

ALTSHULER BERZON LLP

ATTORNEYS AT LAW

177 POST STREET, SUITE 300

SAN FRANCISCO, CALIFORNIA 94108

(415) 421-7151

FAX (415) 362-8064

www.altshulerberzon.com

STEPHEN P. BERZON
HAMILTON CANDEE
EVÉ H. CERVANTEZ
BARBARA J. CHISHOLM
JEFFREY B. DEMAIN
JAMES M. FINBERG
EILEEN B. GOLDSMITH
CORINNE JOHNSON
MEREDITH A. JOHNSON
SCOTT A. KRONLAND
ANDREW KUSHNER
REBECCA C. LEE
DANIELLE E. LEONARD
STACEY M. LEYTON
AMANDA C. LYNCH
MATTHEW J. MURRAY
ZOE PALITZ
P. CASEY PITTS
DANIEL T. PURTELL
MICHAEL RUBIN
HUNTER B. THOMSON*
STEFANIE L. WILSON

FRED H. ALTSHULER
FOUNDING PARTNER EMERITUS

PETER D. NUSBAUM
PARTNER EMERITUS

ELIZABETH VISSERS
FELLOW

*ADMITTED IN NEW YORK ONLY

March 5, 2020

By NLRB Electronic Filing

Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: Opposition to Request for Review of Regional Director's Dismissal of RM
Petition
Nevada Gold Mines, Case No. 32-RM-255914

Dear Executive Secretary:

International Union Operating Engineers, Local 3 ("OE3" or "Union") submits this opposition to the Request for Review of the Regional Director's February 13, 2020 Dismissal of the RM Petition filed by the employer, Nevada Gold Mines, LLC ("NGM"). None of the grounds set forth in Rule 102.67(d) for granting review of a Regional Director's decision are present here.

The Regional Director correctly determined that the Union did not make a present demand for recognition in the bargaining unit in which the employer petitioned for an election, which is a statutory prerequisite to finding a question concerning representation on an RM petition pursuant to Section 9(c) of the Act. Therefore, the petition was properly dismissed. To be sure, the Union *does* demand that NGM recognize it as to those bargaining unit employees whom the Union has historically represented, but those employees are only a subset of the unit in which NGM seeks to conduct an election.

Moreover, NGM filed this RM petition some seven weeks *after* it withdrew recognition from the Union in its long-established bargaining unit on December 23, 2019. That withdrawal of recognition is the subject of a pending unfair labor practice charge. NGM fails to explain why, having already withdrawn recognition from the Union in the historically represented

bargaining unit, NGM also requires an election to determine whether it must *continue* to recognize the Union in a bargaining unit in which the Union had never been recognized before.

In any event, the issues in this petition are so thoroughly intertwined with the issues presented in the pending unfair labor practice cases that the determination in those cases could itself preclude processing of this election petition. If the General Counsel prevails in the unfair labor practice cases, an order will result requiring NGM to continue to recognize the Union in the legacy Newmont operations, foreclosing any question concerning representation. *See, e.g., Leggett & Platt, Inc.*, 367 NLRB No. 51, slip op. at 1 (2018), *reaffirmed* 368 NLRB No. 132 (2019) (recognizing that an “affirmative bargaining order” is the “traditional, appropriate” remedy for the Respondent’s withdrawal of recognition”) (quoting *Caterair International*, 322 NLRB 64, 68 (1996)). That is a separate and independent reason why processing this RM petition would be improper. *See Brannan Sand & Gravel*, 308 NLRB 922 (1992) (dismissing RM petition where favorable result in related §8(a)(5) case would require a bargaining order that would foreclose a question concerning representation).

BACKGROUND

The Union has represented employees of Newmont USA Limited dba Newmont Mining Corporation at gold mines near Elko, Nevada, since 1965. In early 2019, the Union negotiated a new collective bargaining agreement with Newmont, to be effective from March 1, 2019-February 28, 2022. Shortly after completing the negotiations, Newmont informed the Union that it would soon be entering into a joint venture with Barrick Gold Corporation, to be known as NGM. Newmont promised the Union, and also promised represented employees at the legacy Newmont operations, that it would continue to recognize the Union and adhere to the collective bargaining agreement at those locations. NGM, which the Union contends was a perfectly clear successor of Newmont, or a joint or single employer, later withdrew recognition from the Union at the legacy Newmont operations in December 2019. The Union filed unfair labor practice charges that are currently pending. *See* Case Nos. 32-CA-254059, 32-CA-256917.

