

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

**Bemis N.A.**  
**(Employer),**

**Case No. 18-RD-209021**

**and**

**Local 727-S of the Graphic  
Communications Conference, Teamsters,**  
**(Union),**

**and**

**Wayne Devore**  
**(Petitioner).**

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**PETITIONER'S REQUEST FOR REVIEW**

**INTRODUCTION**

Petitioner requests the Board overturn the decision of the Director of Region 18, dated April 3, 2018, dismissing the decertification petition filed by Wayne Devore (“Devore” or “Petitioner”). (Copy attached as Ex. 1). Local 727-S of the Graphic Communications Conference of the International Brotherhood of Teamsters (“Union”) is the exclusive bargaining agent of warehouse employees of Bemis N.A. (“Employer”) in Centerville, Iowa. On October 31, 2017, Devore filed a decertification petition. On or about November 1, 2017 he was notified that a pre-election hearing would be held on November 9, 2017. Shortly before that date the Region notified him the hearing was indefinitely postponed because the Union had filed an unfair labor practice (“ULP”) charge the Region was investigating. The Union eventually withdrew that charge, but filed at least nine additional charges. To date,

almost six months after the filing of the petition, an election has not been held. On January 19, 2018, the Region notified Petitioner that his decertification petition was blocked. He then filed a first Request for Review to this Board.

Then, on April 3, 2018, the Regional Director completely dismissed Devore's decertification petition pending litigation of a complaint issued in Case No. 18-CA-210170. The basis of the Regional Director's latest dismissal is that if the conduct alleged in the complaint is proven it will require issuance of a bargaining order.

Notwithstanding the Region's decision to issue a complaint on some of the Union's numerous "blocking charges," the Union's filing of those ULP charges was clearly intended to deny the Petitioner and his fellow employees their rights under NLRA Sections 7 and 9 to have a fair and prompt election. 29 U.S.C. §§ 157 and 159. In her dismissal letter, the Regional Director characterized those ULP charges as "meritorious." (Ex. 1). However, none of those charges resulted in the issuance of a complaint except for one, in Case No. 18-CA-210170. The "meritorious" ULP charge contains no allegation that the employees' decertification petition was tainted by Employer involvement. Furthermore, the Region held no hearing to determine the truth or falsity of the Union's allegations, which Petitioner believes are spurious and not causally linked to the employees' desire to decertify. *See, e.g., Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004). Indeed, no neutral designee of this Board ever reviewed the Union's allegations while also considering the Petitioner's position in favor of decertification. The decertification petition was summarily dismissed without any input from the Petitioner or the bargaining unit employees.

Petitioner urges the Board to overhaul its "blocking charge" policy so that decertification

elections are no longer delayed/prevented from occurring. Congress created no authority for the Board to postpone or cancel elections due to the filing of ULP charges or the issuance of a complaint.

By her actions, the Regional Director acted outside her authority under the NLRA, by preventing an election despite the absence of any serious claim that the petition was tainted. Her dismissal diminishes and denies Petitioner and other employees' statutory *rights* to decide their representational preferences under NLRA Sections 7 and 9. Furthermore, even if the *Employer* committed some technical violation by failing to bargain properly, that does not mean the *employees* should pay by having their statutory rights stripped from them. If, as the Regional Director believes, a failure to bargain would impact the opinions of the bargaining unit in a decertification election, the Union could use the alleged failure to bargain as a campaign issue to defeat the decertification. Then, at least, the employees would decide, and not the Regional Director or an ALJ.

Pursuant to Board Rules & Regulations Sections 102.67 and 102.71, Devore submits this Request for Review of the Regional Director's decision to dismiss his decertification petition. The Board exists to *conduct* elections and thereby vindicate employees' right to choose or reject union representation, not to act outside the authority of the Act and arbitrarily *suspend* election petitions at the unilateral behest of unions that fear an election loss. Cf. *Gen. Shoe Corp.*, 77 NLRB 124, 126 (1948) (holding that the Board should exercise the power to set aside an election "sparingly" in representation cases because it cannot "police the details surrounding every election," and the secrecy in Board elections empowers employees to express their true convictions); see also *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420 (8th Cir. 1971)

(recognizing that “one of the purposes of the Union in filing the unfair practices charge was to abort Respondent’s petition for an election”). This Request for Review should be granted because the Board’s “blocking charge” rules unfairly deny employees their fundamental rights under NLRA Sections 7 and 9. The Board’s blocking charge rules allow unions to delay all *decertification* elections, even as the Board’s revised Representation Election Rules rush *all certification* petitions to an election with no blocks allowed under any circumstances. 79 Fed. Reg. 74308, 74430-60 (Dec. 15, 2014).

