BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
FIRST STUDENT,	)	
Employer,	)	
	)	
and	)	
	)	
VELVIE LEDGER,	)	Case No. 13-RD-102567
Petitioner,	)	
	)	
and	)	
	)	
TEAMSTERS LOCAL UNION NO. 777,	)	
Union.	)	

Petitioner's Request for Review

On May 8, 2013, the Regional Director dismissed Petitioner Velvie Ledger's decertification petition. Pursuant to Section 102.67(b) of the Board's Rules and Regulations, Petitioner hereby Requests Review of the Regional Director's decision.

The sole issue in this case is Teamsters Local Union No. 777's ("Union" or "Local Union") claim that this decertification petition must be dismissed because the original bargaining unit of First Student employees in Batavia, Illinois ("Batavia unit"), which was recognized as the unit's exclusive bargaining agent by the National Labor Relations Board (NLRB), no longer exists due to its amalgamation into a larger national bargaining unit. According to the Regional

Director, the disappearance of the Batavia unit occurred as a matter of law when all affected bargaining units voted in a single nationalwide International Teamsters union election to ratify the agreement.

I. THE CURRENT BOARD LACKS THE LEGAL AUTHORITY TO DECIDE THIS PETITION

The current Board lacks authority to decide this Petition for Review, *Noel Canning Div. of Noel Corp. v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). In light of *Noel Canning*, the Board should await a decision by the U.S. Supreme Court or appointment of a lawful Board before proceeding with this Petition. If the current Board decides this case, Petitioner reserves the right to challenge the lawfulness of the current Board.

II. STATEMENT OF RELEVANT FACTS

Velvie Ledger is employed by First Student at its Batavia unit. Teamsters Local 777 became the exclusive bargaining agent of the Batavia unit when it was certified by the NLRB on April 29, 2010 (Tr. 7). According to the Union, approximately 200 Batavia employees participated in the election that resulted in the Union's certification (Tr. 46-47). The Local entered into a collective bargaining agreement for the Batavia unit that was effective from January 7, 2010 until June 30, 2013 (U Ex. 2). In June 2011, a vote was taken to ratify a national collective bargaining agreement between the International Brotherhood of Teamsters Union ("International") and First Student. However, there was no separate vote for the Batavia unit. The vote was for all the units in the agreement and the vote(s), if any, from the Batavia unit are unknown. The Batavia unit's vote count was pooled with the other five units that were represented by Local 777. The Union does not know whether a majority of Batavia employees

voted for the National Agreement (Tr. 40) and has no way how many Batavia employees voted or how they voted.. Only one employee in the bargaining unit testified that she was aware of the vote; another employee in the bargaining unit testified that she was unaware of the election.

III. Legal Argument: The National Labor Policy Supports Conducting A Secret-Ballot Election Among the Batavia Employees As To Whether They Wish To Join A National Bargaining Unit.

A. The National Labor Relations Act Guarantees Employee Free Choice.

The National Labor Relations Act (NLRA) exists to protect the Section 7 and Section 9 rights of *employees* like Velvie Ledger at the Batavia facility. It does not exist for the convenience of union officials or employers, *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. . . .").

The case law that governs this petition begins with *Ladies Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731 (1961). *Ladies Garment Workers* involved an employer recognizing a union that lacked majority employee support and negotiating a partial agreement with that union. *Id.* at 734. The Supreme Court held that "[t]here could be no clearer abridgment of § 7 of the Act" than for an employer to grant "exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority."

As discussed below, preventing the Batavia employees from conducting a decertification vote under the pretense that they were lawfully merged into a larger national unit, undermines employee free choice and impresses the International as the bargaining agent upon the nonconsenting majority of the Batavia unit.

B. The Batavia Unit Was Not Lawfully Merged Into A Larger National Unit.

The Regional Director ruled that the Batavia unit was merged into a larger national unit and therefore its right to conduct a decertification election in the Batavia unit was extinguished. The Regional Director does this by relying on the "merger" doctrine. However, the facts of this case do not support the application of the merger doctrine.

