

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

CP ANCHORAGE HOTEL 2, LLC,
D/B/A HILTON ANCHORAGE

Employer

and

Case 19-RD-223516

PATRICK M. WHITE, An Individual

Petitioner

and

UNITE HERE! LOCAL 878¹

Union

DECISION AND ORDER

On July 11, 2018, the Petitioner, employee Patrick M. White ("Mr. White") filed a petition in the above-referenced case seeking an election to decertify the Union as the exclusive bargaining representative of most non-supervisory employees (the "Unit") at the Employer's Anchorage, Alaska facility.²

¹ The names of both the Employer and the Union appear as stipulated at hearing.

² The Petitioner seeks a decertification election in a bargaining unit of banquet bartenders, banquet captains, banquet servers, banquet housemen, baristas, bellmen, bell captains, Bruins bartenders, bus persons, cashiers, coat check/room check attendants, cocktail servers, concierges, cooks, dishwasher/stewards, doormen, front desk/PBX employees, hosts/hostesses, housekeeping clerks, housekeepers/room attendants, housemen, housekeeping inspectors, laundry-presser/chute employees, laundry-washer employees, maintenance employees, maintenance supervisors, night auditors, purchasing employees, restaurant servers, and room service employees; excluding security, managers, confidential employees, clerical employees, and supervisors as defined in the Act.

On July 12, 2019, the undersigned issued an Order Consolidating Cases, Amended Complaint and Notice of Hearing in Cases 19-CA-193656, 19-CA-193659, 19-CA-203675, 19-CA-212923, 19-CA-212950, 19-CA-218647, 19-CA-225466, 19-CA-228578 and 19-RD-223516 (the "Complaint") for a hearing before an Administrative Law Judge.³ The Complaint alleged that the Employer violated §§ 8(a)(1) and (5) by failing and refusing to bargain collectively and in good faith with the Union by, *inter alia*, restricting Union access to the facility by barring interns, and calling the Anchorage Police Department to the Employer's facility, failing and refusing to furnish the Union with information, bypassing the Union, dealing directly with employees and denigrating the Union, and by not making counter-proposals, ceasing negotiations, refusing future bargaining, and unilaterally implementing its access proposal.

The Notice of Hearing directed a hearing on the issue of any causal connection between the Employer's alleged unfair labor practices and the filing of the decertification petition pursuant to *St. Gobain Abrasives, Inc.*, 342 NLRB 434 (2004). A hearing was held before an Administrative Law Judge on October 28-30, and November 12, 2019. Following the hearing, the cases were severed and the instant case was remanded to the undersigned for a determination as to whether, in applying the multi-factor test described in *Master Slack Corp.*, 271 NLRB 78 (1984), the allegations set forth in the Complaint bore a causal relationship to employee disaffection reflected in the filing of the decertification petition in Case 19-RD-223516.

On March 4, 2020, the Administrative Law Judge issued his decision in the aforementioned cases finding, *inter alia*, that the Employer restricted Union access to its

³ The Complaint was further amended on July 25, on August 12, and again on October 30, 2019.

facility by calling the Anchorage Police Department on the Union in violation of § 8(a)(1) of the Act; restricted Union access to its facility by barring interns; denigrated the Union and dealt directly with employees; failed and refused to bargain in good faith with the Union; ceased negotiations and implemented its access proposal; and failed to timely provide the Union with information in violation of §§ 8(a)(1) and (5) of the Act.⁴

The Employer, the Union and the General Counsel all filed exceptions to certain findings of the Administrative Law Judge, which are pending before the Board.⁵ Applying the multi-factor *Master Slack* test, it does not appear that further proceedings on the petition are warranted due to the pending unfair labor practice charges in Cases 19-CA-193656, 19-CA-193659, 19-CA-203675, 19-CA-212923, 19-CA-212950, 19-CA-218647 and 19-CA-228578. Since I find that certain conduct by the Employer precludes the existence of a question concerning representation, I am dismissing the petition without prejudice to its reinstatement, if appropriate, upon Petitioner's application after disposition of the unfair labor practice proceedings in Cases 19-CA-193656, *et al.*

