, this decision provides less protection for reinstatement after a strike. In the future, employees may be less willing to strike, knowing that their jobs may not be there when the strike is over. [back to top](#) 

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