

**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.

UAW'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 attorneys, pursuant to the Board’s Rules and Regulations, hereby file this its Opposition to the Employer’s Second Request for Review in this case. As is shown below, the employer, NTN Bower Corporation (“Company”), has stated no basis to reverse the Regional Director’s decision applying the Board’s *Master Slack* analysis to dismiss the petition in this case.

I. Board Precedent Does Not Require A Hearing

The Company’s Request for Review once again laments that it was denied a hearing on the causal nexus required between its multiple and unremedied unfair labor practices and employee disaffection in this case. In relying exclusively on *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004), the Company overstates the Board’s holding in that case, ignores the obvious narrowness of

the decision and completely overlooks established Board precedent that does not require a hearing. See, *Overnite Transportation Co.*, 333 NLRB 1392 (2001); *Priority One Services*, 331 NLRB 1527 (2000). To support its request for a hearing, the Company relies on an inappropriately broad and overstated application of *Saint Gobain*, one in which every possible situation involving employee disaffection and union decertification requires an evidentiary hearing. The Board did not intend *Saint Gobain* to apply across such a broad spectrum of cases. In fact, the decision is very clear: it has a narrow application to a very specific factual situation, one that involved “a single unilateral change on a single subject.” *Saint Gobain Abrasives, Inc.*, 342 NLRB 434, 434 (2004).

Saint Gobain dealt with the employer’s refusal to bargain in good faith with the union by implementing an interim health insurance program. *Id.* The petition to decertify the union was filed and subsequently dismissed by the Regional Director without a hearing. *Id.* On such a fact-specific issue, a hearing was required to establish a causal relationship between the alleged conduct and the disaffection. *Id.* Absent such a hearing, the employees’ § 7 rights regarding union representation were denied. *Id.* However, if the causal connection between the employer’s unlawful conduct and the employee disaffection is established **at a prior hearing**, an independent hearing for the same purpose is not required. *Id.* Additionally, the Board did recognize that it “has applied *Master Slack* in the context of a representation case, so as to dismiss a decertification petition **without a hearing.**” *Id.* (citing *Overnite Transportation Co.*, 333 NLRB 1392; *Priority One Services*, 331 NLRB 1527) (emphasis supp.).

In *Overnite Transportation*, the Board dismissed the employers’ decertification petitions without a hearing. The Board based its dismissal on the extensive record developed in *Overnite Transportation Co.*, 329 NLRB 990 (1999), which established a “nationwide campaign of extensive

and egregious unfair labor practices.” 333 NLRB at 1392. The Fourth Circuit enforced the Board’s 1999 decision. *Overnite Transportation Co. v. NLRB*, 240 F.3d 325 (4th Cir. 2001), petition for rehearing and rehearing en banc denied (Apr. 17, 2001).

The evidentiary hearing that the Board ordered in *Saint Gobain* was required to establish “genuine factual issues.” 342 NLRB at 434. Such a hearing was clearly not necessary in *Overnite Transportation* because of the extensive factual record established in prior hearings. Moreover, the Board had the opportunity in *Saint Gobain* to overrule *Overnite Transportation* and require an evidentiary hearing for all decertification petitions; it did not do so.¹

Another evidentiary hearing is not required by Board precedent and is similarly not necessary to establish a causal nexus between the Company’s unlawful activity and employee disaffection. This case involves an extensive factual record—exactly like the one used in *Overnite Transportation*—upon which a reviewing court may rely when considering the *Master Slack* factors. Additionally, the record clearly establishes the required causal nexus between the Company’s unfair labor practices and the employees’ subsequent disaffection with the Union, as discussed below.

II. The Regional Director Properly Applied the *Master Slack* Factors in This Case

The Board looks to the following four factors to determine whether a causal relationship exists between an employer’s unlawful activity and employee disaffection with an incumbent union:

- 1) the length of time between the unlawful activity and the filing of the decertification petition; 2) the nature of the illegal acts, including the possibility of a detrimental or lasting effect on employees;
- 3) the tendency to cause employee disaffection from the union; and 4) the effect of the unlawful

¹The Board did overrule *Priority One*, but only to the extent that the earlier case only required an “inherent tendency” to undermine union support without establishing the causal nexus required in *Master Slack*. *Saint Gobain*, 342 NLRB at 435 n.4.

activity on employee morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984); *Overnite Transportation*, 333 NLRB at 1392-93. The Acting Regional Director correctly addressed and rejected the Company's arguments as to each factor.

