NATIONAL LABOR RELATIONS BOARD
REGION 13
CHICAGO
NEWSLETTER

THE ChiRO UPDATE

VOLUME 2, ISSUE 1 WINTER 2008

INSIDE THIS ISSUE:

SAVE THE DATE: May 14, 2008!

The Labor and Employment Relations Association, Region 13 of the National Labor Relations Board, and John Marshall Law School will offer a half-day program on Processing Representation Cases Before the NLRB. Please join us for this informative event at the John Marshall Law School. Watch for further details.

The Board's *Dana* Case: What Are The Practical Implications?

By Joseph Barker, Regional Director*

When all the hand wringing ends, what will be the practical impact of the Board's recent decision to no longer afford protection from a potential challenge in a voting booth to the legitimacy of a union's voluntary recognition by an employer as the asserted majority bargaining representative of its employees? Although the decision is being criticized by organized labor as part of a "September Massacre" of workers' rights, is there a potential silver lining to the Board's recent decision?

In a case that issued as part of a flood of decision making at the end of its fiscal year, the Board in *Dana Corp.*, 35l NLRB No. 28 (2007), modified its 40-year-old recognition bar doctrine and held that an employer's voluntary recognition of a labor organization does not bar a decertification or rival union petition that is filed within 45 days of the notice of recognition.

Under its former policy, an employer's voluntary recognition of a union, based on a showing of the union's majority status, barred a decertification petition filed by employees or a rival union's petition

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Region 13's Practice and Procedure Committee Reviews Latest NLRB Developments

By Paul Hitterman, Deputy Regional Attorney

Region 13's Practice and Procedure Committee held its biannual meeting on November 14. The Practice and Procedure Committee is composed of representatives of unions, management, and the Region, and meets twice a year to discuss important developments in Board jurisprudence and practical concerns of the labor law community.

The meeting covered a wide range of topics. We first discussed the current caseload, which is down from historical highs, but has been holding steady over the past year or so. Upon questions from the private practitioners, the Region's managers speculated that their sense was there were more individually filed charges being filed currently than union or employer filed charges.

We next turned to a discussion of the recent Board decision in *Dana Corp*. Assistant to the Regional Director Gail Moran explained the holding of *Dana*, and the new procedures that were being implemented as a

(Continued on page 12)

LERA Honors Long-Time Practitioners

The NLRB Chicago Regional Office is located on the 9th floor of the Rookery Building at the corner of LaSalle St. and Adams St. in the Chicago Loop .

By Gail Moran, Assistant to the Regional Director

On Wednesday evening, December 12, 2007, members of the Chicago labor relations community came together to honor distinguished practitioners in the field of labor relations. Sponsored by the Chicago Chapter of the Labor and Employment Relations Association, the group of more than 50 practitioners enjoyed course after course of delicious Greek food at The Parthenon Restaurant while reuniting with fellow practitioners from both sides of the aisle.

John Truesdale, an icon in the labor relations community and former Chairperson and Executive Secretary of the National Labor Relations Board, flew in from Washington, D.C. to be presented with LERA's Distinguished Service Award. John was gracious in accepting the award and in turn gave tribute to his long-time friend and colleague, Ed Miller, formerly of the Seyfarth Shaw law firm and Chairperson of the NLRB, by reading from a nostalgic poem about the Board written by Mr. Miller in the 1970s. Said Josh Ditelberg, President of LERA's Chicago Chapter, "… It was a pleasure to honor some of the outstanding leaders of the Chicago labor relations community. LERA's mission is to bring together labor relations professionals from a range of perspectives -- labor, management, government, academics, and neutrals. Our goal is to foster a community where all those interested in labor relations can exchange ideas, learn about new developments in the field, as well as have some fun with each other."

LERA also honored these long-time local practitioners, listed with their respective dates of admission to the Illinois bar:

- Harold Katz, Katz Friedman, January 12, 1948
- Gilbert Cornfield, Cornfield and Feldman, December 30, 1954
- Richard Ostrow, Seyfarth Shaw, May 24, 1956
- S. Richard Pincus, Holland and Knight, November 28, 1961

Each honoree shared a few brief comments expressing their gratitude for the award and their continued commitment to the field of labor relations. The night was filled with history and fun stories of settlements reached and strikes averted - a great time was had by all!

The NLRB Region 13 office is located one block east of the "L's" Quincy Station in the Loop.

PROTECTING WORKPLACE DEMOCRACY

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BOARD ALTERS BACKPAY BURDEN IN SALTING CASES

By Thomas Porter, Compliance Officer

The Board's recent decisions in *Oil Capitol*, 349 NLRB No. 118 (2007), and *Contractor Services, Inc.*, 351 NLRB No. 4 (2007), have altered the landscape of the backpay inquiry in cases involving union salts (unpaid or paid professional union organizers) as well as the burden of proof for the General Counsel (and investigating Compliance Officers). In the construction industry, where "salting" is prevalent, the General Counsel must now present affirmative evidence that a salt/discriminatee, if hired at the job site where he applied, would have worked for the respondent for the backpay period claimed by the General Counsel. When jobs at construction sites end, the investigation must turn to whether the salt would have been transferred to other job sites after the project at the original site was completed. The Board's previous standard, set forth in *Dean General Contractors*, 285 NLRB 573 (1987), applied a "rebuttable presumption" of continuing employment for a salt in the construction industry.

In *Contractor Services,* the Board panel without dissent concluded that the General Counsel did not satisfactorily prove that its formula of gross backpay (total potential liability) was reasonable. The Board found the paid union organizer/salt's search for work was not truly comparable to the search for work of the individuals whose earnings were used to determine gross backpay. The Board further held that this salt unreasonably failed to mitigate his loss of earnings. The Board noted that he failed to receive interim earnings similar to the only other salt – an unpaid organizer who was not restricted by agreement with the Union to ignore non-union jobs and jobs of short duration. The loyalty of the Union organizer/discriminatee to his Union/Employer when compared to the non-employee clearly demonstrated the resulting unavoidable consequence of an insufficient job search. "In plain terms [the paid union salt] cannot have his cake and eat it too."

