UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NTN BOWER CORPORATION,

Employer,

and **Case 10-RD-1504**

GINGER ESTES,

Petitioner,

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO

Union.

UNION'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO, ("UAW" or "Union"), through its attorney, George N. Davies, pursuant to the Board's Rules and Regulations, hereby file this its Opposition to the Employer's Request for Review in this case. As is shown below, the employer, NTN Bower Corporation, has stated no basis to reverse the Regional Director's decision to dismiss the petition in this case. Indeed, the employer in its continuing efforts to undermine and rid itself of the Union, asks the Board to ignore its serious and egregious unfair labor practices in cases 10-CA-37271, et al., currently pending before the Board that have not only interfered with employee free choice, but were so inherently destruction of employee §7 rights that any subsequent causal connection with employee disaffection is apparent.

I. Background

The employer in this case committed multiple unfair labor practices as found by

Administrative Law Judge John H. West in cases 10-CA-37271, et al. These findings include, *inter alia*, the refusal to reinstate economic strikers who had made an unconditional offer to return to work to available positions, discriminating against returning strikers by requiring they sign a return to work log and threatened loss of reinstatement rights if they refused to do so, surveillance of Union representatives and interference with its ability to communicate with employees after the strike including the monitoring of the movements of Union representatives and refusing them access to the facility, the refusal to provide names and addresses of replacement workers to the Union even after there was no longer and basis to refuse to do so and the unilateral modification of mandatory terms and conditions of employment which had the effect of reducing employees' pay by a substantial amount. (ALJD, pp. 126-127, May 10, 2010). The employer has only taken exception to some of these findings of the ALJ and the case is presently pending before the Board. Despite the employer's protestations to the contrary, its unlawful conduct as outlined in the ALJ's decision, was not only the type to interfere with employee free choice but also tainted any purported subsequent loss of majority of support for the Union. Accordingly, the Regional Director was correct in dismissing the petition.

II. The Regional Director Correctly Dismissed the Petition Without a Hearing and The Employer Overstates the Holding of the Board's Decision in *Saint Gobain*

The employer contends that the Regional Director applied the wrong standard in determining to dismiss the Petition. (Employer Br., pp. 6-10). In doing so, the employer not only misinterprets the Board's casehandling manual but overstates the Board's holding in *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004) to always require a hearing to establish a causal relationship between the unlawful conduct and employee disaffection.

The Board's casehandling manual states in relevant part:

> 11730.2 Type I Charges: Charges That Allege Conduct That Only Interferes With Employee Free Choice (Request to Proceed May be Honored)
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> When the charging party in a pending unfair labor practice case is also a party to a petition, and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted, and no exception (Sec. 11731) is applicable, **the charge should be investigated and either dismissed or remedied before the petition is processed**. Unless Type II conduct is involved, a request to proceed by the charging party (Sec. 11731.1) may be honored in these cases. Columbia Pictures Corp., 81 NLRB 1313, 1314 (1949); Carson Pirie Scott & Co., 69 NLRB 935, 938–939 (1946); United States Coal & Coke Co., 3 NLRB 398, 399 (1937); see also Holt Bros., 146 NLRB 383, 384 (1964). (Emphasis supplied).

Therefore, even if the charges in this case were only "Type I", the Regional Director after investigation, could still dismiss the petition. See, Casehandling Manual, Sec. 11730-11734; and *Overnite Transportation Co.*, 333 NLRB 1392, 1393 (2001).

Similarly, the employer overstates the Board's holding in *Saint Gobain*. The employer contends that a hearing is always required to show a causal nexus between the unlawful conduct and the employee disaffection for the Union. That is simply not the Board's holding in *Saint Gobain*. In finding that a hearing was required with respect to the claims in that particular case the Board in *Saint Gobain* held

> "We recognize that the Board has applied *Master Slack*[1] in the

[1]See, *Master Slack Corp.*, 271 NLRB 78 (1984). In *Master Slack*, the Board identified several factors to consider in determining whether a causal relationship exists between the employer's unfair labor practices and employee disaffection including: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the (continued...)

> context of a representation case, so as to dismiss a decertification petition without a hearing. **Here, however, the alleged unfair labor practice is a single unilateral change on a single subject and, as indicated above, there are significant factual issues as to the impact of that change**." 342 NLRB at 434. (Emphasis supplied).

Thus, the Board's decision in *Saint Gobain* did not overrule longstanding case handling procedure as applied by the Board's Regional Directors in dismissing, without a hearing, a decertification petition under the *Master Slack* analysis. Rather, the Board only held that on the specific facts of that case where a single, unilateral change on a single subject was alleged to have been the unfair labor practice that "[i]n such circumstances, it is not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection." *Id*.[2] That is not the case here. The employer in this case has committed multiple unfair labor practices including ones that are inherently destruction of employees' section 7 rights. Indeed, the employer's violations in this case are, under Board precedent, sufficient to dismiss the petition without a hearing. For the employer in this case to argue that the facts in the instant case fit those that led to the Board's decision in *Saint Gobain*, strain the bounds of credulity and overstate the holding of the Board in that case. See also, *Overnite Transportation*, 333 NLRB at 1392

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[1](...continued)
tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Id*. at 84.

[2]This application of *Saint Gobain*, is consistent with the Section 11733.2(a)(2) of the Board's Casehandling Manual which provides that in cases involving violations that may affect an incumbent Union's subsequent loss of majority support the Regional office "may be required to conduct a hearing on the causal nexus between the allegedly unlawful conduct and the filing of the petition." The operative phrase here is "may be required" not that such a hearing is mandated. Neither the Board's precedent nor its Casehandling Manual require, as the employer suggests here, that an evidentiary hearing is required in this instance.

