

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

BEMIS, N.A.,)	
Employer,)	
and)	
WAYNE DEVORE,)	
Petitioner,)	Case No.: 18-RD-209021
and)	
LOCAL 727-S OF THE GRAPHIC)	
COMMUNICATIONS CONFERENCE OF THE)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS,)	
Union.)	
)	

UNION’S OPPOSITION TO PETITIONER’S REQUEST FOR REVIEW

Pursuant to NLRB Rules and Regulations, Section 102.67(f), Local 727-S of the Graphic Communications Conference of the International Brotherhood of Teamsters (“Local 727-S” or “Union”), by and through its undersigned counsel, respectfully submits this Opposition to the Petitioner’s Request for Review of the Regional Director’s decision to block the election pending the investigation of several unfair labor practice charges filed by the Union. For the reasons stated herein, the Board should deny review.

BACKGROUND

Bemis, N.A. (“Bemis” or “Employer”) operates a printing plant in Centerville, Iowa which produces food grade plastics and packaging products. Local 727-S is the bargaining representative for all full-time and regular part-time production employees working in extrusion, press and pre-press, and finishing departments; and all full-time and regular part-time employees working in maintenance, quality assurance, distribution, and shipping and receiving departments

at the Employer's Centerville facilities. Since it was certified in May 2016, *see* Case No. 18-RC-173832, the Union has been in negotiations with Bemis in an attempt to reach a first time collective bargaining agreement but no agreement has yet been made.

Starting July 18, 2017, the Union has filed several unfair labor practice charges against the Employer which allege a variety of Section 8(a)(1), 8(a)(3), and 8(a)(5) violations. *See* Case Nos. 18-CA-202617, 18-CA-2305446, 18-CA-205920, 18-CA-205927, 18-CA-207874, 18-CA-209135, 18-CA-210143, 18-CA-210170, 18-CA-210936, and 18-CA-211086.¹ The charges against Bemis allege, *inter alia*, that the Employer has engaged in discriminatory harassment, discipline, and ultimately termination of certain employees because of their support for Local 727-S; conducted unlawful surveillance of employees' protected, concerted activities; engaged in bad faith surface bargaining during contract negotiations; maintained work rules which discouraged employees from engaging in protected, concerted activities; demonstrated preferential treatment towards, and conferred special benefits for, employees that demonstrated antiunion animus and campaigned against Local 727-S; and implemented a host of unilateral changes. The Region has since found merit in many of these charges.

Wayne Devore, a Bemis employee and member of Local 727-S, filed his petition in this matter on October 31, 2017, over three months after the Union began filing charges. In light of the charges pending against the Company, the Regional Director blocked the decertification petition on January 19, 2018, pursuant to the Board's longstanding blocking charge policy in order to properly investigate and resolve the unfair labor practice allegations before any election could be conducted. Here, Petitioner requests review of that decision.

¹ The allegations made in Case Nos. 18-CA-210143 and 18-CA-209135 have been withdrawn.

ARGUMENT

The Board will grant a request for review of an action by a Regional Director only when there are compelling reasons to do so. NLRB Rules and Regulations § 102.67(d). Accordingly, a request for review may be granted only upon specifically enumerated grounds. *See id.* at §§ 102.67(d), 102.71(a)(1). As it relates here, such grounds include raising a substantial question of law or policy because of the absence of, or departure from, officially reported Board precedent;² or more generally, raising compelling reasons for reconsideration of an important Board rule or policy. *Id.* at §§ 102.67(d)(1), (4); 102.71(a)(1), (4). Petitioner fails to meet either of these grounds for granting review of the Regional Director’s determination to block the election.

As explained in more detail below, the Regional Director’s decision to block the decertification election in light of the Employer’s unfair labor practices is necessary under established Board law and serves the most central purposes of the Act. Moreover, Petitioner’s invitation for wholesale invalidation of the Board’s longstanding blocking charge policy is unavailing and the Board should decline to do so. Lastly, Petitioner’s request for a *Saint Gobain* hearing should be denied because the Regional Director did not dismiss Mr. Devore’s petition, and so no such hearing is required under established law.

