

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

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Coupled Products, LLC,  
Employer

and

Case No. 25-RD-061324

International Union, United Automobile  
Aerospace and Agricultural Workers of  
America, UAW Local 2049,  
Union

and

Connie L. Gray,  
Petitioner.

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**PETITIONER CONNIE GRAY'S REQUEST FOR REVIEW  
OF THE REGIONAL DIRECTOR'S DISMISSAL  
OF HER DECERTIFICATION PETITION**

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**INTRODUCTION:** On December 29, 2011, the Regional Director dismissed without a hearing the Petition for a Decertification Election filed in this case. (See Exhibit 1). That dismissal was based upon the Board’s “blocking charge” doctrine. Pursuant to Rules & Regulations §§ 102.67 and 102.71, Petitioner Connie Gray hereby submits this Request for Review.<sup>1</sup>

This Request for Review should be granted because this case presents compelling issues under cases such as Saint-Gobain Abrasives, 342 NLRB 434 (2004), which held that “blocking charges” often serve to unfairly “deny employees their fundamental § 7 rights”; see also Dana Corp., 351 NLRB No. 28 (2007) (modifying the so-called “voluntary recognition bar” because the bar prevents employees from exercising their § 7 rights).

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<sup>1</sup> Petitioner submits this Request for Review so that she does not waive any deadlines or time limits under the Board’s Rules & Regulations. In doing so, however, Petitioner notes that she specifically challenges the authority of the current Board to act in this case, as three of its members were appointed unlawfully, without the advice and consent of the United States Senate.

On or about January 4, 2012, President Obama announced that he was appointing three new Board members, Sharon Block, Terrence Flynn and Richard Griffin. <http://www.nlr.gov/news/white-house-announces-recess-appointments-three-fill-board-vacancies>. As defined in Article I, Section 5 of the U.S. Constitution, the United States Senate was in session at the time of the President’s appointment of these new Board members. Nevertheless, the President purported to appoint the new Board members without the Advice and Consent of the United States Senate. Such Advice and Consent is required by Article II, Section 2, Clause 2 of the U.S. Constitution. The President improperly named the new Board members as “recess” appointments pursuant to Article II, Section 2, Clause 3, even though the Senate was not in recess at the time.

Thus, despite Petitioner’s instant Request for Review of the Regional Director’s dismissal, she does not waive her objection to the authority of the current Board to act because of its lack of a lawful quorum under 29 U.S.C. § 153(b) and *New Process Steel, LLP, v. NLRB*, 130 S.Ct. 2635 (2010).

In this case, the Regional Director has prevented employees from voting to decertify an unpopular and unwanted union. Other than the Region's speculation, there has been no showing of any "causal nexus" between the employees' desire to throw off this unwanted union and any alleged employer unfair labor practices. In contrast with the Regional Director's cavalier treatment of employee rights, Saint-Gobain Abrasives mandates that the union filing the "blocking charges" bear the burden of proof that such a "causal nexus" exists. See, e.g., Roosevelt Memorial Park, Inc., 187 NLRB 517, 517-18 (1970) (party asserting contract bar "bears the burden of proof that the contract was fully executed, signed and dated prior to the filing of the petition"). The union should be put to that burden of proof.

It must be remembered that the fundamental and overriding principle of the Act is employee free-choice and "voluntary unionism." Pattern Makers v. NLRB, 473 U.S. 95, 102-03 (1985). See also Lee Lumber & Building Material Corp. v. NLRB, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) ("employee free choice ... is a core principle of the Act.") citing Skyline Distributors v. N.L.R.B., 99 F.3d 403, 411 (D.C. Cir. 1999). Since any "bar" to a decertification election deprives employees of rights expressly granted to them under the Act, see §§ 7 and 9(c)(1)(A)(ii), all such "bars" should be strictly and narrowly construed by the Board. See Saint-Gobain Abrasives; Dana Corp.; Waste Management of Maryland, 338 N.L.R.B. No. 155, p.1 (2003) ("a finding of contract bar necessarily results in the restriction of the employees' right to

freely choose a bargaining representative”).

Here, if a Saint-Gobain hearing is held, the facts will conclusively show that union malfeasance and arrogance, not employer misconduct, led the Petitioner and her fellow employees to attempt this decertification. Under no stretch of the imagination could the union ever prove the requisite “causal nexus” in this case, no matter what allegations are filed against the employer. Yet the Regional Director summarily dismissed the instant petition without a hearing, and in the process trampled employees’ statutory right to have a decertification election conducted. See NLRA §§ 7 and 9(c)(1)(A)(ii). “The wrongs of the parent should not be visited on the children, and the violations of [the employer] should not be visited on these employees.” Overnite Transportation Co., 333 NLRB 1392, 1398 (2001) (Member Hurtgen dissenting).

In short, Petitioner asks that her election be reinstated immediately. At the very least, the union should be put to its burden of proof in a “causation” hearing under Saint-Gobain Abrasives.