A. BACKGROUND

The Employer is a Delaware limited liability corporation, that took over the operation of the 606-room Hilton Hotel in Anchorage, Alaska (the "facility") in about December 2005. At the same time, Respondent recognized the Union as exclusive collective bargaining representative of the Unit, and adopted the Union's collective bargaining agreement, which expired on August 31, 2008. The Employer and Union met

⁴ *CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage*, 2020 WL 1061592 (NLRB Div. of Judges, March 4, 2020, Case 19-CA-165356, *et al.*)

⁵ The Employer did not take exception to the ALJ's findings that it violated the Act by: unilaterally restricting the Union's access to its facility by barring interns; failing to timely provide the Union with certain information; bypassing the Union and dealing directly with unit employees by soliciting their grievances and impliedly promising to remedy them, and by denigrating the Union.

to bargain over a successor agreement in 2008 and 2009, and after declaring *impasse*, the Employer implemented parts of its March 11, 2009, contract proposal on April 13, 2009. The parties met again to bargain in 2013 and 2014, after which Respondent declared *impasse*, and implemented its proposed health care changes. Since that time, the parties have not been successful in reaching a successor agreement, and the Union has taken to “holding rallies or protests involving politicians and the media, circulating flyers or surveys suggesting the presence of asbestos, mold, and air quality issues inside the hotel, and urging a consumer boycott.” (ALJ 4:2-5)

As set forth above, on July 11, 2018, Mr. White filed a decertification petition in Case 19-RD-223516. Mr. White did not appear at the hearing held before the Administrative Law Judge in this matter. Accompanying the petition filed by Mr. White were cards signed by bargaining unit employees between June 6, 2018 and June 29, 2108, indicating that they were no longer interested in having the Union represent them. (GC Exh. 9). The majority of the cards submitted by Mr. White were signed between June 6, and June 20, 2018. (GC Exh. 9).

B. THE ISSUE

Whether a causal connection exists between the Employer’s unfair labor practices and the employees’ subsequent disaffection with the Union such that the decertification petition is tainted and must be dismissed.

C. POSITION OF THE PARTIES

The Union argues that the Employer’s repeated violations, in the aggregate, led to the decertification petition being filed, and that the Employer’s conduct was such that tends to cause employee disaffection, satisfying the *Master Slack* factors. In addition to

the conduct found unlawful by the Administrative Law Judge, the Union asserts that there were 14 separate ULPs pending at the time Mr. White filed his petition,⁶ as well as testimony from the Union's witnesses about employees turning their heads while speaking with Union representatives in the employee cafeteria, and testimony about changes in the nature of the conversations held between the Union's representatives and employees. It argues that the Board has not recognized any specific limits with respect to the question of temporal nexus between unfair labor practice conduct and the effects of this conduct on employees, and that when unfair labor practices are particularly serious, the Board finds that "the mere passage of time would not reasonably dissipate the effects of the unfair labor practice[s]." *Williams Enterprises*, 312 NLRB 937,939 (1993) (4 months between employer's misconduct and decertification petition). *Overnite Transp. Co.*, 333 NLRB 1392 (2001).

Conversely, the Employer argues that the charges are insufficient to block or dismiss the petition. The Employer examined each of the unfair labor practices found by the Administrative Law Judge, and not only attacks the merits of the findings, but also argues that the length of time between when the unfair labor practice conduct allegedly occurred and the filing of the petition were too remote in time to have caused the employees' disaffection with the Union. In this regard, the Employer asserts that, other than the allegation relating to the memo it posted by the timeclock, all other complained of activity ceased at least six months before the petition was filed. Further, the Employer asserts that, other than the memo, there was little or no evidence that bargaining unit members knew of any of the complained of conduct.

⁶ This decision is limited to the conduct set forth in the Administrative Law Judge's decision.

