

SUBJECT INDEX

<u>SUBJECT</u>	<u>PAGE NO.</u>
FACTS	2-14
Background	2-4
The Employee Decertification Petitions	4-5
The Collective Bargaining Negotiations in 2018 for a Successor Agreement	5-9
The Subject Unfair Labor Practice Charges	9-14
DISCUSSION	15-28
Compelling Reasons Exist for Reconsideration of the Board's Blocking Charge Policy	15-19
The Allegations in the Unfair Labor Practice Cases Provide no Basis for Blocking the RD Petition	19-28
CONCLUSION	28-29

TABLE OF CASES

<u>CASE</u>	<u>PAGE NO.</u>
<i>ADT Sec. Servs.</i> , 2017 N.L.R.B. LEXIS 625, *1 n.1 (N.L.R.B. December 20, 2017)	15
<i>Cablevision Systems Corp.</i> , Case 29-RD-138839 (June 30, 2016)	16, 18
<i>Baltimore Sun Co. v. NLRB</i> , 257 F.3d 419, 426 (4th Cir. 2001)	16
<i>Conair Corp. v. NLRB</i> , 721 F.2d 1355, 1381 (D.C. Cir. 1983)	16
<i>Pattern Makers League v. NLRB</i> , 473 U.S. 95, 104 (1985)	16
<i>Lechmere, Inc. v. NLRB</i> , 502 U.S. 527, 532 (1992)	16
<i>Lumber & Bldg. Material Corp. v. NLRB</i> , 117 F.3d 1454, 1463 (D.C. Cir. 1997)	16, 18
<i>Levitz Furniture Co. of the Pacific, Inc.</i> , 333 N.L.R.B. 717, 725-26 (2001)	16, 21
<i>Overnite Transp. Co.</i> , 333 N.L.R.B. 1392, 1398 (2001)	17
<i>Mark Burnett Products & Stephen R. Frederick</i> , 349 N.L.R.B. 706, 707 (2007)	19
<i>Fall River Dyeing & Furnishing Corp. v. NLRB</i> , 482 U.S. 27, 42 (1987).	19
<i>Lexus of Concord, Inc.</i> , 343 N.L.R.B. 851, 853 (2004)	20
<i>Parkwood Developmental Center, Inc.</i> , 347 N.L.R.B. 974, 976 (2006)	21
<i>Leggett & Platt, Inc.</i> , 2017 N.L.R.B. Lexis 503. (2017)	21
<i>Walt Disney World Co.</i> , 359 N.L.R.B. No. 73 (2013)	22
<i>NLRB v. Item Co.</i> , 220 F. 2d 956 (5 th Cir. 1955)	22
<i>New York Times Co.</i> , 270 N.L.R.B. 1267 (1984)	22
<i>Hall Industries, Ltd.</i> , 285 N.L.R.B. 391 (1987)	24
<i>Prudential Insurance, Co. v. NLRB</i> , 412 F.2d 77, 84 (2d Cir. 1969)	25

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
EXECUTIVE SECRETARY

ARH MARY BRECKINRIDGE HEALTH
SERVICES, INC.

-and-

Case No. 09-RD-217672
Filed Electronically

CARLETTA CHAPPEL

-and-

UNITED STEEL, PAPER AND
FORESTRY, MANUFACTURING,
ENERGY, ALLIED INDUSTRIAL &
SERVICE WORKERS INTERNATIONAL
UNION, AFL-CIO-CLC

**REQUEST FOR REVIEW OF DECISION OF REGIONAL DIRECTOR TO HOLD
PETITION IN ABEYANCE**

Pursuant to Section 102.71 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “the Board”), the Employer, ARH Mary Breckinridge Health Services, Inc. (“ARH Mary Breckinridge”), hereby appeals the decision of the Regional Director for Region 9 of the NLRB to hold in abeyance the above-referenced election petition pending investigation of the unfair labor practice charges in Case Nos. 09-CA-216861, 09-CA-216936, and 09-CA 217499. Grounds for this appeal are twofold: (i) there are compelling reasons for reconsideration of an important Board rule or policy; and (ii) the decision of the Regional Director is arbitrary or capricious.

It is the position of ARH Mary Breckinridge that the Board’s blocking charge policy is wholly inconsistent with the fundamental purpose of the National Labor Relations Act

("the Act") of permitting the employees the right to exercise their choice whether or not to be represented by a union for the purposes of collective bargaining expeditiously through the Board's election procedures. It is the further position of ARH Mary Breckinridge that, in the circumstances of this RD petition, bargaining unit employees are able to exercise their free choice in an election notwithstanding the existence of the unfair labor practice charges.

FACTS

Background. United Steel, Paper and Forestry, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO-CLC ("the Union"), has served as the collective bargaining representative for bargaining unit employees at ARH Mary Breckinridge for a relatively brief period of time. The Union was certified as the collective bargaining representative for certain ARH Mary Breckinridge employees on September 30, 2011, in Case No. 09-RC-062440. Since that date, ARH Mary Breckinridge and the Union have negotiated two collective bargaining agreements. The first collective bargaining agreement was effective from February 15, 2013, through March 31, 2015. The effective dates of the second collective bargaining agreement were from April 3, 2015, through March 31, 2018.

Also during the course of the Union's representation of the ARH Mary Breckinridge bargaining unit employees, an employee decertification petition was processed to election by the NLRB. On April 6, 2015, an election petition was filed in Case No. 09-RD-149493. An election was conducted on May 13, 2015, among a bargaining unit of 80 employees. Of the eligible voters, 50 votes were cast in favor of the Union and 21 votes were cast against continued representation of the bargaining unit employees by the Union. Thus, as recently as 2015, a significant minority of ARH Mary Breckinridge bargaining unit employees opposed representation by the Union.

Relevant to these proceedings as well is the passage of “right-to-work” legislation in the Commonwealth of Kentucky. The legislation became effective on January 9, 2017. The legislation provides, inter alia, that “no employee shall be required, as a condition of employment or continuation of employment, to [b]ecome or remain a member of a labor organization” or to “[p]ay any dues, fees, assessments, or other similar charges of any kind or amount to a labor organization” Kentucky Revised Statute 336.130 (3). Employees of ARH Mary Breckinridge were aware of the significance of the right-to-work legislation and their ability to work at ARH Mary Breckinridge without the payment of union dues upon the expiration of the 2015-2018 collective bargaining agreement.