In all cases involving the refusal to hire and discharge of union salts, compliance officers will likely collect evidence from the union and/or discriminatee relating to the individual circumstances of the salt including:

- Evidence regarding how the salt came to apply with or become employed by the company;
- Contemporaneous union policies and practices with respect to salting campaigns;
- Specific union organizing plans for the targeted employer;
- Instructions or agreements between the salt and union concerning the anticipated duration of the assignment;
- Historical data regarding the duration of employment of the salt and other salts in similar salting campaigns; and
- Evidence as to whether the salt would have continued working for the employer and transferred to a new job site.

The first post-*Oil Capitol* case to be considered by the Region, *R.J. Corman*, 349 NLRB No. 89 (2007), 13-CA-38807, had a potentially lengthy backpay period due in part to a six-year period pending before the Board. The Region applied *Oil Capitol*, given the general principle that Board decisions apply retroactively to all pending cases in whatever stage. The instatement/reinstatement portion of the remedy was put on hold pending the Region's investigation into issues raised by *Oil Capitol*. The Region found comparable employees who Respondent hired were employed for only a brief period in 2000, and therefore concluded that backpay was tolled and instatement was extinguished. The General Counsel ultimately affirmed the Region's Compliance Determination, stating that it was unnecessary to consider the *Oil Capitol* standard because instatement would not be appropriate even under the old *Dean General* standard. The Respondent fully complied with the requirements of the Order.

In *Jerry Ryce Builders*, 13-CA-43917 & 13-CA-43918, the first Administrative Law Judge's decision received post-*Oil Capitol,* the Judge found that the Respondent had unlawfully refused to hire or consider for hire three union salts, and had discharged or constructively discharged two union salts that had hidden their union affiliation until after their hire. The ALJ issued his decision six months after *Oil Capitol* on November 19, 2007.

With the Board currently not having a full panel, compliance investigations will continue to seek the cooperation of the parties in order to elicit information for interim estimates of potential backpay liability, interim earnings, and the propriety of instatement or reinstatement while awaiting a final disposition of underlying decisions.

REGION 13 INVESTIGATION & LITIGATION UPDATE

Hanson Material Service Corp., 13-CA-44128

By Joyce Hofstra, Field Examiner

Under Section 7 the National Labor Relations Act, employees have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities as well as the right to refrain from such activities. Employees of Hanson Material Services engaged in such activities by signing authorization cards for representation by Laborers' International Union of North America Local 681 and International Union of Operating Engineers Local 150, both of which filed petitions to represent the same unit of four aggregate quality control employees on April 30, 2007 and May 1, 2007, respectively. However, one day prior to the election, Hanson terminated two employees in the petitioned-for unit for allegedly falsifying documents.

After filing a petition for Section 10(j) relief in federal district court, the Region presents "just and proper" evidence in the NLRB hearing to expedite the injunction proceedings.

On July 11, 2007, IUOE Local 150 filed an unfair labor practice charge alleging that Hanson unlawfully terminated two employees because of their protected, concerted activity and to discourage employee support of IUOE Local 150. IUOE Local 150 further alleged that the Employer interrogated employees, threatened employees with lay-off, changed its uniform policy in an attempt to prohibit employees from wearing clothing with union insignia, threatened employees with discipline, made statements that it would be futile to organize, maintained a discriminatory posting rule, promised employees a raise if they voted against unionization, and promised employees positions in management if they voted against unionization.

The investigation showed that in the weeks prior to the election, several senior level managers individually questioned employees as to their union sympathies and encouraged employees to vote for Laborers' Local 681 instead of IUOE Local 150 if they did vote to unionize. Further, these managers held several mandatory meetings, during which time they told employees that they could no longer wear clothing with union insignia and that they had to remove all union posters from Employer bulletin boards. As part of the enforcement of this new policy, a manager took an IUOE Local 150 hat away from an employee while he was working. Employees were also threatened with layoff and told that the Employer could stall the bargaining process. The Employer further promised to give employees $2 - $3 raises and stated that it would promote employees into managerial positions if they were not unionized.

The evidence also showed that while being interrogated as to their union sympathies, the two discharged employees told Hanson managers that they supported IUOE Local 150 because they wanted better wages and benefits. Then, about one week before the election, Hanson managers began monitoring the two employees for hours at a time under the guise that they were not performing their job duties. The managers then reviewed these employees' work, found that they had put the incorrect time on two reports and fired them for allegedly falsifying these reports just less than 24

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REGION 13 INVESTIGATION & LITIGATION UPDATE (*cont.*)

Howard Orloff Imports

This recent case highlighted the Region's authority to take a unilateral stipulation for a re-run election. Machinists Local 701 won an election to represent employees at Howard Orloff Imports. The Employer filed objections to conduct affecting the election following the Union's win. In response, the Union indicated a willingness to stipulate to a re-run election, but the Employer was reluctant to do so. The Region approved a unilateral stipulation for a re-run election, in part based on the reasoning in *New York Shipping*, 109 NLRB 1075 (1954). In that case, the Board held that a losing party to an election who makes determinative challenges as to the eligibility of certain voters cannot prevent an opposing party from stipulating that those voters are ineligible for purposes of the election and having the election results certified. Here, the Region subsequently permitted the Union to withdraw from the unilateral stipulation and set the Employer's objections for a hearing, after the Union filed charges alleging the discharge of two union supporters. The Region found those charges meritorious and is proceeding to a trial on them. Finally, in another procedural twist, the Region held the Employer's CB-charge, which paralleled its objections, in abeyance pending the outcome of the objections hearing.

Grand Mart

The Region's complaint in this case alleged that Grand Mart closed one of its Chicago-area stores in response to UFCW Local 881 being certified as their bargaining representative, as well as discharged several employees for their union activity and made several Section 8(a)(1) violations prior to the closing. The complaint also alleged that all of Grand Mart's stores here operated as a legal single employer. The Region submitted the case for Section 10(j) authorization to the Division of Advice in Washington D.C. Field Attorneys Lisa Friedheim-Weis and Neelam Kundra negotiated an informal settlement pursuant to which the Employer agreed to: 1) pay the discriminatees 100 percent backpay, including time and a half for overtime they would have worked had they not been fired or had their hours reduced; 2) a two-week *Transmarine* remedy for the entire unit of 32 employees, following the Employer's decision to close all of its stores in the Chicago market; 3) a comprehensive notice posting in both English and Spanish which addressed all complaint allegations; 4) extending the Union's certification year for another year; and 5) providing for an open-ended preferential rehire if Grand Mart re-opened any stores in the Chicagoland area. The employees received a total of $40,000 in backpay.

