

EXHIBIT 1

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Rieth-Riley Construction Co., Inc. and Rayalan A. Kent, Petitioner and Local 324, International Union of Operating Engineers (IUOE), AFL-CIO.
Cases 07–RD–257830 and 07–RD–264330

February 8, 2021

ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN,
EMANUEL, AND RING

The Employer’s and Petitioner’s requests for review of the Regional Director’s Decision and Order—Case 07–RD–257830 and Supplemental Decision and Order—Case 07–RD–64330 are granted as they raise substantial issues warranting review, especially with respect to whether the Regional Director’s decision to dismiss the petitions is consistent with Section 103.20 of the Board’s Rules and Regulations. See also Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed.Reg. 18366 (April 1, 2020).

Dated, Washington, D.C. February 8, 2021

Marvin E. Kaplan, Member

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting.

I would deny the Employer’s request for review. There is no need to reach the issue of whether the Regional Director’s decision to dismiss the petitions is consistent with the Board’s so-called “Election Protection Rule,” because it is clear that the Rule should not apply to the petitions

¹ The complaint alleged multiple violations of Sec. 8(a)(5) of the Act, including that the Employer engaged in bad-faith bargaining over a successor collective-bargaining agreement, insisted on bargaining over a permissive subject, engaged in an unlawful lockout in furtherance of its

here. Moreover, even if the Rule did apply, there is no clear conflict between the Regional Director’s decision and the Rule as it now exists.

The Board has held that the Rule applies only to petitions filed after the effective date of the Rule, July 31, 2020. See Order Denying Review, *Arakelian Enterprises, Inc.*, 21–RD–223309, 2020 WL 5658310 (Sept. 22, 2020). Here, the Petitioner filed an initial decertification petition on March 10, 2020. This petition was properly blocked under the Board’s prior blocking-charge rules due to an outstanding unfair labor practice complaint in Case 07–CA–234085.¹ The Board denied review of the Regional Director’s blocking determination on June 20, 2020. This initial petition continued to remain blocked, even as the new Rule went into effect on July 31, 2020. But, on August 7, 2020, the Petitioner filed a second decertification petition in the very same unit, and the Regional Director decided to process this second petition under the new Rule instead of the prior blocking-charge policy.

It is obvious that sole purpose of this second petition was attempt an end run around the prior blocking-charge policy and the Board’s holding in *Arakelian Enterprises*. There is no indication that anything had changed with respect to the composition of the unit, employee sentiment regarding decertification, or even the procedural posture of the still-pending unfair labor practice case. The only difference was that the new Rule had gone into effect while the initial petition was—correctly—being held in abeyance. If the effective date of the new Rule, and the Board’s holding in *Arakelian Enterprises*, are to have any meaning at all, they cannot be circumvented simply by filing a new petition. Because the prior blocking-charge policy should apply to the second petition just as it did to the first, the dismissal of the second petition was proper—and there is no reason for the Board to grant review.

But even if the new Rule were somehow applicable to the second petition, the Regional Director’s dismissal appears to be entirely consistent with the Board’s policies and procedures. The Board has a longstanding practice of dismissing petitions subject to reinstatement when a “merit determination”—often marked by the issuance of a complaint—is made with respect to unfair labor practice charges that allege certain types of conduct, such as where the Regional Director finds a causal connection between the conduct alleged in the complaint and the petition (as the Regional Director did here), or where the General Counsel seeks an affirmative bargaining order against the employer (as the General Counsel has sought in Case 07–

unlawful bargaining objective, and made unilateral changes to wages and to paycheck deductions for holiday and vacation funds. The complaint seeks an affirmative bargaining order.

CA–234085).² Nothing in the plain language of the new Rule abrogates this practice, nor does Board’s preamble to the Rule mention, much less purport to modify, the Board’s established procedures in this area.³ In fact, the Board’s Casehandling Manual, Part II—which was updated in light of the new Rule—explicitly retains references to a Regional Director’s discretion to dismiss a petition, subject to reinstatement, under such circumstances. See Sections 11733.1(a)(1); 11733.1(a)(2); and 11733.1(a)(3). Under these circumstances, there is no “compelling” reason to grant review under the standard of Section 102.67(d) of the Board’s Rules and Regulations.⁴ Indeed, if the new Rule fails to address the issue that the majority sees presented here, then further rulemaking—not a Board adjudication—would seem to be required. “[A] administrative agency may not slip by the notice and comment rule-making requirements needed to amend a rule by merely adopting a *de facto* amendment to its regulation through adjudication.”⁵

In short, because dismissal of the petition here was compelled by *Arakelian Enterprises* and because, in any case, the Regional Director’s dismissal seems consistent with established Board law and practice, I would deny review.

Dated, Washington, D.C. February 8, 2021

Lauren McFerran,

Chairman

NATIONAL LABOR RELATIONS BOARD

² See, e.g., *Overnite Transportation Co.*, 333 NLRB 1392, 1392–1393 (2001); *Big Three Industries*, 201 NLRB 197, 197 (1973); *Brannan Sand & Gravel*, 308 NLRB 922, 922 (1992).

³ See Sec. 103.20 of the Board’s Rules and Regulations; Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed.Reg. 18366 (April 1, 2020).

⁴ Rule 102.67(d) reads:

Grounds for review. The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

⁵ *Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003).

EXHIBIT 2

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN**

RIETH-RILEY CONSTRUCTION CO., INC.

Employer

and

RAYALAN A. KENT

Petitioner

Cases 07-RD-257830

07-RD-264330

and

**LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE), AFL-CIO**

Union

**DECISION AND ORDER – CASE 07-RD-257830
AND SUPPLEMENTAL DECISION AND ORDER – CASE 07-RD-264330**

On March 10, 2020, the Petitioner filed the petition in Case 07-RD-157830, seeking an election to decertify the Union as the exclusive collective bargaining representative of a unit of operating engineers at the Employer's various facilities in the State of Michigan.¹ The petition was blocked on March 20, 2020, based on the Board's blocking charge policy as it existed at that time, and remains blocked based on the Board's holding in *Arakelian Enterprises, Inc.*, 21-RD-223309 (unpublished September 22, 2020) (holding that its rulemaking changes to the blocking

¹ The Unit, as stipulated at the hearing in Case 07-RD-264300, is described as follows:

All full-time and regular part-time employees employed in the State of Michigan by Rieth-Riley Construction Co., Inc. for airport construction work (exclusive of building), railroad track and trestle construction (exclusive of such work inside the property line of an industrial plant covered by the Associated General Contractors of Michigan, Detroit Metro CBA) and all highway work including roads, streets, bridge construction, parking lots, and asphalt plants, in the following classifications: asphalt plant operator, crane operator, dragline operator, shovel operator, locomotive operator, paver operator (5 bags or more), elevating grader operator, pile driving operator, roller operator (asphalt), blade grader operator, trenching machine operator (ladder or wheel type), auto-grader, slip form paver, self-propelled or tractor drawn scraper, conveyor loader operator (Euclid type), endloader operator (1 yard capacity and over), bulldozer, hoisting engineer, tractor operator, finishing machine operator(asphalt), mechanic, pump operator (6" discharge or over, gas diesel, powered or generator of 300 amp or larger), shouldering or gravel distributing machine operator(self-propelled), backhoe (with over 3/8 yard bucket), side boom tractor (type D-4 equivalent or larger), tube finisher (slip form paving), gradall (and similar type machine), asphalt paver (self-propelled), asphalt planer (self-propelled), batch plant(concrete-central mix), slurry machine (asphalt), concrete pump (3" and over), roto mill, swinging boon truck (over 12-ton capacity), hydro demolisher (water blaster), farm type tractor with attached pan; but excluding guards and supervisors as defined in the Act, and all other employees.

charge policy do not apply to petitions filed prior to the rule's effective date of July 31, 2020).² On August 7, 2020, the Petitioner filed the petition in Case 07-RD-264330.

On September 25, 2020, following a hearing conducted before a hearing officer of the National Labor Relations Board (NLRB), the Acting Regional Director directed an election to determine whether the Union is the exclusive collective-bargaining representative of the Unit at issue in the petition in Case 07-RD-264330. The mail ballot election began on October 13, 2020. The ballots were due to the Regional office by November 2, 2020, and the virtual ballot count is scheduled for November 9, 2020 at 1:00 p.m. In light of my decision herein that a question concerning representation cannot be appropriately raised at this time, the decision and direction of election is vacated and the virtual ballot count scheduled for 1:00 p.m. on November 9 is hereby cancelled.³

On May 29, 2019, prior to the filing of the petitions, the undersigned issued a Complaint and Notice of Hearing in Case 07-CA-234085 alleging that the Employer violated Section 8(a)(5) of the Act by: (1) from about September 4, 2018 to about September 27, 2018, locking out its Unit employees represented by the Union at various jobsites throughout the State of Michigan in furtherance of an unlawful bargaining objective, namely, insisting as a condition of reaching any collective-bargaining agreement that the Union agree to engage in multi-employer bargaining by executing a multi-employer contract; (2) since about October 27, 2018, unilaterally deducting monies from unit employee paychecks related to vacation and holiday fund monies without bargaining with the Union about those deductions and (3) about July 23, 2018, unilaterally granting a wage increase to its Unit employees. The hearing regarding the unfair labor practices alleged in Complaint began on October 21, 2019 and is ongoing.

Based both on the allegations contained in the pending litigation of Case 07-CA-234085 and upon information recently gathered during the administrative investigation of the petitions, which demonstrate that the alleged unfair labor practices have materially affected the filing of the decertification petitions, I have determined that further proceedings on the petitions are unwarranted. Because I find that certain conduct by the Employer interferes with employee free choice in an election, I am dismissing the petitions without prejudice to reinstatement, if appropriate, upon Petitioner's application after disposition of the unfair labor practice proceedings in Case 07-CA-234085.

BACKGROUND

² The Petitioner and Employer requested review of the Acting Regional Director's March 20, 2020 decision to hold further processing of Case 07-RD-257830 in abeyance pending, among other things, the litigation of Case 07-CA-234085. By order dated June 8, 2020, the Board denied review.

³ All received mail ballots will be impounded and maintained in accordance with casehandling requirements so that, in the event that the Region is ordered to continue the election in accordance with the decision and direction of election, the count may be held as soon as practicable.

The Employer is engaged in road construction at various work projects throughout the State of Michigan. The Employer has recognized the Union as the exclusive collective-bargaining representative of the Unit based on Section 9(a) of the Act since 1993. The Employer and Union were parties to a series of multiemployer collective-bargaining agreements including, most recently, the Michigan Infrastructure and Transportation Association Agreement (MITA) that expired in 2018.

As described above, on May 29, 2019, prior to the filing of the petitions, the undersigned issued a Complaint and Notice of Hearing in Case 07-CA-234085 alleging that the Employer violated Section 8(a)(5) of the Act. The Complaint seeks an affirmative bargaining order.

On or about July 31, 2019, employees in the Unit went on strike. The strike continues to the present. About half of the petitioned-for employees remain on strike, according to testimony elicited in the pre-election hearing in Case 07-RD-264330. The Union asserts that the strike is an unfair labor practice strike in response to the Employer's unremedied conduct in Case 07-CA-234085.

THE ISSUE

Whether a causal connection exists between the Employer's unfair labor practices and the employees' subsequent disaffection with the Union such that a question concerning representation is precluded at this time because the decertification petitions are tainted, and the petitions must be dismissed.

POSITIONS OF THE PARTIES

The Employer takes the position in the litigation of Case 07-CA-234085 that it has not committed unfair labor practices. The Union took the position in its filings in Case 07-RD-264330 that the petition should not proceed because the Employer has engaged in conduct that would interfere with employees' free choice in an election. The Petitioner addressed this issue by its correspondence to the Region dated August 25, 2020, wherein the Petitioner, citing Section 103.20(d) of the Board's Rules, indicated its belief that the Board's Rules require that an election proceed notwithstanding an unfair labor practice charge and that the impact, if any, of an unfair labor practice charge on the election is to delay when the election results are certified.

BOARD LAW AND ITS APPLICATION TO THIS CASE

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 Transportation Co.*, 333 NLRB 1392, 1392-1393 (2001), citing *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

Not every unfair labor practice will taint a union's subsequent loss of majority support or taint a decertification petition. There must be a causal connection. In cases involving a complaint alleging an 8(a)(5) refusal to recognize and bargain with an incumbent union, the causal relationship between the allegedly unlawful acts or acts and any subsequent loss of majority support or employee 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). 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 937, 939 (1993), *enfd.* 50 F.3d 1280 (4 Cir. 1995).

As to the first factor identified as a criterion under *Master Slack*, 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 *Hearst Corp.*, 281 NLRB 764, 764 (1986).⁴ 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). The Board has further found, in certain circumstances, that a nexus remains even if the unfair labor practices occur well before the disaffection, provided that those actions were both detrimental and lasted through the time the withdrawal petition was circulated. See, *D&D Enterprises*, 336 NLRB 850, 859 (2001); *Comau II* 358 NLRB 593 (2012)(reversed on other grounds)(9 month gap between unfair labor practices and disaffection); *Columbia Portland Cement Co. v. NLRB*, 979 F.2d 460 (1992)(almost a year between unfair labor practices and disaffection evidence.)