**LEGAL ARGUMENT:** Employees enjoy a statutory right to petition for a decertification election under § 9(c)(1)(A)(ii) of the National Labor Relations Act (“NLRA” or “Act”). That right should not be trampled by arbitrary rules or “bars” or “blocking charges” which prevent the expression of true employee free choice. Indeed, most of the Board’s “bars” and “blocking charge” rules stem from discretionary Board policies (see, e.g., Section 11730 of the Casehandling Manual concerning “blocking

charges”), which should be reevaluated when industrial conditions warrant. See e.g., IBM Corp., 341 NLRB No. 148 (2004); Dana Corp., 351 NLRB No. 28 (2007). It is time for the Board to drastically alter, if not end, its “blocking charge” rules.

Employee free choice under § 7 is the paramount interest of the NLRA. See Pattern Makers League v. NLRB, 473 U.S. 95 (1985); Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992); Lee Lumber & Bldg. Material Corp. v. NLRB, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (employee free choice is the “core principle of the Act”) (citations omitted). An NLRB conducted secret-ballot election is the preferred forum for employees to exercise their right of free choice. See Levitz Furniture Co., 333 NLRB 717, 725 (2001) (“We agree with the General Counsel and the unions that Board elections are the preferred means of testing employees’ support”). This right of employee free choice is being sacrificed by the Regional Director on the alter of “industrial stability” simply because the employer is alleged to have committed one or more infractions of the law.

The Regional Director’s reflexive application of the “blocking charge” policies ignores the fact that the Petitioner and her fellow employees have longstanding and principled disagreements with the union, irrespective of any employer infractions. Yet, the employees are being treated like children who cannot possibly make up their own mind. This is wrong. As Member Hurtgen cogently stated in reviewing a similar situation of union blocking charges:

I would not deprive these employees of their statutory right to vote on the issue of union representation. The wrongs of the parent should not be visited on the children, and the violations of Overnite [the employer] should not be visited on these employees.

In re Overnite Transp. Co., 333 NLRB 1392, 1398 (2001) (Member Hurtgen dissenting).

The Board's jurisprudence on blocking elections needs to be drastically overhauled. The Board has long operated under a system of "presumptions" which regularly prevent employees from exercising their statutory right under §§ 7 and 9(c)(1)(A)(ii) to hold a decertification whenever a union files so-called "blocking charges." Basically, the Board will refuse to conduct a decertification election while union unfair labor practice charges against the employer are pending. The rationale is that the employer infractions, if true, destroy the "laboratory conditions" necessary to permit employees to cast their ballots freely and without restraint or coercion.

But it must be remembered that this "blocking charge" practice is not governed by statute or even by formal rules or regulations; rather, its creation and use lies within the Board's discretion to effectuate the policies of the Act. American Metal Prods. Co., 139 N.L.R.B. 601 (1962); see also NLRB Casehandling Manual 11730 et seq., which sets forth the "blocking charge" procedures in detail. Moreover, it must be remembered that in every case the "blocking charge" rule stops employees from exercising their paramount § 7 rights to choose or reject representation.

For this reason, the Board's "blocking charge" practice has faced severe judicial criticism. See, e.g., NLRB v. Gebhard-Vogel Tanning Co., 389 F.2d 71 (7th Cir. 1968);

NLRB v. Minute Maid Corp., 283 F.2d 705 (5th Cir. 1960). In Lee Lumber and Bldg. Material Corp. v. NLRB, 117 F.3d 1454, 1458 (D.C. Cir 1997) (emphasis added), the court described one such set of NLRB “blocking charge” presumptions as follows:

[T]he Board explicitly has adopted not a *per se* rule but a rebuttable presumption that there is a causal nexus between an employer's unlawful refusal to bargain and its subsequent repudiation of the union. In the decision under review, the Board first reaffirmed the general rule that in a case involving an unfair labor practice other than a refusal to bargain the union must show specific proof of a causal relationship between the unfair labor practice and the subsequent repudiation of the union; in cases involving an unlawful refusal to recognize and bargain, however, the Board held that "the causal relationship between unlawful act and subsequent loss of majority support may be presumed," Supplemental Decision at 3, **regardless of whether the employees were aware of the employer's unlawful behavior**. Therefore the Board would not hear evidence about what the employees knew or about "the actual impact of such refusals to bargain on the employees' morale, organizational activities, and union membership." Id. at 3 n. 23.