Industrial Hard Chrome II

As reported in the July 2007 Chiro Update, the Region was successful in obtaining an order from the 7th Circuit Court of Appeals to provide interim reinstatement to a group of Industrial Hard Chrome employees who were unlawfully discharged for engaging in a protected strike. Field Attorneys Ed Castillo and Elizabeth Cortez recently settled a second complaint against the Employer which alleged the failure to reinstate employees to the first shift following the strike, bypassing the Steelworkers' Union and dealing directly with employees about returning to the first shift, and refusing to meet with the Union in negotiations if two discriminatees from the first case were present. The settlement resolved these allegations and also provided full backpay to a discriminatee whom the Region alleged had been constructively discharged because of the failure to return him to the first shift. Furthermore, the Region secured the agreement of a petitioner to withdraw a decertification petition which had been blocked by the ULP charge. Finally, an RM petition was filed but dismissed by the Region based on the outstanding ULPs.

Marmon/Keyston Corp.

The Region's complaint in this case alleged that Marmon/Keyston violated Section 8(a)(3) when it discharged an individual who had gone from a unionized facility of the company to another non-union facility to talk to employees there about organizing. Field Attorney Dawn Blume negotiated an informal settlement with large front pay for the discriminatee of $50,000, in addition to another $20,000 in backpay. The Region approved the front pay as part of the discriminatee waiving reinstatement, because he was closing in on retirement at the time he was discharged.

Practitioner's Debate: *Dana Corp.*

Decision Further Tilts Power to Employees in the Minority

By Patrick E. Deady

Mr. Deady is a partner of the law firm Hogan Marren, Ltd., located in Chicago, IL. He represents unions in labor and employment matters. The views expressed in this article are the author's alone and do not represent the opinion or an official position of the NLRB, the General Counsel, or the Chicago Regional Office.

Overruling forty years of precedent, on September 29, 2007 the National Labor Relations Board stripped voluntary recognition of long-standing legal protections and held that even after a majority of workers expressed a desire to have a union represent them in bargaining, and after the employer had acknowledged their choice and recognized the majority representative, a minority of the employers could override the wishes of the majority and insist on an NLRB election. *Dana Corp.*, 351 NLRB, No. 28 (Sept. 29, 2007). Post-*Dana*, anytime an employer recognizes a union voluntarily, it must register with the Board and post a 45-day notice advising those employees that if 30% of them sign a petition they don't want the union, they can, in effect, nullify the voluntary recognition obtained by the actions of a majority of their co-workers.

How does the Board reconcile requiring an election for voluntary recognition, but not for withdrawal of recognition?

The Board's decision in *Dana* only further underscores the current belief that employers should have the unfettered right to refuse to bargain with a majority representative and that a minority of employees opposed to a union should be able to frustrate the desires of the majority. The Board's decision in *Wurtland Nursing & Rehabilitation Center*, 351 NLRB, No. 50 (Sept. 29, 2007) on the same day highlights the lengths the Board is prepared to go to ensure that employers have the right to withdraw recognition of a majority union based on the same evidence it would require the union to submit to an election. In *Wurtland*, the Board approved an employer's withdrawal of recognition from the union representing its employer on the basis of a petition signed by a majority of the employers asking "for a vote to remove the union." The employer wasn't required to let the Board's election process take its normal course, suggesting it would take too long to conduct a Board election. *See also Shaw's Supermarkets, Inc.*, 350 NLRB No. 55 (Aug. 10, 2007).

Having said this, most unions will not seek to avail themselves of the *Dana* procedures. There seems to be little incentive for an organizing union to obtain recognition through the *Dana* process. First, neither side will bargain for an initial contract until the 45-day window closes. If a decertification petition is filed, it will come at a time that the union will be the most vulnerable – pre-initial contract. Given the choice of seeking either a regular Board election or a consent election at the time of the union's choosing, most unions will seek an election, not voluntary recognition.

In the post-*Dana* world, the Region should expect more elections and fewer *Dana* notices.

Practitioner's Debate: *Dana Corp.*

Decision May Eliminate Coercive Organizing

By Douglas A. Darch

Mr. Darch is a partner of the law firm Seyfarth Shaw who works from the firm's office in Chicago, IL and represents employers in employment and labor matters. The views expressed in this article are the author's alone and do not represent the opinion or an official position of the NLRB, the General Counsel, or the Chicago Regional Office.

The Board's much anticipated decision in *Dana Corp.* probably left those at both ends of the labor management spectrum unhappy. It is very likely the law of unanticipated consequences will govern the legacy of this decision if, indeed, it has one. It is something of a daunting task to predict the unanticipated. Recognizing that even those able to predict the future do not win accolades, witness Cassandra on the plain of Troy, here is my effort.

If *Dana Corp.* causes a fundamental shift in the way the NLRB treats the rights of employees to refuse to join or support unions—a right guaranteed by the Taft-Hartley Act some 60 years ago—then it will be a landmark decision. Much of organized labor's efforts since 1947 have been spent attempting to repeal Taft-Hartley through decisions at the NLRB. One need look no further than the Board's accretion decisions or its plant consolidation decisions to recognize the trammeling of the rights of unrepresented employees at the hands of organized labor. *See e.g. Central Soya,* 281 NLRB 1308 (1986), *aff'd,* 867 F.2d 1245 (10th Cir. 1988). If the Board gives effect to the rights of unrepresented employees (required by Section 7) in other areas, then it will abandon the presumption that a majority of new hires or strike replacements desire union representation, and cases such as *Westwood Imports,* 251 NLRB 1213 (1980) will be overruled. There is no basis for this presumption as a matter of fact, as 90% of private sector employees do not belong to unions.

As a practical matter, this decision is unlikely to have much effect on unions' strategies for organizing employees or on card check agreements or neutrality agreements. Unions will continue to seek neutrality agreements. The NLRB condones the use of card check recognition even under *Dana Corp.* It is only when fraud is reported that the NLRB rejects card check recognition. This case by case basis does not act as an impediment to rogue unions. For example, SEIU Local 49 has agreed twice already to settle unfair labor practice cases because of allegations of chicanery in the card check process, which involved a supposed neutral third party.