The factors that the Board considers in determining whether there is an appropriate mega-unit include geographic separateness, administrative autonomy, and lack of interchange, *Gibbs & Cox,* 280 NLRB 953, 954 (1986) (Members Dotson and Dennis dissenting). In the case of the Batavia unit, there is geographic separateness, administrative autonomy, and lack of interchange. Those factors only can be overcome if the mega-unit has a long history of collective bargaining, *Gibbs & Cox,* 280 NLRB at 954. That is not the case here. There was never collective bargaining involving the Batavia unit beyond its local contract until the national contract was imposed upon the Batavia employees.[1]

What is the Board law when a bargaining unit is merged into a larger unit? The Board has stated that it "'will not, under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret ballot.'" *Towne Ford Sales*, 270 NLRB 311 (1984) (*quoting Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969)). The Board will not put employees in a presumptively appropriate unit into a larger unit if those

[1] First Student does not assert a need to maintain a "national unit" for purposes of this or any other case. To the contrary, First Student did not even participate in this hearing. It provided the Board with no legal or factual reason to limit the free choice of the Batavia workers based upon considerations of "industrial stability." To the contrary, First Student's absence demonstrates that the Teamsters' "merger" does not promote the type of industrial stability needed to overcome this decertification petition.

employees have not had the opportunity to express their sentiments as to representation, *Gibbs & Cox,* 280 NLRB at 954. The employees must have clear notice of, and an opportunity to vote on, the proposed merger, *First Student (Teamsters Local 959)* 359 NLRB No. 27 (2012). The Batavia employees did not have clear notice and certainly had NO opportunity to vote on whether to merge the employees in the Batavia unit into the larger national unit.

1. There Was NO Vote Of The Batavia Unit.

There was **NO vote of the Batavia unit** employees on the merger. According to the Union, approximately 200 Batavia employees participated in the election that resulted in the Union's certification (Tr. 46-47). The Local entered into a collective bargaining agreement for the Batavia unit that was effective from January 7, 2010 until June 30, 2013 (U Ex. 2). In June 2011, a vote was taken to ratify a national collective bargaining agreement between the International Brotherhood of Teamsters Union and First Student (U Ex. 9).

However, there was no separate vote for the Batavia unit. The vote was for all the units in the National Agreement and the vote(s), if any, from the Batavia unit are unknown. Local 777 represents five units in bargaining agreements with First Student (Tr.15). There were approximately 750 employees in all five units (Tr. 42). The Batavia unit's votes were pooled with all the other units that were represented by Local 777. Unlike the 200-vote participation of bargaining unit employees from the Batavia unit alone in the certification election, a total of 327 voted amongst all the First Student units represented by Local 777 (Tr. 40). The Union does not know whether a majority of Batavia employees voted for the national agreement (Tr. 40). The Union admitted there is no way to count how many, if any, votes were cast in the Batavia unit (Tr. 41).

The only evidence of any vote on the national contract being cast by employees in the Batavia unit was the single vote of Tani Benson (a union employee whose credibility was doubtful and was confused about the year and the season of the vote).[2]

2. The Batavia Employees Did Not Receive Adequate Notice Of The Vote.

Even, if *arguendo*, the national vote was deemed sufficient, the **Batavia unit employees did not have adequate notice of the vote.** What sort of notice did the employees receive? According to Petitioner, there was no notice. Velvie Ledger received no mailings on the vote, nothing in her in work mailbox, and no notice that it would be discussed at a meeting or a cookout (Tr. 95). The Union's self-serving testimony was, at best, contradictory as to what they claimed they did to provide notice and appears to be little more than an after-the-fact attempt to create a record that did not exist.