A. Temporal Proximity

The Company claims that the Acting Regional Director erred in finding a close temporal proximity between the employer's unlawful conduct and the circulation and filing of the decertification petition. However, the Company blindly ignores the Administrative Law Judge's decision, upon which the Acting Regional Director relied in finding such proximity. Contrary to the company's claim of a 10-15 month gap between the employer's unlawful conduct and the filing of the decertification petition, the Company "has refused, **to date**, to reinstate former strikers." (Regional Director Decision, p. 7) (emphasis supp.). The Acting Regional Director reviewed a litany of both past and current violations committed by the Company, which contributed to an "atmosphere of **unremedied** unfair labor practices" during which the decertification petition was both circulated and filed. (Regional Director Decision, p. 7) (emphasis supp.).

A close proximity exists where a disaffection petition is circulated or presented to the employer during the course of the employer's bad faith bargaining. *Fruehauf Trailer Services*, 335 NLRB 393, 394 (2001); *El Paso Disposal, L.P.*, 28-CA-21654, JD(SF)-18-09, 2009 WL 1174171 (N.L.R.B. Div. of Judges, Apr. 27, 2009) (signatures for decertification collected immediately after allegations of employer's illegal activity); *Regional House of Wallingford, Inc.*, 347 NLRB 173, 188 (2006) (employer's illegal activity "culminat[ed] . . . at the very moment that the employees' decertification petition was being circulated"). Additionally, the passage of time "does not, per se, preclude a finding of a causal relationship." *Comau, Inc.*, 7-CA-52614, JD-66-10, 2010 WL

5177734 (N.L.R.B. Div. of Judges, Dec. 21, 2010) (unfair labor practice occurred nine months before petition); see also, *AT Systems West*, 341 NLRB 57 (2004) (same); *Columbia Portland Cement v. NLRB*, 979 F.2d 460, 465 (6th Cir. 1992) (passage of one year). Issued on March 14, 2011, the Acting Regional Director's decision demonstrates not only that the unlawful activity did not end in 2008, as the Company claims, but that it also continued up to and after the decertification petition was filed on October 8, 2010.² The Company's claim that its unfair labor practices ended one and one half to three years before the decertification petition was circulated and filed is disingenuous and flatly contradicted by the record.

B. Nature of the Illegal Acts

As to the second *Master Slack* factor, the Company omits any reference to its own unlawful acts and attempts to characterize the Union's actions as immoral and sometimes criminal. "It is well established that when an employer makes unilateral changes to terms and conditions of employment, those changes harm the union's status as the bargaining representative because the employer's actions undermine the union in the eyes of the employees and give the impression that the union is powerless." *Comau, Inc.*, 7-CA-52614, JD-66-10, 2010 WL 5177734 (citing *Priority One Services*, 331 NLRB at 1527; *Goya Foods*, 347 NLRB 1118, 1120-1121, 1123 (2006); *Penn Tank Lines*, 336 NLRB 1066, 1067-68 (2001)).

This case has already been fully and completely tried before Administrative Law Judge West and his decision provides the litany of unfair labor practices that the Company was found to have

²Indeed, the Company's unlawful actions continue to date. The Company unlawfully withdrew recognition from the Union on December 31, 2010 and Region 10 issued a complaint against the Company based on that Conduct. See, *NTN Bower Corporation*, Case 10-CA-38816. This case is scheduled for hearing on May 10, 2011.

engaged in. The ALJ found that the Company engaged in numerous illegal acts with respect to the former strikers, but those findings are conveniently and deliberately left out of the Company's Request for Review. In contrast to the Union's alleged acts against itself or replacement workers, the Acting Regional Director found that the record established the Company engaged in unlawful activity by unilaterally implementing changes that "graphically portray to employees that the employer is in a position to confer or withdraw economic benefits without regard to the presence of the union." (Regional Director Decision, p. 8) Those changes, in addition to the across-the-board requirement that returning workers sign a Return to Work Log as a condition of reinstatement, did directly contribute to employee unrest and disaffection from the Union, as found by the Acting Regional Director. The record conclusively establishes the detrimental or lasting effect of the Company's illegal activities.