I. Settled Board Law and Policy Requires that the Region Block the Election.

The Board’s longstanding “blocking charge policy” provides that representation petitions should be held in abeyance pending the resolution of unfair labor practice charges affecting the unit involved. *Hope Elec. Corp.*, 339 NLRB 933, 935 (2003); *see also Suprenant Mfg. Co. v.*

² Most likely, because there is no real dispute that the Regional Director’s decision to block the election is entirely consistent with well-established Board policy, Petitioner misstates this ground so as to omit the requirement in order for the Board to grant a Request for Review that the Regional Director’s action is taken “in the absence of, or departure from, Board precedent.” *Compare* Req. for Review at 4 *with* NLRB Rules and Regulations §§ 102.67(d)(1)(i)-(ii), 102.71(a)(1)(i)-(ii).

Albert, 318 F.2d 396, 397 (1st Cir. 1963) (“Whenever, shortly prior to a representation election, it is charged that the employer has engaged in an unfair labor practice which might affect the outcome, the Board, upon investigation and a determination that the charge has *prima facie* merit, customarily postpones the election until it has been found that no unfair labor practice has been committed, or until the union waives any claim to rely upon the employer’s conduct to invalidate the election.”). The policy is not a per se rule, and it is applied only when certain categories of unfair labor practice charges are alleged. Specifically, a Regional Director may block elections only when conduct is alleged that would tend to interfere with employee choice. See NLRB CASEHANDLING MANUAL, pt. 2, Representation Proceedings [hereinafter “CHM”], §§ 11730.2, 11730.3 (describing the character of “Type I” and “Type II” blocking charges). Such violations include unlawful employer involvement in a decertification petition, refusing to bargain in good faith, and conduct that might contribute to employee disaffection with an incumbent union. *Id.* at §§ 11730.3(a)-(c).

Here, even a cursory review of the charges filed by Local 727-S against Bemis confirms that the Regional Director’s decision to block the petitioned decertification election was consistent with the Board’s blocking policy and necessary to preserve the interests of the Act. Over the past months, the Union has alleged dozens of serious unfair labor practices on the part of the Employer. It is clear that Bemis’s flagrant violations may cause employee disaffection with the Union and have a coercive effect on the exercise of employee choice in any election if not properly resolved. Among its charges, the Union has alleged that the Employer has engaged in the following:

- rescinding tentative agreements during contract negotiations, refusing to negotiate over mandatory subjects of bargaining, and engaging in other bad faith bargaining

tactics so as to thwart any significant progress towards a first time agreement despite nearly a year and a half of bargaining;

- issuing negative performance evaluations to employees which note their support for the Union as a reason for the poor review;
- directing supervisors to work night shifts in order to see if a particular employee, who managers derogatorily referred to as a “walking union billboard” around the plant, was attempting to “drum up support” for the Union;
- unilaterally implementing and maintaining policies which prohibited employees from posting pro-union materials on lockers or engage in other protected, concerted activities;
- subjecting the most outspoken supporters of Local 727-S to harassment, obviously pretextual discipline, and discharge
- breaking from its stated layoff policies in order to retain employees that demonstrate a vocal antiunion animus and participate in campaigns against the Union;
- unilaterally changing its seniority policy and falsely informing certain employees whose seniority was all but eliminated as a result of the change that the change was because of the Union; and
- refusing to recall certain employees from a layoff because of their support for the Local 727-S.

It is clear that such conduct, if not properly resolved, would cause disaffection with the Union or influence employees’ free choice in an election. *See City Markets*, 273 NLRB 469, 470 (1984) (sustaining a Regional Director’s decision to block a decertification election because the

employer's refusals to bargain in good faith had not been remedied). Thus, the Regional Director correctly determined to block the petitioned election until the unfair labor practices can be resolved.

