

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

ADT Security Services,
Employer,

Case 18-RD-206831

and

IBEW, Local Union 110,
Union,

**UNION'S RESPONSE TO
PETITIONER'S REQUEST FOR
REVIEW**

and

Lance Oelrich,
Petitioner.

INTRODUCTION

Contrary to the Board's longstanding blocking charge policy as well as recent rulemaking authority upholding the policy, the Petitioner nonetheless requests that the Board review the Regional Director's reasonable and appropriate application of this policy in this matter. The Board should deny the Petitioner's request for review because it raises no substantial issues warranting the reversal of the Regional Director's decision and merely engages in generalized policy argumentation, which is inappropriate in the context of this representation proceeding.

LEGAL ANALYSIS

I. The Board's Blocking Charge Policies Serve A Critical Function In Safeguarding Employee Free Choice In Representation Proceedings

It is well-established that although the "filing of a[n unfair labor practice] charge does not automatically cause a petition to be held in abeyance" the Board's general, long-standing policy is to hold the processing of a representation petition in abeyance if there are any concurrent

unfair labor practice charges that allege conduct which, if proven, would interfere with employee free choice if an election were to be conducted. NLRB Casehandling Manual Part Two – Representation Proceedings, Section 11730 et seq. (emphasis added). Additionally, the Board’s Casehandling Manual makes clear that the Board’s blocking charge policy is “premised solely on the Agency’s intention to **protect the free choice of employees** in the election process.”

(emphasis added). Thus, pursuant to clearly established Board policy:

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. . . the charge should be investigated and either dismissed or remedied before the petition is processed** if the charging party files a request to block accompanied by a sufficient offer of proof and promptly makes its witnesses available.

NLRB Casehandling Manual Part Two – Representation Proceedings, Section 11730.2.

The Board’s blocking charge policy is vital to effectuating the Board’s role in representation proceedings: to ensure that employees may freely choose their representative. The Board has long-recognized that it owes a duty to ensure employee free choice in the representation context:

In election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as ideal as possible, to determine the uninhibited desires of the employees.

General Shoe Corp., 77 NLRB 124, 127 (1948) (emphasis added); see also N.L.R.B. v. Wrape Forest Indus., Inc., 596 F.2d 817, 819 (8th Cir. 1979) (“[A]s a matter of fairness in carrying out the Board’s function to allow the workers a free and unfettered choice in employee representation, the Board should make every effort to give effect to the voters’ intent.”); Representation—Case Procedures, 79 FR 74308-01 (December 15, 2014) (“The Board is duty bound to ensure that employees can express their choice of representative free of unlawful coercion.”)

In a recent order denying employer and petitioner's requests for review of a Regional Director's determination to hold a decertification election in abeyance pending investigation of an unfair labor practice charge, a Board majority defended its longstanding blocking charge policy and relied upon the 5th Circuit Court's explanation of the policy's critical importance:

If the employer has in fact committed unfair labor practices and has thereby succeeded in *undermining union sentiment*, it would surely controvert the spirit of the Act to *allow the employer to profit by his own wrongdoing*. In the absence of the 'blocking charge' rule, many of the NLRB's sanctions against employers who are guilty of misconduct would lose all meaning. . .

Nor is the situation necessarily different where the *decertification petition is submitted by employees* instead of the employer or a rival union. Where a majority of the employees in a unit genuinely desire to rid themselves of the certified union, this *desire may well be the result of the employer's unfair labor practices*. In such a case, the *employer's conduct may have so affected employee attitudes* as to make a fair election *impossible*.