What, if any, evidence is there that the Union notified employees that their statutory right to decertify Local 777 as the exclusive bargaining agent would be extinguished if the national contract was ratified? The answer is NONE. What evidence was there that any Batavia employees, other than Teamster employee Tani Benson, were notified by mail that there was even a national contract? The answer, again, is None. What other evidence is there that any other

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[2]Benson had been a shop steward and is currently an employee of another Teamster local (Tr. 113, 117). However, her testimony was not credible. She was confused about when the vote to merge took place. She first testified that it took place in the fall of 2010 and then, after the Union attorney asked her to look at the dates on the contract, she testified it was in the spring of 2011 (Tr. 113-121). It should have been a time frame she should have remembered since she stopped working at First Student at the end of May, 20011 (Tr. 113). Even after being redirected by the Union attorney as to the dates of the contracts, she still could not specify as to when the dates of the delivery of the literature and the vote took place (Tr. 119-121). She testified about a handbook delivered by First Student that referenced the national contract (Tr. 115); but since the contract was ratified after she left on Union leave and then went to work for the Union, she could not have personal knowledge as to whether any handbook referencing the national contract was ever distributed to Batavia employees. Her involvement in the vote appears to have been limited, at best, since she admitted not attending the picnic or meeting that the Union claimed was one of its ways to notify employees about the vote on the National Agreement.

notices of the vote were provided? Based upon the testimony of Union witness Glimco, the Union held a meeting and a cookout, and put a notice on the bulletin board and in the mailboxes.

The Union admitted that it sent NO mailings to the bargaining unit members. The Union relied on mailings of materials allegedly sent out by the International. The testimony of Glimco concerning those mailings should be struck. He had no knowledge about anything other than what he personally received, and he was not in the Batavia bargaining unit. He testified that they had no knowledge of how the Titan mailing system worked, and thus had no other personal knowledge of the mailings. Glimco could not be cross-examined about the system and whether, in fact, any or all bargaining unit members received notice of the merger in the mailings. The Union Secretary-Treasurer Glimco, testified as to what he received, but he was a Union officer and not even a member of the bargaining unit. Therefore, that testimony was irrelevant. Benson also testified about what she received, but she also was a Union officer (shop steward), and her entire memory of the vote was, as discussed above, hazy, at best.

The Union also testified that the merger was discussed at a Union meeting and cookout. The meeting apparently was for all the units represented by Local 777 (Tr. 22). Union witness Benson, who was a shop steward for the Batavia Local at that time, did not even attend the meeting. (Tr. 125). Glimco testified that, at the time of the vote, the Batavia unit had approximately 200 represented employees, but that only 10-12 individuals from the unit attended.

The only testimony concerning the information distributed at the cookout was that Union officers were present and could answer questions about the merger (Tr. 36) and that flyers and postcards had been printed for distribution (Tr. 71). Glimco testified that members had the *opportunity* to discuss contract changes with him (Tr. 35). No flyers or postcards prepared by the

Local were entered into as exhibits and there was no testimony that the flyers and postcards were actually distributed to all attendees. The testimony was limited to the claim that they were sitting on a table (Tr. 74). There is no evidence as to whether there was any notice to the employees that officers were even available to discuss the merger – much less that a merger would be voted on. The primary agenda of the cookout appears to have been no different than any of the other cookouts that would typically occur twice a year – to eat free food. Again, Tani Benson did not even attend the cookout – just like she did not attend the meeting (Tr. 125). It is significant that the only two bargaining unit members – Tani Benson and Velvie Ledger – who testified at the hearing, did not attend the meeting or cookout. It is clear the meeting and picnic was not effective in notifying bargaining unit members about the contract – but perhaps that is because the Union did not intend to truly inform members of the contract vote.

The Union provided testimony about the distribution of pamphlets. However, that testimony was contradictory. First, the pamphlets (U Ex. 5 & 6) never mentioned that the National Agreement would effectively extinguish the rights of the Batavia unit employees to exercise their Section 7 rights. The pamphlet claimed that the National Agreement was a supplemental agreement. As discussed below, if the National Agreement was merely a supplemental agreement, it should not have extinguished the Batavia unit's employees right to have a decertification election. If, however, the National Agreement turned the Local agreement into a supplement of the National Agreement, then the "election" for the National Agreement was conducted under false pretenses since the Union claimed the National Agreement was merely a supplemental agreement.

Secondly, the pamphlets gave little information about the agreement, but were more like a campaign pamphlet with one of the most prominent features being an urge to vote YES on the

National Agreement. Petitioner Ledger testified that she never saw the pamphlets (Tr. 97).