D. ANALYSIS AND CONCLUSIONS⁷

The Board 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. The Board considers conduct to be inconsistent with the petition if it taints the showing of interest, precludes a question concerning representation, or taints an incumbent union's subsequent loss of majority support. To determine whether a causal relationship exists between unfair labor practices and the subsequent expression of employee disaffection from an incumbent union, the Board has identified the following relevant factors: (1) the length of time between the unfair labor practices and the filing of the petition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Overnite Transp. Co.*, 333 NLRB at 1392-1393, citing *Master Slack Corp.*, 271 NLRB at 84. These factors are "overlapping." *Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 82 (D.C. Cir. 2018).

Not every unfair labor practice will taint a union's subsequent loss of majority support or taint a petition. In cases involving a complaint alleging a § 8(a)(5) refusal to recognize and bargain with an incumbent union, the causal relationship between the allegedly unlawful acts and any subsequent loss of majority support or employee

⁷ Both the Union and the Employer make arguments about allegations involving the employee cafeteria, as the Administrative Law Judge did not find a violation with respect to the surveillance or unilateral change allegations, I am not relying on the facts underlying those allegations in this decision.

disaffection may be presumed. See *Lee Lumber and Building Material Corp.*, 322 NLRB 175, 177 (1996), *affd. in part and remanded in part*, 117 F. 3d 1454 (D.C. Cir. 1997); *Sullivan Industries*, 322 NLRB 925, 926 (1997). However, where a case involves unfair labor practices other than a general refusal to recognize and bargain, a causal connection must be shown between the unfair labor practices and the subsequent employee disaffection with the union in order to find that a decertification petition is tainted, thereby requiring that it be dismissed. See *Lee Lumber*, 322 NLRB at 177; *Williams Enterprises*, 312 NLRB at 939, *enfd.* 50 F.3d 1280 (4 Cir. 1995).

The *Master Slack* standard is an objective one. Thus, what is relevant is not why employees have chosen to reject the union, but whether they have in fact done so since the commission of the unfair labor practices and whether the nature of the unfair labor practices is such as to cause rejection. *Saint Gobain Abrasives*, 342 NLRB at 434, n.4. See also *AT Sys. West, Inc., f/k/a Armored Transport*, 341 NLRB 57, 60 (2004) ("It is the objective evidence of the commission of unfair labor practices that have the tendency to undermine the Union, and not the subjective state of mind of the employees, that is the relevant inquiry in this regard"); *Wire Prods. Mfg. Corp.*, 326 NLRB 625, 627 and 627 n.13 (1998) (looking to violations' "foreseeable tendency to weaken employee support for the Union" as reasonable basis "to infer that they contributed to the employee disaffection," and specifying that the causation analysis does not require a showing of "actual knowledge by the employees of the unfair labor practices").

(i) **The length of time between the unfair labor practices and the filing of the petition**

As to the first factor, the length of time between the unfair labor practices and the filing of the petition, the Board has found a close temporal proximity where an employer's

unfair labor practices occurred prior to or simultaneously with the circulation of the petition. See *The Hearst Corp.*, 281 NLRB 764, 764 (1986). While the Board has not set any rigid time guidelines, it has found a violation when as much as a year passed between them, *Columbia Portland Cement v. NLRB*, 979 F.2d 460, 465 (6th Cir. 1992), and has found 9 months to be consistent with a causal linkage. *AT Sys. West, Inc.*, 341 NLRB at 57. See also *Fruehauf Trailer Services*, 335 NLRB 393, 394 (2001) (Board found a close temporal proximity where a disaffection petition was presented to an employer in the midst of the employer's ongoing bad faith bargaining).

Here, looking solely at conduct dating a year from when the petition was filed, the Administrative Law Judge found that in July 2017, during the period of time in which the Union and Employer were negotiating, the Employer unilaterally barred the Union's Interns from its facility. These interns were brought to the Employer's facility for the purpose of speaking with the Employer's J-1 visa employees about the Union. The Administrative Law Judge also concluded that the Employer failed to provide certain information to the Union in a timely manner while the parties were negotiating. Specifically, the Union sought the names of the employees alleged to have voiced concerns to the Employer over the Union forcing them to agree to voice recording. Such information was found relevant under the circumstances of the case, and was withheld from the Union from August 2017, to March 19, 2019.