⁴ The Board has noted that *Hearst* applies when an employer has engaged in unfair labor practices directly related to an employee decertification effort, such as actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative. In those situations, the employer's unfair labor practices are not merely coincident with the decertification effort; rather, they directly instigate or propel it. *SFO Goodnite Inn SFO*, 357 NLRB 79 (2011). No evidence has been presented that the Employer in the instant matters engaged in unfair labor practices directly related to the decertification effort.

Here, while the alleged unfair labor practices began well before the showing of interest in support of the petition was gathered, the alleged unfair labor practices prompted a series of events that directly impacted unit employees and continue to do so to the present. Specifically, the Employer's alleged unlawful conduct created a dispute that led the union and the employees to engage in a strike which began on July 31, 2019, and is currently ongoing.⁵ The instant decertification petitions were circulated and filed in this atmosphere of the alleged unremedied unfair labor practices that undermined the bargaining relationship. The nature of these unfair labor practices has a tendency to undermine the relationship between the employees and the Union, and to cause employee disaffection for, and repudiation of the Union. Inasmuch as the unremedied unfair labor practices led to the strike that continues to date, I conclude that there is a close temporal proximity between the Employer's unlawful conduct and the circulation and filing of the petitions.

Even assuming the ongoing strike that resulted from the unremedied Employer unfair labor practices alleged in Case 07-CA-234085 is not to be considered in this factor, I still find that this factor is met. In this regard, the first signatures on the decertification petition in Case 07-RD-257830⁶ show a signature date of September 28, 2019, which is approximately 11 months after the alleged unlawful lockout began, 14 months after the alleged unlawful wage increase was implemented, which increase has yet to be rescinded, and 11 months after the alleged unlawful deductions began. The circumstances with respect to this factor are similar to those of *Denton County Electric Coop, Inc.*, 366 NLRB No. 103 (June 12, 2018), where the Board found that all the *Master Slack* factors were met. In that case, one unfair labor practice occurred 7 to 11 months before the petition, another, the unilateral elimination of raises, occurred 10 months from the petition, but was implemented throughout the year and a third unfair labor practice pertaining to handbook rules was ongoing. There, as here, the Board noted that these unfair labor practices were unremedied during the time that the decertification petition was being circulated. There, as here, the Employer made unilateral changes to employee wages, affecting all, or nearly all, unit employees, and "...each time the employees received a paycheck [demonstrating the unilateral change] they were reminded of the Union's ineffectiveness.." That the *Denton County* case involved a failure to implement raises and the instant matter involves a unilateral implementation of a wage increase, the message to unit employees is the same and suggests to employees that their union is irrelevant in preserving or increasing their wages.

The second *Master Slack* criterion, the nature of the Employer's unlawful acts, including the possibility of their detrimental or lasting effect on employees, is also satisfied. In addition to the effect of the lockout and subsequent strike mentioned above, the Employer is also alleged to have both deducted money from, and granted a wage increase to employees without any negotiation with and to the exclusion of the Union. The Board has found that such "bread and

⁵ In the investigation in Case 07-CB-247398, the undersigned concluded that the strike is motivated, at least in part, by the unfair labor practices alleged in Case 07-CA-234085.

⁶ The Petitioner relied upon the same showing of interest in Case 07-RD-264330 that was submitted for Case 07-RD-257830.

butter” issues can potentially have a lasting and pervasive negative effect on employees. *M&M Automotive Group*, 342 NLRB 1244 (2004).⁷ Specifically, the Board has found that unlawful unilateral changes demonstrate to employees that the employer is in a position to confer or withdraw economic benefits without regard to the presence of the union. Such a failure by the employer "to accord to the Union its rightful role to negotiate such programs for the employees necessarily tend[s] to undermine the Union's authority among the employees space between each period with erosion of majority status the probable result." *Guerdon Industries, Inc.*, 218 NLRB 658, 661 (1975). Thus, the Board has held that unilateral changes to wages and benefits are of "such a character as to either affect the Union's status, cause employee disaffection or improperly affect the bargaining relationship itself." *Guerdon*, supra at 661. The possibility of a detrimental or long-lasting effect on employee support for the union is particularly clear where unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages and benefits, as currently alleged in the complaint. *M & M Automotive Group, Inc.*, supra; *Penn Tank Lines*, supra. In the instant case, the Employer's unilaterally implemented changes are the type of conduct designed to invite employee unrest and disaffection from a union, particularly given that the lockout and the changes affected all of the Unit employees. Compare, e.g., *Lexus of Concord, Inc.*, 343 NLRB 851 (2004) (single employee transfer did not have a detrimental or long lasting effect on employees); *Champion Home Builders Co.*, 350 NLRB 62 (2007) (nature of the violations did not support a finding of taint because employer's confiscation of union materials from an employee workstation and a supervisor's threat to an employee were isolated events involving one employee each). I conclude that the Employer's alleged unlawful lockout and unilateral changes to the terms and conditions of employment without bargaining with the Union are the type of unlawful acts which have a detrimental and long-lasting effect on employee support for the Union.

Furthermore, the Board has consistently held that employers cannot, in circumstances such as the one in this case, rely on a decertification petition to withdraw recognition when support for the petition was gathered subsequent to an unlawful lockout. See, *Bunting Bearing Corp.*, 349 NLRB 1070 (2007)(the Board held that an Employer could not rely upon a decertification petition to withdraw recognition from a union when the petition was gathered in the aftermath of a lockout that lasted nearly a month). While the allegations in Case 07-CA-234085 do not allege a withdrawal of recognition, the analysis per *Master Slack* is the same in determining whether an unlawful lockout, and here a resulting strike, creates a lasting and detrimental effect on the unit employees, their relationship with the Union and the Union's status as the bargaining representative. I find that here, as in *Bunting Bearings* and similar cases, the alleged unlawful lockout was the genesis of the labor dispute which had a significant negative impact on employees and continues to do so presently. As such, I find the alleged unfair labor practices are the type to cause a lasting and detrimental effect on the employees and meet the second *Master Slack* factor.

⁷ See also, *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001) ("the possibility of a detrimental or long-lasting effect on employee support for the union is clear" where the employer's unlawful unilateral conduct, like here, "suggests to employees that their union is irrelevant in preserving or increasing their wages.")

Furthermore, per the third *Master Slack* factor, the unfair labor practices described herein are those that demonstrate the tendency to cause employee disaffection from the union. Here, the employee lockout, the changes to employee wages and benefits and the bad faith bargaining were not discrete or isolated violations but instead affected the entire bargaining unit. Compare, e.g., *Lexus Of Concord, Inc.*, 343 NLRB 851 (2004) (single employee transfer did not have detrimental or long lasting effect on employees); *Champion Home Builders Co.*, 350 NLRB 62 (2007) (nature of the violations did not support a finding of taint because employer's confiscation of union materials from an employee workstation and a supervisor's threat to an employee were isolated events involving one employee each). Further, the Board has held that the unilateral implementation of significant changes in terms and conditions of employment during negotiations, such as those described herein, have the tendency to undermine employees' confidence in the effectiveness of their selected collective-bargaining representative. *Vincent Industrial Plastics, Inc.*, 328 NLRB 300, 302 (1999). 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.*, supra at 765. In addition, the Board has held, "that it is the objective evidence of the commission of unfair labor practices that has the tendency to undermine the union, and not the subjective state of mind of the employees, that is the relevant inquiry." *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007), quoting *AT Systems West*, 341 NLRB 57, 60 (2004). Accordingly, I find that the Employer's conduct had a tendency to cause employee disaffection from the Union. As such, I find that the third factor identified as a criterion under *Master Slack* is satisfied.

As to the fourth factor, there is direct evidence of the effect of the Employer's alleged unlawful conduct on employee morale and membership in the union and significantly impacted the employees' organizational activities and desire to maintain membership in the union. As previously stated, the administrative investigation of the petition revealed that employees chose to sign the decertification petition in order to abandon the ongoing strike and return to work without consequence. The investigation also revealed that the union enjoyed support before the alleged unfair labor practices occurred, but that it significantly dissipated after and as the effect of those unremedied actions. An employee testified in a sworn and signed affidavit that he supported the Union prior to the lockout and would not have supported a decertification effort but for the lockout and subsequent strike. Multiple employees testified in sworn and signed affidavits that they supported the decertification effort because of the economic hardship caused by the ongoing strike. While some employees may have been motivated to remove the Union for reasons other than the unfair labor practices described herein, 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.*, supra at 765. The Board has further stated, "it 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 Transportation Co.*, 329 NLRB 990, 995, fn 26 (1999). The evidence gathered during the administrative investigation of the petitions reveals that the lockout and resultant strike have

created a situation whereby employees feel that the only way to return to work and receive pay is to abandon the Union. Such evidence demonstrates that the alleged unfair labor practices had a tendency to and did cause disaffection. Because there is direct evidence of causality as well as evidence that the unfair labor practices objectively would tend to impact employee morale and support for the Union, I find the fourth factor identified as a criterion under *Master Slack* is satisfied.

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 lockout and unilateral implementation of changes to employees' terms and conditions of employment are the type of unlawful acts which have a detrimental and long-lasting effect on employee support for the Union, (3) the Employer's lockout and unilateral changes to employees' wages and benefits had a tendency to cause employee disaffection from the Union, and (4) there is direct evidence 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 petitions should be dismissed, subject to reinstatement after the final disposition of Case 07-CA-234085.⁸

I further find that there is no need for an evidentiary hearing to establish a causal relationship between the alleged unlawful conduct by the Employer and employee disaffection. The Board has held that a hearing under *Saint Gobain Abrasives*, 342 NLRB 434 (2004), is not required in every representation case. See *NTN-Bower Corporation*, 10-RD-1504 (unpublished May 20, 2011) (denying review of Regional Director's decision to dismiss a petition based on the *Master Slack* causation factors without a *Saint Gobain* hearing) and *Modern Concrete Products Inc.*, 12-RD-1057 (unpublished December 30, 2009) (denying review of Acting Regional Director's decision to dismiss a petition after meritorious 8(a)(5) violations and without a *Saint Gobain* hearing). Inasmuch as the Employer's unfair labor practices affected the entire unit and had a detrimental and long-lasting effect on employees' relationship with the Union, I find that no evidentiary hearing is necessary to establish the causal connection.

Further, the Petitioner asserts that the Board's Rules require that an election proceed in Case 07-RD-264330 notwithstanding an unfair labor practice charge and that the impact, if any, of an unfair labor practice charge on the election is to delay when the election results are certified. My decision herein does not implicate the blocking charge policies as described in Section 103.20 of the Board's Rules inasmuch as I have determined a question concerning

⁸ The decertification petitioner will be made a party in interest in the unfair labor practice proceeding in Case 07-CA-234085, with an interest limited solely to receipt of a copy of the order or other document that operates to finally dispose of the proceeding.

representation cannot be raised at this time because of my finding that the Employer's unfair labor practices had a causal connection to the decertification petitions.

IT IS ORDERED that the petitions are dismissed.

RIGHT TO REQUEST REVIEW – CASE 07-RD-257830

Right to Request Review: Pursuant to Section 102.71 of the National Labor Relations Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. The request for review must contain a complete statement of the facts and reasons on which it is based.

Procedures for Filing Request for Review: A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business (**5 p.m. Eastern Time**) on November 23, 2020, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on November 23, 2020.

Procedures for Filing Request for Review: Pursuant to Section 102.5 of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (**E-Filing**) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. A request for review filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. The request for review must comply with the formatting requirements set forth in Section 102.67(i)(1) of the Board's Rules and Regulations. Detailed instructions for using the NLRB's E-Filing system can be found in the [E-Filing System User Guide](#).

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

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of

such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

RIGHT TO REQUEST REVIEW – CASE 07-RD-264330⁹

Pursuant to Section 102.71¹⁰ of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A copy of the request for review must be served on each of the other parties as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. The request for review must contain a complete statement of the facts and reasons on which it is based.

Procedures for Filing Request for Review: Pursuant to Section 102.5 of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. A request for review filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. The request for review must comply with the formatting requirements set forth in Section 102.67(i)(1) of the Board's Rules and Regulations. Detailed instructions for using the NLRB's E-Filing system can be found in the [E-Filing System User Guide](#).

A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business (**5 p.m. Eastern Time**) on **November 24, 2020**, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time on November 24, 2020**.

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The

⁹ Case 07-RD-264330 was filed after the Board's rulemaking changes that were made effective on May 31, 2020, as well as additional rulemaking changes that were made effective on July 31, 2020.

¹⁰ Although the parties participated in a pre-election hearing, after which I issued a Decision and Direction of Election, such Decision and Direction and of Election is vacated by this administrative determination. Thus, it is the rules of Section 102.71 that govern this decision, and not Section 102.67.