The Board should put an end to this double-standard, order this election to proceed at once, and follow the lead of former Chairman Miscimarra, who urged a wholesale revision of the “blocking charge” rules. *See Cablevision Sys. 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.”).

In short, this Request for Review, challenging the Board’s “blocking charge” rules, raises questions of exceptional national importance. There are compelling reasons for the Board to reconsider the blocking charge rules, i.e., vindicating employee free choice. *See* NLRB Rules & Regulations § 102.71(a)(1) & (2), indicating that Requests for Review should be granted when “(1) . . . a substantial question of law or policy is raised . . . [or] (2) [t]here are compelling reasons for reconsideration of an important Board rule or policy.” Petitioner asks the Board to: 1) grant his Request for Review; 2) reactivate the election petition; and 3) overrule, nullify, or substantially revise the “blocking charge” rules. Such action by this Board will

provide more protection for employees' right to choose or reject unionization at a time of their choosing, and less protection for incumbent unions that "game the system," unilaterally block elections, and cling to power despite their unpopularity.

## ARGUMENT

### **I. The Board and its Regional Directors lack explicit statutory authority to block an election and the current rules on "blocking charges" should be abandoned or substantially revised.**

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"). Employees have a statutory right to petition for a decertification election under the NLRA and should not have that right be trampled by arbitrary rules, bars, or "blocking charges" that prevent employee free choice. A NLRB conducted secret-ballot election is the preferred forum for employees to exercise their right of free choice. *See Levitz Furniture Co. of the Pac., Inc.*, 333 NLRB 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 "blocking charge" rules sacrifice this right of employee free choice based on a theory that permits an unpopular incumbent union to cling to power.

There is no statutory basis for "blocking charges." Nowhere did Congress authorize the Board to ignore Section 9(c)(1) of the Act, 29 U.S.C. § 159(c)(1), which states that when a question concerning representation is raised, the Board "*shall* direct an election by secret ballot and certify the results thereof." (Emphasis added). The sole express limitation on the Board's mandate

to conduct such elections is the provision that prevents elections from being held within twelve months of a previous election. No matter how offensive an alleged ULP may be, an election should be held once there is a proper showing of interest, with challenges or objections, if any, sorted out afterwards. Simply stated, the ballots should be cast and counted when a decertification petition is filed, or employee free choice is destroyed.

As noted, the “blocking charge” practice is not governed by statute. Rather, it is a creation of the Board, theoretically based upon the Board’s discretion to effectuate the policies of the Act. NLRB Casehandling Manual (Part Two) Representation Section 11730 et seq. (setting forth the “blocking charge” procedures in detail). But in practice, the “blocking charge” rules stop employees from exercising their paramount right to choose or reject representation, which is not a proper use of the Board’s discretion.

In the absence of blocking charges, there are safeguards to election fraud or significant unlawful activity. Objections can be made and a post-election hearing held to determine the validity of those objections and whether they impacted employee free choice. It is no solution to prevent an election from occurring whenever charges are filed. Indeed, that can be a very time-consuming process due to the investigation process, a potential trial, and appeals. Such delays can drag on for years, all the while violating employees’ right to free choice.

Petitioner does not believe that the allegations in the Union’s charges are true. However, even if they are, many employees have their own independent reasons to end the Union’s representation. Many employees simply do not like the union they are saddled with, and will vote it out regardless of any progress or lack thereof at the bargaining table. The Regional Director’s reflexive application of the “blocking charge” policies ignores the fact that Petitioner and his fellow bargaining unit members may wish to be free from union representation irrespective

of any alleged employer infractions. The policies presume that the employees cannot possibly make up their own minds. This is wrong. *Overnite Transp. Co.*, 333 NLRB 1392, 1398 (Member Hurtgen, dissenting); *Cablevision Syst. Corp.*, Case 29-RD-138839 (June 30, 2016) (Order Denying Review) (Member Miscimarra, dissenting).