Consider the practical realities of the situation following a card check. On the one side is a union which has convinced an employer to sign a neutrality agreement and to agree to card check recognition. It is unlikely the union will file a petition for an election, meaning *Dana Corp.* will not affect its behavior. On the other side is a company which has agreed to remain neutral and has agreed to card check recognition. This employer has indicated a willingness to cooperate with the union in obtaining recognition rights and by all rights should neither desire nor encourage the filing of a petition. The third apex of this triangle is occupied by employees who presumably listened to the union's pitch and decided that they wanted union representation. Since the individuals freely agreed to union representation, they should not file a petition for an election either.

Why then, if there is one big happy family, should unions be concerned by the decision? The answer lies in the assumptions underlying the above analysis. In the cases wherein the card check neutrality agreement was obtained by union threats and coercion directed against the employer, such employers are not willing to cooperate with the union and would welcome a secret ballot election. Potentially, then, *Dana Corp.* could temper the use of corporate campaigns. Likewise, employees who were coerced by union tactics into signing an authorization card or petition would also welcome the opportunity for a secret ballot election so that they can express their feelings in secret and without fear of retaliation. Absent access to legal counsel or a high level of exposure to the NLRA (which is unlikely in a non-union workforce) these employees are unlikely to know they can file a petition. Here then is why *Dana Corp.* represents such a threat to unions. The truth is a forced public expression of union

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PRACTICAL IMPLICATIONS OF *DANA* (*cont.*)

for a reasonable period of time. The Board had reasoned that labor relations stability was promoted by a rule under which a voluntarily recognized union was insulated from challenge to its status while negotiating for a first collective bargaining agreement.

However, in a 3-2 decision, with the three Republican members constituting the majority, the Board concluded that although the basic justifications for providing an insulated period were sound, they did not warrant an immediate imposition of an election bar following voluntary recognition. Instead, it was believed that the uncertainty surrounding voluntary recognition based on an authorization card majority, as opposed to union certification after a Board-conducted secret ballot election, justified delaying the insulated period for a brief time during which employees could decide whether they preferred a Board-conducted election. Under this new policy, an employee or a rival union could file a petition, supported by 30 percent of the employees in the asserted bargaining unit, during a 45-day period following notice that a union has been voluntarily recognized. If no petition is filed during that period, the union's status as the exclusive bargaining representative will not be subject to challenge for a reasonable period of time to permit the union and the employer to negotiate a collective-bargaining agreement, as has traditionally been the case under the recognition bar doctrine.

The Democratic minority on the Board criticized the *Dana* case's "radical departure" from the traditional recognition bar procedure as relegating voluntary recognition to a disfavored status by allowing a minority of employees to disrupt the bargaining process just as it is getting started. In their view, this will discourage voluntary recognition altogether.

Is the Board minority correct that this decision will or should discourage voluntary recognition? Well, it is important to look at what the *Dana* decision does not change. For instance, once voluntarily recognized, a union will have all the protections of an incumbent union under Section 8 (a)(5) of the Act during the 45-day notice period. In other words, the employer will have to bargain in good faith with the union during this period and execute any contract that is reached between the parties. This obligation does not change even if a petition for an election is filed and processed during this initial 45 days, although obviously if the union loses an election any contract will be null and void and the bargaining obligation will cease. Any potential delay in this election process, which has been a source of criticism by labor organizations and an asserted justification for them to more actively seek voluntary recognition to avoid the Board's processes, is rendered meaningless under these circumstances because the union retains its incumbency status throughout the representation process until the Board certifies election results to the contrary.

The *Dana* decision also does not impact the most prevalent instances of voluntary recognition— those in the construction industry pursuant to Section 8(f) of the Act. Under that section, a construction employer is free to voluntarily recognize a union as the bargaining representative of its employees without any showing that it represents a majority of its employees. Analogous to the *Dana* outcome, under existing Board law such 8(f) relationships have always been subject to attack, even during the term of a contract, by outside labor organizations or by decertification efforts from employees. Yet, as a practical matter, very few petitions are filed during these relationships, and it is just as likely that any petition filed will be by the incumbent union seeking to be certified as the majority representative pursuant to Section 9(a) of the Act in an effort to gain the full bargaining protections offered by Section 8(a)(5). It is this experience in the context of 8(f) that may explain why many labor-side practitioners appear to greet the *Dana* decision with a big ho-hum.

Certainly, in theory, the *Dana* decision has the potential to

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Practical Implications of *Dana* (*cont.*)

increase the amount of representation petition activity in Regional offices, although in the first few months since the Board decision, there have been few cases involving voluntary recognition brought to the Agency's attention, except for those involving other facilities operated by Dana Corporation itself.

In preparation for such cases, the General Counsel did issue guidance to its Regional Offices (Memorandum OM 08-07, dated October 22, 2007, which is available to the public), describing the casehandling procedure to be followed according to the *Dana* decision. Because there will no longer be a bar to an election petition following the grant of voluntary recognition unless the affected employees receive adequate notice of the recognition and of their ability to file a Board petition within 45 days of receiving such notice, there is an incentive for an employer and/or union to notify the Regional Office of the Board, in writing, of the grant of voluntary recognition. This notification must include a copy of the recognition agreement, which must be reduced to writing and must describe the unit and the date of recognition. In response, the Region will open a case file and will send an official NLRB notice (see form at right) to the employer to be posted in conspicuous places at the workplace throughout the 45-day period.

A SAMPLE "DANA" NOTICE

FORM NLRB-5517
(10-07)

NOTICE TO EMPLOYEES

FROM THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

[EMPLOYER'S NAME]
CHICAGO, ILLINOIS

Case 13-RV-?????

On [INSERT DATE], your Employer, [EMPLOYER'S NAME], recognized [UNION'S NAME] as the unit employees' exclusive bargaining representative based on evidence indicating that a majority of employees in the following bargaining unit desire its representation:

[BARGAINING UNIT DESCRIPTION]

All employees, including those who previously signed cards in support of the Union, have the right to a secret ballot election conducted by the National Labor Relations Board to determine whether a majority of the voting employees wish to be represented by the Union, another union or by no union at all, as provided below.

