

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

APPLE BUS COMPANY
Employer,

and

GENERAL TEAMSTERS LOCAL 959
Union,

and

ELIZABETH CHASE
Petitioner.

Case No. 19-RD-216636

UNION'S OPPOSITION TO PETITIONER'S FIFTH REQUEST FOR REVIEW

I. INTRODUCTION

On July 31, 2017, Elizabeth Chase (Chase), filed a decertification petition (Case No. 19-RD-203378).

On August 28, 2017, Chase's decertification petition was dismissed by the Regional Director on the basis of *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), and the successor bar doctrine (Exhibit B to Fourth Request for Review).

On September 25, 2017, Chase filed a Request for Review of the Regional Director's Decision and Order. The same day, Apple Bus filed a Request for Review of the Regional Director's Decision and Order.

On December 14, 2017, the National Labor Relations Board (Board) issued an Order denying the two Requests for Review because they raised no substantial issues warranting review.

On March 15, 2018, Chase filed another decertification petition (Case No. 19-RD-216636).

On March 16, 2018, Chase filed an unfair labor practice charge against Apple Bus for allegedly continuing to bargain with a minority union. The Regional Director dismissed that

charge on August 15, 2018 and the Office of Appeals later denied Chase's appeal (see Fourth Request for Review at 3, fn. 5).

On March 20, 2018, the Regional Director issued an Order Postponing Hearing Indefinitely due to five blocking unfair labor practice charges filed by the Union (Exhibit H to Fourth Request for Review).

On March 28, 2018, Chase filed Petitioner's Request for Review of the Regional Director's March 20, 2018 Order Postponing Hearing Indefinitely.

On or about April 9, 2018, Apple Bus filed Employer's Response to the Petitioner's Request for Review and Union's Brief in Opposition.

On May 2, 2018, the Regional Director notified Chase that the petition would be held in abeyance pending the investigation of unfair labor practice charges in Cases 19-CA-218290 and 19-CA-218755 (Exhibit K to Fourth Request for Review).

On May 9, 2018, this Board issued an Order denying Petitioner's Request for Review of the Regional Director's determination to hold the petition in abeyance as it raised no substantial issues warranting review (Exhibit L to Fourth Request for Review).

On May 15, 2018, Chase filed Petitioner's Second Request for Review. The Union filed its Opposition.

On July 9, 2018, the Regional Director notified Chase that the petition would be held in abeyance pending the investigation of the unfair labor practice charge in Case 19-CA-222039 (Exhibit O to Fourth Request for Review).

On July 23, 2018, Chase filed Petitioner's Third Request for Review of the Regional Director's July 9, 2018 election block.

On August 2, 2018, this Board issued an Order denying Petitioner's Second and Third Requests for Review of the Regional Director's determination to hold the petition in abeyance as they raised no substantial issues warranting review (Exhibit Q to Fourth Request for Review).

On August 1, 2019, Chase filed Petitioner's Fourth Request for Review of the Regional Director's July 9, 2019 election block.

On August 20, 2019, the Regional Director notified Chase (Exhibit A to Fifth Request for Review) that the petition would be held in abeyance pending investigation of the unfair labor practice charge in Case 19-CA-246017 (Exhibit B to Fifth Request for Review).

On September 13, 2019, Chase filed Petitioner's Fifth Request for Review of the Regional Director's August 20, 2019 election block. Chase cited Board Rules and Regulations 102.67 and 102.71 and urged this Board to re-evaluate the blocking charges rules (Fifth Request for Review at 1).

The Union files this Opposition to Petitioner's Fifth Request for Review. The Union incorporates by reference its previous Oppositions to Chase's Requests for Review. There are no compelling reasons to grant Chase's Fifth Request for Review. Chase's decertification petition was not dismissed or denied by the Regional Director. It was merely postponed or held in abeyance pending investigation and decisions on the Union's unfair labor practice charges (Exhibit A, first paragraph, to Fifth Request for Review).

II. FACTS

From 2008-2017, the Union represented First Student, Inc. employees performing services for the Kenai Peninsula Borough School District (see Exhibit B to Fourth Request for Review, Decision and Order of the Regional Director (DO) at 1).

After being awarded a bid, Apple Bus performed the services starting July 1, 2017. The Union and Apple Bus met on February 24, 2017 to discuss a probable collective bargaining

relationship. For several months, the Union asked Apple Bus to agree to be bound by the First Student collective bargaining agreement (CBA) but Apple Bus refused. The Union rejected an agreement presented by Apple Bus. DO at 2.