With respect to the ballots themselves, there was testimony that if someone did not receive a ballot, there were instructions about how to get the ballot. However, there was no testimony as to how, if at all, such information about how to receive a missing ballot was communicated to employees. We know that some did not receive the ballot, since Glimco testified that several individuals asked for ballots (Tr. 37). However, that just proves that the "Titan" mailing system did not work and that every employee did not receive a ballot. When he was asked, Glimco was unable to identify who asked for the ballots (Tr.37-38). It is just as likely that no one, other than union officers, received the ballots in the mail. It is possible that it was other Union shop stewards who asked Glimco for the ballots since perhaps only they, and other Union insiders (such as the handful that attended the Union meeting), were the only ones aware of the upcoming election. Only one individual employed at the Batavia facility testified about receiving a ballot – Tani Benson, a Union shop steward. It is meaningless that Glimco received a ballot since he was not a member of the bargaining unit.

In contrast to Glimco, Petitioner Ledger was actually a member of the bargaining unit. She received no mailings, saw no signs at work, did not attend the cookout, did not attend the meeting, and saw no notice that the National Agreement would be discussed at the meeting or cookout (Tr. 95-96). She did not have an opportunity to vote and was not given a copy of the National Agreement after it was ratified (Tr. 95). She first learned of the National Agreement when the First Student branch manager mentioned that she could get a free flu shot as per the national master agreement (Tr. 96). None of the other employees that Ledger spoke to were aware of the National Agreement (Tr. 109).

C. Policy Considerations Support The Batavia's Unit To Have A Decertification Election.

The policy interest in collective bargaining that underlies the rule that "decertifications must be coextensive with the unit" cannot justify squelching employee free choice in this case. Indeed, there is a presumption in the law that single facility locations are the most appropriate units, precisely because they are most likely to protect employees' right to choose or reject unionization. *See, e.g., West Lawrence Care Center*, 305 NLRB 212, 216-217 (1991).[3]

As discussed above, the "National Agreement" was, as the Union admitted prior to the vote, merely a supplemental agreement. It provides some minor "benefits" such as free flu shots, but wages and working conditions – the primary rationale for union recognition as an exclusive bargaining agent – are not covered by the agreement. Its most significant effect is to merely deprive employees of their statutory right to remove a union by decertification. The wages and conditions of employment of the Batavia employees are NOT covered by the National Agreement, but by the Local Contract. That is a fatal flaw in the Union's unlawful scheme. When a multi-location and supplemental agreement have different termination dates, the one to be considered for contract-bar purposes is the agreement which embodies the basic terms and conditions of employment. When the master agreement and the supplemental agreement have different terminal dates, the one to be considered for election bar purposes is the agreement which embodies the basic terms and conditions

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[3] Logically, the policy interest in collective bargaining can never trump employees' statutory right to free choice under § 7 of the Act because collective bargaining is only a legitimate interest if employees freely chose to engage in it. *See Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB. 717, 731 (2001) (Hurtgen concurring) (The NLRA "pronounce[s] a policy under which our nation protects and encourages the practice and procedure of collective bargaining for those employees who have freely chosen to engage in it"); *MGM Grand Hotel Inc.*, 329 NLRB 464, 575 (1999) (Member Brame, dissenting) ("the Board must never forget 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"). *See generally Mo's West*, 283 NLRB130, 130-31 (1987) (Member Dotson, dissenting); *Gibbs & Cox*, 280 NLRB 953, 956-60 (1986) (Members Dotson and Dennis, dissenting).

of employment. *Tri-State Transportation Co., Inc.*, 179 NLRB No. 54 (1969).

In this case, the basic terms and conditions of employment are embodied in the Batavia contract. Thus, its expiration date governs the timeliness of the decertification petition. Presumably, other local contracts have different and varied expiration dates (for example, the unit in the Philadelphia case had an August, 2013 expiration date (U. Ex. 10). If it is a national unit, a decertification vote could not occur on multiple different dates. The only way the Board's doctrine is viable is to recognize in this case that the Batavia unit is free to hold its election, since it is NOT part of a national unit.