Within **45** days from the date of the posting of this notice, a decertification petition supported by 30 percent or more of the unit employees may be filed with the National Labor Relations Board for a secret-ballot election to determine whether or not unit employees wish to be represented by the Union. Within the same 45-day period, a representation petition supported by 30 percent or more of the unit employees may be filed with the National Labor Relations Board to determine whether or not unit employees wish to be represented by another union.

Any properly supported petition filed within the 45-day period will be processed according to the Board's normal procedures.

If no petition is filed within 45 days from the date of the posting of this notice, then the Union's status as the unit employees' exclusive bargaining representative will not be subject to challenge for a reasonable period of time to permit the Union and your Employer an opportunity to negotiate a collective-bargaining agreement.

Contacting the NLRB – If you are interested in filing a petition for a secret-ballot election or receiving more information about the matters covered by this Notice, you should contact the NLRB office at:

National Labor Relations Board, 209 South LaSalle Street, Suite 900, Chicago, Illinois 60604
(312) 353-7570

Additional information about the NLRB and the National Labor Relations Act is available at the Agency's website: www.nlrb.gov, or by calling the NLRB toll-free at 1-866-667-6572.

_____
(Date of Posting)

The form notice sent by the Region will have the name of the employer, union, and description of the bargaining unit inserted in the text, along with a space for the employer to insert the date the notice is posted, which is crucial to initiation of the 45-day window period. The notice itself will advise employees of their right to file a decertification petition, or to have another union file a representation petition, during that 45-day period if such is supported by at least 30 percent of the employees in the unit voluntarily recognized by the employer.

There, nevertheless, remains a way to avoid the entire *Dana* procedure, and the asserted heavy-handed notice as unions refer to it. Nothing prevents the union from filing its own representation petition at the time it receives voluntary recognition. Under those circumstances, there need be no notification of the bargaining relationship to

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PRACTICAL IMPLICATIONS OF *DANA* (*cont.*)

the Regional Office and there will be no notice posted because employees will be provided an opportunity to vote regarding representation. Yet, having already been voluntarily recognized, the union will have all the protections of Section 8(a)(5), as discussed previously, while the petition is being processed.

Furthermore, in the context of voluntary recognition, the Board still recognizes the validity of neutrality agreements between an employer and a union. Pursuant to such agreements, an employer can agree to remain neutral during the course of an organizing campaign or representational proceeding, giving the union a considerable advantage in extolling the virtues of representation. Such neutrality agreements might also provide for the signing of a consent-election agreement after the filing of the representation petition. A consent election agreement provides for a more expeditious election process where the Regional Director, rather than the Board, makes the final decision regarding any disputes as to the conduct of the election.

If a union is unable to win a Board-conducted election under these circumstances, especially if it is running an unopposed election campaign pursuant to a neutrality agreement, the Board's suggestion in *Dana* that union authorization cards are a poor indicator of true employee sentiment certainly rings true.

There remains some intriguing possibilities on the other side of the *Dana* coin. If Board conducted elections truly are the favored method for gauging union support in the context of initial recognition, should not the same logic apply in the context of withdrawal of recognition? Rather interestingly, on the same day that the Board issued the *Dana* decision, it issued a decision in *Wurtland Nursing*, 351 NLRB No. 50 (2007), that sanctioned an employer's withdrawal of recognition from a union based on an ambiguous petition signed by a majority of employees stating that they wanted a vote to remove the union.

Conspicuously missing from the debate between the majority and minority members in that case was the *Dana* preference for a Board election. Instead, the debate focused on the respective burdens of proof to show loss of majority status under *Levitz Furniture of the Pacific,* 333 NLRB 717 (2001). Consequently, it seems reasonable to conclude that, despite being issued the same day, the *Wurtland* case was decided on a separate track from *Dana* without consideration given to the potential impact of *Dana* generally on withdrawal of recognition cases.

If the logic of *Dana* is sound, there is no more reason to trust that employees are not being unduly influenced by co-workers or an unscrupulous employer to sign a decertification petition than it is to question the validity of union authorization cards. Employees would seem to be just as likely to sign a decertification petition as they would an authorization card just to get rid of an overzealous co-worker or union agent as hypothesized by the Board in *Dana.* Under either circumstance, it would seem the best method to gauge support for the union is through a Board-conducted secret ballot election.

Alternatively, if an employer is to be allowed to withdraw recognition from the union based on asserted objective evidence of loss of majority support amongst employees, should not the *Dana* procedures apply? That might mean the employer, either prior to or upon withdrawing recognition from the union, would have to notify the Board of such action so that employees could be advised of their right to file a petition to test the validity of the employer's action. Until a similar 45-day insulated period has passed, or the union has lost an election, should the union be deprived of its incumbency status? Of course, there has never been an impediment to an incumbent union from filing such a petition when faced with a withdrawal of recognition, although they rarely do so.

Consequently, the practical impact or potential implications of the *Dana* decision are far from clear. Those implications may be rendered completely academic if the Employee Free Choice Act is enacted, which is an entirely different subject for debate.

*NOTE: THE VIEWS EXPRESSED ARE THOSE OF THE AUTHOR ALONE AND SHOULD NOT BE CONSTRUED TO REFLECT THE POSITION, POLICY, OR PRACTICE OF THE NATIONAL LABOR RELATIONS BOARD, THE GENERAL COUNSEL, OR THE CHICAGO REGIONAL OFFICE.

From the Desk of the Regional Director

By Joseph Barker

Time does pass quickly. More than a year has passed since I relocated to Chicago and assumed the position of Regional Director in Region 13. In that time, I've been fortunate enough to meet many of the practitioners and parties who utilize our services. I've been overwhelming impressed with their professionalism and sophistication in dealing with some very difficult labor issues that have arisen.

As part of the Region's continuing effort to become more transparent and practical in our dealings with parties and their representatives during our proceedings, I am pleased to announce that on Thursday, June 19, 2008, the Region will be co-hosting a labor law conference with Chicago-Kent College of Law. The event will take place at the law school and will be a great opportunity for members of our staff to meet with many of you outside the confines of a particular case to discuss casehandling issues and processes.

The Region has rather ambitious plans for the conference. We have been meeting with a committee representative of many of the practitioners and organizations the Region deals with. I believe we have come up with a program that will be of enormous benefit to those served by, or who appear before, our Agency. Several topics have been selected that should have broad appeal and lend themselves to interesting discussion and debate. Practitioners and representatives of various organizations, both management and labor, will participate in presenting these topics. Also, representatives from the Region, including myself, will moderate or make presentations during many of these discussions.