On June 8, 2017, Apple Bus mailed job offer letters to 105 of the 126 former First Student employees. DO at 2. By August 11, 2017, 98 former First Student employees and 4 persons who had not worked for First Student accepted positions with Apple Bus. Apple Bus expected to employ 115 Bargaining Unit employees by August 14, 2017. DO at 3.

On July 18 and 19, 2017, the Union and Apple Bus first met to bargain for a new CBA. Tentative agreement was reached on Declaration of Purpose, Recognition, Maintenance of Standards, and Union Stewards articles. DO at 2-3. The Union and Apple Bus met again on August 9, 10, and 11, 2017. DO at 3. Further negotiations were held after that. The Union asked to schedule more days for negotiations but Apple Bus usually only agreed to meet two days a month, refused to schedule dates past the next month, and canceled some negotiation sessions.

Apple Bus sent out job offer letters in June 2017, hired a majority of Bargaining Unit employees in July 2017 at the earliest, and did not have a majority of Bargaining Unit employees hired and on the job until August 14, 2017. DO at 2-3.

The Regional Director noted, “A ‘reasonable period of bargaining’ for the purposes of the successor bar doctrine ... is ‘measured from the date of the first bargaining session after recognition.’” DO at 3 (citations omitted). Based on the foregoing facts, and notwithstanding the Regional Director’s DO and Chase’s argument that the successor bar expired on February 24, 2018 (Fourth Request for Review at 2, fn. 4), the Union urges that the successor bar should be measured from no earlier than the date of the first substantive bargaining meeting of the Union and Apple Bus on July 18, 2017 and should have lasted until at least July 18, 2018. However, since Apple

Bus did not have a majority of Bargaining Unit employees hired and on the job until August 14, 2017 (DO at 2-3), the Union further urges that the successor bar should have been seen as in effect until at least August 14, 2018.

Apple Bus never questioned the Union's majority status and agreed to a Recognition article. DO at 3. Chase argued that most employees were unaware of the status of negotiations or employer misconduct (Fourth Request for Review at 3, 13, 18). However, four Apple Bus employees have been on the Union negotiating team and directly involved when the Union and Apple Bus negotiated. The Union kept employees informed through meetings, events, gatherings, publications, and social media.

In July 2019, the Union and Apple Bus reached tentative agreement to a first CBA. Apple Bus signed the tentative CBA. An employee ratification vote was held September 25-27, 2019. The result was a tie vote. The parties are considering their next steps.

III. ARGUMENT IN OPPOSITION TO REVIEW

In requesting review for the fifth time, Chase again cited this Board's Rules and Regulations Sections 102.67 and 102.71 (Fifth Request for Review at 1). Those sections provide for granting a request for review only where compelling reasons exist therefor, i.e., that there are compelling reasons for reconsideration of an important Board rule or policy.

Webster's II New Riverside University Dictionary defines "compel" or "compelling" as, "1. To force, drive, or constrain, 2. To make necessary." Chase may wish to see the law and blocking charge policy changed but there are no compelling reasons to change the policy.

A. The successor bar provided stability for the bargaining relationship

Chase's initial decertification petition was dismissed by the Regional Director on the basis of *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011) and the successor bar doctrine (Exhibit B to Fourth Request for Review). *UGL* restored the "successor bar" doctrine. Under the doctrine,

when a successor employer acts in accordance with its legal obligation to recognize an incumbent representative of its employees, that representative is entitled to represent the employees in collective bargaining with their new employer for a reasonable period of time, without challenge to its representative status. *UGL* at 801, citing *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999).

Analogous bar doctrines are well established in labor law, based on the principle that “a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.” The bar promotes a primary goal of the National Labor Relations Act (NLRA) by stabilizing labor-management relationships and promoting collective bargaining, without interfering with the freedom of employees to periodically select a new representative or reject representation. *UGL* at 801.

The *UGL* Board observed that the transition from one employer to another threatens to seriously destabilize collective bargaining, even when the new employer must recognize the incumbent union. The new employer is free to choose (on any non-discriminatory basis) which of the predecessor’s employees it will keep and which will go. It is free to reject an existing CBA. It will often be free to establish unilaterally all initial terms and conditions of employment. In a setting where everything employees have achieved through collective bargaining may be swept aside, the union must deal with a new employer and, at the same time, persuade employees that it can still effectively represent them. *UGL* at 805.