Rieth-Riley Construction Co., Inc.
Cases 07-RD-257830
07-RD-264330

responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

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

Any party may, within 5 business days after the last day on which the request for review must be filed, file with the Board a statement in opposition to the request for review. An opposition must be filed with the Board in Washington, DC, and a copy filed with the Regional Director and copies served on all the other parties. The opposition must comply with the formatting requirements set forth in §102.67(i)(1). Requests for an extension of time within which to file the opposition shall be filed pursuant to §102.2(c) with the Board in Washington, DC, and a certificate of service shall accompany the requests. The Board may grant or deny the request for review without awaiting a statement in opposition. No reply to the opposition may be filed except upon special leave of the Board.

Dated: November 9, 2020



Terry Morgan, Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 05-200
Detroit, Michigan 48226

EXHIBIT 3

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RIETH-RILEY CONSTRUCTION CO.,
INC.

Employer

and

Case 07-RD-257830

RAYALAN KENT

Petitioner

and

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE), AFL-CIO

Union

ORDER

The Petitioner's and Employer's Requests for Review of the Acting Regional Director's determination to hold the petition in abeyance are denied as they raise no substantial issues warranting review.¹

JOHN F. RING,

CHAIRMAN

MARVIN E. KAPLAN,

MEMBER

WILLIAM J. EMANUEL,

MEMBER

Dated, Washington, D.C., June 8, 2020.

¹ In denying review, we find that the Acting Regional Director's decision to hold the petition in abeyance was permissible under the representation-case procedures currently in effect, although we note that the Acting Regional Director's letter to the parties inaccurately referenced the charge in Case 07-CA-256735, which was withdrawn the day before the blocking determination issued. We observe, however, that the Acting Regional Director's decision in this regard raises many of the concerns that led the Board to recently adopt changes to the blocking charge policy. See 85 Fed. Reg. 18366 (Apr. 1, 2020). Those amendments are not effective until July 31, 2020, however. 85 Fed. Reg. 20156 (Apr. 10, 2020).

EXHIBIT 4



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 05-200
Detroit, MI 48226

Agency Website: www.nlr.gov
Telephone: (313)226-3200
Fax: (313)226-2090



Download
NLRB
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August 10, 2020

URGENT

raykent65@yahoo.com

Rayalan A. Kent
1280 Russell Lea Drive
Charlotte, MI 48813

Re: Rieth-Riley Construction Co., Inc.
Case 07-RD-264330

Dear Mr. Kent:

The enclosed petition that you filed with the National Labor Relations Board (NLRB) has been assigned the above case number. This letter tells you how to contact the Board agent who will be handling this matter; explains your obligation to provide the originals of the showing of interest and the requirement that you complete and serve a Responsive Statement of Position form in response to each timely filed and served Statement(s) of Position; notifies you of a hearing; describes the employer's obligation to post and distribute a Notice of Petition for Election, complete a Statement of Position and provide a voter list; requests that you provide certain information; notifies you of your right to be represented; and discusses some of our procedures including how to submit documents to the NLRB.

Investigator: This petition will be investigated by Field Examiner Andrew Hampton whose telephone number is (616)930-9174. The mailing address is 110 Michigan St NW Ste 299, Grand Rapids, MI 49503-2313. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. The Board agent may also contact you and the other party or parties to schedule a conference meeting or telephonic or video conference for some time before the close of business the day following receipt of the final Responsive Statement(s) of Position. This will give the parties sufficient time to determine if any issues can be resolved prior to hearing or if a hearing is necessary. If the agent is not available, you may contact Resident Officer Colleen J. Carol whose telephone number is (616)930-9161. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Showing of Interest: If the Showing of Interest you provided in support of your petition was submitted electronically or by fax, the original documents which constitute the Showing of Interest containing handwritten signatures must be delivered to the Regional office within **2 business days**. If the originals are not received within that time the Region will dismiss your petition.

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **9:30 a.m., on Friday, August 28, 2020 by ZOOM Hearing**, if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, we will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party showing good cause, the regional director may postpone the hearing. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Posting and Distribution of Notice: The Employer must post the enclosed Notice of Petition for Election by **Monday, August 17, 2020** in conspicuous places, including all places where notices to employees are customarily posted. If it customarily communicates electronically with its employees in the petitioned-for unit, it must also distribute the notice electronically to them. The Employer must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Failure to post or distribute the notice may be grounds for setting aside the election if proper and timely objections are filed.

Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the Employer and the Union are required to complete the enclosed Statement of Position form, have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition by **noon Eastern Time on Thursday, August 20, 2020**. The Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the Employer contends that the proposed unit is inappropriate, it must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The Employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit.

Required Responsive Statement of Position (RSOP): In accordance with Section 102.63(b) of the Board's Rules, following timely filing and service of a Statement of Position, the petitioner is required to complete the enclosed Responsive Statement of Position form addressing issues raised in any Statement(s) of Position. The petitioner must file a complete, signed RSOP in response to all other parties' timely filed and served Statement of Position, with all required attachments, with this office and serve it on all parties named in the petition such that it is received by them by **noon Eastern Time on Tuesday, August 25, 2020**. This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form must be e-Filed, but unlike other e-Filed documents, will not be timely if filed on the due date but after noon**

Eastern Time. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

Failure to Supply Information: Failure to supply the information requested by the RSOP form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Voter List: If an election is held in this matter, the Employer must transmit to this office and to the other parties to the election, an alphabetized list of the full names and addresses of all eligible voters, including their shifts, job classifications, work locations, and other contact information including available personal email addresses and available personal home and cellular telephone numbers. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. The list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 days after the date when the Employer must file the voter list with the Regional Office. However, a petitioner and/or union entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483, which is available on the NLRB's website or from an NLRB office. A waiver will not be effective unless all parties who are entitled to the voter list agree to waive the same number of days.

Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

- (a) The correct name of the Union as stated in its constitution or bylaws.
- (b) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any employees in the petitioned-for unit.
- (c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.
- (d) The name and contact information for any other labor organization (union) claiming to represent or have an interest in any of the employees in the petitioned-for unit and for any employer who may be a joint employer of the employees in the proposed unit. Failure to disclose the existence of an interested party may delay the processing of the petition.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before the NLRB. In view of our policy of processing these cases expeditiously, if you wish to be represented, you should obtain representation promptly. Your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlr.gov, or from an NLRB office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any “inside knowledge” or favored relationship with the NLRB. Their knowledge regarding this matter was obtained only through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Pursuant to Section 102.5 of the Board’s Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency’s web site (www.nlr.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission. The Region will make its determinations solely based on the documents and evidence properly submitted. All evidence submitted electronically should be in the form in which it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the petition.

Information about the NLRB and our customer service standards is available on our website, www.nlr.gov, or from an NLRB office upon your request. We can provide assistance

for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

A handwritten signature in black ink that reads "Terry Morgan". The signature is written in a cursive style with a large, sweeping initial "T".

TERRY MORGAN
Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)
6. Responsive Statement of Position (Form 506)

cc: Amanda K. Freeman, Staff Attorney
National Right to Work Legal Defense
Foundation, Inc.
8001 Braddock Road
Suite 600
Springfield, VA 22160

EXHIBIT 5

Amanda K. Freeman

From: Amanda K. Freeman
Sent: Thursday, August 13, 2020 12:14 PM
To: Hampton, Andrew (Andrew.Hampton@nlrb.gov)
Cc: Judith Basinger (jab@nrtw.org)
Subject: RE: RD Petition 07-RD-257830

Drew,

In light of our conversation this afternoon that the new rules will apply to Mr. Kent's second RD Petition, Case No. 07-RD-264330, regardless of whether the first RD Petition, Case No. 07-RD-257830, is withdrawn, Mr. Kent is not withdrawing his first decert petition, Case No. 07-RD-257830, at this time and asks that you disregard the below e-mail.

Amanda

AMANDA K. FREEMAN

Staff Attorney (*admitted and licensed to practice only in Virginia*)
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600, Springfield, VA 22151
P: [\(703\) 321-8510](tel:7033218510) | F: [\(703\) 321-9319](tel:7033219319)
E-mail: akf@nrtw.org | Web: www.nrtw.org

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From: Amanda K. Freeman
Sent: Wednesday, August 12, 2020 5:29 PM
To: Hampton, Andrew (Andrew.Hampton@nlrb.gov) <Andrew.Hampton@nlrb.gov>
Cc: Judith Basinger (jab@nrtw.org) <jab@nrtw.org>
Subject: RD Petition 07-RD-257830

Drew,

In light of his new RD petition, Case No. 07-RD-264330, and the Region's statement that it is handling this new RD petition under the new rules, Mr. Kent is withdrawing his first RD petition, which is Case No. 07-RD-257830.

Please let me know if you need anything else on this.

Amanda

AMANDA K. FREEMAN

Staff Attorney (*admitted and licensed to practice only in Virginia*)
c/o National Right to Work Legal Defense Foundation, Inc.

8001 Braddock Road, Suite 600, Springfield, VA 22151

P: [\(703\) 321-8510](tel:(703)321-8510) | F: [\(703\) 321-9319](tel:(703)321-9319)

E-mail: akf@nrtw.org | Web: www.nrtw.org

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EXHIBIT 6

Nickelhoff & Widick, PLLC

ATTORNEYS AND COUNSELORS AT LAW

Andrew Nickelhoff | Marshall J. Widick
OF COUNSEL Amy Bachelder | John R. Runyan, Jr.

☎ Direct Dial No. (313) 496-9408
Facsimile Number: (313) 965-4602
Email: abachelder@michlabor.legal

August 25, 2020

Terry Morgan, Regional Director
National Labor Relations Board
477 Michigan Ave Room 5-200
Detroit, MI 48226

Efiled

**Re: Rieth-Riley Construction Co., Inc.
Case 07-RD-264330**

Dear Ms. Morgan:

The hearing in the above petition is currently scheduled for Friday, August 28, 2020.

I have just been advised by Drew Hampton of your staff that the Region is conducting an investigation of the effects of the pending unfair labor practices on the above case.

Accordingly I request a postponement of the August 28, 2020 hearing until such time as the investigation has been concluded as it may have an impact on the decertification petition proceeding forward.

I have sent an email to Amanda Freeman and Alex Preller and Ryan Funk describing my intention to request this postponement, soliciting their positions. Ms. Freeman opposes the request. I have not yet received a response from Mr. Preller or Mr. Funk.

Accordingly, I request that the hearing scheduled for August 28, 2020 be postponed until the investigation has been completed. A copy of this letter has been sent to the parties as indicated below.

Thank you for your consideration of this request.

Yours truly,



Amy Bachelder

333 West Fort Street | Suite 1400 | Detroit, Michigan 48226
PHONE 313-496-9515 | FAX 313-965-4602

AMY BACHELDER, being first duly sworn, deposes and says that on the 25th day of August 2020, she served a copy of Respondent's Request for Postponement upon the following via email:

Alex Preller, Esq.:

Via email: alex.preller@faegredrinker.com

Ryan J. Funk, Esq.:

Via email: ryan.funk@faegredrinker.com

Amanda Freeman, Esq.:

Via email: akf@nrtw.org

By: 

AMY BACHELDER
NICKELHOFF & WIDICK, PLLC
Attorneys for Respondent
333 W Fort, Suite 1400
Detroit, MI 4826
Telephone (313) 496-9408
Email: abachelder@michlabor.legal

Dated: August 25, 2020

EXHIBIT 7



NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 BRADDOCK ROAD, SUITE 600, SPRINGFIELD, VIRGINIA 22160

AMANDA K. FREEMAN

Staff Attorney

Admitted & Licensed in Virginia Only

Phone: (703) 321-8510

Fax: (703) 321-9319

Email: akf@nrtw.org

August 25, 2020

Via E-filing

Terry Morgan, Regional Director
National Labor Relations Board
477 Michigan Ave., Room 5-200
Detroit, MI 48226

Re: *Rieth-Riley Construction Co., Inc.*,
Case No. 07-RD-264330

Dear Ms. Morgan:

This letter is in response to Ms. Bachelder's August 25, 2020 request that the August 28, 2020 pre-election hearing in the above case be postponed based on the Region's investigation of any potential effect the pending unfair labor practice charges have on the decertification petition.

Mr. Kent strongly opposes this request, which is an improper attempt to delay the decertification election. Regardless of the words the Union uses, it is actually requesting that its unfair labor practice charges *block* the election process and that the hearing be held indefinitely pending the Region's investigation. Boiled down, the Union is asking that the Board's old "blocking charge" rules be applied to deny Mr. Kent and his fellow employees their statutory right to an election. Such request, however, is not permitted under the Board's new rules. NLRB Rules & Regs. § 103.20, et seq.

Under the new rules, the presence of an unfair labor practice charge does not block or delay an election from actually taking place. Nor can a *Master Slack*¹ investigation be used to block an election. The point of a *Master Slack* investigation is to determine if an unfair labor practice charge should *block* an election from taking place. The rules, however, require that an election proceed notwithstanding an unfair labor practice charge and that the impact, if any, of an unfair labor practice charge on the election is to delay when the election results are certified. NLRB Rules & Regs. § 103.20(d).

Rather than comply with the new rules, the Union is attempting to further delay Mr. Kent's and his fellow employees' exercise of their statutory rights. The Region

¹ *Master Slack Corp.*, 271 NLRB 78 (1984)

should not permit itself to be enlisted in the Union's effort to delay the election in contravention of the new rules.