Over the summer, the joint venture was established. For several months, NGM leased employees at the legacy Newmont sites from Newmont under the terms of an MOU that was negotiated at the employer’s request from July to September 2019. A true and correct copy of the MOU is attached hereto as **Exhibit 1**.

In the MOU, NGM expressly recognized that the Union continued to represent employees at the legacy Newmont sites, and agreed to adhere to the CBA with respect to those employees; and the Union expressly promised not to demand recognition of the legacy Barrick employees or to argue that the CBA should be extended to those employees:

[D]uring the Lease Period, the Status Quo shall be maintained with regard to OE3’s right to represent the Newmont employees specified in the CBA at Section 04.01.00. Also, during the Lease Period, the Status Quo shall be maintained with regard to Barrick’s and the JV [Joint Venture] Company’s pre-Lease Period rights and non-union status, including without limitation with regard to Barrick’s and

the JV company's lack of any duty to bargain with OE3 and the lack of any obligation to recognize, acknowledge or be bound by the CBA. During the Lease Period, the Status Quo shall be maintained with regard to Newmont's obligations and rights concerning the CBA, OE3 and its employees.

...
Finally, it is comprehensibly [*sic*] agreed that this MOU shall maintain the Status Quo for the JV Company, Newmont, Barrick and OE3 that existed before the Lease Period. All events and occurrences during the Lease Period may not be used by any party for any purpose, except to enforce the terms of this MOU.

Id. at 1-2. The "Lease Period" in the agreement extended to December 31, 2019. *Id.* at 1.

In November 2019, NGM proposed to the Union to hold a union representation election in a bargaining unit that would have consisted of all employees at both the Newmont and the Barrick legacy operations. NGM repeated that proposal on several occasions in November and December. The Union never agreed to this proposal.

As stated above, NGM withdrew recognition from the Union on December 23, 2019. Shortly thereafter, the Union filed the unfair labor practice charge in Case No. 32-CA-254059.¹ Six weeks after withdrawing recognition from the Union, NGM filed the instant RM petition on February 6, seeking an election in a unit consisting of all employees at the former Newmont and former Barrick operations. On February 13, the Regional Director dismissed the petition on the ground that NGM had not demonstrated that the Union made a present demand for recognition in NGM's requested bargaining unit as required by Section 9(c)(1)(B) of the National Labor Relations Act.

ARGUMENT

I. The Regional Director Correctly Determined that the Union Made No "Present Demand for Recognition" in the Bargaining Unit Requested by NGM in its RM Petition.

The "present demand for recognition" requirement is statutory. Absent such a "present demand," the Board lacks the authority to process an RM petition. NGM contends that the Regional Director erred in finding that the Union made no present demand for recognition in the bargaining unit requested by NGM in its RM petition. None of NGM's theories why the Union made such a demand has merit.

A. NGM's challenge to the standard applied by the Regional Director is meritless.

NGM contends that the Regional Director improperly set an overly high standard for finding a present demand for recognition. NGM is wrong. The Regional Director's decision

¹ A second, closely related charge was filed on February 24, 2020. Case No. 32-CA-256917.

does not depart from any recognized NLRB precedent. To the contrary, it is fully consistent with that body of precedent. Therefore, there is no basis for review under Rule 102.67(d)(1).

Section 9(c)(1)(B) of the Act states that a petition filed by an employer shall be processed only where the employer “alleg[es] that one or more labor organizations have presented to him a claim to be recognized *as the representative as defined in section 9(a).*” (Emphasis added.) A Section 9(a) representative is one that is “designated or selected for the purposes of collective bargaining *by the majority of the employees* in a unit appropriate for such purposes.” (Emphasis added.) Therefore, “the words of the statute dictate that ‘absent a claim by someone for recognition *as the majority-supported representative of the employees*, an employer is not entitled to an election under Section 9(c)(1)(B).” *New Otani Hotel & Garden*, 331 NLRB 1078, 1078 (2000) (quoting *Albuquerque Insulation Contractor*, 256 NLRB 61 (1981)) (emphasis added); *see also Windee’s Metal Indus.*, 309 NLRB 1074, 1074-75 (1992). Absent a present demand for recognition that meets this standard, an RM petition must be dismissed.