As shown by the highlighted text, the Board’s policies often deny decertification elections even where the employees themselves are unaware of the alleged employer misconduct, and where their disaffection from the union springs from wholly independent sources. Such use of “presumptions” to halt decertification elections thus serves to entrench unpopular but incumbent unions, thereby forcing an unwanted representative onto employees. Judge Sentelle’s concurring opinion in Lee Lumber, 117 F.3d at 1463-64, highlights the unfairness of the Board’s policies:

As the court today notes in discussing the imposition of the bargaining order, “employee ‘free choice’ ... is a core principle of the [National Labor Relations] Act.” (citing Skyline Distribs. v. NLRB, 99 F.3d 403, 411 (D.C. Cir.1996)). However, in cases like the present one, the Board, in the face of that core principle, presumes that the employees are incapable of exercising their core right because they might have been deceived as to the union’s strength by the employers’

apparent willingness to challenge the union. If that is the case, and a union is worth having, then why couldn't the unions so inform the employees out of it? To presume that employees are such fools and sheep that they have lost all power of free choice based on the acts of their employer, bespeaks the same sort of elitist Big Brotherism that underlies the imposition of the invalid bargaining order in this case. Consider anew the facts before us. In 1990, 85.7 percent of the employees of the bargaining unit signed a petition asking for a chance to exercise their free choice. Seven years later, those employees still have not had the election they sought because the Board presumes that the employers' refusal for a few days to bargain with the Union thoroughly fooled those poor deluded employees to such a point that neither the Union nor anyone else could possibly educate them of the truth known only to their Big Brother, the Labor Board.

Region 25 should be ordered to proceed to an immediate election without further delay. The uncertainty in this bargaining unit has dragged on for too long, and it is time to hold the vote and let the chips fall where they may for all parties. Petitioner and her colleagues are not sheep, but responsible, free-thinking individuals who should be able to make their own choice about unionization. Id. Even in situations where employers commit an unfair labor practice, the Board's "blocking charge" rules are arbitrary and anti-democratic because they halt elections without regard to the desires of the employees, based upon "the sins" of the employer. Overnite Transp. Co., 333 NLRB 1392, 1398 (2001) (Member Hurtgen dissenting).

Member Hurtgen was correct in pointing out the major flaw of most election "blocks," to wit: that they visit the sins (or potential sins) of employers on the employees. But it must be remembered that it is the employees themselves whose paramount § 7 rights are at stake, and they should not be so cavalierly discarded simply because their employer committed a violation or made a mistake under the labor laws. Petitioner urges

the Board to overhaul its “blocking charge” policies to protect the true touchstone of the Act – employees’ paramount right of free choice under § 7. See Pattern Makers League v. NLRB, 473 U.S. 95 (1985) (paramount policy of the NLRA is “voluntary unionism”); Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) (“By its plain terms, thus, the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers. . . .”); International Ladies Garment Workers v. NLRB, 366 U.S. 731, 737 (1961) (“There could be no clearer abridgment of § 7 of the Act” than for a union and employer to enter a collective bargaining relationship when a majority of employees do not support union representation).

Procedural hurdles which deny employees their right to hold a decertification election are woven throughout the Board’s rules. See Casehandling Manual 11730 et seq. These procedural hurdles also find voice in cases like Master Slack, 271 NLRB 78 (1984), and its progeny, which hold that various employer unfair labor practices are “presumed” to taint employee decertification petitions.

But in granting review in Saint-Gobain Abrasives, 342 NLRB 434 (2004) and overruling cases such as Priority One Services, 331 NLRB 1527 (2000), the Board has signaled its understanding that many of these “blocking charge” rules are arbitrary, unfair, and rely upon “speculat[ion] . . . to deny employees their fundamental Section 7 rights.” As Member Hurtgen said in his dissent in Priority One Services, 331 NLRB at 1528:

My colleagues respond that they are not establishing a conclusive presumption. They say that the conduct was "inherently likely" to cause employees to disaffect

from the Union. The distinction escapes me. The bottom line is that the Employer is denied an opportunity to present counter-evidence on a critical issue.

Member Hurtgen should have also added that the employees (who have paramount § 7 rights at stake when they seek the decertification of a union that may well not represent a majority) are similarly denied their statutory rights under § 9(c)(1)(A)(ii).

Thus, the Board must create new standards that limit the use and abuse of blocking charges by NLRB Regional offices and incumbent unions bent on clinging to power.

As Member Brame has stated, the Board must be mindful that “unions exist at the pleasure of the employees they represent. Unions **represent** employees; employees do not exist to ensure the survival or success of unions.” MGM Grand Hotel, Inc., 329 NLRB 464, 475 (1999) (emphasis added).

At the very least, the Board should order the Regional Director to conduct a Saint-Gobain “causation hearing,” at which the burden of proof will be upon the union, the party asserting the “blocking charge,” to prove that the employer’s infractions caused the employee disaffection. Petitioner is confident that the union will never be able to meet this burden, given the fact that the union’s own arrogance and malfeasance is what led to the employees’ efforts to decertify.

**CONCLUSION:** The Board should grant the Request for Review and order the Regional Director to reinstate and process this decertification petition, or, alternatively, order the Regional Director to hold a “causation hearing” under Saint-Gobain Abrasives,

342 NLRB 434 (2004), whereupon the union will bear the burden of proof on the “causal nexus” issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11<sup>th</sup> day of January, 2012, all parties named below have been served with this Motion by First Class Mail.

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