Valley Hosp. Med. Ctr., Inc., 28-RD-192131, 2017 WL 2963204, fn. 1 (July 6, 2017) (quoting NLRB v. Big Three Industries, Inc., 497 F.2d 43, 51-52 (5th Cir. 1974)) (emphasis added). This quote is especially appropriate in the matter at hand. The pending unfair labor practice charge against the Employer bears a specific and direct connection to the issue of employee free choice. It alleges that the Employer engaged in precisely the type of conduct prohibited in the quote above: that the decertification petition was a direct result of the Employer's coercive conduct, and thus the Employer's prohibited intervention into the realm of employee free choice makes a fair election impossible. At the very least, it is clear that such allegations, supported by the requisite offer of proof, require the petition to be held in abeyance pending investigation and resolution of the charge.

A. The Board's recent rulemaking confirms that the Board's blocking charge policies are necessary and reasonable, and even Board Members who oppose the policies in theory acknowledge that they are the governing standard in practice

Although the Petitioner engages in an impassioned denunciation of the Board's blocking charge policies in its request for review, the Board itself recently reaffirmed the validity of its blocking charge policies in its 2014 Rulemaking proceedings. See Representation-Case Procedures, 79 Fed Reg. 74308, 74418-74420; 74428-74429 (Dec. 15, 2014). The Board's blocking charge policies are critical because "[i]t advances no policy of the [NLRA] for the agency to conduct an election unless employees can vote without unlawful interference." Id. at 74429.

After careful consideration, **the Board has decided to continue applying the blocking charge policy** and to block elections in circumstances where unfair labor practice charges allege conduct that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, and no special circumstances are present that would warrant further processing the petition in the face of the charges. **The Board is duty bound to ensure that employees can express their choice of representative free of unlawful coercion, and regional directors will therefore not generally process a petition through to an election in the face of a pending charge if they believe employee free choice is likely to be impaired.** Furthermore, we agree that holding a tainted election results in damage beyond that caused by the employer's unfair labor practices, which damage cannot be fully remedied simply by conducting a rerun election. **As the Fifth Circuit noted in Bishop v. NLRB, 502 F.2d 1024, 1028 (5th Cir. 1974), the salutary purposes for imposing the blocking charge policy, a policy the Board has followed since 1937, "do not long elude comprehension."**

Representation – Case Procedures, 79 FR 74308-01 (emphasis added).

The Board's blocking charge policy was even modified in the 2014 Rulemaking to protect against abuse, and it is this newly-bolstered blocking policy which the Regional Director applied in this matter. The Board "decided to codify several new practices to protect against the abuse of the blocking charge policy...." Id. These new practices

require any party to a representation proceeding that files an unfair labor practice charge together with a request that it block the processing of the petition to simultaneously file a written offer of proof. The offer of proof must provide the names of the witnesses who will testify in support of the charge, and a summary of their anticipated testimony.

Representation – Case Procedures, 79 FR 74308-01.

The Union complied with the policy above and filed a written offer of proof providing names of witnesses who would testify in support of the charge and a summary of their testimony with its request to block the petitioner’s decertification petition. After the blocking request was granted, the Region began its investigation of the charge and took affidavits from two witnesses provided by the Union. Thus, the Union had no difficulty complying with the Board’s augmented blocking charge policies, and the Regional Director’s decision to grant the blocking request was valid.

Nevertheless, the Petitioner argues that the Board should ignore its well-established and recently reaffirmed blocking policies and overrule the Regional Director’s decision to hold the election in abeyance pending resolution of the Union’s unfair labor practice charge. Not only is this position contrary to the Board’s express policies, it is contrary to several recent Board orders in which Chairman Miscimarra, who opposes the Board’s blocking charge policies in theory, still recognizes and enforces them as the governing standard:

Chairman Miscimarra favors reconsideration of the Board’s blocking charge... but he acknowledges that the Board has declined to materially change its blocking charge doctrine, which was the basis for the Regional Director’s determination to hold the petition in abeyance.

Valley Hospital Medical Center, Inc., Case 28-RD-192131, fn. 1 (July 6, 2017).