Petitioner's argument to the contrary—that the petition should go forward because the Union's charges were purportedly filed solely to prevent an election—is frivolous on its face. The Union began filing charges against the Employer in July 2017, well before Mr. Devore petitioned for an election. Indeed, Local 727-S already had five charges pending against Bemis by the time Mr. Devore filed his petition. *See* Case Nos. 18-CA-202617, 18-CA-205446, 18-CA-205920, 18-CA-205927, 18-CA-207874. The Union later filed amended charges in these cases in order to withdraw certain allegations in which the Region found no merit or the Union elected not to pursue—not to add additional claims as Petitioner suggests. And while Petitioner maintains that the claims against the Employer are somehow “spurious,” Req. for Review at 6, the Region has already found merit in many of the Union's allegations. The notion that the Union invented these charges simply to impede the possibility of a later decertification effort from Mr. Devore is ridiculous.³ The Board should therefore find no basis for review of the Regional Director's decision.

II. The Board Should Decline to Revisit its Well-Established Blocking Charge Policy.

Because there can be no doubt that Petitioner's request for review should be denied under prevailing Board law, Petitioner spends the majority of his request for review asking the Board to upend decades of its precedent and overrule the blocking charge policy so as to permit an immediate election, notwithstanding the Employer's myriad of unresolved alleged unfair labor

³ Petitioner filed an unfair labor practice charge filed against the Union making essentially the same arguments. *See* Case No. 18-CB-213051. Region 18 dismissed the charge without even soliciting a responses from Local 727-S because the charge is baseless.

practices all of which would be fatal defects of any such election. Req. for Review at 3-8. The Board should decline to do so.

As a threshold matter, the Board has already rejected similar challenges to its blocking charge policy on the ground that it is not appropriate to reconsider the rule in the context of a request for review. *See Wellington Indus., Inc.*, 359 NLRB 246, 246 (2012). As stated in *Wellington Industries*, the matter is better taken up through traditional rulemaking where there is proper notice and an opportunity for comment on any potential change. *See id.* (“The rulemaking presents a more suitable vehicle for revisiting our procedures in this area in a fully-informed and comprehensive manner.”)⁴ The Board should apply that reasoning here and decline to revisit the policy through a request for review.

As to the merits of Petitioner’s request, the Board should decline to eliminate blocking charges because they promote the central purposes of the Act, and Petitioner’s arguments for doing away with the policy are entirely unavailing. The blocking charge policy exists because certain unfair labor practices, if not remedied, would destroy the laboratory conditions necessary to permit employees to cast their ballots freely and without restraint or coercion. *Photo Drive Up*, 267 NLRB 329, 331 n.7 (1983). Indeed, “well-established Board law makes it clear that elections should not be held during periods when the employees’ freedom of choice may arguably be compromised or influenced by alleged unlawful conduct of an employer.” *Hope*

⁴ In that rulemaking process, the Board did consider comments suggesting that the blocking charge policy should be eliminated, or in the alternative, narrowed in its application, for essentially the same reasons Petitioner restates here. The Board appropriately decided to continue applying the blocking charge policy because “[t]he 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,” and “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.” Representation—Case Procedures, 79 Fed. Reg. 74419 (proposed December 15, 2014).

Elec. Corp., 339 NLRB at 935. Without the blocking effect of these charges, employers would be free to foment dissatisfaction with an incumbent union in advance of a decertification election and influence or coerce employees in the exercise of their Section 7 rights in blatant violation of the Act. As the Fifth Circuit explained: “[i]t would be particularly anomalous, and disruptive of industrial peace, to allow the employer’s wrongful refusal to bargain in good faith to dissipate the union’s strength, and then to require a new election which would not be likely to demonstrate the employees’ true, undistorted desires.” *Bishop v. NLRB*, 502 F.2d 1024, 1028 (5th Cir. 1974) (quoting *NLRB v. Gissel Packing Co.*, 39 U.S. 575, 611-12 n.33 (1969)).