Next, the Administrative Law Judge found that, at the parties' bargaining session on December 20, 2017, the Union had made proposals on wages, health insurance, the 17-room cleaning requirements, successorship and Union access that reflected movement sufficient to create the possibility of further fruitful discussions. (ALJ 31:17-

28). The Employer rejected each of the Union's proposals, declared that impasse had been reached and notified the Union that it would be implementing changes to the Union access policy. The Administrative Law Judge found that "[b]y prematurely declaring impasse and implementing the revised access policy, the [Employer] failed and refused to bargain in good faith with the Union, in violation of Section 8(a)(5) and (1)." (ALJ 35:2-3).

Shortly after implementing changes to the Union access policy, the Employer, on January 31, 2018, called the Anchorage Police Department to its facility to assist it in enforcing its revised policy to bar the Union's representatives from accessing its facility. The Administrative Law Judge found that, since implementing the change to the access policy was unlawful, so was contacting the police to seek help enforcing it. The evidence did not establish that any employees witnessed the interaction between the Union and officers from the Anchorage Police Department. However, news of the police being called to the facility was communicated to unit employees by Union President Marvin Jones at a quarterly meeting on April 18, 2018.

Finally, the Administrative Law Judge found that in late June 2018, the Employer bypassed the Union and engaged in direct dealing by soliciting employee complaints with the implied promise of remedying them, and by denigrating the Union by undercutting its role as the employees' exclusive bargaining representative. Specifically, in June 2018, in response to a notice posted by the Union on its bulletin board, in English, the Employer posted a memorandum for employees in English and Spanish, next to the time clock informing them: (a) it wanted "to have a direct working relationship with our employees to solve issues and does not believe having a 3rd party labor union involved is necessary;"

(b) the Union was wrong that without a union employees could lose benefits; (c) at 40 of its hotels without unions employees had the same benefits the Unit employees currently had "and more;" and (d) "our managers welcome you to come to us with any concerns you may have for solutions that are satisfactory to you."

The Employer argues, citing *Champion Enterprises, Inc.*, 350 NLRB 788, 792 (2007), that all but one of the charges at issue relate to events and alleged conduct that occurred 6 months or more before Mr. White filed his petition in July 2018, and thus the conduct is too remote in time to have caused employees' disaffection. However, I find that the conduct at issue in *Champion Enterprises* involved isolated and short-lived conduct, including the employer threatening one employee, laying bargaining unit employees off for a single day, and confiscating union materials from a single employee, 5-6 months before the petition and resulting withdrawal of recognition. Unlike the conduct in *Champion Enterprises*, the conduct at issue here was not limited to one employee or one day.

The instant decertification petition was circulated and filed in this atmosphere of unremedied unfair labor practices that have a tendency to undermine the relationship between employees and the Union, including a memo posted by the time clock encouraging employees to get rid of the Union, and to cause employee disaffection for, and repudiation of, the Union. I, therefore, conclude that there is a close temporal proximity between the Employer's unlawful conduct and the circulation and filing of the petition.

(ii) **The nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees**

As to the second *Master Slack* criterion, the nature of the Employer's acts, including the possibility of their detrimental or lasting effect on employees, the Board has found unilateral changes harm the union's status as bargaining representative because such actions undermine the union in the eyes of employees. See *Goya Foods*, 347 NLRB 1118, 1120-21, 1123 (2006); *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067-1968 (2001). Here, the Employer banned the Union's interns from accessing its facility, refused to provide the Union with information during bargaining, prematurely declared impasse, and then unilaterally implemented a change to the Union access policy.