In that connection, between February 14 and March 8, 2018, 51 bargaining unit employees presented statements to ARH Mary Breckinridge generally to the effect that the employee was cancelling their dues deduction authorization (hereafter referred to as “the dues deduction letters”) and no longer wanted Union dues deducted from their pay. In each case, a copy of the employee communication was made by the ARH Mary Breckinridge Human Resources Department and placed in the facility mailbox of Local Union President Chris Williams. ARH Mary Breckinridge took no action on the dues deduction letters because the parties’ collective bargaining agreement contained both a mandatory union membership provision and a dues check off provision.

Relevant to the employee decertification petition, ARH Mary Breckinridge and the Union were scheduled to begin contract negotiations for a successor collective bargaining agreement on March 8, 2018. As the Union received copies of the dues deduction letters in advance of the scheduled negotiations, Local Union President Williams informed bargaining unit employees in late February and early March 2018 to the effect that there would not be any

negotiations if the Union received more than 40 dues deduction letters. Bargaining unit employees apparently understood the statement of Local Union President Williams to mean that the Union would decline further representation of ARH Mary Breckinridge bargaining unit employees if the 40-letter “line in the sand” was crossed. Coincident with the statements of Local Union President Williams, between February 23 and March 8, 2018, ARH Mary Breckinridge received dues deduction letters voluntarily from 32 bargaining unit members.

The Employee Decertification Petitions. On or about Friday, March 16, 2018, the Petitioner in the subject representation case, Carletta Chappell, voluntarily presented to ARH Mary Breckinridge copies of four petitions¹ signed by bargaining unit employees stating their desire to no longer be represented by the Union for purposes of collective bargaining (hereafter collectively “the employee decertification petitions”). The employee decertification petitions read in relevant part:

We the undersigned employed by ARH Mary Breckinridge Health Services, Inc. . . . no longer desire to be represented by United Steelworkers

Three of the four petitions also contained the following statement, which was immediately below the quoted language above: “I want to get rid of the U.S.W. at MBARH.” At all times relevant herein, 81 employees of ARH Mary Breckinridge held positions in the bargaining unit.

A total of 46 ARH Mary Breckinridge bargaining unit employees signed the employee decertification petitions between March 13 and March 16, 2018. All of those employee signatures are dated either March 13, 14, 15, or 16, 2018. Further in that connection, 23 employees signed the petition notated “page 1” on March 13, 2018, including the Petitioner. The petitions notated “page 1,” “page 2,” and “page 3” contain the signatures of eight employees dated March

¹ In the upper left corner of each of the petitions is a notation, either “page 1,” “page 2,” “page 3,” or “page 4.”

14, 2018. Thirteen employees signed the petitions notated either “page 2” or “page 4” on March 15, 2018, and two employees signed the petition notated “page 4” on March 16, 2018.

On or about March 21, 2018, ARH Mary Breckinridge was presented the petition notated “page 4” with an additional employee signature dated March 17, 2018, and a new unannotated petition with the signatures of two bargaining unit employees dated March 20 and 21, 2018, respectively. Thus, as of March 21, 2018, 49 of 81 bargaining unit employees had signed petitions indicating their desire to “get rid of the U.S.W. at MBARH.”

On April 3, 2018, ARH Mary Breckinridge received formal notice from Region 9 of the NLRB of the RD petition filed by the Petitioner in this case. Thereafter, on April 6, 2018, the parties to the RD petition were notified by Region 9 of the receipt of the Union’s formal “Request to Block” the further processing of the RD petition based upon the three unfair labor practice cases referenced above, and the decision of the Regional Director to hold the RD petition in abeyance pending disposition of the pending unfair labor practice charges. Formal notice of the decision of the Regional Director was issued on April 9, 2018.

Collective Bargaining Negotiations in 2018 for a Successor Agreement. On March 8, 2018, ARH Mary Breckinridge and the Union commenced negotiations for a successor collective bargaining agreement to the agreement that expired on March 31, 2018. Prior to the suspension of negotiations on March 19, 2018, which will be discussed in more detail below, the parties held seven negotiation meetings on four scheduled days of negotiation and made significant progress in reaching agreement on terms of a new collective bargaining agreement. Specifically, during the negotiations, the parties reached tentative agreement on 15 contract articles.

The lead negotiator for ARH Mary Breckinridge in the negotiations was Christopher A. Johnson, System Director Employee & Labor Relations for Appalachian Regional

Healthcare, Inc. (“ARH”). USW Staff Representative Roger McGinnis was the Union counterpart to Johnson. Each was assisted in the negotiations by a negotiating committee. During the negotiations, it was not uncommon for Johnson and McGinnis to have private “sidebar” discussions without their respective committees to discuss sensitive matters.

Early on in the negotiations in a sidebar conversation, McGinnis asked Johnson if he thought the negotiations would extend beyond the March 31, 2018, contract expiration date. Johnson opined that he fully expected to have the negotiations “wrapped up” before the contract expiration date. During this or another sidebar conversation early in the negotiation process, McGinnis asked Johnson if the dues deduction letters would affect the ongoing negotiations. Johnson responded emphatically, “no, we are not relying on them for anything.” As if to confirm that statement, McGinnis noted that dues revocation letters are different from decertification information, which Johnson acknowledged to be accurate.

A contract negotiation meeting between the parties was scheduled for Monday, March 19, 2018, in Hazard, Kentucky. In view of the employee decertification petitions received by ARH Mary Breckinridge evidencing actual loss of majority support by the Union among the bargaining unit employees, ARH Mary Breckinridge determined that it was both necessary and appropriate to suspend negotiations at least temporarily while it considered how to proceed in the circumstances. In order to prevent McGinnis from making an unnecessary drive from Harlan, Kentucky, Johnson contacted McGinnis by telephone early in the morning on March 19, 2018, and advised him of the employee decertification petitions and the decision to suspend negotiations.