Thus, blocking charges are necessary to protect employees’ free choice against unlawful employer interference and coercion. Petitioner’s claim that eliminating this protection would somehow serve the interests of the Act is misguided. *See Bishop*, 502 F.25 at 1028 (“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.”). Blocking charges do not deny employees their Section 7 or Section 9 rights as Mr. Devore claims—they guarantee the free exercise of those rights. While decertification petitions may be processed more expediently and result in quicker elections without blocking charges, the ensuing voting would be marred by employer misconduct and coercion, thereby undermining the integrity of NLRB representation proceedings.

The instant matter illustrates clearly the need for the blocking charge policy. In his request for review, Petitioner states that a complement of employees no longer wishes to be represented by Local 727-S. Req. for Review at 6. Even assuming that is true, the claim altogether ignores the effect of the unfair labor practice charges at issue in this case. If employees are disaffected with the Union, it is in large part because of the Employer’s unlawful

conduct. Petitioner even suggests that the Union failing to reach a collective bargaining agreement is a reason for their disaffection with the Union. *Id.* But to that end, Bemis's bad faith surface bargaining, which has prevented Local 727-S from reaching a labor agreement, is the basis of one of the very charges currently blocking the decertification petition. *See* Case. No. 18-CA-210170. Thus, if the election were to proceed unblocked, it is manifestly clear that it would be improperly influenced by the Employer's violative conduct at the bargaining table. *See NLRB v. Big Three Indus. Inc.*, 497 F.2d 43, 52 (1974) (concluding that a decertification election should not go forward "since employee disaffection with the union in such cases is in all likelihood prompted by the employer-induced failure to achieve desired results at the bargaining table"). This only reaffirms the need for the Board's longstanding blocking charge policy.

Despite this, Petitioner asks the Board to eliminate blocking charges because of a purported "double-standard" which he perceives as allowing labor unions to "delay all decertification elections, even as the new election rules rush all certification petitions to an election with no 'blocks' allowed under any circumstances." Req. for Review at 3, 6-7. This is a demonstrably false premise, and the Board should disregard it. The Board's new election rules, which Petitioner claims "rush" to an election, also apply to decertification petitions, including Mr. Devore's RD petition. Thus, as required under the new rules, a notice of hearing was issued the very next day after Mr. Devore filed his petition and, had the Union not submitted its request to block, a pre-election hearing would have been held on November 9, 2017. Further, contrary to Petitioner's representations, the blocking charge rule applies to RC petitions as well. *See, e.g., Mistletoe Express Serv. of Tex.*, 268 NLRB 1245, 1246-47 (1984) (ordering an RC petition to be blocked pending resolution of an unfair labor practice charge), *Town & Country*, 194 NLRB 1135, 1135-36 (1972) (blocking an RC petition because of unfair labor practices even though the

petitioner made a request to proceed); *see also* 29 C.F.R. § 103.20 (describing the updated blocking charge rule in the context of “representation proceedings” generally, not just decertification petitions), NLRB Gen. Counsel Memo. 15-06, Guidance Memorandum on Representation Case Procedure Changes (April 6, 2015), at *34 (same), CHM § 11730 (same).

Petitioner’s underlying concern about certain “presumptions” which supposedly permit unions to file false charges, with no bearing on an election, in order to stop a decertification effort is unfounded as well. *See* Req. Review at 7. The blocking charge rule requires a charge to be accompanied with an offer of proof for the Regional Director to determine whether it merits staying an election, and witnesses must be made available promptly. 29 C.F.R. § 103.20, CHM § 11730. Thus, if a union indeed filed a baseless charge without any proof of a violation as Mr. Devore fears, the charge would not serve to block the election. Further, Regional Directors are to continually evaluate blocking charges throughout their processing to determine whether an election may proceed despite the pendency of the charge. CHM § 11730.4.⁵

Petitioner also argues that the Board’s blocking charge policy is extralegal because there is there is no explicit statutory authority for staying a decertification petition. Req. for Review at 2, 5. This specious argument provides no basis to overrule the blocking charge policy. The Board and the courts have long held that blocking elections in light of certain unfair labor practices is a proper exercise of the Regional Director’s discretion and authority. *See Am. Metal Prods. Co.*, 139 NLRB 601, 604 (1962) (“[I]t is well-settled that this [blocking charge] practice is a matter which lies within the discretion of the Board as part of its function of determining whether an election will effectuate the policies of the Act.”); *see also Suprenant*, 318 F.2d at 397 (“[T]he Board has followed this ‘blocking charge’ procedure from the beginning.”). Of course,