The Regional Director correctly recognized that while no “particular wording [is] necessary, the Union must clearly assert it has majority support at the present time.” Dismissal Letter at 1, citing *New Otani*, 331 NLRB at 1079. This is an accurate reading of *New Otani*, which holds that a present demand for recognition requires “a claim by someone for recognition as the majority-supported representative of the employees.” *New Otani*, 331 NLRB at 1078 (citations omitted). *New Otani* was in lockstep with a long line of NLRB authority in imposing this requirement. *See Albuquerque Insulation*, 256 NLRB at 62 (“[W]e hold that Section 9(c)(1)(B) of the Act permits representation elections on the petition of an employer *only* when that employer has been presented with a claim of *majority* status by ‘one or more individuals or labor organizations.’”) (emphasis in original); *K. Van Bourgondien & Sons, Inc.*, 294 NLRB 268, 268 (1989) (“[A]n employer’s petition for an election must be predicated on a union’s claim to be a *Section 9(a) representative*.”) (emphasis added); *Windee’s Metal Indus.*, 309 NLRB at 1074-75; *Brylane, L.P.*, 338 NLRB 538, 541-42 (2002) (Regional Director’s dismissal of RM petition, which the Board approved for the reasons stated by the Regional Director, *id.* at 538) (“[E]mployers can petition for an election only after a union has sought recognition *as the majority representative* of its employees.”) (emphasis added); *see also Rapera, Inc.*, 333 NLRB 1287, 1287 (2001) (“The Board has consistently construed Section 9(c)(1)(B) of the Act as requiring evidence of a ‘present demand for recognition’ *as the majority representative of the employer’s employees* before an employer’s petition will be processed.”) (Members Truesdale and Hurtgen); BRENT GARREN, ET AL., HOW TO TAKE A CASE BEFORE THE NLRB at 5-4 (Ninth ed. 2016) (“The union ... must claim to represent a majority of the employees.”). By relying on *New Otani*, the Regional Director did not break any new ground.²

² NGM’s authorities articulate this same requirement. *See Kimel Shoe Co.*, 97 NLRB 127, 129 (1951) (by engaging in recognitional picketing, “the Union reaffirmed its claim to majority representation”); *see also Curtis Bros., Inc.*, 114 NLRB 116, 117 (1955) (union’s picketing was not merely to *regain* its former majority status, but communicated the message that the employer must recognize the union as the present majority representative).

As *Windee's Metal Industries* explained, "Congress understood [§9(c)(1)(B)] to mean that 'employers may ask for elections, *but only after a representative has claimed collective bargaining rights.*'" 309 NLRB at 1075 (quoting legislative history of §9(c)(1)(B); emphasis in original). Such a claim of collective bargaining "rights" is necessarily rooted in present majority support for the union (except in the construction industry). *See, e.g., §8(a)(2); Laborers Local 1184*, 296 NLRB 1325, 1327 (1989) (an employer could only lawfully grant recognition in response to a minority nonconstruction industry union's demand or recognitional picketing *without* an election if the union enjoyed majority support among the employees). Thus, "it would be contrary to the Congressional intent underlying Section 9(c)(1)(B) to find that any conduct with a representational objective, *which falls short of an actual present demand for recognition*, will support an election petition filed by an employer." *Windee's Metal Indus.*, 309 NLRB at 1075 (emphasis added). If NGM were correct that no such underlying claim of majority support were necessary, then *all* union activities with a recognitional objective would necessarily support an RM petition, but this is not the law.

Moreover, *New Otani* explains why a demand for recognition without a concurrent claim of majority support in the bargaining unit is not sufficient to trigger an RM election. As the Board explained:

The Section 9(c)(1)(B) requirement that an employer may secure an election *only if* a claim is made by a party *that it is the majority representative of employees* was placed in the statute to prevent an employer from precipitating a premature vote before a union has the opportunity to organize. *See S. Rept. 80-105 on S.1126*, 80th Cong. 1st Sess. 11 (1947); *Legislative History of the Labor Management Relations Act, 1947*, 417 (G.P.O. 1974). Thus, the Act contemplates that a union which is not presently majority representative may decide when or whether to test its strength in an election by its decision as to when or whether to request recognition or itself petition for an election. ... [O]nce the union seeks recognition as majority representative, the election process – with its potential risks and rewards – may be invoked by either side. But, until that time, an employer may not attempt to short circuit the process ... by obtaining a premature election.