On the effect of a successor situation on employees, *UGL* noted, “After being hired by a new company ..., employees initially will be concerned primarily with maintaining their new jobs. *In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor....* Without the presumptions of majority support ..., an employer could use a successor enterprise as a way of getting rid of a labor contract

and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence." *UGL* at 803 (citation omitted).

B. The successor bar protected employee free choice

The *UGL* Board noted that the *St. Elizabeth Manor* Board rejected the view that the "successor bar" gave too little weight to employee freedom of choice, which it recognized as a "bedrock principle of the statute." The crucial aspect of the balance struck by the successor bar was that the bar "extends for a 'reasonable period,' not in perpetuity." *UGL* at 804, 808. *UGL* defined the reasonable period of bargaining mandated by the successor bar. Where the successor employer recognizes the union, but unilaterally announces and establishes initial terms and conditions of employment before proceeding to bargain, the "reasonable period of bargaining" will be a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the union and the employer. The Board will apply the *Lee Lumber* analysis to determine whether the period has elapsed. Where the parties are bargaining for an initial contract, because the destabilizing factors associated with successorship are at their height, a longer insulated period is appropriate. *UGL* at 808-809.

C. The blocking charge policy is consistent with the purpose of the NLRA, aims to protect employee rights, and should not be changed; the current case shows no reason to change the blocking charge policy; no adversarial hearing is needed

Chase alleges that the Regional Director did not hold a hearing, there was no proof of a "causal nexus," and the blocking charge rules halt decertification elections simply based on a union filing an unfair labor practice charge (Fourth Request for Review at 3-4, 5-6, 9, 20-21; Fifth Request for Review at 4, 5-6, 7, 9, 11, 12-14). Chase claims that the unfair labor practice charges are without veracity or merit (Fourth Request for Review at 4, 12, 13, 16, 18, 19; Fifth Request for Review at 2, 4, 5, 6, 7, 8, 9, 10, 11, 12). Chase cynically and inaccurately portrays the Regional Director's Decision and Order and decision to hold the petition in abeyance (Exhibit A to Fifth

Request for Review) as a swift denial (Fifth Request for Review at 7), as at the Union's behest (Fourth Request for Review at 2, 3, 10), invariable (Fourth Request for Review at 13), with immediate application (Fourth Request for Review at 13), predictable (Fourth Request for Review at 9), arbitrary (Fourth Request for Review at 10), automatic (Fourth Request for Review at 13, 16, 19; Fifth Request for Review at 1, 5), and reflexive (Fourth Request for Review at 21; Fifth Request for Review at 13) in response to the Union filing blocking charges.

Chase fails to acknowledge the requirements and guidance of the Board's Casehandling Manual Part Two Representation Proceedings:

11730 Blocking Charge Policy – Generally

The filing of a charge does not automatically cause a petition to be held in abeyance. When a party to a representation proceeding files an unfair labor practice charge and desires to block the processing of the petition, the party must file a request that the petition be blocked and must simultaneously file a written offer of proof in support of the charge that contains the names of the witnesses and a summary of each witness's anticipated testimony ... The charging party requesting to block the processing of the petition must promptly make its witnesses available. If the regional director determines that the party's offer of proof does not describe evidence that, if proven, would interfere with employees free choice in an election or would be inherently inconsistent with the petition itself, ... the regional director shall continue to process the petition and conduct the election where appropriate ... [T]he blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process.

The Regional Director's letter (Exhibit A to Fifth Request for Review at 1) stated, "This is to notify you that the petition [in Case 19-RD-216636] will continue to be held in abeyance pending the investigation and disposition of the recently filed unfair labor practice charge in Case 19-CA-246017. Case 19-CA-246017 ... alleges that the Employer has violated [Sections] 8(a)(3) and (5) of the Act by discriminatorily disciplining, suspending, and terminating certain employees who support the Union. On August 9, 2019, the Union filed a request to block together with an offer of proof detailing its evidence in support of the allegations. Based on this, I have determined the decertification petition will be held in abeyance pending the investigation. Such action is

consistent with Representation Casehandling Manual Section 11730.2 Type I Charges: Charges that Allege Conduct that Only Interferes With Employee Free Choice, which provides:

When the charging party in a pending unfair labor practice case is also a party to a petition, and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted, and no exception (Sec. 11731) is applicable, the charge should be investigated and either dismissed or remedied before the petition is processed if the charging party files a request to block accompanied by a sufficient offer of proof and promptly makes its witnesses available.