⁵ These provisions were included in the current blocking charge rule specifically to address Petitioner’s concerns. 79 Fed. Reg. 74419.

the mere fact the text of the NLRA itself does not provide for the prospect of blocking charges is no basis for eliminating them altogether. If the Board were to accept this flawed reasoning, it would also have cause to do away with innumerable other regular and integral NLRB policies and procedures that are not explicitly written into the Act.

Mr. Devore further posits that the effect of any unfair labor practices alleged in blocking charges would be better addressed as objections in a post-election hearing. This is misguided as well. Req for Review at 5. Such an arrangement will not maintain free and fair elections, nor could it properly redress the underlying unfair labor practices. Even if the Board were to set aside a decertification election corrupted by employer misconduct, the employer's unfair labor practices could never be adequately remedied after the election because irreparable damage would have already been done to the union. *See Bishop*, 502 F.2d at 1029 (“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. Nothing would be more pitiful than a bargaining order where there is no longer a union with which to bargain.”), *Remington Lodging & Hosp., LLC v. Ahearn*, 749 F. Supp. 2d 951, 960 (D. Alaska 2010) (noting that without blocking charges, “the employer could wrongfully prompt employees to decertify the union and moot any potential relief that might remediate the unfair practices”). Further, under Petitioner’s proposal, the Board would be required to continually conduct tainted elections, even if marred by the most flagrant unfair labor practices, only to set them aside thereafter. Not only would this exercise waste considerable time and NLRB resources, it would create confusion and uncertainty in the workplace and undermine the integrity of the Board’s representation proceedings. Petitioner’s proposed alternative to blocking charges is therefore deficient and the Board should reject it accordingly.

Accordingly, the Board should decline to revisit its longstanding and important blocking charge policy.

III. The Region Did Not Err by Not Conducting a Hearing Prior to Blocking the Election.

Finally, Petitioner erroneously claims that the Region failed to hold a requisite *Saint Gobain* hearing prior to blocking the decertification petition. This argument is misplaced as it relies on an obvious misreading of *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004). In *Saint Gobain*, the Board determined that a Regional Director improvidently **dismissed** a decertification petition without a holding hearing to determine whether a causal nexus existed between the alleged unfair labor practices and the filing of the petition. 342 NLRB at 434. This hearing requirement is not applicable here because the Regional Director did not dismiss Mr. Devore's petition. As the Board has previously explained, *Saint Gobain* does not extend to cases in which a Regional Director merely stays elections pending resolution of unfair labor practice charges. *See Wellington Indus., Inc.*, 359 NLRB 246, 246 (2012). (“[S]ignificantly, the Regional Director here did not dismiss the petition outright, as in *Saint Gobain*, but decided to hold it in abeyance pending the Employer's compliance with the Board's remedial Order. Thus, this case is markedly distinct from *Saint Gobain*, and we find no basis for extending it to the circumstances presented here.”).

Moreover, *Saint Gobain* has been limited to those cases in which it is alleged that an employer implements only a single, unproven unilateral change. 359 NLRB at 246. Where, as here, an employer engages in several serious violations of the Act which may interfere with the employees' free choice, a *Saint Gobain* hearing should not be required even if a Regional Director were to dismiss the petition. *Id.* Thus, Petitioner's misguided claim that the Regional

Director erred by not holding a hearing prior to blocking the election provides no grounds for review.

CONCLUSION

Petitioner fails to raise any substantial issues warranting reversal of the Regional Director's determination to block the election pending resolution of the outstanding unfair labor practice charges. The Board should deny review accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2018, the foregoing Union's Opposition to Petitioner's Request for Review was filed electronically with the National Labor Relations Board and served upon the following individuals via email:

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