New Otani, 331 NLRB at 1079 (quoting *Albuquerque Insulation*, 256 NLRB at 63) (first emphasis in original; second emphasis added). NGM suggests that no claim of majority support is necessary to support a demand for recognition, but that position is not only foreclosed by these authorities but would also improperly open the floodgates to unwarranted elections.³

³ NGM's authorities do not support its claim that the Regional Director erred in her framing of the standard for finding a "present demand for recognition." *Holiday Inn of Providence-Downtown*, 179 NLRB 337 (1969), found that a request for "clearance in order to establish proper procedure with the operators of the Holiday Inn in this city, for the sole purpose of signing a Union contract with our union" in combination with picketing was a present demand for recognition. *Id.* at 338. Similarly, in *Denny's Restaurant, Inc.*, 186 NLRB 48 (1970), the

NGM describes no statements by the Union that could possibly evince a claim by the Union to have majority support in a bargaining unit consisting of both the Newmont and Barrick legacy employees. *Cf. Rapera*, 333 NLRB at 1288 (describing specific union claims that union had achieved majority status, and which supported an RM petition). Therefore, the Regional Director properly dismissed the RM petition.

B. The alleged Union statements that NGM claims were demands for recognition are too vague to support an RM petition.

It is the employer's burden to establish that a "present demand for recognition" was made. *Brylane*, 338 NLRB at 542-43. NGM did not meet this burden. NGM first tries to locate a present demand for recognition in alleged statements by Union representatives in August 2019 and November 2019. None of these alleged statements constitutes a present demand for recognition in the bargaining unit requested by NGM in its petition. The Regional Director did not clearly err in her determination of this factual issue. Rule 102.67(d)(2).

1. The alleged August 2019 statement by Chris Conner

First, NGM alleges that Chris Conner, a former union business representative, made some demand of recognition to a company representative in August 2019. Nowhere in NGM's extensive papers does NGM quote this alleged demand such that any decision-maker could review whether it actually supports NGM's contention, but NGM apparently paraphrases the alleged statement as a request that "once the Barrick people become employed by NGM, the Union should be recognized as their representative." *See* Request for Review ("RFR") at 2; *id.* Exh. 5 at 1. Absent the actual statement, which was undoubtedly in NGM's possession at all relevant times, there is no evidence from which the Board could find that a cognizable "present demand for recognition" was made. *Brylane*, 338 NLRB at 542 (dismissing RM petition where company failed to produce evidence establishing a present claim of majority support in the bargaining unit). Nothing prevented NGM from forthrightly telling the Regional Director what it contends that Mr. Conner actually said.

Even if Mr. Conner had made a statement along the lines of NGM's characterization, that statement cannot have been a present demand for recognition because the former Barrick employees did not become NGM employees until December 2019. NGM's own characterization of the alleged statement is phrased as a proposition about what might happen in the future, not a

union demanded a contract from Denny's, the new operator of two restaurants where it had hitherto represented employees, and also engaged in recognitional picketing; this too constituted a demand for recognition. *Id.* at 49. *Denny's* is no help to NGM, because it concerned locations where the union already represented employees, and as to which the presumption of continued majority support necessarily attached. *New Otani* is fully consistent with both decisions, as it acknowledges that a "demand ... for a contract" combined with informational or recognitional picketing is one way that a union may articulate a present demand for recognition. 331 NLRB at 1079-80 (citing, *inter alia*, *Holiday Inn*).

claim of current representation at the time the statement was made. So clearly, Mr. Conner's alleged statement cannot have been a *present* claim that the Union was the majority representative of the legacy Barrick employees in August 2019, as would be necessary to support an RM petition; the most that could be attributed to his alleged statement could be some intent to seek recognition *in the future*. But such statements regarding the Union's future intentions cannot support an RM petition. *See, e.g., New Otani*, 331 NLRB at 1079 (“[I]t would be contrary to the Congressional intent underlying Section 9(c)(1)(B) to find that any conduct with a representational objective, which fall short of an actual, present demand for recognition, will support an election petition filed by an employer.”) (quoting *Windee's Metal Industries*, 209 NLRB at 1075); *see also Brylane*, 338 NLRB at 542-43.⁴