For these reasons, Mr. Kent asks that you deny Ms. Bachelder's request and proceed with the election as the new rules require.

Very truly yours,

A handwritten signature in blue ink that reads "Amanda K. Freeman". The signature is written in a cursive style with a large initial 'A'.

Amanda K. Freeman

Cc: Amy Bachelder (abachelder@michlabor.legal)
Alexander E. Preller (alex.preller@faegredrinker.com)
Ryan J. Funk (ryan.funk@faegredrinker.com)

EXHIBIT 8

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

RIETH-RILEY CONSTRUCTION CO.,)	
INC,)	
)	
Employer,)	
)	
and)	Case No. 07-RD-264330
)	
LOCAL 324, INTERNATIONAL UNION)	
OF OPERATING ENGINEERS (IUOE),)	
AFL-CIO,)	
)	
Respondent.)	

**RIETH-RILEY CONSTRUCTION CO., INC'S OPPOSITION TO LOCAL 324'S
REQUEST FOR POSTPONEMENT OF THE PRE-ELECTION HEARING**

Rieth-Riley Construction Co., Inc. ("Rieth-Riley") hereby opposes Local 324, International Union of Operating Engineers (IUOE), AFL-CIO ("Local 324")'s request for a postponement of the pre-election hearing based on the Regional Director's investigation of the effect of pending unfair labor practice charges on the pending decertification petition. In support thereof, Rieth-Riley states as follows:

Local 324's postponement request fails the "good cause" requirement of NLRB Rules and Regulations ("Rule") 102.63(a)(1) for at least three reasons. First, the NLRB's blocking charge policy currently in effect, Rule 103.20, does not permit any delay to an election based on pending unfair labor practice charges. At *most*, if there are charges relating *specifically* to the manner in which the petition was filed (and here, there are none), the final certification of results or certification of representation cannot be issued until the charges are resolved, per Rule 103.20(d). Accordingly, it likewise cannot serve as a basis to delay a pre-election hearing; to hold otherwise would be to improperly re-invigorate the now-expired version of the blocking

charge policy, and hold this petition in *de facto* abeyance against the explicit will of the Board, which finished promulgating the current blocking charge rule not even a month ago.

Second, to the extent the adequacy of the showing of interest is the underlying substantive issue (as was communicated to Rieth-Riley's counsel by Field Examiner Andrew Hampton), the appropriate time frame for conducting this investigation has already expired. NLRB Casehandling Manual Part Two (CHM) ("R-Case Manual") Section 11020 expressly notes: "[I]t is essential that a check of the adequacy of the showing of interest (Sec. 11030) be performed in every case shortly after the filing of the petition, in order that issues concerning the showing of interest will be resolved before the case progresses beyond the initial stages." Indeed, Section 11028.1 further requires that the Union (as the party alleging misconduct) "must take early action on raising such allegations, in a timely manner relative to gaining knowledge of the alleged conduct In the event a party fails to promptly present such evidence after raising the allegations, the regional director may regard the evidence as untimely filed and is not required to consider it, absent unusual circumstances." Yet here, this issue is being raised just three days before the pre-election hearing, as to the *second sequential* decertification petition by the same Rieth-Riley employee. If the Union wanted to timely allege taint, it should have done so "shortly after" March 10, 2020, when the Petitioner first filed a decertification petition for this bargaining unit (presumably using the same showing of interest now at issue). This is therefore not an appropriate consideration at this time, especially with respect to further delaying the proceedings.

Third, NLRB guidance is *profuse* in its instructions that concerns regarding the adequacy of a showing of interest are irrelevant to the pre-election hearing process. *See, e.g.*, R-Case Manual Section 11021 ("While any information offered by a party bearing on the validity and

authenticity of the showing should be considered, no party has a right to litigate the subject, either directly or collaterally, including during any representation hearing that may be held.”); *Id.* at Section 11028.3 (“A challenge to the validity or authenticity of the showing of interest may not be litigated at a hearing”); *Id.* at Section 11184 (“This should be made clear to any party at a hearing that seeks to attack the interest showing of any involved union, whether petitioner or intervenor. Argument at the hearing on the adequacy of the interest is not permitted . . . Evidence of interest (or of revocation) should never be introduced or received in evidence.”); *Id.* at Section 11184.1 (“If a party seeks at the hearing to introduce evidence of alleged fraud, misconduct, supervisory taint, or forgery in obtaining the showing of interest, the line of questioning should not be permitted. . . . **The hearing should not be interrupted.**) (emphasis added); *accord* NLRB Outline of Law and Procedure In Representation Cases (“R-Case Outline”) Section 5-900. Considering that this investigation thus has no place within the pre-election hearing, it also cannot serve as a basis to postpone it.

In short, there is no Board law or Agency guidance supporting a postponement of the pre-election hearing on the basis of this investigation. Should the Regional Director determine, despite this total lack of authority, to nonetheless postpone the election beyond August 28, 2020, Rieth-Riley shall motion for the General Counsel’s office to assume direct oversight of this petition pursuant to Rule 102.72, on the grounds that such intervention is “necessary in order to effectuate the purposes of the Act.”

Respectfully submitted,

FAEGRE DRINKER RIDDLE & REATH LLP

By: 

Stuart R. Buttrick

Ryan J. Funk

Alexander E. Preller

300 N. Meridian Street, Suite 2500

Indianapolis, IN 46204

Telephone: 317-237-0300

stuart.buttrick@faegredrinker.com

ryan.funk@faegredrinker.com

alex.preller@faegredrinker.com

Counsel for Rieth-Riley Construction Co.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion has been served by electronic mail on this 25th day of August, 2020, upon the following:

Amy Bachelder, Esq.
Nickelhoff & Widick, PLLC
333 W. Fort Street, Suite 1400
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EXHIBIT 9

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN**

RIETH-RILEY CONSTRUCTION CO., INC.

Employer

and

RAYALAN A. KENT

Petitioner

Case 07-RD-264330

and

**LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE), AFL-CIO¹**

Union

DECISION AND DIRECTION OF ELECTION

On a petition duly filed under Section 9(c) of the National Labor Relations Act (Act), a hearing on this petition was conducted before a hearing officer of the National Labor Relations Board (Board) on the sole issue of whether the Region should conduct an election for certain employees of the Employer, who are employed at jobsites throughout the State of Michigan, by manual or mail ballot. The Employer and Petitioner argue a manual election is appropriate and it can be conducted safely despite the continuing COVID-19 pandemic.² The Union contends the petitioned-for employees are geographically scattered, and that the ongoing strike, which involves petitioned-for employees, and the COVID-19 pandemic support conducting a mail ballot election.

The Employer is engaged in road construction at various work projects throughout the State of Michigan. The Petitioner seeks to remove the Union as the exclusive collective-bargaining representative of a unit of operating engineers employed by the Employer. At the hearing, the parties stipulated to the following appropriate unit of employees (Unit):³

¹ Parties' names appear as stipulated during the hearing. The Employer moved to amend the petition and all the formal papers to reflect the correct names and I hereby grant that motion.

² Throughout this decision, the terms "COVID-19," "Covid," and "coronavirus" are used interchangeably to describe the novel coronavirus.

³ I find that the Unit is coextensive with the existing bargaining unit as described in the expired MITA contract. *Mo's West*, 283 NLRB 130, 130 (1987), citing *Campbell Soup Co.*, 111 NLRB 234 (1955); see also, *USC Norris Cancer Hospital*, 21-RD-002890 (unpublished 2012).

All full-time and regular part-time employees employed in the State of Michigan by Rieth-Riley Construction Co., Inc. for airport construction work (exclusive of building), railroad track and trestle construction (exclusive of such work inside the property line of an industrial plant covered by the Associated General Contractors of Michigan, Detroit Metro CBA) and all highway work including roads, streets, bridge construction, parking lots, and asphalt plants, in the following classifications: asphalt plant operator, crane operator, dragline operator, shovel operator, locomotive operator, paver operator (5 bags or more), elevating grader operator, pile driving operator, roller operator (asphalt), blade grader operator, trenching machine operator (ladder or wheel type), auto-grader, slip form paver, self-propelled or tractor drawn scraper, conveyor loader operator (Euclid type), endloader operator (1 yard capacity and over), bulldozer, hoisting engineer, tractor operator, finishing machine operator (asphalt), mechanic, pump operator (6" discharge or over, gas diesel, powered or generator of 300 amp or larger), shouldering or gravel distributing machine operator (self-propelled), backhoe (with over 3/8 yard bucket), side boom tractor (type D-4 equivalent or larger), tube finisher (slip form paving), gradall (and similar type machine), asphalt paver (self-propelled), asphalt planer (self-propelled), batch plant (concrete-central mix), slurry machine (asphalt), concrete pump (3" and over), roto mill, swinging boom truck (over 12-ton capacity), hydro demolisher (water blaster), farm type tractor with attached pan; but excluding guards and supervisors as defined in the Act, and all other employees.

Although election details, including the type of election to be held, are nonlitigable matters left to my discretion,⁴ the parties were permitted to present their positions, as well as witnesses and documentary evidence, and file post-hearing briefs regarding the mechanics of this election. I have carefully considered the record, including those positions and arguments, and for the reasons discussed below, I find that a prompt mail-ballot election is appropriate in this case.

I. BACKGROUND

The Employer is engaged in road construction and has work projects throughout the State of Michigan with “the exception of the metro-Detroit area and for the most part, the Upper Peninsula,” according to its Regional Vice President for Michigan Operations (Vice President).⁵ The Employer maintains 13 asphalt plants and “probably nine different offices” in Michigan. According to the Vice President, the Employer’s operating engineers have historically commuted between 30 and 120 minutes to their jobsites, which is a common practice for the construction industry in Michigan. Some, but not all, of those employees report to various facilities to retrieve vehicles and equipment, while others simply report directly to their respective worksites. The employees primarily work one daytime shift starting at daylight and ending between 8 to 14 hours later, depending on the project.

⁴ Sec. 102.66(g)(1) of the Board’s Rules and Regulations. See also, Representation-Case Procedures, 84 Fed. Reg. 69524, 69544 fn. 82 (2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)).

⁵ The Employer’s Vice President was the only witness presented at the hearing.

The Employer has recognized the Union as the exclusive collective-bargaining representative of the Unit based on Section 9(a) of the Act since 1993. The Employer and Union were parties to a series of multiemployer collective-bargaining agreements including, most recently, the Michigan Infrastructure and Transportation Association Agreement (MITA) that expired in 2018.

Around July 2019, employees in the petitioned-for unit went on strike. About half of the petitioned-for employees remained on strike as of the date of the preelection hearing in this case.⁶

II. POSITIONS OF THE PARTIES

A. The Employer⁷

The Employer proposes a manual election consisting of 2-hour sessions, from 4:30 p.m. to 6:30 p.m., on September 23 and 24 in the repair and wash bays at its facilities in Grand Rapids, Kalamazoo, Mason, and Petoskey, for a total of eight 2-hour sessions. It contends that despite the multiple facilities and transient nature of the work, its proposal would appropriately provide all eligible employees with the opportunity to vote. The Vice President, the Employer's only witness, testified that jobsites for those facilities were "no more than 45 miles in any direction," and he guessed that 20% of employees need to retrieve company vehicles from those facilities before going to the jobsites. He also estimated that employees would start work around 7:00 a.m. to 7:20 a.m. on September 23 and 24, then work between 8 and 14 hours.⁸ The record does not indicate whether "starting" work is retrieving a company vehicle from a facility or reporting to a jobsite or both. In either event, according to the Employer, its proposed plan

⁶ The Petitioner previously filed a petition to decertify the Union in Case 07-RD-257830; however, that petition is currently blocked by Case 07-CA-234085, where Complaint issued for unfair labor practices violating Section 8(a)(5) of the Act under the Board's previous blocking policy. NLRB Casehandling Manual (Part Two) Representation Proceedings, Secs. 11730-11734 (2017). The instant petition was filed on August 7, 2020, after the Board's new blocking charge rule took effect on July 31. See Sec. 103.20 of the Board's Rules and Regulations.

⁷ The Employer also argues the format for a Board-conducted election is a litigable issue and burdens of proof apply. In support of its argument, the Employer cites *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 fn. 1 (1998) (Hurtgen and Brame, concurring). However, the *Nouveau Elevator* Board majority simply stated that "the applicable presumption favors a manual, not a mail-ballot election" (emphasis added) and made clear that "[i]t is well established that a Regional Director has broad discretion in determining the method by which an election is held, and whatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown." *Id.* at 471 (citing *San Diego Gas & Electric*, 325 NLRB 1143, 1144 fn. 4 (1998); *National Van Lines*, 120 NLRB 1343, 1346 (1958)). The only subsequent mention of a "presumption" regarding the method of election that I have found is in an unpublished dissenting opinion referencing *Nouveau Elevator*. See *Covanta Honolulu Resource Recovery Venture*, 20-RC-140392 at fn. 1 (unpublished 2015) (Member Miscimarra, dissenting). In fact, myriad Board decisions highlight the Regional Director's discretion to determine the details of the election and, *once the decision has been made*, the burden lies on the party seeking to alter the determination by showing the Regional Director abused her discretion.