The Regional Director's letter (Exhibit A to Fifth Request for Review at 1 -2) further explained to Chase:

As you are aware, the RD petition was already blocked. It will remain so, as required by Representation Casehandling Manual [Section] 11734, Resumption of Processing of Petition, until the Employer has taken all remedial action required by the two settlement agreements in: (1) Cases 19-CA-230002, 19-CA-229797, 19-CA-228939, 19-CA-229782, 19-CA-227811, 19-CA-227810, 19-CA-222050, 19-CA-221066, 19-CA-218290, and 19-CA-212813; and (2) Cases 19-CA-242905, 19-CA-242952, and 19-CA-242954.¹

As to the first group of cases, 19-CA-230002 *et. al*, the Board has denied requests for review of the Region's decision to block the petition. The Region, per Compliance Casehandling Manual [Section] 10528.4, Bargaining Obligations Monitored for a Reasonable Period of Time, is continuing to monitor compliance for a reasonable period of time after the expiration of the notice posting period.

As to the second group of cases, the Petitioner has filed a request for review and the matter is pending before the Board.² In the interim, the Region approved a bilateral settlement agreement on August 16, 2019, encompassing the allegations of these charges filed on June 6 and 7, 2019. The allegations include that the Employer violated [Sections] 8(a)(1) and (5) of the Act by, *inter alia*, failing to provide the Union with information, unilaterally changing its visitation policy, engaging in regressive bargaining, and creating the impression of surveillance. Since these allegations involve conduct that could interfere with employee free choice in an election, were one to be conducted, the Region blocked the petition.

¹ A third case, 19-CA-238757, involving access and described in detail in the letter to you from Regional Director Hooks dated July 9, 2019, recently closed in compliance. The parties' informal settlement agreement in that matter had been approved on about May 14, 2019, and the case closed in compliance on August 8, 2019. As such, it no longer blocks the processing of the petition.

² On June 6, 2019, the Union also filed a charge in Case 19-CA-242879, alleging the Employer dealt directly with employees regarding bargaining proposals. Although the Region granted the union's request to block, that charge no longer serves to block the petition, as it has since been withdrawn.

As stated in the last sentence of Section 11730, the blocking charge policy is intended to protect the free choice of employees in the election process. The policy began in 1937 “as part of the Board’s function of determining whether an election will effectuate the policies of the Act.” *American Metal Products*, 139 NLRB 601 (1962); *U.S. Coal & Coke*, 3 NLRB 398 (1937). The Board’s principal role in elections is to ensure that employees are able to express their choice free of unlawful coercion. The policy aims to ensure that interference with employee choice is remedied before an election. The policy gives a regional director discretion to not process a petition in the face of a pending unfair labor practice charge if the regional director believes that employee free choice is likely to be impaired. Here, it should be assumed that the Regional Director properly followed the above requirements and guidance and sought to protect employee free choice in the election process. The Regional Director’s August 20, 2019 notification (Exhibit A to Fifth Request for Review) stated, “... [The] allegations of these charges filed on June 6 and 7, 2019 ... involve conduct that could interfere with employee free choice in an election, were one to be conducted....”

Chase mistakenly, and hysterically, portrays the Union’s unfair labor practice charges and blocking charges as calculated filings or withdrawals, strategically filed, intended to strategically delay, and Machiavellian maneuvering (Fourth Request for Review at 3, 9, 10, 12, 19; Fifth Request for Review at 4, 10, 12). In fact, the unfair labor practice charges and offers of proof filed by the Union have raised serious concerns about unlawful Apple Bus coercion and interference with employee choice including failure to bargain in good faith by:

1. Failing to provide information the Union requested during contract negotiations - information necessary for the Union to bargain for a new CBA. Charge 19-CA-212764.
2. Unilaterally changing terms and working conditions for employees during CBA negotiations. Charge 19-CA-212776.