Nor could NGM reasonably have construed Mr. Conner's alleged August 2019 statement, whatever it may have been, as a present demand for recognition in a bargaining unit consisting of both Newmont and Barrick legacy employees. At the very same time, the Union was negotiating with NGM, at NGM's request, for the MOU governing the leasing of Newmont legacy employees to NGM. Those negotiations began in July 2019 and ran through September 2019. In that MOU, NGM and the Union carefully drew a line between the Newmont and Barrick legacy operations, making clear that NGM would continue to recognize the Union and adhere to the CBA in the Newmont legacy operations, while the Union would not claim any right to represent employees or have the CBA apply in the Barrick legacy operations. Exh. 1; *see supra* at 5. That MOU was signed by the Union's business manager on September 9, 2019. Therefore, even if Mr. Conner made some statement about future representation of the former Barrick employees in August, no reasonable NGM representative would have interpreted such a statement as a present Union demand for recognition. As the Board's precedent make clear, the relevant inquiry is whether the evidence objectively demonstrates that an actual, present demand for recognition was made, not whether the employer subjectively believed there was such demand. *See, e.g., New Otani*, 331 NLRB at 1079 (evidence sufficient to support an RM petition must establish that the “union's *real* object is to obtain *immediate* recognition as the employee's representation” (emphasis added)); *Rapera*, 333 NLRB at 1288 (finding union's statements constituted a present demand for recognition where they were not “hypothetical, conditional, or distant,” and distinguishing between an actual, present demand for recognition and “mere campaign ‘puffery’”) (Members Truesdale and Hurtgen); *see also* LEE MODJESKA, ET AL., FEDERAL LABOR LAW: NLRB PRACTICE §8:4 EMPLOYER PETITIONS (2020) (“The request by the union or labor organization that it be recognized must be quite explicit in order to trigger the employer's rights under Section 9(c)(1)(B).”).

2. The alleged statements in November and December 2019

Next, NGM alleges statements by Union representatives in meetings with NGM representatives on November 15 and 19 and December 11, 2019. Here, NGM at least tries to quote one specific statement allegedly from November 19, albeit without identifying the speaker

⁴ Nor could a stray remark by a Union business agent in August 2019 plausibly support an RM petition filed six months later in February 2020. *Martino's Complete Home Furnishings*, 145 NLRB 604, 607 (1963).

(information that was undoubtedly within NGM's control if the statement was actually made). RFR at 2. To the extent that the alleged statements are sufficiently clear to be evidence that would satisfy the employer's burden, *cf. Brylance*, 338 NLRB at 542; *supra* at 6, they do not amount to a present demand for recognition. The crucial fact about the meetings in question is that NGM, not the Union, initiated a discussion of holding an election in a bargaining unit consisting of all former Newmont and Barrick employees, to be held at some point after all employees were transferred to the joint venture in late December. Any remarks by the Union were only made in response to those proposals by management, and even assuming that the alleged statements were made, they could at most reflect an interest in representing those employees in the future, not a present claim that the Union was entitled to immediate recognition as those employees' majority representative. *See Ny-Lint Tool & Mfg. Co.*, 77 NLRB 642, 643 (1948) (dismissing employer's election petition where the employer sought an election in a larger unit than the unit where the Union sought continued recognition).

Moreover, these alleged statements were made during the period when the Union was contractually bound by the leased-employee MOU to forego any claim of representing the employees at the Barrick legacy operations. Exh. 1 at 1-2. NGM explicitly relies on the binding nature of the MOU when that reliance suits its interests (*see* RFR at 7-8); NGM may not avoid the binding nature of the MOU when NGM finds the MOU to be inconvenient. For all of these reasons, there is no sufficient evidence of an actual, present demand for recognition in the bargaining unit that NGM now requests, and no reasonable employer would have understood the alleged Union statements as such.

C. The Union's unfair labor practice charges do not evince a demand for recognition in NGM's requested bargaining unit.

NGM's argument that the Union's unfair labor practice charges constitute an "implicit" demand for recognition merits little discussion. That the Union has alleged that NGM violated the Act by *withdrawing* recognition in a bargaining unit the Union previously represented cannot plausibly be construed as a Union demand for recognition from NGM in a *different* bargaining unit. The plain language of the charges (RFR Exhs. 1-3) does not reflect any demand by the Union to be recognized as the exclusive representative in the unit sought by NGM.