⁸ While the Employer stated nightshift work happens occasionally, the Vice President testified that he did not believe such work would materialize before the Employer's proposed manual election dates.

would provide all eligible voters a reasonable opportunity to participate and cast a ballot in person.

While no arguments were made nor evidence presented at the hearing regarding the issue, the Employer further argues in its post-hearing brief that a manual election is necessary to ensure that Board personnel supervise the casting of ballots to minimize the risk of coercion by Union personnel. It specifically points to allegations of union misconduct in the past, some of which is the subject of ongoing unfair labor practice litigation. It argues that those prior instances of alleged misconduct render a mail-ballot election inappropriate. It cites *Mission Industries*, 283 NLRB 1027 (1987) (mail-ballot elections are “more vulnerable to the destruction of laboratory conditions than are manual elections, due to the absence of direct Board supervision over the employees’ voting.”)

Lastly, the Employer maintains that the ongoing pandemic does not present an obstacle to safe in-person voting, as it follows the CDC guidelines and is willing to abide by the Suggested Manual Election Protocols memorandum issued by General Counsel Peter Robb (see GC 20-10, below.) It argues that it will hold the elections in empty shipping bays that will be cleared and cleaned prior to the election and will provide ample space to maintain social distancing. As the bays contain separate entrances and exit garage doors, the Employer notes there is ample ventilation and air circulation and the opportunity for one-way voter traffic. It also offers the option of conducting the election via “drive-through voting.”⁹

According to the Vice President, the Employer has a COVID-19 preparedness and response plan that mirrors interim guidance from the United States Centers for Disease Control and Prevention (CDC) updated on May 6, 2020.¹⁰ The Employer introduced the CDC’s interim guidance as evidence but did not provide its preparedness and response plan. The Employer’s supervisors give weekly safety briefings, known as “toolbox talks,” where its response and preparedness plan has been discussed. Specifically, the Employer regularly instructs employees that they should be self-assessing for COVID-19 before coming to work, staying home if they have symptoms, and stressing the importance of personal protective equipment (PPE) and good hygiene. The record does not disclose if the Employer regularly provides PPE to the employees or requires its use. The Employer further offers to quarantine the polling places for 14 days prior to a manual election and/or conduct the election via “drive-through voting.” The Employer further commits to abiding by the standards set out in GC 20-10 and to provide the requisite certifications, sanitizing procedures, space and equipment necessary for in-person voting, including plexiglass, glue sticks, tables, floor markings and disposable single-use pencils.

The Employer does not test its employees for COVID-19 or screen for symptoms, relying on employee self-reporting and supervisor observation. Since March, the Employer knows of at

⁹ No specific details were provided by the Employer as to what was meant by “drive through voting” other than the bays suggested for use as polling sites were so large that they could accommodate voters driving in and casting their ballots from their cars. There was no evidence or guidance from the Employer as to how this would conform with the Board’s standard procedures regarding manual elections.

¹⁰ All dates are in 2020 unless otherwise indicated.

least three workers who have tested positive. The most recent tested positive the week before the preelection hearing (with his last day of work on August 19) and another tested positive just after July 4. At least two other employees missed work because of symptoms but tested negative. None of the confirmed positive cases were in the petitioned-for unit, but ongoing contact tracing revealed the most recent positive person may have been in contact with a Unit employee. It is unknown how many nonemployees or individuals employed by other companies work at the jobsites with the petitioned-for employees.

B. The Petitioner

The Petitioner asserts a manual election, including a drive-through election, as detailed by the Employer, is appropriate because the four proposed facilities are “well within the distance employees already drive for work.” It contends the ongoing 13-month strike has no impact on the propriety of a manual election because there is no active picketing so no employees would have to cross a picket line to vote. It also notes all parties, particularly the Employer, will comply with the suggested election protocols in GC 20-10.

C. The Union

The Union argues the instant petition should be blocked by “the outstanding unfair labor practices which are being litigated ... in Case 07-CA-234085” and, if an election is ordered, a certification of results should not issue pursuant to the Board’s blocking charge rule, which took effect on July 31. See Sec. 103.20 of the Board’s Rules and Regulations;¹¹ see also 85 Fed. Reg. 20156 (2020) (postponing the effective date of the blocking charge rule to July 31).

The Union maintains a mail-ballot election is appropriate both because the employees are scattered geographically and because there is an ongoing strike. It argues petitioned-for employees work on jobsites throughout the Michigan that may be hundreds of miles from any of the Employer’s proposed facilities and that striking employees may have temporary interim employment that would restrict their ability to vote during the sessions proposed by the Employer. It also highlights that the extraordinary circumstances of the COVID-19 pandemic further support a mail ballot, as the Employer conducts only minimal monitoring of its current workforce while striking employees are not monitored at all by the Employer.

III. BOARD LAW AND ITS APPLICATION TO THE INSTANT CASE

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board, in turn, has delegated the discretion to determine the arrangements for an election to Regional Directors. *Ceva Logistics US*, 357 NLRB 628, 628

¹¹ Subsection (d) states: “For all charges described in paragraphs (b) or (c) of this section, the certification of results (including, where appropriate, a certification of representative) shall not issue until there is a final disposition of the charge and a determination of its effect, if any, on the election petition.” However, the Board has not indicated whether Regional Directors, Administrative Law Judges, or the Board itself will make the determination of a charge’s effects on an election petition.

(2011) (cases cited therein); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) (citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Halliburton Services*, 265 NLRB 1154, 1154; *National Van Lines*, 120 NLRB 1343, 1346 (1958)). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas* at 1144-1145. “[W]hatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown.” *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) (citing *San Diego Gas* at 1144 fn. 1; *National Van Lines* at 1346).

The Board’s longstanding policy is that elections should, as a general rule, be conducted manually. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2.¹² However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. This includes a few specific situations addressed by the Board, including where voters are “scattered” over a wide geographic area, “scattered” in time due to employee schedules, in strike situations, or other “extraordinary circumstances.” In exercising discretion in such situations, a Regional Director should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and what constitutes the efficient use of Board resources. *San Diego Gas*, above at 1145.

The instant case satisfies not one but two of the specific situations that normally suggest the use of mail ballots in *San Diego Gas*. First, the approximately 161 eligible voters are scattered geographically throughout Michigan. The Employer’s Vice President testified that six of its 13 asphalt plants are 50 miles or more from the proposed centrally located facilities, with one being 90-100 miles. Moreover, he indicated no more than 30 employees, on average, are currently working out of these facilities. The location and distance from the proposed polling places of the remaining 161 eligible voters in its statement of position is unknown.¹³

¹² I note the provisions of the Casehandling Manual are not binding procedural rules. The Casehandling Manual is issued by the General Counsel, who does not have authority over matters of representation, and is only intended to provide nonbinding guidance to regional personnel in the handling of representation cases. See Representation-Case Procedures, 84 Fed. Reg. 39930, 39937 fn. 43 (2019) (“the General Counsel’s nonbinding Casehandling Manual”); *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988)); *Aaron Medical Transportation, Inc.*, 22-RC-070888 (unpublished 2013) (citing *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 552 fn.4 (2007); *Queen Kapiolani Hotel*, 316 NLRB 655, 655 fn.5 (1995)). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

¹³ The Vice President testified to the average Unit employment of each facility and its approximate distance from the proposed polling place.

Petoskey: The Thumb Lake and Levering facilities are approximately 20 miles away and employ two employees each. The Manton and Traverse City facilities are approximately 60 miles away and employ two employees each. The Prudenville facility is approximately 90-100 miles away and employs two employees.

Grand Rapids: The Grand Rapids facility employs three employees. The Zeeland facility is less than 20 miles away and employs two to three employees. The Big Rapids facility is approximately 50 miles away and employs two employees. The Ludington facility is approximately 60-70 miles away and employs two to three employees.

Kalamazoo: The Kalamazoo facility employs two to three employees. The Benton Harbor facility is approximately 50 miles away and employs two to three employees.

Second, there is an ongoing strike, in which about half of the potential voters (approximately 80 people) are not working due to the strike and are not reporting to facilities or jobsites, as there is no active picketing. The record does not disclose the locations of, or distances to polling places for, these potential voters. Some or all of these strikers may have obtained temporary interim employment that would significantly restrict their ability to vote in a manual election despite being eligible voters.¹⁴

I also note the record indicates that the proposed polling period, from 4:30 p.m. to 6:30 p.m., would prevent some Unit employees from voting. According to the Employer, eligible voters work 8- to 14-hour shifts starting no earlier than 7:00 a.m., which means they conclude work between 3:00 p.m. and 9:00 p.m. As the record fails to reveal the specific shift lengths for any of the Employer's individual facilities or jobsites, an employee working an 8-hour shift at a centrally located facility would be available to vote at 3:00 p.m. while an employee at Prudenville working a 14-hour shift would not be able to drive the 100 miles to the polling place in Petoskey until 9:00 p.m. Therefore, to maximize employee enfranchisement, a polling period from 3:00 p.m. to 11:00 p.m. would be necessary to ensure that those employees would have access to voting.

As to the Employer's argument that a manual election is necessary to avoid potential Union interference, that concern is speculative. While the Board has noted that manual elections under Board supervision often obviate such possibilities, it has consistently affirmed that the current mail-ballot procedures and safeguards contained therein, are "designed to preserve the integrity of the election process and ensure that no reasonable doubt is raised about the fairness or validity of that process." *Mission Industries*, supra at 1027 (1987). Further, the Board has post-election mechanisms for addressing such conduct if it occurs. See, Casehandling Manual Part II, Sections 11390-11397.¹⁵

Due to geographic scatter of employees and the ongoing strike, balloting by mail will better facilitate employee participation in the election and allow all employees a convenient

Mason: The Mason facility employs two employees. The Lansing facility is less than 20 miles away and employs two employees.

¹⁴ The record contains no evidence regarding the eligibility of individual employees, including strikers.

¹⁵ In determining whether the conduct has "the tendency to interfere with the employees' freedom of choice," the Board considers nine factors: (1) The number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit (3) the number of employees in the bargaining unit subjected to the misconduct; (4) *the proximity of the misconduct to the election*; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. (emphasis added). See *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004), citing *Taylor Wharton Division Hrasco Corporation*, 336 NLRB 157, 158 (2001), et al.; *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

opportunity to exercise their right to vote.¹⁶ For the above reasons, I conclude a mail-ballot election is appropriate for the election in this matter.

IV. THE COVID-19 PANDEMIC

As explained above, the record evidence demonstrates that a mail ballot election is appropriate due to the geographic scatter of employees and the strike; however, the propriety of mail balloting in the instant case is further supported by the extraordinary circumstances of the ongoing COVID-19 pandemic.

A. Legal Authority and Agency Directives

Consistent with the longstanding recognition of the discretion afforded to Regional Directors, on April 17, the Board issued a “COVID-19 Operational Status Update,”¹⁷ which states in pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.

The Board has recognized the COVID-19 pandemic to be extraordinary circumstances as contemplated by *San Diego Gas*, above, since at least May. See, for example, *Atlas Pacific Engineering Co.*, 27-RC-258742 (unpublished May 8, 2020) (relying on “the extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework” to deny review of Regional Director’s decision to order a mail ballot election).

The Board has continually affirmed the ongoing COVID-19 pandemic constitutes extraordinary circumstances and it will continue to consider whether manual elections should be directed “based on the circumstances then prevailing in the region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.” See *Rising Ground*, 02-RC-264192 (unpublished September 8, 2020) (denying review of Regional Director’s decision to order a mail ballot election); *Tredroc Tire Services*, 13-RC-263043 (unpublished August 19, 2020) (same); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020) (same); *PACE Southeast Michigan*, 07-RC-257046 (unpublished August 7, 2020) (same); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020) (same); *Brink’s Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020).

¹⁶ No party contends that voters are unable to read or understand the balloting procedures.

¹⁷ <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

I recognize a degree of reopening has begun, in the United States generally and in Michigan specifically. At the same time, it is undisputed that COVID-19 remains present in the community and presents a well-established and significant health risk. There is no easily identifiable bright line that can designate when “extraordinary circumstances” have passed while the increased risk of transmission in group activities remains.

B. Prevailing COVID-19 Circumstances

The United States and the State of Michigan continue to operate under declared states of emergency.¹⁸ Despite unprecedented efforts to limit transmission, confirmed cases of COVID-19 in the United States exceeded 6.9 million, with over 200,000 fatalities as of September 25.¹⁹ Michigan has reported 132,337 cases and 7,019 deaths.²⁰ The rolling seven-day average for new cases in Michigan has dropped below 600 only once since July 14 (574 on August 21), up from a low of 182 on June 16.²¹

In assessing the local conditions, I must consider the state of the pandemic in Michigan, where petitioned-for employees reside and work and where the Board agents conducting the election are located and would be required to travel. The record does not reveal the residences of employees or their worksites, although the Employer has facilities in at least 13 different counties, some of which are regularly visited by employees for the purpose of equipment or vehicle retrieval.²²

C. Current Federal, State, and Local Directives

The United States Centers for Disease Control and Prevention (CDC) explains that COVID-19 is primarily spread from person to person.²³ A person may become infected when an

¹⁸ “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak” (March 13, 2020). The White House. <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (accessed September 11, 2020); “Executive Order 2020-177: Declaration of state of emergency and state of disaster related to the COVID-19 pandemic” (September 4, 2020). The Office of Governor Gretchen Whitmer. https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-538955--,00.html (accessed September 11, 2020).