Petitioner and his fellow employees are not sheep, but responsible, free-thinking individuals who should be able to make their own choice about unionization. The employees' paramount Section 7 rights are at stake, and those rights should not be so cavalierly discarded simply because their Employer is alleged to have committed a violation or made a technical mistake under the labor laws. Petitioner urges the Board to overrule or overhaul its "blocking charge" policies to protect the true touchstone of the Act—employees' paramount right of free choice under Section 7.

In the context of challenges to a certification petition, the Board holds the election first and settles any objections and challenges afterwards. If the Board can rush certification petitions to prompt elections by holding all objections and challenges until afterwards, it can surely do the same for Decertification Petitions. 79 Fed. Reg. at 74430-74460. It is time for the Board to eliminate its discriminatory "blocking charge" rules, which apply solely to employees who seek to refrain from supporting a union, and create a system for decertification elections whereby such employees are afforded identical rights as employees seeking a certification election in support of a union. The solution, if there is any misdeed, is to rely on the Board's objection policies with respect to elections. *Int'l Ladies' Garment Workers v. NLRB*, 366 U.S. 731, 737 (1961) (holding that "there could be no clearer abridgment of § 7 of the Act" than for a union and employer to enter into a collective bargaining relationship when a majority of employees do not support union representation); *see also Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004).

The Board’s jurisprudence on blocking elections must be drastically overhauled if not completely overruled. The Board has long operated under a system of “presumptions” that prevent employees from exercising their statutory rights under Sections 7 and 9(c)(1)(A)(ii) to hold a decertification election whenever a union files so-called “blocking charges.” As discussed above, this is without statutory authorization. Furthermore, the Board’s practice of delaying and denying elections has faced judicial criticism. *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960) (“[T]he Board is [not] relieved of its duty to consider and act upon an application for decertification for the sole reason that an unproved charge of an unfair practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented.”); *NLRB v. Gebhardt-Vogel Tanning Co.*, 389 F.2d 71, 75 (7th Cir. 1968). Indeed, the Board’s policies often deny decertification elections even where the employees are not aware of 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 unwanted representatives onto employees. Judge Sentelle’s concurrence in *Lee Lumber* specifically highlights the unfairness of the Board’s policies. 117 F.3d at 1463-64; see also *Scomas of Sausalito v. NLRB*, 849 F.3d 1147, 1159 (D.C. Cir. 2017) (Henderson, J., concurring).

Most of these “bars” and “blocking charge” rules stem from discretionary Board policies (see, e.g., Section 11730 of the NLRB Casehandling Manual concerning “blocking charges”) that should be reevaluated when industrial conditions warrant. See, e.g., *IBM Corp.*, 341 NLRB 1288, 1291 (2004) (holding that the Board has a duty to adapt the Act to “changing patterns of industrial life” and the special function of applying the Act’s

general provisions to the “complexities of industrial life”) (citation omitted)). The Board should take administrative notice of its own statistics, which show that 30% of Decertification Petitions are “blocked,” whereas certification elections are never blocked, for any reason. See NLRB, Annual Review of Revised R-Case Rules, <https://www.nlr.gov/sites/default/files/attachments/news-story/node4680/R-Case%20Annual%20Review.pdf>. These frequent blocks in only decertification elections frustrate employee free choice, and the Director of Region 18 should be ordered to proceed to an immediate election without further delay.

**II. Even under current Board law, the Region erred by dismissing the petition without a hearing, in which the Union must prove the existence of a causal nexus between the alleged unfair labor practices and employee disaffection.**

The Regional Director is preventing the Petitioner and the bargaining unit from voting to decertify an unpopular and unwanted union, based on the Union’s ULP assertions. The Regional Director should have held a hearing pursuant to *Saint Gobain Abrasives*, 342 NLRB 434, in order for the Union to meet its burden and prove a causal relationship between the alleged ULPs and employee dissent. In order for a ULP to taint a petition or block an election, there must be a “causal nexus” between an employer’s ULP and the employees’ dissatisfaction with the union. “[I]t is not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection. To so speculate is to deny employees their fundamental Section 7 rights.” *Id.*

Relying on *Master Slack Corp.*, 271 NLRB 78 (1984), the Region should be required to hold a hearing and promptly determine if a causal relationship exists by analyzing a number of factors, including: “[1] the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; [2] any possible tendency to cause employee disaffection from the

union; and [3] the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.” *Id.* at 84.