Acting Chairman Miscimarra ***favors a reconsideration*** of the Board’s blocking charge doctrine...but he acknowledges that the Board has declined to materially change its blocking charge doctrine. Accordingly, ***he concurs in holding the petition in abeyance.***

CPL (Linwood) LLC, 365 NLRB No. 24, fn. 4 (Feb. 3, 2017) (emphasis added).

Member Miscimarra ***favors a reconsideration of the Board's blocking charge doctrine***...but he acknowledges that the Board has declined to materially change its blocking charge doctrine, and he ***agrees that the Regional Director did not abuse his discretion in applying the doctrine in the instant case.***

Cablevision Systems Corp., Case 29-RD-138839, fn. 1 (June 20, 2016) (emphasis added).

Thus, Petitioner's policy arguments are unavailing. Since the Regional Director correctly applied the Board's governing blocking charge procedures in the case, it is inappropriate for the Board to reconsider its procedures in this context, and Petitioner's request for review should be denied. See also In re Bally's Park Place, Inc., 338 NLRB 443, *1 (2002) (declining petitioner's request for review of regional director's decision to hold representation case in abeyance and stating "[o]ur dissenting colleague...advocates a revision of [blocking charge] procedures...We decline our colleague's invitation to reconsider those procedures in this case.").

II. The Regional Director's Determination To Hold The Decertification Election In Abeyance Pending Resolution Of The Union's Unfair Labor Practice Charge Against The Employer Is A Reasonable and Appropriate Application Of The Board's Blocking Charge Policies

The Board should deny Petitioner's request for review because the Regional Director correctly applied the Board's governing blocking charge standard to the Union's unfair labor practice charge against the Employer after reasonably determining the Union's pending charge could interfere with employee free choice in an election.

A. The Regional Director's determination was based upon the Union's Offer of Proof and thus was not an arbitrary, capricious, or reflexive application of the blocking charge rules

Despite the Petitioner's baseless arguments to the contrary, the Regional Director's determination to hold the election in abeyance was not an arbitrary or reflexive act but was rather a principled application of the Board's blocking charge policy. As discussed above, the Board's amended blocking charge policy requires a party to support its request to block with an offer of proof:

[T]he regional office *will not block a representation case unless* the party filing the unfair labor practice charge files a request that the petition be blocked and the

required offer of proof. **If the regional director determines that the party's offer of proof does not describe evidence that, if proven, would interfere with employees' free choice in an election** or would be inherently inconsistent with the petition itself, and thus would **require that the processing of the petition be held in abeyance** absent special circumstances, **the regional director shall continue to process the petition and conduct the election where appropriate.**

NLRB Casehandling Manual – Representation Proceedings, Section 11730 Blocking Charge Policy – Generally (emphasis added).

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 if the charging party files a request to block accompanied by a sufficient offer of proof and promptly makes its witnesses available.**

Id. at Section 11730.2 Type I Charges: Charges that Allege Conduct that Only Interferes With Employee Free Choice (emphasis added).

Importantly, the Board's policy does not place the party seeking to block a petition in the unreasonable position of having to conclusively **prove** the asserted unfair labor practice charge before it is even investigated in order to halt an election which would be tainted if the unfair labor practice is allowed to continue. Rather, the Board's policy strikes a reasonable middle ground by requiring the party seeking to block the petition to submit an initial offer of proof sufficient for the Regional Director to ascertain whether the conduct alleged "if proven, would interfere with employees' free choice in an election." NLRB Casehandling Manual at Section 11730.

In the matter at hand, the Union filed an unfair labor practice charge alleging Employer coercion in the events surrounding the filing of the Petitioner's decertification petition. The Union supported its request that this unfair labor practice charge block the petition with the requisite offer of proof, which included at least one witness who was readily available to provide an affidavit. Thus, the Regional Director's resulting determination to hold the election in

abeyance was not arbitrary, reflexive, or unreasonable. As the Board stated in Mark Burnett Productions:

If proven, the *Employer's conduct would have a tendency to undermine the Union in the eyes of the employees, in effect "polluting" the election atmosphere.* This is not the "free and fair" election atmosphere in which the Board prefers to conduct representation elections. Thus, it was not an abuse of discretion for the Regional Director to hold the petition in abeyance pending resolution of the unfair labor practice proceedings.