C. Tendency to Cause Disaffection

The Company's pervasive illegal activities "clearly had a tendency to cause employee disaffection." (Regional Director Decision, p. 8) "It is the objective tendency of the unfair labor practices to undermine union support that is critical, not the actual effect of the unfair labor practices." *Overnite Transportation Co.*, 329 NLRB at 995 n.26; *Overnite Transportation Co.*, 333 NLRB at 1395; see also, *Hearst Corp.*, 281 NLRB 764, 765 (1986).

The March 14 decision lists several actions that contribute to employee disaffection: 1) unilateral implementation of employment terms and conditions; 2) threat of the loss of reinstatement rights; 3) refusal to honor reinstatement rights; 4) refusal to provide relevant information regarding replacement workers to the Union after 30 days; and 5) refusal of access to Union representatives. The Company relies on the so-called Union activity and completely ignores the central role its

numerous and pervasive unfair labor practices played in causing disaffection with the Union. All of the evidence the Company would purport to offer in support of the Request for Review has already been heard and rejected by the Administrative Law Judge. Based on the established and detailed record, the Acting Regional Director reasonably concluded that the Company's own activities had the objective tendency to cause the disaffection.

D. Effect on Employee Morale, Organizational Activities, and Union Membership

The Company apparently does not distinguish between the third and fourth *Master Slack* factors in its Request for Review. Instead, the Company conflates the two together under one heading and apparently hopes that by mentioning instances of alleged Union activity, the Board will overlook the Administrative Law Judge's findings and the overwhelming evidence against the Company regarding its effect on employee morale, organizational activity, and membership in the Union. "The transcripts of the unfair labor practice hearing provide **direct evidence** that the Employer's conduct has, in fact, caused employee disaffection from the Union. (Regional Director Decision, p. 10) (emphasis supp.). The record is replete with such examples, four of which are referenced by the Acting Regional Director. There was "no doubt that the Employer's conduct . . . resulted in not only employee disaffection from the Union, but in a situation where the employees ha[d] absolutely no knowledge of representation by the Union." (Regional Director Decision, p. 10)

III. Conclusion

Saint Gobain does not stand for the proposition that every situation involving a decertification petition requires an independent evidentiary hearing. Moreover, this situation is much more similar to that of *Overnite Transportation*, where the record is both extensive and, perhaps most importantly, complete regarding the Company's unlawful conduct and its causal

connection to disaffection with the Union. The Administrative Law Judge's decision, which is approximately 130 pages long, and his findings and conclusions of law are more than sufficient for the Region to rely on in dismissing the petition. Moreover, the record clearly establishes the causal relationship between the Company's illegal acts and the employee disaffection with the Union, pursuant to the four *Master Slack* factors. Consequently, the Company's Request for Review should be denied. The Regional Director's determination to dismiss the petition was correct and should not be disturbed.

Respectfully submitted,

/s/George N. Davies

George N. Davies

Matthew S. Swerdlin

Quinn, Connor, Weaver, Davies & Rouco LLP

2700 Highway 280 East, Suite 380

Birmingham, AL 35223

(205) 870-9989

(205) 803-4143 facsimile

gdavies@QWDCR.com

mswerdlin@QCWDR.com

Counsel for UAW

Date: April 14, 2011

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:

C. Douglas Marshall, Resident Officer
National Labor Relations Board, Region 10
1130 22nd Street South
Ridge Park Place
Birmingham, AL 35205-2870

and

Roy G. Davis, Esq.
Richard A. Russo, Esq.
Davis and Campbell L.L.C.
401 Main Street, Suite 1600
Peoria, Illinois 61602

and by U.S. Mail to:

Ginger Estes
175 Beecher Street
Hamilton, AL 35570

Martin M. Arlook, Regional Director
Region 10
National Labor Relations Board
Harris Tower, Suite 1000
233 Peachtree Street, N.E.
Atlanta, GA 30303-1513

On this the 14th day of April, 2011.

/s/George N. Davies

George N. Davies