D. The National Teamsters' Contract Should Not Extinguish The Batavia Unit Employees' Section 7 Rights.

The mega-unit that the Union claims the Batavia unit was merged into is just a fictitious scam to prevent employees from exercising their Section 7 rights. The employees of the Batavia unit did not receive proper notification or an opportunity to vote on the national contract. The Region should not, under the guise of inclusion in a multi-location unit, compel the Batavia employees, who constitute a separate appropriate unit, to be included in a "nationwide" unit without allowing those employees the opportunity of expressing their preference in a secret-ballot election. The Board should facilitate employee free choice by holding an election in the single-location unit at the Batavia unit.

Not granting the Batavia employees these rights will **permanently** preclude them from exercising their Section 7 rights. The Union, thru the National Agreement, wants to lump them into an agglomerated unit consisting of dozens of First Student facilities scattered across the nation. It will be a practical impossibility for the Batavia employees (or any other First Student employees) to

decertify this massive, sprawling bargaining unit. If the First Student employees are not permitted a secret-ballot election amongst their own unit, the Board will be permanently foreclosing the exercise of their Section 7 rights to choose or reject union representation. This result is both unjust and contrary to the Act's policy of "[assuring] to employees the fullest freedom in exercising the rights guaranteed by this Act." 29 U.S.C. § 159(b); *see Shaw's Supermarkets*, 343 NLRB 963 (2004) (granting review of a decision enforcing an "after acquired" stores clause).

Any policy interest in facilitating collective bargaining cannot justify quashing the Section 7 rights of the Batavia employees. First Student's absence from the hearing has made it abundantly clear that it has **no interest** in enforcing the Union's "nationwide unit," and that its interests are **not** served by using such a "nationwide unit" to squelch employees' rights under Sections 7 and 9 of the Act. Thus, permitting the employees to vote in a secret-ballot election will not upset "industrial stability" or any established collective bargaining relationship.

E. The Merger Doctrine Should Be Re-Examined.

Finally, while the employees of the Batavia unit were not properly merged according to the terms of the merger doctrine, the merger doctrine itself should be re-examined. It has no basis in the text of the NLRA itself. It simply exists to get unions into power and keep them in power notwithstanding the wishes of the employees. *See, e.g., Pall Corp. v. NLRB*, 275 F.3d 116 (D.C. Cir. 2002) (where the D.C. Circuit refused to enforce a Board order over a similar doctrine – "after-acquired" stores clause).

The paramount purpose of the NLRA is to protect employees' statutory right to choose or reject union representation under Section 7 of the NLRA. *Ladies' Garment Workers; Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (D.C. Cir. 1983) ("[F]reedom of choice and majority rule in employee

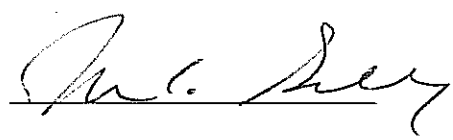
selection of representatives" are "[t]he Act's twin pillars"). "Congress has entrusted the Board with ...establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 328 (1944). Specifically, Section 9(b) of the Act gives the Board the responsibility to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b).

The employees of the Batavia unit seek an election. The NLRA's interest in facilitating employee free choice clearly supports giving these Batavia employees their first and only opportunity to exercise their Section 7 rights to decline Union representation in a secret-ballot election, rather than sacrificing them on an altar of "industrial stability" that serves no purpose in this case.

CONCLUSION

For these reasons, the Request for Review should be granted. The decision of the Regional Director should be reversed, the petition for an election should be processed, and an election promptly scheduled amongst the Batavia facility employees.

Respectfully Submitted,



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May 22, 2013

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2013, Petitioner's Request for Review was filed through the Board's E-Filing system, and that the party below was served by e-mail:

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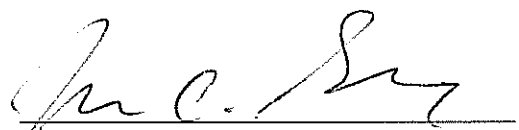

John C. Scully

Date: May 22, 2013