The Employer points out that the Union representatives didn't abide by the changed access policy, and thus, it could not have had a detrimental or lasting effect on employees. It also argues that its refusal to provide information to the Union was not known to many employees, and thus this conduct could not have had a lasting or detrimental effect. Whatever merit the Employer's argument may have in this regard, I find that this conduct, in combination with the end to bargaining brought about by the Employer's premature declaration of impasse, as well as summoning the police was sufficient to cause employee disaffection. Moreover, it stands to reason that employees, especially those on the Union's bargaining committee, were aware that the Employer had rejected the Union's proposal to increase wages, and declared impasse. Further, I note that while the Employer has chosen to examine each of the alleged unfair labor practices separate and apart from the other conduct at issue, I find it unlikely that employees have experienced the Employer's conduct through such a limited lens.

Likewise, I also find the facts of *AIM Aerospace Sumner, Inc.*, 367 NLRB No. 148 (2019), another case cited by the Employer, distinguishable. In *AIM Aerospace*, the Board affirmed the ALJ's decision that a promotion granted to the employee soliciting signatures for a decertification petition was unlawful, but that the single personnel action was insufficient to taint the decertification petition. In that case, the ALJ reasoned that, while the employee's promotion was likely known to other employees, those employees would not have a basis for assessing whether or not the employee was legitimately selected for promotion. 367 NLRB slip op. at 14. While it is true that there is some conduct that not all employees might have been aware of, (e.g., the Employer's refusal to provide the Union with information while the parties were still bargaining), I find that is not the case with respect to the Employer's rejection of the Union's proposed increases to employee benefits, declaration of *impasse*, contacting the police and direct dealing. Further, while the Employer argues that its conduct is unlikely to have detrimental or lasting effects, it cites to cases in support that involve a single employee or an isolated incident. There is no dispute that the Employer's conduct in this case involved the entire unit. Moreover, while it is possible that a personnel action involving one employee may escape the notice of the larger unit, it is unlikely a dramatic incident such as calling the police on the Union representatives would not be widely discussed.

(iii) Any possible tendency to cause employee disaffection from the union

The third *Master Slack* criterion is any possible tendency to cause employee disaffection from the Union. The Board has stated that finding that an employer's unfair labor practices caused employee disaffection "is not predicated on a finding of actual coercive effect, but rather on the tendency of such conduct to interfere with the free exercise of employee rights under the Act." *Hearst Corp.*, 281 NLRB at 765. See also *D and D Enterprises, Inc.*, 336 NLRB 850, 858-9 (2001) (employee disaffection based on

employer terminating two union activists over 6 months earlier inferred, absent evidence of employee disaffection from the union prior to the terminations even when not all petition signers were aware of the terminations).

I find that the conduct found unlawful by the Administrative Law Judge, as discussed above, comprises such conduct.

The Employer argues that the evidence showed that it did nothing while the parties were bargaining to undermine the Union or engaged in conduct that could be interpreted as causing employee disaffection, and that even assuming there was a cognizable bargaining claim, the evidence does not establish that such conduct caused employee disaffection. It cites to the Board's decision in *Garden Ridge Management, Inc.*, 347 NLRB 131 (2006), where the Board found the employer did not meet at reasonable times as required by §8(d), dismissed the surface bargaining and withdrawal of recognition allegations, and found that the petition relied upon by the employer to withdraw recognition from the union was not tainted by the employer's unlawful conduct. In *Garden Ridge*, the parties met to bargain on 20 occasions over 11 months, reaching tentative agreements on 28 articles. Months later, the employer received a petition from employees stating they no longer wished to be represented by the union. Unlike in the instant case, in *Garden Ridge*, there was no other unfair labor practice conduct that was even alleged to have been committed. Thus, I do not find this authority convincing.

The Employer also argues that, as most of the cards supporting Mr. White's decertification petition were signed prior to the Employer posting its memo by the time clock, the record did not establish a causal connection between the posting and employee disaffection. The Employer cites to *Timmins Ex Rel. NLRB v. Narricot Industries*, 567 F.