Mark Burnett Prods., 349 NLRB 706, 707 (2007).

B. The pending unfair labor practice charge filed by the Union against the Employer alleges that the Employer engaged in coercive conduct relating to the decertification petition and this conduct would obviously affect employee free choice in a decertification election

The Board should deny Petitioner's request for review of the Regional Director's determination to hold the decertification election petition in abeyance pending resolution of the outstanding unfair labor practice charge because the conduct alleged in the charge, if proven, would interfere with employee free choice in an election, were one to be conducted. NLRB Casehandling Manual Part Two – Representation Proceedings, Section 11703, et seq. Thus, the Regional Director's application of the blocking charge policies in this case is a "reasoned utilization of a practice long-since legitimized by experience and well-suited to the particular facts of this controversy." Bishop v. NLRB, 504 F.2d 1024, 1032 (5th Cir. 1974).

In its pending charge, the Union alleges that the Employer aided and facilitated in the circulation of a decertification petition at the conclusion of an unusual mandatory training meeting for bargaining unit members, including former Protection One employees, who were recently added to the bargaining unit. Within a few days of the meeting, the Employer's Area Manager sent out an email to all bargaining unit employees which urged the bargaining unit members to vote to decertify the Union. This coercive conduct would clearly "have a tendency to

undermine the Union in the eyes of the employees, in effect “polluting” the election atmosphere.” Mark Burnett Prods. 349 NLRB 706, 707 (2007). By providing the Petitioner a Company-sanctioned forum to solicit signatures to decertify the Union and then shortly thereafter expressly state that the Company believes the employees would fare better without the Union, the Employer interfered with the employees’ free choice.

The Regional Director reasonably determined that the conduct alleged in the complaint and the related offer of proof, if proven, would tend to interfere with the employee’s free choice. In determining that the Employer interfered with employees’ free choice by encouraging them to file a decertification petition, the Board in Lee Lumber & Bldg. Material Corp. stated that neither the employer’s motive nor the conduct’s actual effect on employees is relevant in determining coercion:

The Board and the courts have long held that the test for unlawful interference, restraint, or coercion does not turn on the employer's motive, or on actual effect. **Rather, the test is whether the employer’s statements may reasonably be said to have tended to interfere with employees’ exercise of their Section 7 rights.**

Lee Lumber & Bldg. Material Corp. 306 NLRB 408, 409 (1992) (emphasis added). Furthermore, although “[i]t is not determinative that an employer does not expressly advise employees to get rid of the union” and “such direct appeals are not essential to establish that an employer solicited decertification,” the email from the Employee’s Area Manager did, in fact, directly advise employees of the Employer’s position that the employees would be off better without a union. Armored Transport, Inc., 339 NLRB 374, 378 (2003) (citing Wire Products Mfg. Corp., 326 NLRB 625, 626 (1998), enfd. sub nom. NLRB v. R. T. Blankenship & Associates, Inc., 210 F.3d 375 (7th Cir. 2000)). Thus, the Regional Director did not violate the Board’s policies by holding the decertification in abeyance pending resolution of this charge.

CONCLUSION

In conclusion, the Board should deny the Petitioner's request for review and affirm the Regional Director's determination to hold the election petition in abeyance pending the resolution of the Union's unfair labor practice charge against the Employer.

Respectfully submitted,

CUMMINS & CUMMINS, LLP

Dated: October 23, 2017

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2017, a true and correct copy of the foregoing Response to Request for Review was filed electronically with the Executive Secretary using the NLRB e-filing system, and copies were sent to the following parties via e-mail, as noted:

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