Nor does NGM's theory make any sense. Since 1965, the Union has represented employees at the legacy Newmont operations that are the subject of the withdrawal of recognition charge. That charge could not possibly constitute a demand for recognition in a bargaining unit consisting of the former Newmont *and* Barrick employees, for the simple reason that the Union was never recognized as the exclusive representative in such a unit in the first place. When NGM withdrew recognition from the Union, it obviously withdrew recognition only in the historical bargaining unit of former Newmont employees, because NGM had never recognized the Union in any unit including the former Barrick employees. *See, e.g.*, Exh. 1. Simply stated, NGM provides no authority to support its argument that a ULP challenging an

employer's withdrawal of recognition in one bargaining unit constitutes a demand for recognition in a *different* unit that would give rise to a question concerning representation.⁵

NGM cites several Board decisions for its argument that the ULP constitutes an "implicit" demand for recognition in NGM's requested unit, but none of those decisions can be stretched to fit the facts here. RFR at 6. Each of those decisions concerned an unsuccessful demand that an employer sign a collective bargaining agreement, followed by picketing that the Board deemed to be recognitional in the context of all of the other facts and circumstances. *See Kimel Shoe Co.*, 97 NLRB 127 (1951); *Curtis Bros. Inc.*, 114 NLRB 116 (1955); *Roberts Tires*, 212 NLRB 405 (1974); *Johnson Bros. Furniture Co.*, 97 NLRB 246 (1951). Those decisions have no bearing on the facts here, where the employer promised to recognize the Union in its historical bargaining unit, and then withdrew recognition from the Union *in that unit*, and the Union filed a ULP challenging the withdrawal of recognition *in that unit*.

The Union's alleged "aggressive" organizing campaign similarly cannot be deemed an "implicit" demand for recognition, both because NGM made clear in its position statement to the Region that it understood that such activity was undertaken *among the former Newmont employees*, not the former Barrick employees (RFR Exh. 5 at 2 & n.1), and cannot claim otherwise now; and because, as discussed above, organizing activities with a future representational objective do not suffice to support an RM petition. *New Otani*, 331 NLRB at 1079; *Brylane*, 338 NLRB at 542-43.

II. NGM's Arguments Regarding the Appropriate Unit Should be Disregarded Because that Issue is Presented and Will Necessarily be Decided in the Pending Unfair Labor Practice Case.

Because there is no evidence that the Union made a "present demand for recognition" in the unit in which NGM requested an election, NGM's petition was properly dismissed. *See ADT, LLC*, 365 NLRB No. 77 (2017), slip op. at 5 (where petitioner fails to establish that the union made a demand for recognition, bargaining unit issues "do not exist in th[e] case"). NGM nevertheless contends that it is entitled to an election on the ground that the historical bargaining unit of Newmont legacy employees in which the Union was previously recognized is not an appropriate bargaining unit.⁶ But several weeks before it filed its RM petition, NGM had already

⁵ While an employer in a withdrawal of recognition case may defend on the ground that the unit from which it withdrew recognition is no longer an appropriate unit, *see, e.g., N. Mont. Health Care Ctr.*, 324 NLRB 752, 752 (1997), *enf'd* 178 F.3d 1089 (9th Cir. 1999); *Winco Petroleum Co.* 241 NLRB 1118, 1118 (1979), *enf'd* 668 F.2d 973 (8th Cir. 1982), such an argument does not transform the union's claim into a demand for recognition in the employer's preferred unit. *See N. Mont. Health Care Ctr.*, 324 NLRB at 754-55 (ordering successor employer to bargain with the representative of the same bargaining unit formerly recognized by the predecessor employer); *Winco Petroleum*, 241 NLRB at 1119 (same).

⁶ Curiously, NGM suggests that the historical bargaining unit was never an appropriate unit even though the Union was recognized in that unit for more than 50 years.

withdrawn recognition from the Union in the historical bargaining unit. That withdrawal of recognition is being litigated in the pending ULP proceeding. Therefore, the ULP proceeding will determine the very bargaining unit question that NGM tries to raise in the RM petition. For this separate and independent reason, the RM petition was properly dismissed.