Thereafter, in a letter to McGinnis dated March 19, 2018, Johnson confirmed the substance of their earlier telephone call concerning the temporary suspension of negotiations. Johnson wrote in part, as follows:

This will confirm my earlier telephone conversation with you this date. I advised you at that time that ARH Mary Breckinridge Health Services, Inc. ("Mary Breckinridge ARH") received a petition signed by a clear majority of bargaining unit employees stating that they no longer desire to be represented by USW for purposes of collective bargaining.

Given the circumstances, I advised you that Mary Breckinridge ARH was suspending negotiations temporarily while it considers how to proceed in light of the evidence it received demonstrating USW's actual loss of majority support among bargaining unit employees. Additionally, Mary Breckinridge ARH also withdraws its current contract proposals.

Please call or email with any questions. I will be back in touch as soon as possible.

McGinnis responded by email that same day with a demand that Johnson provide a copy of the employee decertification petitions "by the end of business tomorrow."

After further evaluation of the employee decertification petitions, and extant Board law bearing on the issue of a union's actual loss of majority support among bargaining unit employees, on March 22, 2018, Johnson sent a letter to McGinnis articulating the position of ARH Mary Breckinridge going forward. Johnson advised McGinnis as follows:

Being satisfied with the objective evidence, please be advised that Mary Breckinridge ARH will not negotiate a successor agreement to the current collective bargaining agreement. Additionally, Mary Breckinridge ARH will withdraw recognition of USW as the bargaining representative of the bargaining unit employees when the current collective bargaining agreement expires on March 31, 2018. Mary Breckinridge ARH will continue to honor its obligations under the collective bargaining agreement through and including that date.

McGinnis provided no immediate response to the letter of Johnson or the positions of ARH Mary Breckinridge concerning a successor collective bargaining agreement and withdrawal of

recognition of the Union as collective bargaining representative upon expiration of the collective bargaining agreement on March 31, 2018.

The Union ultimately responded to the March 22 letter of Johnson by letter dated March 30, 2018. In that letter, McGinnis sent copies of five documents styled "Petition to Support USW" ("USW petitions"). The USW petitions were signed by a total of 24 ARH Mary Breckinridge bargaining unit employees, although only eight of the signatures were dated. The claim of the Union, as articulated in the letter from McGinnis, was that the employee signatures were sufficient in number to undermine the position of ARH Mary Breckinridge that it possessed objective evidence that a majority of the bargaining unit employees no longer desired to be represented by the Union.

Because of the Easter holiday, Johnson did not receive the letter from McGinnis until April 2, 2018. Upon receipt of the letter, ARH Mary Breckinridge first compared the employee signatures on the USW petitions with known exemplars of the employees' signatures from its personnel files to confirm, at least superficially, the validity of the signatures on the USW petitions. Satisfied that the signatures appeared authentic, ARH Mary Breckinridge proceeded to compare the names on the USW petitions with those on the employee decertification petitions presented to ARH Mary Breckinridge by the Petitioner.

The results of this comparison were that, of the 24 employees who purported to have signed the USW petitions, the names of only seven of those employees also appeared on the employee decertification petitions of the Petitioner. (Of course, ARH Mary Breckinridge neither had, nor has, any information as to the circumstances under which the Union obtained employee signatures on the USW petitions.) In any event, even excluding the seven employees whose signatures appear on both the USW petitions and the employee decertification petitions in the

count of employees who supported the decertification efforts of the Petitioner, a clear majority of bargaining unit employees still did not desire representation as of April 2, 2018.

When ARH Mary Breckinridge received notice of filing of the RD petition from the NLRB on April 3, 2018, it determined that a direct response to the letter from Staff Representative McGinnis challenging its loss of majority support was both inappropriate and unnecessary since formal proceedings on the question concerning representation had been initiated. Indeed, ARH Mary Breckinridge considered the NLRB to be the appropriate channel for communication of such information as the NLRB processed the decertification petition, as well as unfair labor practice charges that already had been filed by the Union.

The Subject Unfair Labor Practice Charges. As noted above, the decision of the Regional Director to hold in abeyance the decertification petition was based on the pendency of unfair labor practice charges in Case No. 09-CA-216861, Case No. 09-CA-216936, and Case No. 09-CA-217499. We will discuss briefly the allegations in each case, as we understand them, in turn.

In Case No. 09-CA-216861, which was filed on March 20, 2018, it is alleged that “[s]ince on or about March 19, 2018, [ARH Mary Breckinridge] has refused to bargain with the Union for a successor agreement.” The obvious focus of this unfair labor practice charge is the action taken by ARH Mary Breckinridge following receipt of the employee decertification petitions. The employee decertification petitions plainly evidenced an actual loss of majority support by the Union among the bargaining unit employees. Up to March 19, 2018, the parties had actively engaged in collective bargaining negotiations and reached tentative agreement on many contract terms.

Also significant with regard to this unfair labor practice charge is the fact that 47 of 49 signatures on the employee petitions were dated before March 19, 2018. Furthermore, ARH Mary Breckinridge has made no announcement, formal, informal, or at all, to the bargaining unit employees that contract negotiations were suspended temporarily as of March 19, 2018, or that ARH Mary Breckinridge declined to negotiate a successor agreement with the Union upon expiration of the 2015 – 2018 collective bargaining agreement. The only information provided to bargaining unit employees by ARH Mary Breckinridge relevant to these proceedings was a status update on the processing of the RD petition of the Petitioner.

The Union alleges in Case No. 09-CA-216938, which was filed on March 21, 2018, that “[s]ince on or about March 20, 2018,” ARH Mary Breckinridge has failed and refused to provide “relevant information requested by the Union.” According to information provided by NLRB Field Attorney Eric Brinker, who was assigned to investigate the subject unfair labor practice charges, the “relevant information” referenced in the unfair labor practice charge is “the source document [ARH Mary Breckinridge] claims gave it justification to withdraw recognition of the Union . . . and a list of updated contact information including telephone numbers” of bargaining unit employees.