Supp. 2d 835, 845-46 (ED VA 2008), a case in which the Court declined to impose an affirmative bargaining order on the employer based, in part, on evidence establishing that, prior to the employer's unlawful assistance with the decertification petition, support for the Union had been waning. Like with the *Garden Ridge* case, I find the facts of *Narricot Industries* sufficiently distinguishable from those here. In *Narricot Industries* the Court determined that it was not possible to determine how much the decertification petition in that case was tainted by the employer's unlawful assistance, as a substantial number of signatures was obtained free from employer involvement. The Court also relied upon evidence from the hearing before the ALJ in that case establishing that the Union had been losing support over the prior two years, and that some of the employees felt the union was responsible for their not receiving a wage increase over the prior 4 years. 567 F. Supp. 2d at 846, n. 4 and 30. No such facts or evidence of any prior loss of support for the Union was presented here.

While the majority of the cards in support of Mr. White's petition were signed prior to the Employer posting the memo found by the Administrative Law Judge to constitute direct dealing, a not insignificant number of them were signed after. As the Board has found that direct dealing tends to cause disaffection, I find it is reasonable to infer that the Employer's conduct, for those signing after the memo was posted, as well as for the decision to file the petition, contributed to employees' disaffection. See, e.g., *AT Sys. West, Inc.*, 341 NLRB at 60 (direct dealing is a violation "clearly [] of a type that tend[s] to have a lasting effect on employees and cause employee disaffection from a union.") (quoting *Bridgestone/Firestone, Inc.*, 332 NLRB 575, 576 (2000), *enfd. in rel. part*, 47 Fed. Appx. 449 (9th Cir. 2002) (unpublished)).

(iv) **The effect of the unlawful conduct on employee morale, organizational activities, and membership in the union**

As to the fourth factor, no employees testified and there is no direct evidence of the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. However, as noted by the Board “[i]t is the objective tendency of the unfair labor practices to undermine union support that is critical, not the actual effect of the unfair labor practices.” *Overnite Transp. Co.*, 329 NLRB 990, 995 n. 26. (1999).

Accordingly, I find the evidence is sufficient to infer that the Employer's conduct had a tendency to cause employee disaffection from the Union. This is especially true in light of the absence of evidence that the Union had been losing support prior to the unfair labor practice conduct at issue.

E. CONCLUSION

Based on the foregoing and the record as a whole, I find that the causation test factors set forth in *Master Slack*, *supra*, have been met: (1) there is a close temporal proximity between the Employer's unlawful conduct and the filing of the petition, (2) the Employer's premature declaration of impasse, unilateral implementation of change to the Union access policy, soliciting the assistance of police and direct dealing are the type of unlawful acts which have a detrimental and long lasting effect on employee support for the Union, (3) the Employer's actions had a tendency to cause employee disaffection from the Union, and (4) the evidence is sufficient to conclude that the Employer's unlawful conduct has had a detrimental effect on employee morale, organizational activities, and membership in the union. Under these circumstances, the weight of evidence supports, and I conclude, that a causal relationship exists between the Employer's unlawful conduct and employee disaffection, and that the petition should be dismissed.

ORDER

Accordingly, **IT IS ORDERED** that the petition in Case 19-RD-223516 be, and it is, dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Sections 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by February 5, 2021.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile.⁸ To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

DATED at Seattle, Washington this 22nd day of January 2021.

Ronald K. Hooks

Ronald K. Hooks, Regional Director
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⁸ On October 21, 2019, the General Counsel (GC) issued Memorandum GC 20-01, informing the public that Section 102.5(c) of the Board's Rules and Regulations mandates the use of the E-filing system for the submission of documents by parties in connection with the unfair labor practice or representation cases processed in Regional offices. The E-Filing requirement went into immediate effect on October 21, 2019, and the 90-day grace period that was put into place expired on January 21, 2020. Parties who do not have necessary access to the Agency's E-Filing system may provide a statement explaining the circumstances, or why requiring them to E-File would impose an undue burden.