“The Board generally will dismiss a representation petition, subject to reinstatement, where there is a concurrent unfair labor practice complaint alleging conduct that, if proven, (1) would interfere with employee free choice in an election, and (2) is inherently inconsistent with the petition itself.” *Overnite Transp. Co.*, 333 NLRB 1392, 1392-93 (2001). “Dismissal on this basis generally occurs when the complaint alleges an outright refusal to recognize and bargain with a union in violation of Sec. 8(a)(5) of the Act and the remedy is an affirmative bargaining order. Under such circumstances, the Board has found that the existence of a real question concerning representation would be inconsistent with the employer’s statutory obligation to bargain.” *Id.* at 1393 n.6 (citing *Big Three Indus.*, 201 NLRB 197 (1973)). Thus, the Board has affirmed the dismissal of RM and RD petitions where a pending ULP charge alleging a refusal to bargain would, if sustained, result in an affirmative bargaining order that would “preclude the existence of a question concerning representation.” *Brannan Sand & Gravel*, 308 NLRB 922 (RM petition); *see also Big Three*, 201 NLRB 197 (RD petition); *CalPortland Co.*, Case No. 28-RD-206696, 2018 WL 571496 (NLRB Jan. 24, 2018) (RD petition).

That is precisely the situation here. The Union’s ULP alleges that NGM unlawfully withdrew recognition from the Union in the historically recognized bargaining unit of Newmont legacy employees. If a violation of the Act is established, the remedy will be an order requiring NGM to recognize and bargain with the Union in that bargaining unit.⁷ Such an order would preclude a question concerning representation here, just as an order requiring the employer to recognize and bargain with the union would have precluded such a question in *Brannan Sand & Gravel*. Therefore, even if the Union had made a present demand for recognition, NGM’s petition would have been dismissed. For these reasons, NGM’s arguments regarding the ongoing appropriateness of the historical bargaining unit should be disregarded.⁸

⁷ *See Rhode Island PBS Found.*, 368 NLRB No. 29, slip op. at 15 (2019) (bargaining order justified to remedy Section 8(a)(1) and (a)(5) violations where necessary to “restore[] the status quo ante”); *Leggett and Platt*, 367 NLRB No. 51, slip op. at 1 (remedy for unlawful withdrawal of recognition was for employer to “[r]ecognize and, on request bargain in good faith with the Union as the exclusive collective-bargaining representative of the” same bargaining unit defined in the collective bargaining agreement), *reaffirmed* 368 NLRB No. 132 (2019).

⁸ NGM argues now that there is no “present demand” requirement where the union’s claimed bargaining unit is not a proper unit. RFR at 7, citing *K. Van Bourgondien & Sons, Inc.*, 294 NLRB 268, 268 n.2 (1989). But there is no evidence that NGM presented this argument to the Regional Director, so it is not a proper ground for a request for review. *See* Rule 102.67(e); *see generally* RFR Exh. 5. In any event, *K. Van Bourgondien* only stated, in dicta and without citing any authority, that a “limited exception” to the statutory present demand requirement exists “when the claimed unit is contrary to the purposes of the Act, such as a unit including supervisors.” 294 NLRB at 268 n.2. This statement was plainly dicta because the Board

For the foregoing reasons, NGM has failed to demonstrate the presence of any of the grounds required for review of the Regional Director's decision. Because the Regional Director's factual determination was not clearly erroneous, and her legal analysis was fully consistent with Board precedent, the dismissal of the petition resulted in no prejudice to NGM. An employer's right to petition for an election "is not a guarantee that it will secure one in every case." *Ny-Lint*, 77 NLRB at 643. Indeed, no prejudice to NGM could possibly be present because NGM has already withdrawn recognition from the Union (instead of filing an RM petition to determine whether it had the right to do so). To the contrary, processing the RM petition would be prejudicial to the General Counsel's ability to litigate the ongoing ULP proceeding and to the Board's authority, if the ULP is sustained, to order effective relief.⁹

Respectfully submitted,

Eileen B. Goldsmith WP,SLW

Eileen B. Goldsmith

*Attorney for International Union Operating
Engineers, Local 3*

proceeded to explain that "[n]o such exception is present in this case." *Id. Cf. ADT*, 365 NLRB No. 77, slip op. at 5 (absent a demand for recognition, issue of appropriateness of the bargaining group "do[es] not exist in th[e] case"). In any event, the historical unit here is not unlawful (as a unit including supervisors would be), nor is it repugnant to the Act, as will be established in the ULP proceeding.

⁹ NGM suggests that review is appropriate to reconsider Board rules or policies (*see* Rule 102.67(d)(4)), but does not identify any such rule or policy as to which it contends that review is needed. RFR at 7-8. This suggestion plainly fails to state a cognizable ground for review.