Concerning the “source document” [i.e., employee decertification petitions], by email on March 19, 2018, Staff Representative McGinnis demanded that Johnson provide to McGinnis “a copy of the petition as I am entitled to it now that you have possession of it.” Johnson responded to the demand of McGinnis on March 20, 2018, as follows:

As you know, the authorization cards for an [sic] union election are treated by the NLRB and the union as confidential. An employer is never provided a copy of the cards. I do not view the employee petition provided to us any differently. If you would like to provide me with the specific authority on which you are relying to make the

claim that you are entitled to a copy of the employee petition, I will review it and take it under consideration.

McGinnis did not reply to this response directly. In particular, McGinnis provided no authority for the claim that he was entitled to the employee decertification petitions.

Instead, in an email dated March 20, 2018, McGinnis simply repeated his demand of Johnson: “You stated . . . that you have received the petition If you have it, I’m entitled to it” Johnson replied in turn by email on March 21, 2018, stating in pertinent part:

I am not aware of any legal obligation requiring me to provide to you the employee petition that was presented to me. I specifically asked that you identify the authority on which you rely when you state that you “are entitled to it [the employee petition].” If you have some authority, I am willing to review it. If it supports your demand, I will act accordingly.

McGinnis dismissed out of hand Johnson’s request for authority supporting his demand, stating simply: “We will let the NLRB sort it out as a charge has been filed on the issue”²

Regarding the Union’s request for updated contact information for the bargaining unit employees, this request was made by McGinnis on February 2, 2018. On or about February 22, 2018, Johnson sent the updated contact information on a spreadsheet to McGinnis, which information had been obtained from the ARH “Lawson Human Resources System” software program. All of the updated contact information requested by McGinnis, including home addresses, email addresses, and hire dates, was provided, with the exception of the employees’

² We note that ARH Mary Breckinridge provided to the Union copies of the dues deduction letters presented to it voluntarily by the 51 bargaining unit employees. We acknowledge the view of the Board that where a majority of employees revoke their dues check off authorization, that does not establish the union’s actual loss of support of the majority of bargaining unit employees. Nevertheless, where an employee petition confirms a union’s actual loss of support among a majority of bargaining unit employees, such as in this case, parallel information regarding employee cancellations of dues deduction authorizations provides a reasonable source for determining the identity of disaffected bargaining unit employees. To the extent that it is even relevant, any claim by the Union that it had no information concerning bargaining unit employees who may have signed the employee decertification petition is, at best, completely disingenuous.

telephone numbers. The reason why this information was not provided to the Union was because the telephone numbers were not uploaded in the Lawson system.³

In any event, following delivery of the contact information to McGinnis in February, McGinnis did not raise any issue to Johnson about the lack of telephone numbers on the spreadsheet until March 19, 2018, when McGinnis texted Johnson and asked for the employee telephone numbers. On March 21, 2018, Johnson responded by email, as follows:

It appears that [the single telephone number on the spreadsheet] is the only phone number we have in Lawson (HR system). We are gathering them from other sources manually. This will take longer than this afternoon. I will send batches as we get them.

McGinnis never responded to this email from Johnson.

Further in this regard, during the first or second contract negotiation session between ARH Mary Breckinridge and the Union, McGinnis asked Johnson during a sidebar discussion why so many bargaining unit employees were submitting dues deduction letters. Johnson offered his candid opinion that bargaining unit employees did not like Local Union President Williams. At a subsequent negotiation meeting between the parties, again during a sidebar discussion between McGinnis and Johnson, McGinnis told Johnson that he had been calling bargaining unit employees and confirmed the assessment of Johnson that Local Union President Williams was the reason why so many bargaining unit employees were disaffected with the Union.

At least two salient points can be distilled from these sidebar conversations. First, McGinnis was in possession of the active telephone numbers of bargaining unit employees. Second, either McGinnis had not even looked at the spreadsheet with the contact information provided in response to his request, or he had reviewed the contact information and was

³ The telephone number for one bargaining unit employee had been input into the Lawson system.

unconcerned by the lack of telephone numbers in that he voiced no protest or objection to Johnson in McGinnis's efforts to contact bargaining unit employees. The missing employee telephone numbers only became an issue for the Union as it searched for reasons to block the processing of the decertification petition.

The Union alleges in Case No. 09-CA-217499, which unfair labor practice charge was filed on March 30, 2018, that ARH Mary Breckinridge "coerc[ed] and provid[ed] unlawful assistance to employees to seek to withdraw support for . . . and resign their memberships with the Union." According to preliminary information from NLRB Field Attorney Brinker, "several employees" were encouraged by members of ARH Mary Breckinridge management to stop paying union dues, employees were escorted to the Human Resources Department and given specific instruction as to the content of the dues deduction letter, and employees were misinformed on what is meant to stop paying dues to the Union.

In conversations with Mr. Brinker on April 4 and 16, 2018, he identified one bargaining unit employee by name, Latisha Wright, as having been "convinced" by a co-worker (and not an ARH Mary Breckinridge supervisor or manager) to withdraw her union dues deduction authorization. According to Mr. Brinker, Wright presented at the ARH Mary Breckinridge Human Resources Department and indicated that she no longer wanted to pay union dues. At that point, someone in the Human Resources Department provided the verbiage necessary to accomplish this, which Wright hand-wrote on a piece of paper and gave it to the Human Resources Department employee.

Mr. Brinker did not have the names of any other bargaining unit employees whom the Union claims were coerced into withdrawing their support for the Union, or who received unlawful assistance to withdraw their support for the Union. The only information apparently

provided by the Union to the NLRB in support of its Request to Block was that there were “several” employees. Further, the Union apparently did not provide to Mr. Brinker exact dates for when the alleged interference, restraint and coercion of bargaining unit employees occurred. The only information that Mr. Brinker was able to provide on that subject was that it appeared to occur sometime around “the beginning to the middle of March” 2018.