¹⁹ “Cases in the U.S.” (updated September 10, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (accessed September 11, 2020).

²⁰ “Michigan Data” (updated September 10, 2020). State of Michigan. https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html (accessed September 11, 2020) (109,519 confirmed and 11,327 probable cases; 6,569 confirmed and 325 probable deaths).

²¹ “Michigan Coronavirus Count and Case Map.” *The New York Times*. <https://www.nytimes.com/interactive/2020/us/michigan-coronavirus-cases.html> (accessed September 11, 2020)

²² The Employer also maintains nine offices; however, the record does not disclose the locations other than an office in Lansing.

²³ I take administrative notice of the information, guidance, and recommendations of the CDC regarding COVID-19. See “Coronavirus (COVID-19)” and pages linked therein. <https://www.cdc.gov/coronavirus/2019-ncov/> (accessed August 20, 2020).

“infected person coughs, sneezes or talks” or by “touching a surface or object that has the virus on it, and then by touching your mouth, nose or eyes,” so its guidance recommends “limit[ing] in-person contact as much as possible.”²⁴ Guidance issued by the CDC highlights the “[b]est way to prevent illness is to avoid being exposed to this virus” (emphasis in original).²⁵ Moreover, the CDC’s September 8, update for travelers continues to maintain that “[b]ecause travel increases your chances of getting infected and spreading COVID-19, **staying home is the best way to protect yourself and others from getting sick**” (emphasis in original).²⁶

The CDC’s recommendations for dealing with this public health threat include, among others, the avoidance of large gatherings, the use of facial coverings, good personal hygiene, and social distancing of at least six feet. The CDC further states that the virus can survive for a short period on some surfaces and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes; however, “it is unlikely to be spread from domestic or international mail, products or packaging.”²⁷ To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.”²⁸

In addition to the federal recommendations described above, many state and local governments have issued COVID-19 restrictions tailored to the particular conditions in their communities. Michigan imposed strict guidelines early in the pandemic when, on March 23, Governor Gretchen Whitmer issued her first stay-at-home executive order suspending all nonessential activities. The stay-at-home orders thereafter extended through May 31. On June 1, Governor Whitmer rescinded the stay-at-home orders and announced the state was ready to transition to Phase Four, the “Improving” phase, of her 6-step Michigan Safe Start Plan, for the reopening and easing of restrictions in the state.²⁹ Under “MI Safe Start,” the state’s 83 counties

²⁴ “Frequently Asked Questions, Spread” (updated August 4, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed August 20, 2020).

²⁵ “How to Protect Yourself & Others” (updated July 31, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (accessed September 11, 2020).

²⁶ “Travel during the COVID-19 Pandemic” (updated September 8, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (accessed September 11, 2020).

²⁷ “Coronavirus Disease 2019 (COVID-19), Frequently Asked Questions (updated September 9, 2020), Prevention, Am I at risk for COVID-19 from mail, packages, or products?” <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed September 11, 2020).

²⁸ “Running Essential Errands” (updated August 3, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (accessed September 11, 2020).

²⁹ “Governor Whitmer Rescinds Safer at Home Order, Moves Michigan to Phase Four of the MI Safe Start Plan” (June 1, 2020). The Office of Governor Gretchen Whitmer. <https://www.michigan.gov/whitmer/0,9309,7-387-90499-530627--,00.html> (accessed September 11, 2020). See also, MI Safe Start (under the MI Safe Start Plan, the six phases to stop the spread of the COVID-19 and fully reopen the state are: (1) uncontrolled growth; (2) persistent spread; (3) flattening; (4) improving; (5) containing; and, (6) post-pandemic). <https://www.michigan.gov/coronavirus/0,9753,7-406-100467---,00.html> (accessed September 11, 2020).

were divided into eight regions. While certain regions in the state, largely in Northern Michigan and the Upper Peninsula, have advanced to Phase Five (Containing), the majority of regions, including several where the Employer operates, remain at Phase Four. On June 30, Governor Whitmer announced that, due to the recent spike in COVID-19 cases in Michigan, the Grand Rapids, Kalamazoo, and Lansing Regions (which includes three of the four proposed polling places) would not advance to the fifth phase of her reopening plan by the Fourth of July weekend, as she had originally planned.³⁰ After cases began increasing, Governor Whitmer closed indoor bar service across most of the state, including regions where polling places are located and the Employer operates, which constituted a move backward on reopening Michigan.³¹

Following the hearing in this case, on September 4, Governor Whitmer extended the state of emergency and state of disaster related to the COVID-19 pandemic.³² and issued new and clarified workplace safeguards.³³

D. Election Guidance

While the CDC has not specifically addressed Board elections, it has issued recommendations based on the following guiding principles:

The more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread. Elections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times.

Specifically, the CDC instructs officials to “[c]onsider offering alternatives to in-person voting if allowed” and recommends voters “[c]onsider **voting alternatives available in your jurisdiction that minimize contact.** Voting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the

³⁰ Executive Order 2020-143 (COVID-19) (July 1, 2020). https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-533435--,00.html (accessed September 11, 2020).

³¹ “Gov. Gretchen Whitmer closes Michigan indoor bar service, except for Up North.” *Detroit Free Press*. <https://www.freep.com/story/news/local/michigan/detroit/2020/07/01/gov-whitmer-closes-michigan-indoor-bar-service-except-up-north/5354417002/> (accessed September 11, 2020).

³² “Executive Order 2020-177: Declaration of state of emergency and state of disaster related to the COVID-19 pandemic” (September 4, 2020), above.

³³ “Executive Order 2020-175: Safeguards to protect Michigan’s workers from COVID-19” (September 4, 2020). The Office of Governor Whitmer. https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-538728--,00.html (accessed September 11, 2020). The Michigan Department of Labor & Economic Opportunity and Michigan Occupational Safety and Health Administration issued updated guidelines for the construction industry on September 8. See https://www.michigan.gov/leo/0,5863,7-336-100207_101283---,00.html (accessed September 11, 2020).

spread of COVID-19” (emphasis in original).³⁴ Following these recommendations, Michigan mailed absentee applications to all of its 7.7 million registered voters in July for primary elections and, in August, sent postcards encouraging the use of mail ballots to the 4.4 million who did not vote in the primary elections.³⁵

On July 6, General Counsel Peter Robb issued GC 20-10, a memorandum setting forth suggested manual election protocols. While specifically noting that it is not binding on Regional Directors because the Board—not the General Counsel—has authority over matters of representation, it provides, in relevant part:

They [Regional Directors] have made, and will continue to make, these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locally.

In other words, GC 20-10 offers advice on how to conduct a manual election when and if a Regional Director determines a manual election is appropriate. It is not a checklist whereby a manual election is mandated if the protocols are met.

The suggested protocols include: polling times sufficient to accommodate social distancing without unnecessarily elongating exposure among Board Agents and observers; the employer’s certification in writing that the polling area is consistently cleaned in conformity with CDC standards; a spacious polling area, sufficient to accommodate six-foot distancing; separate entrances and exits for voters; separate tables spaced six feet apart; sufficient disposable pencils without erasers for each voter to mark their ballot; glue sticks or tape to seal challenge ballot envelopes; plexiglass barriers of sufficient size to protect the observers and Board Agents; and provision of masks, hand sanitizers, gloves, and disinfecting wipes.

The General Counsel’s suggestions also include the Employer’s self-certification 24 to 48 hours before a manual election for how many individuals have been present in the facility within the preceding 14 days who have tested positive for COVID-19; who have been directed by a medical professional to proceed as if they have tested positive for COVID-19; who are awaiting results of a COVID-19 test; who are exhibiting symptoms of COVID-19; or who have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19. The certifications in GC 20-10 state “symptoms of COVID-19, including a fever of 100.4°F or

³⁴ “Considerations for Election Polling Locations and Voters.” U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (accessed September 11, 2020).

³⁵ “Michigan SOS Benson to mail millions of postcards to encourage absentee voting” (August 13, 2020). *Detroit Free Press*. <https://www.freep.com/story/news/politics/elections/2020/08/13/absentee-voting-election-michigan-benson-postcard/3364515001/> (accessed September 11, 2020).

higher, cough, or shortness of breath.” However, the CDC’s “Symptoms of Coronavirus” include additional symptoms:

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

The CDC also notes, “[t]his list does not include all possible symptoms.”³⁶ Similarly, the State of Michigan identifies symptoms as “fever, cough, shortness of breath, chills, repeated shaking with chills, muscle pain, headache, sore throat, [and] new loss of taste or smell,” along the emergency warning signs of “trouble breathing, persistent pain or pressure in the chest, new confusion or inability to arouse, [and] bluish lips or face.”³⁷

Subsequent to the issuance of GC 20-10, the CDC updated its COVID-19 pandemic planning scenarios and clarified the definition for the percent of transmission occurring prior to symptom onset (pre-symptomatic transmission). The CDC’s “current best estimate” is that 50% of COVID-19 transmission occurs while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic³⁸ and would neither be identified nor have sought testing, limiting the usefulness of any certifications. Similarly, the CDC’s September 8 update for “Travel during the COVID-19 Pandemic” continues to warn travelers: “You may feel well and not have any symptoms, but you can still spread COVID-19 to others.”³⁹ While the suggested protocols for manual elections in GC 20-10 appear to adopt many of the CDC’s in-person election recommendations for when other alternatives are not available, the Board has an acknowledged and accepted mail ballot procedure. Additionally, GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling the manual election, which would delay resolution of the question concerning representation. A mail-ballot election avoids these concerns.

³⁶ “Symptoms of Coronavirus.” CDC. <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (accessed September 11, 2020).

³⁷ “What are the symptoms of COVID-19?” State of Michigan. <https://www.michigan.gov/coronavirus/0,9753,7-406-98810-523219--,00.html> (accessed September 11, 2020).

³⁸ “COVID-19 Pandemic Planning Scenarios” (updated September 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (estimating the infectiousness of asymptomatic individuals compared to infectious individuals at 75%) (accessed September 11, 2020).

³⁹ “Travel during the COVID-19 Pandemic” (updated September 8, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html> (accessed September 11, 2020).

E. COVID-19 Analysis

The circumstances surrounding the COVID-19 virus are extraordinary. In the instant case, a manual election will necessarily bring together approximately 160 eligible voters, from various parts of the State of Michigan, plus party representatives, and at least four Board agents. During the election, Board agents and observers will remain within close proximity of each other for an extended period of time and will interact with over 160 voters.

Additionally, there are elements of a manual election that simply cannot be undertaken in compliance with proper social distancing requirements, specifically in the case of a challenged ballot. The Board Agent, observers, and voter must be in close proximity to deal with the voter challenge, exchange, and passing of the required envelopes, and initialing of the appropriate section of the challenge envelope. See NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11338.3. Moreover, at the culmination of the election, ballots from the multiple sessions and polling places will be transported comingled, the ballot count will proceed in the same area, with the possibility of many individuals present to witness the count, which will unnecessarily cause a significant risk of exposure for all involved.

There is also a significant risk of voter disenfranchisement for any voter who is (1) diagnosed with COVID-19 immediately preceding the election, (2) required to self-quarantine, or (3) who exhibits symptoms of COVID-19 on the day of the election, whether or not those symptoms are due to virus. Under the Employer's response and preparedness plan,⁴⁰ on the day of the election, if an employee believes they have any symptoms of COVID-19,⁴¹ they should not report to worksites or to any of the Employer's facilities. All of the substantial risks outlined above are eliminated by use of the Board's mail-ballot procedures.

The record contains no evidence regarding from where people travel to the Employer's facilities or jobsites or if they carpool or rideshare, but it does indicate commutes of 30 to 120 minutes suggesting employees travel through multiple counties, some of which may be experiencing a surge in cases or designated a hotspot, where they may have to interact with other people (e.g., getting meals, fueling vehicles), increasing the chance of contracting the virus. This election would also involve travel to facilities by employees, many of whom do not regularly report to the facilities, and by Board agents, who may require overnight stays, and party representatives. Even if everyone who would participate in a manual election might appear to be infection free, the virus is believed to spread through pre-symptomatic and asymptomatic

⁴⁰ The CDC's interim guidance for businesses and employers, the only record evidence of the Employer's COVID-19 protocols, provides general and aspirational suggestions but does not provide any details about steps the Employer has taken to mitigate the risk of contracting or transmitting the virus. For example, the CDC's interim guidance states "employers should implement and update as necessary a plan that: [i]s specific to your workplace, identifies all areas and job tasks with potential exposures to COVID-19, and includes control measures to eliminate or reduce such exposures." However, the record is devoid of specific areas and job tasks with the potential for exposure or control measure to eliminate or reduce such exposure.