The conference will kick off with Professor Matthew Finkin of the University of Illinois College of Law giving an academic perspective on recent developments under the NLRA. Following this presentation, we plan two plenary roundtable discussions involving a couple topics that have been the subject of recent, significant Board decisions: neutrality/card check agreements, along with voluntary recognition; and the application of the NLRA in the electronic workplace. Each roundtable will have three representatives from the management perspective and three from the union perspective, with a neutral academic or arbitrator serving as the moderator.

We even have ambitious plans for lunch if you so choose. You can join table discussions set up to talk about particular subjects such as salting campaigns, the scope of Section 7 rights in non-union workplaces, special remedies in first-contract cases, the use of 10(j) injunctive relief, and supervisory status in light of the Board's recent *Oakwood* decision. These table discussions will also be hosted by at least one representative from management and labor, with a NLRB professional on hand.

Immediately after lunch there will be a keynote speaker, hopefully an NLRB Board member or the General Counsel.

After the keynote address in the afternoon, we'll have two sets of workshops available for participants to choose from. The two tracks will run concurrently and include such topics as ethical issues in settlements; ethical conflicts in representation (which I will host); outsourcing, leased employees, independent contractors, and the Illinois Classification Act; use of banners, rats, and street theatre as secondary pressure by unions; practical aspects of handling representation cases; and practical aspects of handling unfair labor practice cases. These workshops will be less formal than the plenary roundtables and will allow for considerably more participation. Again, each workshop will have at least one representative from management and labor, along with a professional from our Region.

After the workshops there will be time to mingle at a reception hosted by Chicago-Kent College of Law.

Within the next couple months you should be receiving notification from Chicago-Kent College of Law regarding the conference, along with a registration form. If you don't receive something by early May, please notify our office for more information. Of course, the conference is fully accredited by the Illinois bar for CLE credits, including the all important ethics training. Hope to see you there.

Update from the Region's Practice and Procedure Committee (*cont.)*

result of the decision. The Region was aware of a case to be filed already, and expects more to follow. The procedure calls for either party to notify the Region when there has been voluntary recognition, at which point the Region will issue notices that the employer will post for a 45-day period. This posting advises employees of their right to file competing petitions pursuant to *Dana* before the voluntary recognition and any resultant contract is treated as a bar. The Region has assigned a small team of experienced field examiners to process the *Dana Corp.* petitions.

In the realm of compliance, the Region announced the upcoming retirement of long-time compliance supervisor Marge Peck. Deputy Regional Attorney Rich Kelliher-Paz will be taking over the supervision of compliance and bankruptcy. In related news, we announced that bankruptcy filings were down nationwide.

DRA Paz also discussed developments with the Freedom of Information Act. Recently, the Region has been receiving unredacted medical information from respondents more frequently in cases. This creates FOIA issues when these case files are requested because the exceptions to disclosure may not always protect this information. Our advice to practitioners is to be careful when submitting information to be sure that private information is not being inadvertently disclosed. Also, under a proposed Operations Memorandum, the circumstances under which we disclose affidavits in closed cases may be expanded. The practitioners were very interested in this topic and the implications it would have in how they responded to NLRB investigations.

We next turned to litigation matters. Regional Attorney Arly Eggertsen discussed the Region's trial history over the past year. In that regard, there were about five or six more trials this year than the previous year. Arly is the Region's Alternative Dispute Resolution Coordinator, and as such, he is always available to assist in settlement negotiations.

Deputy Regional Attorney Paul Hitterman then presented recent developments in the Region's 10j program. In a recent case discussed in more detail elsewhere in this newsletter, *Hanson Material Service Corp.*, Case 13-CA-44128, the parties agreed to present all evidence, including the "just and proper" evidence, before the administrative law judge. This differs from the usual procedure of litigating the merits of the case before the ALJ, and holding a hearing on whether an injunction is just and proper before the District Court judge. The parties proceeded in this fashion with the goal of getting an expedited decision from the District Court, instead of waiting for the judge to clear space on a crowded docket. The practitioners raised a number of questions on the practical effect of this procedure, such as whether the ALJ would make findings of fact as to whether there was irreparable harm. DRA Hitterman explained that those findings were still the province of the District Court judge, and that the ALJ's role was strictly to make a record for the District Court to consider. We next described the 10(j) program in general. Region 13 is proud to have one of the most active 10(j) programs in the nation. We usually are one of the top 2 or 3 regions in the country in 10(j) submissions, and this year was no exception. Currently, we have several cases under active consideration.

We announced Region 13's upcoming seminar to be jointly sponsored by Chicago-Kent College of Law. A number of panel discussions will be part of the seminar, including panels on e-mail policies and voluntary recognition, as well as discussion groups and workshops on various topics of interest. The seminar will be held all day on June 19, 2007. CLE credits will be available.

Regional Director Barker next outlined his policy on settlement agreement violations. For practical reasons, he is reluctant to set them aside. This requires the litigation of all substantive allegations covered by the settlement, and the passage of time makes that increasingly difficult to do. Instead, his preference is to up the ante by increasing the remedies called for in subsequent settlements or complaints because of recidivism. This has a similar deterrent effect, and does not burden the Region with having to litigate stale cases.

Finally, we discussed an upcoming pilot program for the use of video testimony in representation cases. The details are still being worked out regarding the precise circumstances in which this would be allowed, but the program is intended to last for two years. The response to the program was favorable.

Marge and John Peck Retire From Region 13

By Richard Kelliher-Paz,
Deputy Regional Attorney

The end of 2007 brought a major change to the Chicago Regional Office with the retirement of long-time employees Marge and John Peck. At the time of their retirements, both were Field Examiner Supervisors in the Region.

Marge Peck has been a part of Region 13 since 1977. She began her NLRB career as a co-op. You do not have to spend much time with Marge to know that she is an intelligent person who is passionate about the laws that this agency enforces. During her career, Marge progressed from field examiner to field examiner supervisor, where she oversaw a team of field examiners. She also was responsible for managing all cases in compliance and deferral, through which she became one of the Region's primary reservoirs of knowledge on those topics. Over the years, she also acted as a respected mentor and teacher for many of her co-workers.