Specifically with regard to bargaining unit employee Wright, she appeared at the Human Resources Department unescorted on March 7, 2018. She initiated the conversation about union dues and stated that she did not want to pay union dues “anymore.” At that point, Human Resources Manager Julie Asher advised Wright that this decision was voluntary on her part and the decision was totally up to her. When Wright reiterated her desire to stop paying union dues, Asher offered language that would accomplish Wright’s purposes. Wright wrote down the language, signed the document, and handed it to Asher. That was the sum and substance of the event. Sometime later, Wright requested that her dues deduction letter be returned to her, and ARH Mary Breckinridge promptly complied.

What also is known to a certainty, regardless whether the Union provided the information to the NLRB, is that 51 bargaining unit employees submitted dues deduction letters to ARH Mary Breckinridge. The dues deduction letters were received between February 14, and March 8, 2018. The Union was provided a copy of every such dues deduction letter. Notwithstanding the Union’s knowledge of every employee who submitted a dues deduction letter and thus the opportunity to “encourage” the employees to revoke their dues deduction letters, and the fact that Staff Representative McGinnis admittedly contacted at least some of these employees, only five bargaining unit employees revoked their dues deduction letters.

DISCUSSION

Compelling Reasons Exist for Reconsideration of the Board's Blocking Charge Policy. The decision of the Regional Director to block the election proceedings in Case No. 09-RD-217672 must be reconsidered because it raises "compelling reasons for reconsideration of [a] . . . Board rule or policy." NLRB Rules and Regulations, Section 102.71(a)(1), (2). The current blocking charge policy permits a party to an election proceeding to stop the proceeding upon the filing of an unfair labor practice charge and an offer of proof of evidence by the charging party outside of the purview of the other parties to the election proceedings. The Board's blocking charge policy is contrary to the purposes of the NLRB and the Act. Application of the blocking charge policy of the Board in the circumstances of this case underscores the displacement of employee free choice by the vagaries of unproven unfair labor practice allegations that, at this stage in the unfair labor practice proceedings, are supported only by representations of interested witnesses, with no meaningful opportunity for challenge or rebuttal by the Petitioner, or any other party to the proceedings.

A fundamental purpose of the NLRB is to conduct elections and thereby vindicate the rights of employees under the Act to choose or reject union representation. It is not to suspend election petitions based upon the unilateral efforts of a party to a representation case that fears an election loss. In decertification cases, such as here, the blocking charge policy inequitably denies employees their fundamental rights under Sections 7 and 9 of the Act, and allows unions to strategically delay decertification elections. The NLRB should follow the lead of Members Kaplan and Emanuel, who recently called for a review and the revision of the blocking charge policy. *See ADT Sec. Servs.*, 2017 N.L.R.B. LEXIS 625, *1 n.1 (N.L.R.B. December 20, 2017). Member Emanuel indicated a particular concern over the impact of blocking charges in RD petitions, stating

that “he believes that an employee’s petition for an election should generally not be dismissed based on contested and unproven allegations of unfair labor practices.” *Id.*

The concerns expressed by Members Kaplan and Emanuel echo the many calls for change made by former Member Miscimarra, who urged a wholesale revision of the blocking charge rules. *See Cablevision Systems Corp.*, Case 29-RD-138839 (June 30, 2016) (Order Denying Review); *see also Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001) (finding that Section 7 “guards with equal jealousy employees’ selection of the union of their choice and their decision not to be represented at all.”); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (D.C. Cir. 1983) (citing the “NLRA’s core principle that a majority of employees should be free to accept or reject union representation.”).

Employees enjoy a statutory right to petition for a decertification election under Section 9(c)(1)(A)(ii) of the Act, and that right should not be undermined by arbitrary rules, bars, or blocking charges that prevent the expression of employee free choice. Employee free choice under Section 7 is the paramount interest of the NLRA. *See Pattern Makers League v. NLRB*, 473 U.S. 95, 104 (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”) (quotation marks and citation omitted). A Board-conducted, secret ballot election is the preferred forum for employees to exercise their right of free choice. *See Levitz Furniture Co. of the Pacific, Inc.*, 333 N.L.R.B. 717, 725-26 (2001). Industrial stability is enhanced when employees vote in secret ballot elections, since this ensures that employees actually support the workplace representative empowered to speak exclusively for them. Yet, the Board’s blocking charge policy sacrifices this right of employee free choice where

an incumbent union seeks to hold on to its representational status, regardless of the desires of the employees it represents.

Once an unfair labor practice charge is filed by a union against an employer during a decertification proceeding, pursuant to the policies of the NLRB, the decertification proceeding is subject to being held in abeyance upon the barest of unchallenged evidence. Granting the abeyance deprives employees from exercising their statutory rights under Sections 7 and 9(c)(1)(A)(ii) through a decertification election. The Board's blocking charge policy ignores the fact that the employee petitioner and fellow bargaining unit members may wish to be free from union representation, irrespective of any alleged employer infractions.

Employees are further prejudiced by the Board's blocking charge policy when filing a decertification petition as they are inexperienced in the complexities of labor law. It is unlikely that those employees favoring decertification have the ability to file requests for review, or otherwise respond to a blocking charge on their own, or that they would have the resources to independently hire counsel to represent their interests before the Board. Filing an RD petition is a complicated matter in and of itself without the further complication of addressing the efforts of the incumbent union to protect its interests by delaying the election process and thwarting the exercise of free choice by the employees. Although the petitioner employee initially is in control of the "fate" of bargaining unit employees who signed a decertification petition in filing an RD petition, the petitioner can quickly lose control to the incumbent union based solely upon the unproven allegations contained in unfair labor practice charges.

Even assuming, *arguendo*, the employer actually committed the violations alleged in the unfair labor practices charges, "[t]he 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*

Transp. Co., 333 N.L.R.B. 1392, 1398 (2001) (Member Hurtgen, dissenting); *see also Cablevision Systems Corp.*, Case 29-RD-138839 (June 30, 2016) (Order Denying Review) (Member Miscimarra, dissenting). Indeed, the policies of the NLRB often deny decertification elections even where the employees are not aware of the alleged employer misconduct, and where their disaffection from the union springs from wholly independent sources. Use of “presumptions” to halt decertification elections serves only to entrench unpopular but incumbent unions, thereby forcing an unwanted representative onto employees. The blocking policy may lead to the inequitable result of a decertification election being delayed for a period of months or years even where the employees are not aware of the alleged employer misconduct, and where their disaffection from the union originates from wholly independent sources. Use of the blocking charge policy to halt decertification elections under such circumstances serves only to entrench unpopular but incumbent unions, thereby forcing an unwanted representative onto employees. Judge Sentelle’s concurrence in *Lee Lumber* specifically highlights the inequitable nature of the policies of the NLRB. 117 F.3d at 1463-64.