⁴¹ If only the three symptoms listed in GC 20-10 are used there is a significantly increased risk of exposure to COVID-19. If all symptoms recommended by the CDC and State of Michigan are used there is an increased chance eligible voters will not be able to cast a manual ballot.

individuals.⁴² Eligible voters, along with other employees who may come into contact with the Employer's participants, the Board agent, and party representatives, could risk exposure to the virus and spreading it to participants, the community, and their families. Therefore, the number of people placed at risk for exposure is much greater than just the number of employees eligible to vote.

I recognize the Employer has attempted to mitigate the risk to voters and its participants by proposing various safety measures to mitigate COVID-19, including conducting the election in repair and wash bays with markings for social distancing, plexiglass barriers, and a separate entrance and exit; providing masks, gloves, hand sanitizer, and disposable writing instruments and glue sticks; releasing voters gradually; and limiting the number of election observers. It also agrees to abide by the suggestions made in GC 20-10. Assuming a manual election is appropriate for the sake of argument, I have carefully considered the Employer's proposals and the suggestions in GC 20-10. Ultimately, as GC 20-10 recognizes, the decision to conduct the election by mail ballot is within my discretion. Regarding the COVID-19 pandemic at this time, as I have already described, we have not reached a safe enough juncture in the pandemic, particularly in the regions in which the election would be held, not to mention the areas where employees' jobsites are located. In any manual election voters and the Board agents will still physically come together in a single location, even if dispersed over time and socially distanced. This represents an increased risk to all those participating which can be avoided by a mail-ballot election. It is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This increased interaction may be minimal, such as an employee standing in a line who might not normally in the course of his work interact with others, or may be major, such as an employee infected with COVID-19, perhaps even unknowingly, reporting to work to vote in the election and potentially unwittingly expose others to the virus. The fact that two of the Employer's employees have tested positive within the last two months highlights the fact the risk of exposure to somebody at the Employer's facility with COVID-19 is not just theoretical.

The undisputed continued presence of the virus in Michigan, particularly the Grand Rapids, Kalamazoo, and Lansing Regions where the majority of polling places are located, and the severity of the COVID-19 risk further support a mail-ballot election. Furthermore, the record reveals that there were two employees who tested positive for the virus in the Employer's facilities in the last two months. While the Employer's COVID-19 protocols and those suggested in GC 20-10 may mitigate some of the risk of transmission of COVID-19, I cannot conclude that they sufficiently mitigate the risk of transmission and community spread to justify holding a manual election given the circumstances present in this case.

I have already determined the record evidence supports finding a mail-ballot election appropriate. Combined with current prevailing circumstances of the COVID-19 pandemic in the

⁴² "Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Pre-symptomatic or Asymptomatic" (May 4, 2020). *Emerging Infectious Diseases Journal* (Online Report). Centers for Disease Control and Prevention. https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (accessed September 11, 2020). See also, "COVID-19 Pandemic Planning Scenarios," above.

region, the most appropriate course of action at this time is to follow accepted guidance to limit in-person contact and travel within Michigan and hold a mail-ballot election in this case.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I direct a mail ballot election to be conducted in accordance with the election details discussed below, and I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce⁴³ within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed in the State of Michigan by Rieth-Riley Construction Co., Inc. for airport construction work (exclusive of building), railroad track and trestle construction (exclusive of such work inside the property line of an industrial plant covered by the Associated General Contractors of Michigan, Detroit Metro CBA) and all highway work including roads, streets, bridge construction, parking lots, and asphalt plants, in the following classifications: asphalt plant operator, crane operator, dragline operator, shovel operator, locomotive operator, paver operator (5 bags or more), elevating grader operator, pile driving operator, roller operator (asphalt), blade grader operator, trenching machine operator (ladder or wheel type), auto-grader, slip form paver, self-propelled or tractor drawn scraper, conveyor loader operator (Euclid type), endloader operator (1 yard capacity and over), bulldozer, hoisting engineer, tractor operator, finishing machine operator(asphalt), mechanic, pump operator (6" discharge or over, gas diesel, powered or generator of 300 amp or larger), shouldering or gravel distributing machine operator(self-propelled), backhoe (with over 3/8 yard bucket), side boom tractor (type D-4 equivalent or larger), tube finisher (slip form paving), gradall (and similar type machine), asphalt paver (self-propelled), asphalt planer (self-propelled),

⁴³ Rieth-Riley Construction Co., Inc., an Indiana corporation, is engaged in the business of road construction with places of business in the State of Michigan, and conducting its operations during the calendar year ending December 31, 2019, the company purchased and received goods valued in excess of \$50,000 directly from points outside the State of Michigan.

batch plant(concrete-central mix), slurry machine (asphalt), concrete pump (3" and over), roto mill, swinging boom truck (over 12-ton capacity), hydro demolisher (water blaster), farm type tractor with attached pan; but excluding guards and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Local 324, International Union of Operating Engineers (IUOE), AFL-CIO**.

1. Election Details

The election will be conducted by mail. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at 2:15 p.m. (EDT) on **Monday, October 13, 2020** by personnel of the National Labor Relations Board, Region 7. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote by mail and do not receive a ballot in the mail by **October 22, 2020**, should communicate immediately with the National Labor Relations Board by calling Board Agent Drew Hampton at 616-930-9174, Election Specialist Callie Clyburn at 313-335-8049, the Region 7 Office at (313) 226-3200 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 7 Regional Office by close of business, 4:45 p.m. (EST) on **November 2, 2020**. All ballots will be commingled and counted at 1:00 p.m. (EDT) on **November 9, 2020**. In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots. The method for the count will be determined by the Regional Director and will require video participation.

2. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **September 19, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who either 1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or 2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who

were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.⁴⁴

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Also eligible to vote are the employees in the unit who are engaged in an economic strike that began more than 12 months before the election date unless they have been permanently replaced. In the event the strike is found to be an unfair labor practice strike, any employees hired as replacements after the commencement of the unfair labor practice strike or conversion to an unfair labor practice strike might be deemed temporary replacements. In either case, whether the strike is an economic strike or an unfair labor practice strike, both strikers and their replacements may vote in this election if they wish to do so. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are 1) employees who have quit or been discharged for cause since the designated payroll period; 2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and 3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

3. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. The Employer is directed to provide a separate list containing the above described information for those individuals the Employer considers ineligible to vote due to their status as strikers.

To be timely filed and served, the lists must be *received* by the regional director and the parties by **September 29, 2020**. The lists must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be provided in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word (.doc or .docx). The first column of the lists must begin with each employee's last name and the list must be alphabetized (overall or by

⁴⁴ The parties stipulated that the Employer was in the construction industry and agreed that the *Steiny/Daniel* formula applies in this case. See *Steiny & Co., Inc.*, 308 NLRB 1323 (1992); *Daniel Construction Co., Inc.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

department) by last name. Because the lists will be used during the election, the font size of the lists must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the lists is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The lists must be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The lists must also be served electronically on the other parties named in this decision.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the lists within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter lists for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

4. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. 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. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. 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.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and, therefore, the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: September 25, 2020



Dennis R. Boren, Acting Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 05-200
Detroit, Michigan 48226

EXHIBIT 10

Amanda K. Freeman

From: Anderson, Rochelle <Rochelle.Anderson@nlrb.gov>
Sent: Monday, November 9, 2020 11:22 AM
To: ryan.funk@faegredrinker.com; daniel.dorson@faegredrinker.com; Preller, Alexander E.; Buttrick, Stuart R.; Amanda K. Freeman; abachelder@michlabor.legal
Cc: cloney@rieth-riley.com; dstockwell@iuoe324.org; raykent65@yahoo.com
Subject: RE: RIETH-RILEY CONSTRUCTION CO., INC. Cases 07-RD-257830 and 07-RD-264330
Attachments: SPP.07-RD-264330.Supplemental Decision and Order 11-9-2020.pdf

Importance: High

The previous email sent out had a typographical error in the Order.

Rochelle Anderson, OM
Grand Rapids Resident Office, Region 7
Phone: 616.930.9170
Fax: 616-456-2596
rochelle.anderson@nlrb.gov



Go Green! Do not print this email unless it's necessary

From: Anderson, Rochelle
Sent: Monday, November 9, 2020 9:39 AM
To: ryan.funk@faegredrinker.com; daniel.dorson@faegredrinker.com; Preller, Alexander E. <alex.preller@faegredrinker.com>; Buttrick, Stuart R. <stuart.buttrick@faegredrinker.com>; akf@nrtw.org; Amy Bachelder <abachelder@michlabor.legal>
Cc: cloney@rieth-riley.com; dstockwell@iuoe324.org; raykent65@yahoo.com
Subject: RIETH-RILEY CONSTRUCTION CO., INC. Cases 07-RD-257830 and 07-RD-264330
Importance: High

Attached is the Supplemental Decisions and Order in the above cases.

Rochelle Anderson, OM
Grand Rapids Resident Office, Region 7
Phone: 616.930.9170
Fax: 616-456-2596
rochelle.anderson@nlrb.gov



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EXHIBIT 11

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 07-CA-234085

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

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Goshen, IN 46827

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Michael Nystrom
Michigan Infrastructure and Transportation
Association, Inc.
2937 Atrium Drive
Suite 100
Okemos, MI 48864

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

RIETH-RILEY CONSTRUCTION CO., INC.

Respondent

and

Case 07-CA-234085

**LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE), AFL-CIO**

Charging Party

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by the Charging Party. It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Respondent has violated the Act as described below.

1. The charge in this proceeding was filed by the Charging Party on January 11, 2019, and a copy was served on Respondent by U.S. mail on January 16, 2019.

2. (a) At all material times, Respondent has been a corporation with an office and place of business in Goshen, Indiana and has been in the business of road construction.

(b) During the calendar year ending December 31, 2018, Respondent in conducting their business operations described above in paragraph 2(a), purchased and received at its job sites in the State of Michigan good and services valued in excess of \$50,000 from points outside the State of Michigan.

(c) At all material times, Respondent, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

4. (a) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Keith Rose	-	President
Chad Loney	-	Vice President

(b) At all material times, Michael Nystrom held the position of Executive Vice President of the Michigan Infrastructure and Transportation Association, Inc. (MITA) and has been an agent of Respondent within the meaning of Section 2(13) of the Act.

5. (a) The following employees of Respondent constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part time Operating Engineers employed by the Respondent within the State of Michigan performing building construction, underground construction, and/or heavy, highway and airport construction, at the site of construction, repair, assembly and erection, including equipment operators, field mechanics, oilers, apprentices, and on the job trainees, but excluding employees represented by other labor organizations, and professional, office and clerical employees, guards and supervisors as defined under the Act.

(b) Since about November 2, 1993, and at all material times, Respondent has recognized the Charging Party as the exclusive collective-bargaining representative of the Unit described above in paragraph 5(a). This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from March 19, 2013 through June 1, 2018.

(c) At all times since November 2, 1993, based on Section 9(a) of the Act, the Charging Party has been the exclusive collective-bargaining representative of the Unit described above in paragraph 5(a).

6. About July 23, 2018, Respondent unilaterally granted a wage increase to its Unit employees.

7. (a) From about September 4, 2018 to about September 27, 2018, Respondent insisted, as a condition of reaching any collective-bargaining agreement, that the Charging Party agree to engage in multi-employer bargaining by executing a multi-employer contract.

(b) Multi-employer bargaining is not a mandatory subject for the purposes of collective-bargaining.

8. (a) From about September 4, 2018 to about September 27, 2018, Respondent locked out its Unit employees represented by the Charging Party and employed by Respondent at various jobsites throughout the State of Michigan.

(b) Respondent engaged in the conduct described above in paragraph 8(a) in furtherance of an unlawful bargaining objective as described above in paragraph 7.

9. Since about October 27, 2018, Respondent unilaterally deducted monies from unit employee paychecks related to vacation and holiday fund monies without bargaining with the Charging Party about those deductions.

10. The subjects set forth above in paragraphs 6, 8(a) and 9 relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

11. Respondent engaged in the conduct described above in paragraphs 6, 7, 8(a) and 9 without affording the Charging Party an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

12. By the conduct described above in paragraphs 6, 7, 8(a) and 9 Respondent has been failing and refusing to bargain collectively and in good faith with the Charging Party, in violation of Section 8(a)(1) and (5) of the Act.

13. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, it is prayed that Respondent be ordered to:

1. Cease and desist from engaging in the conduct described in paragraphs 6, 7, 8(a) and 9, or in any like or related manner refusing to bargain collectively and in good faith with the Charging Party.

2. Take the following affirmative action:

(a) Upon request by the Charging Party, rescind the deduction of monies from employee paychecks related to the repayment of vacation and holiday funds.

(b) Make employees whole for the unilateral deduction of money by payment or repayment of all money unilaterally deducted from employee paychecks with interest computed in accordance with Board policy.

(c) Upon request by the Charging Party, rescind the wage increase given to Unit employees.

(d) Make employees whole for any loss of earnings and benefits suffered as a result of its decision to lockout employees by payment of backpay and reimburse them for any out-of-pocket expenses they incurred while searching for work, with interest computed in accordance with Board policy.

(e) Bargain collectively and in good faith with the Charging Party with respect to rates of pay, wages, and hours of employment.

(f) Mail notices, at its own expense, to all current and former employees, who were employed at any time since August 15, 2018.