3. Unilaterally changing employees' wages during CBA negotiations. Charge 19-CA-212798.
4. Failing to agree to schedule negotiations and meet with the Union at reasonable dates/times for the purpose of bargaining a CBA. Charge 19-CA-212813.
5. Failing to provide prior notice to the Union re changes it was going to make during the course of CBA negotiations for holiday pay, standby pay, park out benefits/pay, and longevity; during the course of bargaining the Company unilaterally provided gifts to certain employees in the form of holiday pay, standby pay, and park out pay/benefits without prior knowledge of the Union; unilaterally ceasing holiday pay after it had established a practice of paid holidays. Charge 19-CA-214770.
6. Surface bargaining; lack of commitment to the bargaining process as evidenced by failure to meet with the Union at reasonable times, including the frequency of meetings, actual bargaining time, the number of tentative agreements reached, lengthy caucuses taken by the Company for relatively non-complex issues, refusal to negotiate a Union security clause, and refusal to negotiate over certain sections of the proposed CBA, among other things. Charge 19-CA-218290. An NLRB settlement covered this charge and cases 19-CA-230002, 19-CA-229797, 19-CA-228939, 19-CA-229782, 19-CA-227811, 19-CA-227810, 19-CA-222050, 19-CA-221066, and 19-CA-212813 (Exhibit S to Fifth Request for Review).
7. Allowing and/or assisting certain employees to pursue decertifying the Union; allowing certain employees to utilize Company resources, including decertification activity on Company time, among other things. Charge 19-CA-218755.
8. Failing to bargain in good faith, regressive bargaining. Charge 19-CA-221066. Part of NLRB settlement agreement referenced in 6 above.
9. Discriminating against employees based on whether they support or do not support the Union and discouraging employees from supporting the Union; termination of Toni Knight. Charge 19-CA-222039.
10. Failing to bargain in good faith, failing to agree to meetings, limiting bargaining sessions. Charge 19-CA-222050. Part of NLRB settlement agreement referenced in 6 above.
11. Failing to bargain in good faith, failing to provide policies and information necessary to bargain for a new CBA. Charge 19-CA-223071.
12. Failing to bargain in good faith, refusing to bargain economic items. Charge 19-CA-227810. Part of NLRB settlement agreement referenced in 6 above.

13. Failing to bargain in good faith by canceling meetings, frequency of meetings, actual bargaining time, etc. Charge 19-CA-227811. Part of NLRB settlement agreement referenced in 6 above.
14. Failing to bargain in good faith, failing to provide information necessary for contract negotiations. Charge 19-CA-228939. Part of NLRB settlement agreement referenced in 6 above.
15. Failing to bargain in good faith re economics, canceling meetings, refusal to schedule meetings, surface bargaining, etc. Charge 19-CA-229782. Part of NLRB settlement agreement referenced in 6 above.
16. Failing to bargain in good faith, failing to provide information necessary for contract negotiations. Charge 19-CA-229797. Part of NLRB settlement agreement referenced in 6 above.
17. Failing to bargain in good faith, failing to provide information necessary to bargain for a new CBA. Charge 19-CA-230002. Part of NLRB settlement agreement referenced in 6 above.
18. Refusing or interfering with Union representatives' access. Charge 19-CA-238757. Resulted in settlement that required Apple Bus to post a notice.
19. Soliciting direct dealing, telling employees to contact management with questions about bargaining proposals. Charge 19-CA-242879. The Union withdrew this charge.
20. Failing to bargain in good faith, failing to provide revenue contract necessary to bargain for a new CBA. Charge 19-CA-242905. The Union amended this charge. The NLRB found merit to the charge. An NLRB settlement covered this charge and cases 19-CA-242952, and 19-CA-242954 (see Exhibit A to Fifth Request for Review at 2).
21. Interfering, chilling, and surveilling Union representative. Charge 19-CA-242952. The Union amended this charge. The NLRB found merit to the charge. Part of NLRB settlement agreement referenced in 20 above.
22. Failing to bargain in good faith, surface bargaining, and delay tactics. Charge 19-CA-242954. The Union amended this charge. The NLRB found merit to the charge. Part of NLRB settlement agreement referenced in 20 above.
23. Continued discrimination in disciplinary actions against employees who support the Union; favored treatment to employees who support the decertification petition. Charge 19-CA-246017.

The NLRB found merit to a number of the above charges. Some charges blocked an election. The NLRB proposed settlement to Apple Bus with respect to a number of the charges and Apple Bus decided to settle. A 60-day posting was required in connection with the settlement agreements. During that time the election blocks continued.