This case is a compelling example of such an inequitable result. There has been employee disaffection with the USW at ARH Mary Breckinridge for at least three years, as witnessed by the decertification election held three years ago. Now, instead of bargaining unit employees having an opportunity to express their choice on representation by the Union via a Board-conducted election, they have been sidelined by the blocking charges filed by the Union. Those blocking charges are based on unproven allegations and unfair labor practice charges that, even if proved true, would have no impact on the integrity of the election process. The unfair labor practice charges filed by the Union in this case do not warrant granting an abeyance and the Board should order that the election proceed without further delay. On the other hand, the unfair labor

practice charges and application of the Board's blocking charge policy do underscore the pressing need for the Board to reconsider the blocking charge policy and the disruptive effect it has on employee free choice.

The Allegations in the Unfair Labor Practice Charges Provide No Basis for Blocking the RD Petition. The blocking charge policy of the NLRB is premised solely on the intention of the NLRB to protect the free choice of employees in the election process. See National Labor Relations Board Case Handling Manual, Part Two, Representation Proceedings, Section 11730. Under Board law, a requested postponement of a decertification election pursuant to a blocking charge should be granted when there is evidence of "coercive behavior that could affect employee free choice sufficiently to sway the outcome of the election." *Mark Burnett Products & Stephen R. Frederick*, 349 N.L.R.B. 706, 707 (2007).

On the other hand, the blocking charge policy "is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition." Case Handling Manual, Section 11730. With regard to the refusal-to-bargain unfair labor practice allegations in Case No. 09-CA-216861, they provide no support for the decision of the Regional Director to hold in abeyance the RD petition in this case, and reliance by the Regional Director on the allegations is arbitrary or capricious.⁴ Rather than interfering with employee free choice in an election, the actions of ARH Mary Breckinridge that precipitated this unfair labor practice charge were the product and direct result of bargaining unit employees exercising their free choice to oust the Union as their collective bargaining representative by signing the employee decertification petitions of the Petitioner.

⁴ Administrative action may be regarded as arbitrary or capricious where it is not "rational and consistent with the Act." *Fall River Dyeing & Furnishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987).

It was in the midst of fast-paced and successful contract negotiations with the Union that ARH Mary Breckinridge initially was presented with the employee decertification petitions on or about March 16, 2018, which were signed by 46 bargaining unit employees. (Three additional employee signatures on Employee decertification petitions were received on March 21, 2018.) The intent of the employees as stated on the employee decertification petitions was unambiguously clear and that is that the employees no longer wanted to be represented by the Union. (“I want to get rid of the U.S.W. at MBARH.”) Also unambiguously clear was the fact that the 46 employee signatures constituted objective evidence of the Union’s actual loss of majority support among the bargaining unit employees.

Faced with this information, and with imminent contract negotiations scheduled for March 19, 2018, ARH Mary Breckinridge notified the Union that it (ARH Mary Breckinridge) was suspending negotiations temporarily while it considered how to proceed. In similar circumstances, the Board has held that suspending negotiations was reasonable and cannot be construed as a general refusal to bargain. *Lexus of Concord, Inc.*, 343 N.L.R.B. 851, 853 (2004). The Board observed further in *Lexus of Concord* that because Lexus of Concord had received evidence that a majority of employees unequivocally rejected the union as their collective bargaining representative, and reaffirmed their rejection of the union subsequently by filing a decertification petition, Lexus of Concord was “privileged” to withdraw recognition of the union “if no legal barrier precluded reliance on it.” *Lexus of Concord, Id.* at 852.

Thereafter, on March 22, 2018, Johnson sent his letter to the Union wherein he anticipatorily withdrew recognition of the Union upon the expiration of the collective bargaining agreement. Again, ARH Mary Breckinridge possessed objective, uncontroverted evidence of the Union’s actual loss of majority support in the form of employee decertification petitions signed by

a clear majority of bargaining unit employees. Under *Levitz Furniture Co. of the Pacific*, 333 N.L.R.B. 717, 725 (2001), “an employer may . . . unilaterally withdraw recognition [of a union] . . . on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.” Furthermore, it is settled Board law that an anticipatory withdrawal of recognition is not unlawful so long as it is properly “supported by objective evidence at the time of the announcement and that evidence survived any timely challenge.” *Parkwood Developmental Center, Inc.*, 347 N.L.R.B. 974, 976 (2006). See *Leggett & Platt, Inc.*, 2017 N.L.R.B. Lexis 503 (2017).

ARH Mary Breckinridge possessed objective evidence of the Union’s actual loss of majority support among bargaining unit employees on March 19 and March 22, 2018. Even after the Union’s obvious concerted and aggressive effort to obtain employee signatures on its USW petitions, as of April 2, 2018, after expiration of the collective bargaining agreement, there remained a majority of bargaining unit employees who no longer desired to be represented by the Union.

There is no claim by the Union that ARH Mary Breckinridge had any involvement in the collection of signatures on the employee decertification petitions by the Petitioner and, in fact, ARH Mary Breckinridge had no involvement whatsoever. ARH Mary Breckinridge did not temporarily suspend negotiations with the Union, and thereafter refuse to negotiate a successor agreement with the Union, until after the Petitioner had collected signatures from a majority of bargaining unit employees on the employee decertification petitions and presented the employee decertification petitions to ARH Mary Breckinridge. Consequently, there is no causal relationship between the withdrawal of ARH Mary Breckinridge from collective bargaining negotiations and

the employees' disaffection with the Union. Indeed, that disaffection had manifested itself three years earlier with a decertification petition and Board-sponsored election.