(Decertification petitions dismissed and causal connection between unfair labor practices and employee disaffection determined without a hearing.).[3]

III. The Unfair Labor Practices Committed By The Employer Require Dismissal of the Petition Without The Necessity Of A Hearing

The employer in this case did not make a single unilateral change on a single mandatory subject of bargaining. The unfair labor practices the employer committed in this case were numerous and went directly to the heart of the employees' exercise of their section 7 rights and to the Union's ability to represent the employees. The employer attempts to make it appear that its unlawful acts were trivial in nature. Nothing could be further from the truth. Almost all of the unfair labor practices committed by the employer were committed after the Union ended the strike and made an unconditional offer to return to work on behalf of the employees.[4] The unfair labor practices committed by the employer in this case, from refusing to reinstate economic strikers to refusing Union representatives access to the facility were designed to do nothing more punish the employees for exercising their section 7 right to engage in protected activity and to create a lasting impression that the Union is ineffectual in being able to provide representation to the employees. Thus, these unlawful acts created the disaffection that led to the filing of the tainted petition.

An employer's unlawful refusal to reinstate economic strikers is conduct so inherently destructive of employee rights that evidence of specific anti-union motivation is not necessary to

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[3]The Board did not overrule *Overnite* when it issued its decision in *Saint Gobain*.

[4]The unfair labor practice charge regarding the refusal of the employer to turn over the names and addresses of the replacement workers while filed prior to the end of the strike, the ALJ found that the employer did not violate the Act with respect to this allegation until after the strike had ended and there was no basis for its continuing refusal to turn over the information. Also, the ALJ's finding that the employer committed an unfair labor practice by refusing to provide information regarding a picket line incident occurred prior to the end of the strike.

establish a violation of the Act. *NLRB v. Great Dane Trailers*, 386 U.S. 26 (1967); *Laidlaw Corp.*, 171 NLRB 1366, 1369 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). In cases, 10-CA-37271, et al., pending before the Board, the ALJ found that the employer violated the Act by refusing to reinstate approximately 25 economic strikers. Clearly this action was designed to not only punish the employees who had engaged in protected activity but to also send a message to all of the other employees that they likewise might lose employment if they manifested or engaged in any support for the Union. *Penn Tank Lines*, 336 NLRB 1066, 1068 (2001); *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986). It is clear that the employer's failure to immediately reinstate the former strikers, as found by the ALJ, at the conclusion of their strike, was exactly the type of unlawful conduct that would cause employee disaffection with the Union and would interfere with the employees' free choice in an election. The Board will generally dismiss a decertification petition where there are concurrent unfair labor practices which interfere with employee free choice in the election and are "inherently inconsistent" with the petition itself. "The Board considers conduct that taints . . . an incumbent union's subsequent loss of majority support to be inconsistent with the petition." *Overnite*, 333 NLRB at 1393.

Further, by engaging in unlawful actions designed to prevent and impede access by the Union to the employees and by making unilateral changes in mandatory terms and conditions of employment, the employer minimized the necessity for collective bargaining and emphasized to the other employees that there existed no necessity for representation by the Union. *Id.*; *Williams Enterprises*, 312 NLRB 937, 940 (1993).

One of the numerous unfair labor practices committed by the employer here is when it unilaterally modified the employees' work week from 5 days to 4 days and caused a corresponding

20% loss of pay. Where unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages, the possibility of a detrimental or long-lasting effect on employee support for the union is clear. *Alachua Nursing Center*, 318 NLRB 1020, 1030-1031 (1995); *Penn Tank Lines*, 336 NLRB at 1067. Indeed, the employer in this case was engaging in these unlawful tactics to undermine support for the Union and demonstrate its power to undercut economic gains that were collectively bargained.

As noted by the Board, the final two of the *Master Slack* factors focus on the effect of Respondent's unfair labor practices upon the employees' protected concerted activities. Clearly, the refusal to reinstate strikers would "have a lasting inhibitive effect on a substantial percentage of the work force", remaining in their collective memories for a long time. *NLRB v. Jamaica Towing*, 632 F. 2d 208, 213 (2nd Cir. 1980). Accordingly, the employer's unfair labor practices in cases 10-CA-37271, et al., were the type which would have resulted in employee disaffection from the Union and therefore, a causal connection existed between said unfair labor practices and the instant decertification petition. In these circumstances, the Regional Director's administrative dismissal of the decertification petition was appropriate.

Lastly, the employer in its Request for Review attempts to minimize the effects of its unfair labor practices by claiming that their proximity in time to the decertification petition was too remote. This contention is without merit. In *Overnite*, supra, The Board held that unremedied unfair labor practices which occurred 4 years prior to decertification petition were not too remote in time given serious and pervasive nationwide unfair labor practices that would have a lasting effect on all employees. 333 NLRB at 1395-1396. The same is true in this case. Almost all of the employer's numerous unfair labor practices were committed post-strike and continue unremedied today.

Accordingly, "the coercive effects of the unfair labor practices . . . has in no way dissipated." *Id*. at 1395. At bottom, the employer's serious, pervasive and unremedied unfair labor practices which created employee disaffection, require that the instant petition be dismissed.

III. Conclusion

The employer's request for review is due to be denied as no compelling reasons exist to grant the request. The Regional Director's determination to dismiss the petition was correct and should not be disturbed.

Respectfully submitted,

/s/George N. Davies
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Date: November 24, 2010

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition to Employer's Request for Review was filed electronically with the National Labor Relations Board and served by email and U.S. Mail to:

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On this the 24th day of November, 2010.

/s/George N. Davies
George N. Davies