With respect to Charge 19-CA-222039 (listed in 9 above), Chase fails to mention (Fourth Request for Review at 5; Fifth Request for Review at 3-4, 7-8) that, as stated in the Charge, Union supporter Toni Knight was terminated for allegedly violating a policy that neither she nor the Union had ever been given, despite requests for the policy.

Chase implies, but fails to prove, that there was anything improper about the withdrawal by the Union of a number of unfair labor practice charges. Withdrawal can occur because a charge was refiled, requested information was finally provided, a settlement agreement resolved the dispute, or other good reason. If not for settlement agreements reached, a Complaint may have been issued with respect to a number of the Union charges.

Chase alleges that the Regional Director is violating her Sections 7 and 9 rights by “gratuitously monitoring” settlements and compliance (Fourth Request for Review at 9; Fifth Request for Review at 4). To the contrary, the Regional Director detailed in his letter (Exhibit A to Fourth Request for Review; Exhibit A to Fifth Request for Review at 2) the valid reasons and authority for continued monitoring and the blocking charges.

Chase argues (Fourth Request for Review at 12) for an election on the authority of *Johnson Controls, Inc.*, 368 NLRB 20 (July 3, 2019). That case involved anticipatory withdrawal of recognition and is distinguishable from Apple Bus and its campaign of unfair labor practices. Here the unfair labor practice charges have not all been investigated or resolved. Therefore, Chase’s

attempt (Fourth Request for Review at 16; Fifth Request for Review at 4, fn. 2, 5) to rely on *Cablevision Sys. Corp.*, is also misguided and does not advance her crusade.

Chase's reliance (Fourth Request for Review at 11, 20, 21; Fifth Request for Review at 5-6, 12-13) on *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004), is off base. In *Saint Gobain* the Regional Director dismissed a decertification petition without a hearing. The Board held that a hearing was a prerequisite to denying the petition. At 434. By contrast, here the Regional Director did not deny or dismiss Chase's petition. A *Saint Gobain* hearing does not have to be separate from the unfair labor practice hearing. A regional director may use the record in an unfair labor practice hearing in making a *Saint Gobain* determination. See, e.g., *NTN-Bower Corp.*, 10 RD 1504 (Order, May 20, 2011). *Saint Gobain* did not address situations like here where Apple Bus has encouraged decertification and surface bargained.

Chase desperately attempts to rely on dissenting Board and legal views, Orders, and cases before the 2014 rulemaking (Fourth Request for Review at 12-14; Fifth Request for Review at 6-7). But Chase must admit that only 30% of decertification petitions are blocked (Fourth Request for Review at 15). *Valley Hospital Medical Center, Inc. and SEIU Local 1107*, Case 28-RD-192131 (Order July 6, 2017), denying Requests for Review of the Regional Director's decision to hold the decertification petition in abeyance pending the investigations of unfair labor practice charges, noted:

Contrary to our colleague's criticism of the Board's longstanding blocking charge policy, we find it continues to serve a valuable function. As explained in our 2014 rulemaking, the blocking charge policy is critical to safeguarding employees' exercise of free choice. See Representation-Case Procedures, 79 Fed. Reg. 74308, at 74418-74420, 74428-74429 (Dec. 15, 2014). Indeed, "[i]t advances no policy of the Act for the agency to conduct an election unless employees can vote without unlawful interference." *Id.* at 74429. Nevertheless, in response to commentary and our colleague's concerns, the Election Rule modified the policy to limit opportunities for unnecessary delay and abuse. *Id.* at 74419-20, 74490.

We also observe that in upholding the Election Rule, the U.S. Court of Appeals for the Fifth Circuit recently rejected an argument similar to our colleague's ... and found that the Board did not act arbitrarily by implementing various regulatory changes resulting in more expeditious processing of representation petitions without eliminating the blocking charge policy altogether. See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 228 (5th Cir. 2016). In doing so, the court cited with approval its prior precedent in *Bishop v. NLRB*, 502 F.2d 1024 (5th Cir. 1974), wherein the court set forth the following explanation for why the blocking charge policy is justified:

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

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

Id. At 1029 (quoting *NLRB v. Big Three Industries, Inc.*, 497 F.2d 43, 51-52 (5th Cir. 1974)).

Chairman Miscimarra favors a reconsideration of the Board's blocking charge doctrine for reasons expressed in his and former Member Johnson's dissenting views to the Board's Election Rule, 79 Fed. Reg. 74308 at 74430-74460 (Dec. 15, 2014), but he acknowledges that the Board has declined to materially change its blocking charge doctrine....