John Peck came to Region 13 in a roundabout manner. John started his career in prison—he claims that he worked there as a guard. Marge confirms that she checked on this, likely before agreeing to marry him. After leaving prison, John taught sociology and anthropology at Ohio Northern University in Ada, OH, northwest of Columbus. In 1979, John began his NLRB career in Indianapolis at Region 25. John met Marge after he began working at the NLRB. In 1982, John made two of the best decisions in his life: he asked Marge to marry him and he transferred to Region 13. John also progressed from field examiner to field examiner supervisor. John, like Marge, is respected by the staff for his knowledge and willingness to act as a mentor and teacher.

John and Marge have three daughters. They live with two rottweilers (260 lbs of dogs). John is a fanatical golfer who has no qualms about walking a course as long as the temperature is above 40 degrees. He is a fan of Notre Dame University, which has subjected him to both praise and ridicule during his stay in the Region. He also enjoys his restored 1966 Austin Healy convertible. Marge is an avid gardener who also engages in a variety of crafts, including quilting, scrapbooking, and cardmaking. Their retirement plans include traveling through the U.S., golfing, and perhaps a return to teaching (for John).

The staff of Region 13 wishes the best for Marge and John on their retirement. We thank you for all that you have given us of yourselves through the years. We will not forget you and look forward to continue hearing from both of you.

Hanson Material Service Corp. (*cont.*)

hours before the scheduled election.

The Region found that Hanson's anti-union campaign was clearly crafted to extinguish any support for IUOE Local 150 by creating an overall atmosphere of intimidation. Further, the Employer's stated reason for the discharges was demonstrably pretextual. Therefore, on August 22, 2007, the Region issued a complaint on all allegations and submitted the case to the Board's Division of Advice, recommending that the Region be permitted to file a 10(j) petition seeking interim reinstatement of the two employees. The Board authorized the Region's request and on October 14, 2007, Field Attorneys Ed Castillo and Kevin McCormick petitioned Federal District Court Judge Charles R. Norgle for a preliminary injunction under Section 10(j).

From November 13 through November 16, 2007, Attorneys Castillo and McCormick litigated the unfair labor practice trial before Administrative Law Judge Robert A. Giannasi. Judge Giannasi agreed to hear "just and proper" evidence, needed by the federal district judge to evaluate the appropriateness of issuing a Section 10(j) injunction, during the administrative hearing. Therefore, there was no need to hold an evidentiary hearing on that evidence in federal court, where Judge Norgle could rely on the transcript of the proceeding before ALJ Giannasi. Unfortunately, the ALJ found that two alleged discriminatees were not unlawfully discharged. As a result, the Region has withdrawn its 10(j) petition.

NLRB FISCAL YEAR 2007 STATISTICS

UNFAIR LABOR PRACTICE CASES (NATIONWIDE)

- Settlement Rate: 97 percent (7,214 settlements), +0.3 percent from FY 2006
- Total Complaints: 1,182, -12.4 percent from FY 2006
- Merit Factor (of all charges filed): 36.6 percent, -0.5 percent from FY 2006
- Litigation Results: Regional Offices won 85 percent of Board and Administrative Law Judges decisions in whole or in part, -1.4 percent from FY 2006
- Total backpay, dues, and fines recovered: $110,388,806, -$338,622 (-0.3 percent) from FY 2006

REPRESENTATION CASES (NATIONWIDE)

- Elections Conducted: 2,080, -14.4 percent from FY 2006
- Elections Conducted Pursuant to an Agreement of the Parties: 91.2 percent, +3.1 percent from FY 2006
- Median time between filing of a petition and an election being conducted: 39 days, the same as in FY 2006

Dana: Decision May Eliminate Coercive Organizing (*cont.)*

support to a union agent is not likely to be sincere and is likely to be repudiated in a secret ballot election.

The decision may also affect the pie-in-sky first contract proposal strategy employed by many unions. Paradoxically, at the same time unions are objecting to a forty-five (45) window for employees to "test drive" the collective bargaining process, they are urging Congress to pass the Employee Free Choice Act which mandates arbitration of the first contract if an agreement is not reached in 120 days. Either unions can display their bargaining acumen in 45 days, in which case *Dana Corp.* does not represent a threat, or the 120 day time limit in the EFCA is unrealistic.

Thus, the likely impact of *Dana Corp.* is to bring reality into line with theory. Unions will now have to emphasize the advantages of a constructive union-management relationship in any contacts between union officials and corporate representatives so that the employer is a true believer rather than an unwilling participant. When unions solicit authorization cards their organizers will need to use the persuasive power of ideas rather than intimidation, peer pressure, and ridicule. The vicious attacks on a corporation's reputation and good-will which have characterized corporate campaigns will become a thing of the past, as these attacks engender union animus in employees. Finally, unions will develop a first contract more in line with establishing a foundation on which to build improvements in successor agreements rather than trying to force the first set of negotiations to replicate a mature contract.

It will take a number of years to determine if the decision has these long-term consequences. Hopefully, the Board will give the decision in *Dana Corp.* life long enough to determine if it improves the tone and process of labor management relations.

CHICAGO LABOR HISTORY: THE 1894 NATIONAL PULLMAN BOYCOTT

By Professor Robert Bruno,
University of Illinois, Urbana-Champaign
Institute of Labor & Industrial Relations

One of the most pivotal events in U.S. labor history was the 1894 Pullman Company Strike and Railroad Boycott. The work dispute involved a national rail strike, a draconian federal court order, the use of federal troops, the constitutionality of company towns and the anxieties of working people about growing corporate power.

The **American Railway Union (ARU)** was formed to represent railroad workers during the late 19th Century. The ARU was unique among railroad unions in that it welcomed anyone who worked for or on the railroad. Membership was open to both train crews, shop, and yardmen. Before the ARU, only a small portion of rail workers was unionized due to the control wielded by the craft-based, and all white, Brotherhood of Locomotive Engineers. In 1894, however, the ARU won a surprise victory over the Great Northern Railroad. Railroad workers, emboldened by the audacity and strength of the ARU, rushed to join. Membership climbed to 150,000, just 25,000 less than the entire membership of all other labor bodies. Their leader was **Eugene Debs**, soon to be America's leading socialist who while imprisoned for violating a federal injunction collected over 1 million votes for president in 1912.