EXHIBIT 1

MEMORANDUM OF UNDERSTANDING

Newmont USA Limited, DBA Newmont Mining Corporation ("Newmont") and Operating Engineers Local Union #3 of the International Union of Operating Engineers, AFL-CIO ("OE3") executed a Collective Bargaining Agreement ("CBA") dated February 1, 2019. Barrick Gold Corporation ("Barrick") and Newmont have entered into a joint venture and formed a new entity called Nevada Gold Mines LLC (the "JV Company").

The JV Company is willing to lease employees from Newmont, including employees that are governed by the CBA, from July 1, 2019 through December 31, 2019 ("Lease Period"). During the Lease Period union and non-union employees will be working together and holding the same/similar positions.

It is the intent of this Memorandum of Understanding ("MOU") that the identity, scope and legal rights and obligations of the Newmont represented employees and the Barrick and JV Company's un-represented employees remain as they existed before the Lease Period (this principle as well as the other principles concerning status quo contained in this MOU shall collectively be referred to as "Status Quo"). Status Quo includes that the rights and obligations of OE3, Newmont, Barrick and the JV Company, and the employees of each under the National Labor Relations Act, shall be unaltered during the Lease Period. During the Lease Period the rights and obligations of OE3, Newmont, Barrick and the JV Company concerning the CBA, the duty to bargain, and the rights of the union to be recognized as the bargaining representative, regardless of the degree of interchange of employees, control over employees and labor conditions, integration of operations, changes to or similarity of, working conditions, skills and function shall not be altered and the Status Quo before the Lease Period shall be maintained.

Additionally, during the Lease Period, the Status Quo shall be maintained with regard to OE3's right to represent the Newmont employees specified in the CBA at Section 04.01.00. Also, during the Lease Period, the Status Quo shall be maintained with regard to Barrick's and the JV Company's pre-Lease Period rights and non-union status, including without limitation with regard to Barrick's and the JV Company's lack of any duty to bargain with OE3 and the lack of any obligation to recognize, acknowledge or be bound by the CBA. During the Lease Period, the Status Quo shall be maintained with regard to Newmont's obligations and rights concerning the CBA, OE3 and its employees.

Further, in order to maintain the Status Quo, no events or facts occurring during the Lease Period shall be used in any manner to alter the Status Quo, including to argue or demonstrate accretion, alter-ego or any other successorship principle or doctrine. It is agreed that there is a recognized risk of accretion, alter-ego or other successorship principles altering the Status Quo because of facts that occur during the Lease Period. It is agreed that this MOU shall prevent any argument of accretion, alter-ego or other successorship principal being argued or established based on facts and events occurring during the Lease Period. This prohibition includes that during the Lease Period the Newmont unionized employee shall not be deemed to be accreted into a non-union group. Also, during the Lease Period, the Barrick and JV Company employees shall not be deemed to be accreted into a union group.

This MOU shall not limit or restrict the parties' rights under the existing CBA during the Lease Period, including Newmont's management rights, the rights to terminate, lay off or otherwise discipline employees, and to assign duties.

Finally, It is comprehensibly agreed that this MOU shall maintain the Status Quo for the JV Company, Newmont, Barrick and OE3 that existed before the Lease Period. All events and occurrences during the Lease Period may not be used by any party for any purpose, except to enforce the terms of this MOU. This MOU may be used and enforced by the parties to the agreement (i.e., Newmont and OE3) as well as the intended third-party beneficiaries to this MOU. Barrick and the JV Company are explicitly recognized as intended third-party beneficiaries of this MOU.



Newmont USA Limited, DBA Newmont
Mining Corporation



Operating Engineers Local Union #3 of
the International Union of
Operating Engineers, AFL-CIO

Gavin Jorgard
By:

Dan Reding
By:

September 5, 2019
Date

9/9/2019
Date

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

CASE NAME: Nevada Gold Mines, LLC
CASE NUMBER: 32-RM-255914

At the time of service I was over 18 years of age and not a party to this action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On March 5, 2020, I served the following document(s):

**OPPOSITION TO REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S
DISMISSAL OF RM PETITION**

I served the documents on the persons below, as follows:

ANTHONY HALL
JENNIFER SMITH
SIMONS HALL JOHNSTON PC
6490 S. MCCARRAN BLVD, SUITE F-46
RENO, NV 89509
ahall@shjnevada.com
jsmith@shjnevada.com

The Document(s) were served by the following means:

By e-mail. I electronically delivered the documents to be sent to the person at the e-mail addresses listed above.

I declare under penalty of perjury under laws of the State of California that the foregoing is true and correct.

Date: March 5, 2020



Meghan Herbert