The Union long negotiated with Apple Bus to try to reach agreement on a first CBA. The Union had to negotiate virtually everything and the issues were complex. Apple Bus, in an initial effort to "run out the successor bar clock" and undermine union sentiment, engaged in repeated unfair labor practices, which forced the Union to file unfair labor practice charges. Apple Bus long hindered the parties' reaching a CBA in the limited time allotted for the Union to do so. Due to the repeated unfair labor practices of Apple Bus, the Union needed more time to reach agreement to the terms of a first CBA. The blocking charges and Regional Director's actions were appropriate.

Chase alleges that the unfair labor practice charges and blocking charges are without veracity or merit (Fourth Request for Review at 4, 12, 13, 16, 18, 19; Fifth Request for Review at

2, 4, 5, 6, 7, 8, 9, 10, 11, 12). Chase has tried to downplay the many egregious unfair labor practices of Apple Bus. The Union filed each blocking charge in good faith based on the merits and the information known to the Union. The Board has traditionally had considerable discretion to adopt practices to effectuate the policies of the NLRA. *American Metal Products*, 139 NLRB 601 (1962).

Employers are not entitled to an election caused by their unlawful conduct. *Frank Bros. v. NLRB*, 321 US 702 (1944) (election not appropriate remedy where union lost majority after employer's wrongful refusal to bargain); *Brooks v. NLRB*, 348 US 96 (1954) (employer's refusal to bargain may not be rewarded with the decertification it seeks). The blocking charge policy has been approved by Federal Courts. *Associated Builders and Contractors of Texas, Inc.*, 826 F3d 215, 228 (5th Cir. 2016); *Bishop v. NLRB*, 502 F2d 1024 (5th Cir. 1974); *NLRB v. Big Three Industries, Inc.*, 497 F2d 43, 51-52 (5th Cir. 1974).

The Union should not be forced to proceed to an election when there are serious and substantial concerns that repeated unfair labor practices by Apple Bus undermined employee free choice. A tainted election may cause additional damage that cannot be remedied by rerunning an election. The blocking charge policy saves the Board from wasting resources on a "contingent" election and forces remediation of the unfair labor practices before an election. No policy of the NLRA is advanced by conducting an election unless employees can vote without unlawful interference and coercion. The blocking charge policy protects against frivolous charges, as indicated by statistics showing a large decline in dismissal of decertification petitions since the new rule went into effect. "Unfair labor practice charges that warrant blocking an election involve conduct that is inconsistent with a free and fair election ... there is no inconsistency between the

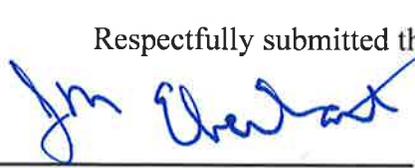
final rule's preservation of that basic policy and the other changes made by the final rule." 79 Fed. Reg. 74429 (December 14, 2014).

Chase claims majority support for her decertification efforts (Fourth Request for Review at 3, 14, 16, 19; Fifth Request for Review at 6, 11, 12, 14). The Union has no knowledge that it has allegedly lost the support of a majority of Bargaining Unit employees. The Union does not know the details of Chase's alleged petition, how or when signatures were gathered, how many signatures are not valid, and other factors. Apple Bus recognized the Union as the representative of the employees. It has not been proved that the Union does not represent the majority of Bargaining Unit employees. An actual loss of majority support needs to be proved, not simply doubt about majority status, before an employer can withdraw recognition from a union. *UGL* at 806, fn. 21 (citation omitted). As addressed in *Bishop v. NLRB*, where the decertification petition is submitted by employees, where a majority of the employees in a unit genuinely desire to rid themselves of the union, this desire may well be the result of the employer's unfair labor practices. In such a case, the employer's conduct may have so affected employee attitudes as to make a fair election impossible.

IV. CONCLUSION

There is no good reason to change the current blocking charge policy. For the above and other reasons, this Board should deny Chase's Fifth Request for Review.

Respectfully submitted this 17 day of October 2019.



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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2019, a true and correct copy of the Union's Opposition to Petitioner's Fifth Request for Review was filed electronically with the Executive Secretary using the NLRB e-filing system and copies were emailed to:

Ronald K. Hooks, Regional Director
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