The bad faith bargaining/refusal to provide information allegations in Case No. 09-CA-216936 are much ado about nothing. They represent a quintessential example of the vulnerability of the Board's blocking charge policy to misuse by a party as a tactic to delay resolution of a question concerning representation, and any failure by ARH Mary Breckinridge to provide the information sought could not interfere with employee free choice in a decertification election. The apparent conclusion of the Regional Director to the contrary is arbitrary or capricious, and contrary to Board law.

Broadly speaking, a Union has the right to demand information from an employer, and the employer has a concomitant duty to provide the information, if it is relevant and necessary to the union in the performance of its representational duties to bargaining unit employees. *Walt Disney World Co.*, 359 N.L.R.B. No. 73 (2013), *NLRB v. Item Co.*, 220 F. 2d 956 (5th Cir. 1955). Various categories of information are presumptively relevant (e.g., wage and related information; information related to employer policies; information concerning terms and conditions of employment of bargaining unit employees; information relevant to the union in its effort to police and administer the collective bargaining agreement, etc.) and generally must be disclosed. A decertification petition signed by employees and received by the employer is not information that is presumptively relevant. Indeed, it is counterintuitive that employee decertification petitions have bearing to a union in its capacity as representative of bargaining unit employees.

When a union asks for information that is not presumptively relevant, the union must demonstrate the probable relevance of the information to its representation of bargaining unit employees. *New York Times Co.*, 270 N.L.R.B. 1267 (1984). In this case, the Union demanded

that ARH Mary Breckinridge provide the employee decertification petitions in its possession. ARH Mary Breckinridge did not expressly refuse to provide the information to the Union. Rather, in two communications from System Director Johnson to Staff Representative McGinnis, Johnson requested that McGinnis provide the legal basis upon which the Union relied (which is to say, the relevance and necessity) in making the demand. Instead of offering any explanation for why it was entitled to the information, the Union simply filed the subject unfair labor practice charge.

Furthermore, it defies logic that the unwillingness of ARH Mary Breckinridge to turn over to the Union, without any explanation as to why it was entitled to the employee decertification petitions, information which generally is treated as confidential and not subject to disclosure by the NLRB, as well as by unions in RC cases, could affect employee free choice in the subject RD case. Other than a representation election conducted under the auspices of the Board, we submit that the purest expression of employee free choice in representation cases is the signatures of employees on a decertification petition collected solely and exclusively by their co-workers and untainted by any conduct of the employer. While the Union may have wanted the employee decertification petitions in order to contact disaffected employees and convince them to withdraw their support for the decertification efforts, such efforts by the Union could have no impact on employee free choice in the election process.

The Union “piggy backs” its employee decertification petition allegation with the claim that ARH Mary Breckinridge failed to provide updated contact information, including telephone numbers, of bargaining unit employees. ARH Mary Breckinridge provided updated employee information fully responsive to the request of the Union, with the exception of telephone numbers that were not in its Lawson Human Resources System, on February 22, 2018. For approximately one month, the Union took no issue with the information provided by ARH Mary

Breckinridge. The glaringly obvious fact is that the missing employee telephone numbers only became a concern to the Union after the employee decertification petitions came to light as the Union searched for reasons to advance its Request to Block the RD petition. In any event, the Board has held that failure of an employer to provide such employee information does not affect the conduct of an election.

In *Hall Industries, Ltd.*, 285 N.L.R.B. 391 (1987), the Board considered whether the refusal of an employer to provide requested information to a union had an adverse impact on a decertification election. Upon being advised of the filing of a decertification petition, the union requested that the employer furnish it with the names and addresses of the bargaining unit employees, their dates of hire, job and shift assignments, wage rate, insurance costs, and status of the pension plan. *Id.* at 391. The employer did not furnish this information until more than two months after the election. *Id.* The union did not prevail in the decertification election and filed timely objections, protesting in part that the employer's failure to provide the requested information prevented the union from participating fully and in a knowledgeable manner in the election.

Finding that the information was relevant and necessary to the union's collective-bargaining function, the Board held the employer had violated the Act by failing to produce the requested information in a timely manner. *Id.* Despite that holding, the Board overruled the election objection, finding that it was "virtually impossible to conclude that the [employer's] conduct affected the election results." *Id.* The Board reached this decision based upon the fact that the violation was not severe and the fact that, at most, one employee was even aware of the employer's delay in supplying the requested information. *Id.* at 391-392.

The Union demand for a copy of the employee decertification petitions is outside the scope of information that ARH Mary Breckinridge is required to produce to the Union under the Act. The Union did not then, and does not now, require that list of disaffected employees to carry out its duties as the employee representative. “When a union requests information which is not pertinent to its performance as a bargaining representative, the Union is required to make a showing of relevance before the employer must comply with the request.” *Prudential Insurance, Co. v. NLRB*, 412 F.2d 77, 84 (2d Cir. 1969). The Union made no such showing of relevance and the employee decertification petitions should remain confidential. That position is enforced by the NLRB instructions for filing a decertification petition, which specifically instructs employees not to serve a showing of interest listing employees favoring the petition on the other parties involved in the election. *See* Form NLRB-4812.

In Case No. 09-CA-217499, the Union alleges that ARH Mary Breckinridge “interfered with, restrained and coerced employees” by “coercing and providing unlawful assistance to employees” in various respects. Although the unfair labor practice charge alleges that multiple employees were subject to the alleged unlawful conduct, ARH Mary Breckinridge has been advised of the identity of only one bargaining unit employee – Latisha Wright – who apparently has been presented to the Board by the Union in support of the allegations in the charge.

As discussed above, from information provided by Field Attorney Brinker, Wright must have acknowledged that a co-worker, and not a member of management, convinced her to revoke her union dues authorization. Wright then voluntarily went to the Human Resources Department and indicated her desire to stop paying union dues to the Human Resources Manager. Only upon receiving that information did the Human Resources Manager provide verbiage to Wright to accomplish this purpose.