Here, the Regional Director made a unilateral decision to dismiss the election petition based on unproven ULP allegations. This case should be used to reestablish, at the very least, the need to hold *Saint Gobain* hearings before election petitions are dismissed. Petitioner believes that, even if the Union’s ULP charges are true, they do not impact employee free choice, and there is no nexus between the conduct alleged and employee disaffection from the Union. To so speculate is to deny employees their fundamental Section 7 rights. *Saint Gobain*, 342 NLRB at 434. At a hearing, the incumbent union will be required to bear the burden of proof concerning the existence of a “causal nexus.” *See, e.g., Roosevelt Mem. Park, Inc.*, 187 NLRB 517, 517-18 (1970) (holding party asserting the existence of a bar bears the burden of proof); *Saint-Gobain*, 342 NLRB at 434. The Union in this case will not be able to prove any nexus.

### CONCLUSION

The Board should grant the Request for Review and order the Regional Director to promptly process this decertification petition. It should also overrule or substantially overhaul its “blocking charge” rules, which are used and abused to arbitrarily deny decertification elections.

Respectfully submitted,  
/s/ John C. Scully  
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*Counsel for Petitioner*

May 1, 2018

## **CERTIFICATE OF SERVICE**

I hereby certify that on May 1, 2018, a true and correct copy of the foregoing 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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/s/ John C. Scully

**Ex. 1**



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April 3, 2018

JOHN C. SCULLY, ESQ.  
C/O NATIONAL RIGHT TO WORK LEGAL  
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8001 BRADDOCK ROAD, SUITE 600  
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Re: BEMIS N.A.  
Case 18-RD-209021

Dear Mr. Scully:

The above-captioned case, petitioning for an investigation and determination of representative under Section 9(c) of the National Labor Relations Act, has been carefully investigated and considered.

**Decision to Dismiss:** I have carefully considered your petition seeking to decertify the Graphic Communications Conference of the International Brotherhood of Teamsters, Local 727-S, the Union that currently serves as the exclusive bargaining representative of a unit of employees employed by the Employer at its Centerville, Iowa facility. Since this petition was filed, the Union has filed multiple meritorious unfair labor practice charges against the Employer, Bemis Company, Inc., specifically, Cases 18-CA-202617, 18-CA-205446, 18-CA-205920, 18-CA-205927, 18-CA-207874, 18-CA-209515, 18-CA-210936, 18-CA-210170, and 18-CA-211086. The involved parties to these charges were already informed that the conduct involved in these charges, if proven, would interfere with employees' free choice and as such, the processing of the petition was blocked. In Case 18-CA-210170, I determined that the investigation warrants issuance of a complaint alleging bad faith bargaining, including surface bargaining and refusal to meet at reasonable times since May 20, 2017. This conduct, if proven, will require issuance of a bargaining order and would preclude the existence of a question concerning representation.

Accordingly, I am dismissing the petition in this matter, subject to a request for reinstatement by the petitioner after final disposition of the charge.

**Right to Request Review:** Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. The request for review must contain a complete statement of the facts and reasons on which it is based.

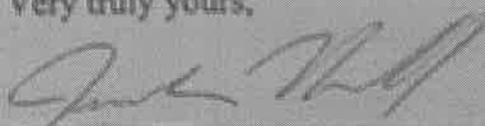
**Procedures for Filing Request for Review:** A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business (5 p.m. Eastern Time) on April 17, 2018, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished** by no later than 11:59 p.m. Eastern Time on April 17, 2018.

Consistent with the Agency's E-Government initiative, parties are encouraged, but not required, to file a request for review electronically. Section 102.114 of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the Efiling system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Very truly yours,



JENNIFER A. HADSALL  
Regional Director

cc: See Page 3.