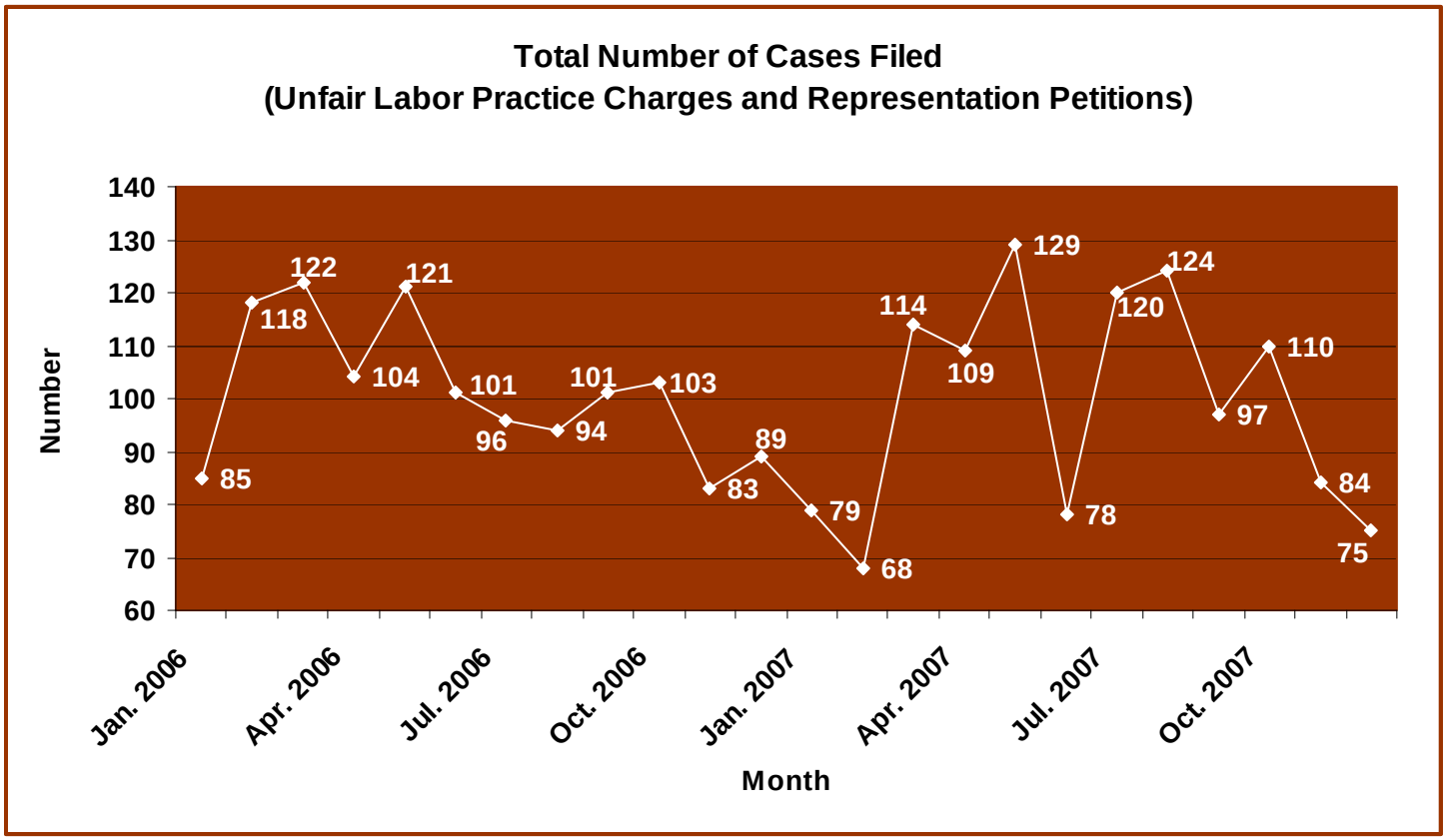
Flush with their success against the Great Northern, the ARU agreed later in 1894 to call for a general strike and boycott against the Chicago-based **Pullman Palace Car Manufacturing Company**. The ARU was acting in defense of the 4,000 workers at the Pullman works who went out on strike over the company's decision to reduce their wages by 28%. Debs first opposed involving the union so quickly after a major labor battle, but rank and file support was so great that he threw the full weight of the union behind the striking Pullman workers. The decision would prove to be a fateful one. Railroad workers across the nation refused to switch Pullman cars onto trains and within a few days 125,000 workers on 29 railroads had quit work.

On June 26th the boycott began and, although centered in Chicago, crippled railroad traffic nationwide. All twenty-nine lines out of Chicago were closed down and only companies that refused to handle Pullman cars were allowed to move. The struggle then extended to 26 states and within 3 days the conflict against the railroad companies had become a national general strike.

With rail traffic shut down, the country's economic engines began to slowly atrophy. Pullman and rail workers across the nation had seized the upper hand and were winning the strike. But then the workers faced a foe they could not defeat - the United States Government. The railroads had established a General Managers Association (GMA) to coordinate strikebreaking activities. On June 30th they called on Illinois Governor John Altgeld to request that President Grover Cleveland use his powers to crush the strike. When the labor-supported Altgeld refused, the GMA asked the President directly. Cleveland obliged by first directing the Attorney General, who had been a railroad attorney, to secure broad sweeping injunctions against all strikers. The court ordered injunction was quickly issued, and effectively criminalized all union activity in support of the strike. Debs, however, ignored the injunction and was subsequently jailed. Still, workers refused to go back to work and the national work stoppage continued.

The GMA then demanded that Cleveland act more forcibly. He accommodated their request by sending federal troops against the strikers. Over 14,000 soldiers and hired railroad guns were ominously gathered and stationed in Chicago. With the arrival of the federal army, violence soon erupted with railroad cars turned over and burned. Property damage in one day reached $340,000. In the end, 13 people were killed and 53 seriously wounded. Finally on July 6th, the militia began to usher strikebreakers into the rail yards. The strike was over and the ARU was broken. Workers had proven that they could defeat company efforts to starve them into submission, but were no match for the coercive power of the U.S. army turned against American citizens for private and political ends.

REGION 13 STATISTICS



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