This information hardly supports the allegations of the unfair labor practice charge. If Wright was coerced, the so-called coercion came from a co-worker. Any assistance provided to ARH Mary Breckinridge was provided only in response to a request for assistance from Wright, which settled Board law permits an employer to do. *See Eastern States Optical*, 275 N.L.R.B. 371 (1985). Moreover, the information provided to Wright accurately described to Wright what she must do to not be subject to an obligation to pay dues to the Union. It is patently unreasonable to conclude from this information that, if proven, the conduct “would interfere with employee free choice in an election” as is required by Section 103.20 of the Rules and Regulations of the NLRB.

Furthermore, under Section 103.20, when a party to a representation proceeding files an unfair labor practice charge together with a request that the Regional Director block the representation proceeding, an offer of proof must be provided in support of the unfair labor practice charge and request to block, which includes the following information:

- the names of witnesses who will testify in support of the unfair labor practice charge; and
- a summary of the anticipated testimony of each witness

The party seeking to block the processing of the election shall also promptly make available to the Regional Director the witnesses identified in its offer of proof.

Of course, ARH Mary Breckinridge is not privy to the offer of proof submitted by the Union in this Case (or either of the other two Cases for that matter). Under Section 103.20, offers of proof are not subject to disclosure to the other parties to the representation case (not unlike the identity of employees who have supported a representation petition). Given the fact that only one bargaining unit employee has been identified in support of the allegations in Case No. 09-CA-217499, the reasonable conclusion is that the Union has failed in its obligations under

Section 103.20. Therefore, it was unreasonable for the Regional Director to premise his decision to hold in abeyance the RD petition on the allegations in Case No. 09-CA-217499.

It also is significant in connection with the decision of the Regional Director to hold in abeyance the RD petition that the allegations in Case No. 09-CA-217499 have absolutely nothing to do with the employee decertification petitions. The dues deduction letters were presented to ARH Mary Breckinridge by bargaining unit employees between February 14 and March 8, 2018. ARH Mary Breckinridge did not notify bargaining unit employees about the number of dues deduction letters received, nor did it make any representations to bargaining unit employees with regard to the dues deduction letters.

Wholly separate and distinct from the dues deduction letters, between March 13 – 21, 2018, the Petitioner (and perhaps other bargaining unit employees who may have assisted her, which information is unknown to ARH Mary Breckinridge) collected the signatures of 49 bargaining unit employees on the employee decertification petitions. The prefatory statements on the employee decertification petitions eliminated any doubt as to the purpose of the Petitioner in soliciting employees' signatures. However the Petitioner went about obtaining the signatures on the employee decertification petitions, it was totally disassociated from the employees' submission of dues deduction letters. Thus, as observed earlier, the employee decertification petitions represented an untainted expression of employee free choice.

Finally, after the Union became aware of the employee decertification petitions, it apparently mounted a significant effort to counter the objective evidence of loss of majority support of the bargaining unit employees represented by the employee decertification petitions. As discussed above, 24 bargaining unit employees signed the USW petitions, but only seven of those employees also signed the employee decertification petitions. (Of course, ARH Mary

Breckinridge has no knowledge how many bargaining unit employees refused to sign the USW petitions.) The obvious point is, despite the concerted efforts of the Union, a majority of bargaining unit employees still supported the decertification efforts of the Petitioner as of April 2, 2018.

This sequence of significant events regarding bargaining unit employee expressions of free choice concerning their representation by the Union belies any finding that employee free choice in Case No. 09-RD-217672 could be interfered with by the unfair labor practice charges in Case No. 09-CA-217499. By the actions of the bargaining unit employees, the dues deduction letters were of no moment when it came to the employee decertification petitions. Whatever understanding they may have had of the purpose or significance of the dues deduction letters, it did not inhibit them when they signed the employee decertification petitions, the purpose of which was stated in unambiguously straightforward terms. Accordingly, reliance by the Regional Director on the allegations in Case No. 09-CA-217499 was arbitrary or capricious.

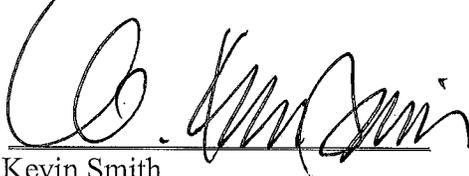
CONCLUSION

The blocking charge policy of the Board is premised solely on the intention of the Board to protect the free choice of employees in the election process. As this case amply shows, however, the requirements for holding in abeyance the processing of an election petition are drawn so broadly in Section 103.20 of the Board's Rules and Regulations that the blocking charge policy presents a substantial and unreasonable impediment to the employees' exercise of free choice in the election process. Accordingly, compelling reasons exist for reconsideration of the Board's blocking charge policy and the decision of the Regional Director should be reviewed for this reason.

It is the further position of ARH Mary Breckinridge that the decision of the Regional Director to hold in abeyance the further processing of the RD petition in this case is arbitrary or capricious. The operative facts do not support the conclusion that the Union would prevail on any of the allegations in the unfair labor practice cases, or that if any of the allegations were proven, employee free choice would be interfered with thereby. Nor do the operative facts establish a causal relationship between the unfair labor practice allegations and the RD petition. In fact, the genesis of the RD petition predates the subject unfair labor practice charges by three years. Moreover, the actions of ARH Mary Breckinridge with which the Union takes issue in its unfair labor practice charges are sanctioned by settled Board law. Therefore, the decision of the Regional Director should be set aside and the RD Petition in Case No. 09-RD-217672 should be processed to election by the Board.

Respectfully submitted,

SMITH & SMITH ATTORNEYS

By: 

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CERTIFICATE OF SERVICE

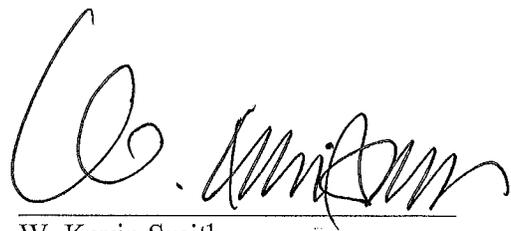
I hereby certify that a true and correct copy of the foregoing was filed electronically with the Executive Secretary of the National Labor Relations Board using the Board's E-File system, and copies of the foregoing were served by electronic mail, on April 23, 2018, upon:

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