(g) Post appropriate notices at your offices, and at all worksites where unit work is occurring.

The General Counsel further prays for such other relief as may be just and proper to remedy the unfair labor practices herein alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before June 12, 2019, or postmarked on or before June 11, 2019.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **September 23, 2019 at 11:00 a.m. at Room 300, Patrick V. McNamara Federal Building, 477 Michigan Avenue, Detroit, Michigan**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached

Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: May 29, 2019

A handwritten signature in black ink that reads "Terry Morgan". The signature is written in a cursive style with a large, sweeping initial "T".

Terry Morgan, Regional Director
National Labor Relations Board, Region 07
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, MI 48226

Attachments

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. You may be represented at this hearing by an attorney or other representative. If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered.

in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

EXHIBIT 12

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

Rieth-Riley Construction Co.,
Employer,
and

Case No. 07-RD-257830

Local 324, International Union of Operating
Engineers (IUOE), AFL-CIO,
Union,
and

Rayalan Kent,
Petitioner.

**DECLARATION OF RAYALAN KENT IN SUPPORT
OF PETITIONER'S REQUEST FOR REVIEW**

Pursuant to Section 1746 of the Judicial Code, 28 U.S.C. §1746, Rayalan Kent declares as follows:

In support of Petitioner's Emergency Request for Expedited Review, I submit this Declaration under National Labor Relations Board ("NLRB") Rules and Regulations §§ 102.67 and 102.71. The facts stated in this Declaration are within my personal knowledge.

1. In, or about, April 2009, Rieth-Riley Construction Co. ("Employer") hired me to be an equipment operator working in the prep and milling divisions. I have been in the same position the entire time of my employment with Employer. I am a member of the bargaining unit currently represented by International Union of Operating Engineers, Local Union 324 ("Local 324").

2. On, or about, September 28, 2019, I began circulating a decertification petition to remove Local 324 as the bargaining unit's representative, which is the basis for this RD petition that I filed with the Regional office in Michigan on, or about, August 7, 2020.

3. In the Fall of 2019, Local 324 published its Engineer's News magazine in which it, among other things, acknowledged its strike against Rieth-Riley, discussed its 2018 unfair labor practice charge, and published a scab list with my name on it because I exercised my legal right not to be a union member. A copy of the relevant pages of the Fall 2019 magazine, which I obtained from my Local 324's members portal, are attached as Exhibit A.

4. I circulated the decertification petition to remove Local 324 as the bargaining unit's representative because I no longer wanted it as my bargaining representative. Neither the unfair labor practice charges Local 324 filed against my Employer, some of which I learned about for the first time upon reading Rieth-Riley's filed Request for Review in my first decertification case, nor the strike against my Employer had any impact on my desire to remove Local 324's representation of the bargaining unit.

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

Executed on November 13, 2020.

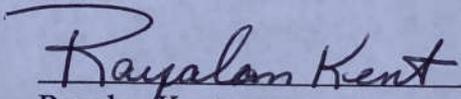

Rayalan Kent

EXHIBIT A



Engineers' News

CHARTERED FOR THE ENTIRE STATE OF MICHIGAN

FALL 2019



DOUGLAS W. STOCKWELL
BUSINESS MANAGER & GENERAL VICE PRESIDENT

STATIONARY ENGINEERS - DETROIT PUBLIC SCHOOLS



Even in the predawn shadows, the school looms large over the park across the street deep. Not only because of its size - Western International High School with its three-story brick exterior is certainly massive - but because of the community it serves. Western, deep in the heart of Southwest Detroit, is the most culturally diverse public high school in Detroit, with over 2,000 students. So when Operating Engineers 324 member and Steward **Ben Gibson** enters the dark halls before 6:00 am to begin his workday, he is well-aware of the impact it has.

Gibson goes through a narrow wooden door and descends several staircases, travels down a short hall and enters the cavernous boiler room. Originally built to house the massive coal boilers required to heat the school, there is more space now. The more modern, natural gas boilers are certainly more space efficient, if still massive. When the weather gets cooler, Gibson starts up the boilers, gets them up to steam, and checks that it is running right. Today, we're in one of those famous Michigan Indian Summers, so he passes the boilers and moves to his quiet office, where he goes through his checklist for the day. In a few hours, the halls will be teaming with kids, and making sure they have the best environment to learn is what Gibson wants to ensure.

There will be messages and requests, items around the school that need attention. Ben Gibson prides himself on doing it all. Western has boilers for heating, and HVAC for cooling. It also houses a full pool that needs to be main-

tained. But that's not where it ends – he can be found doing anything needed, from changing light bulbs to fixing leaks.

Gibson makes a list and gets to work.

Further north, in the Barton-McFarland neighborhood in Detroit, fellow 324 Stationary Engineer and Steward **John Strolger** is doing similar things to get David L. Mackenzie Elementary-Middle School ready for class. Strolger is new to this school, coming over after spending the last 7 of his 38 year career as an Operator at Nolan Elementary-Middle School. Mackenzie is a newer school, built in the last few years, and Strolger is using his accumulated knowledge to familiarize himself with the facilities and fix a few nagging issues.

A drainage issue has been a nuisance of late, so he puts on boots, and heads outside to see why water has been pooling in an area beside the staff parking lot. Later in the day, he will be showing **Sharanae Marion** around – she will be joining staff as an Engineer trainee herself and working with him at the school. She has recently finished her certifications, and Strolger is looking forward to the help.

Combined, Gibson and Strolger have 80 years of experience as Operating Engineers, but they are just two of the dozens of OE324 members working for GDI Integrated Facility Services in Detroit Public Schools. When both hired in, the Detroit Board of Education oversaw Engineers in the

(Continued on page 4)

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Douglas W. Stockwell
Business Manager &
General Vice President

I hope everyone had a good summer. While we recognize that it has been a long year with the road issues, I'm happy to say that we are close to being complete, with the exception of a few hold outs. I am sure the majority of you are well aware of our strike with Rieth-Riley Construction. I want to tell you how proud I am of the Rieth-Riley members. They have stayed strong in solidarity. Out of 186 members, only 22 have chosen to go back to be scabs for Rieth. I am listing their names here so everyone will know who they are.

- | | |
|-----------------|---------------------|
| Arens, Jeremy | Moline, Cody |
| Blank, John | Patrick, Darryle |
| Brouwer, Craig | Sandburg, Branden |
| Cassidy, Shawn | Snavley, Anthony A |
| Cook, Corey | Snavley, Anthony W |
| Grifka, Harold | Thompson, Andrew |
| Hart, Daniel | Thompson, Mark |
| Jones, Jay | Thompson, Michael G |
| Kent, Rayalan | Weeks, Charley |
| Knuth, Michael | Williams, Timothy |
| Kryger, Matthew | Willison, Richard |

This fight affects every Operating Engineer in the state of Michigan. So, if you know or meet a member who works for Rieth-Riley, make sure you tell them how proud you are to call them brother or sister.

We have spent the summer working with the Governor and the legislature (both Democrats and Republicans) to come up with new road funding options. The end goal is for that money to be held in a lockbox for roads only. That way, the politicians cannot play games or move money

around that was slated for road funding, as they have done in the past. We are yet to come to a full funding plan, but the conversation has been positive.

As of the writing of this article, we have met with the Michigan Union Contractors Group (MUCG) to negotiate the Underground Agreement. I'm confident that by the time you read this, we will have come back to the membership for ratification of the new agreement.

While summer work may be winding down, this fall and winter look to be substantial. There are a handful of projects and large outages that we look forward to around the state.

As of September 1st, the Stationary and Hoisting & Portable Training Funds have merged. I'm excited because this will open doors for members that have not been open prior to the merger. While on the subject of training, if you are laid off this winter, try to make it to Howell or Detroit to sharpen up on your skills or take a couple of new classes. Knowledge is something no one can take away from you and will always make you more employable.

Please try to plan to attend one of the special area meetings in January and February. These meetings are designed to give updated information about the Pension Fund and Health Care Plan. It is an opportunity for you to ask questions, get answers and get educated. The more you understand how they work, the safer we all are.

Welcome to our new Shop and Stationary Division Business Agents Ron Heurtebise, Brian Affeldt and Adam Hutchinson. Tim Ganton has been acting as a fringe field coordinator for years and will be moving into the role of business representative. Welcome to the team gentlemen!

I would like to take a moment and acknowledge our former Dispatcher, **Rich Killingback**. Rich retired August 1st. A huge thank you to Rich for his dedication to Local 324 and it's membership. Rich spent five years in our Dispatch and was a consummate professional. You will be missed!

Fraternally,
Douglas W. Stockwell
Business Manager & General Vice President

HOWELL SWEARING IN - JULY 2019



FOR IMMEDIATE RELEASE



News from the Operating Engineers 324

July 31, 2019

Contact: Dan McKernan at Dan.McKernan@iuoe324.org or
Alan Fosnacht alan@faroughassociates.com

CONTRACTOR ACCUSED OF UNFAIR LABOR PRACTICES AGAINST WORKERS SEES HEAVY MACHINE OPERATORS STRIKE FOR FAIR TREATMENT

GRAND RAPIDS, Michigan (July 31, 2019) – After more than a year of enduring underhanded actions while negotiating in good faith to resolve an Unfair Labor Practice dispute, Operating Engineers who work for Indiana-based Rieth-Riley Construction chose to strike for fair treatment. The negotiations aimed to resolve several unfair labor practice allegations against Rieth-Riley while the hundreds of OE324 members continued to work without a new contract since June 2018.

“The Operating Engineers at Rieth-Riley have repeatedly shown themselves to be dedicated and hardworking, and instead of being rewarded they have suffered at the hands of the company,” said **Operating Engineers 324 Business Manager Douglas Stockwell**. “Our workers have negotiated in good faith and the National Labor Relations Board has offered Rieth-Riley a settlement to avoid a trial over unfair labor practice charges. Through it all, Rieth-Riley has refused to act in the best interests of its employees, and in light of the hardships Rieth-Riley has placed on our workers and their families, we are left with no other recourse than a strike to protect our hardworking men and women.”

The OE324 members, who operate heavy machinery for Rieth-Riley, including those at their asphalt producing facilities, have faced a number of aggressive activities alleged to be unlawful by the NLRB from the company since June 2018 that could result in the company paying more than \$1.8 million in back pay. They include:

- A **controversial lockout** after Labor Day that stalled construction projects across Michigan. Workers who travel to worksites with company vehicles were stranded at locations throughout Michigan, sometimes hundreds of miles from home. The National Labor Relations Board investigated and alleges that Rieth-Riley committed an unfair labor practice because the lockout violated the National Labor Relations Act. The lockout ended only after Michigan’s governor intervened;
- Engaging in what appears to be a **bait-and-switch with wages** when Rieth-Riley docked workers’ pay – to take back money it had given to the workers in 2018. The practice of taking away pay to offset money paid to workers in an earlier period is alleged to violate the National Labor Relations Act. Rieth-Riley’s shell game with workers’ wages is scheduled for an NLRB hearing in October before an administrative law judge; and
- Rieth Riley **denied locked-out workers unemployment benefits**. The State of Michigan ruled in the workers favor allowing them to receive benefits for the period of the lockout.

Rieth-Riley operates several construction crews in Michigan, as well as 13 facilities that produce asphalt for themselves and other contractors in the state. There will likely be an impact on road construction throughout the state as asphalt supplies become limited.

“A strike is always a last resort,” states **Operating Engineers 324 President Ken Dombrow**. “Unfortunately, Rieth-Riley – despite calling themselves a ‘family company’ – treats its workers unfairly and with malice. These workers have decided to make their voices heard in the only manner left available. Rieth-Riley should do the right thing and give these hard-working professionals a new contract and a resolution to these Unfair Labor Practices.”



FOR IMMEDIATE RELEASE

News from the Operating Engineers 324
 Wednesday, June 1, 2019

Contact: Dan McKernan at Dan.McKernan@iuoe324.org

ON LABOR DAY, STRIKING WORKERS URGE COMPANY TO RESUME NEGOTIATIONS, RAISE CONCERNS ABOUT REPLACEMENT WORK

Strike enters 2nd month without a resolution from the contractor despite a pending trial

GRAND RAPIDS, Mich., Aug. 30, 2019 – Nearly 200 striking heavy machinery operators urged their company today to return to negotiations for a new contract, even as the company, Rieth-Riley Construction Co. of Goshen, Ind., faces federal charges related to allegations of wage irregularities and harassment of workers.

The employees, members of Operating Engineers 324, had worked without a contract for 14 months before going on strike a month ago and are now raising concerns about the quality of work being done by replacement workers on dozens of road and bridge projects throughout Michigan.

“While workers are putting their livelihoods on the line and publicly demanding accountability from their employer, Rieth-Riley continues to hide behind their PR flaks and spin machine to smear the same hardworking men and women whose dedication and skills have helped the company succeed,” said Operating Engineers 324 Business Manager Douglas W. Stockwell. “These workers are fighting for respect and fairness, and Michigan taxpayers would be outraged if they knew their tax dollars are going to a company that is accused of abusing workers.”

Rieth-Riley has publicly boasted that it has been able to continue operations, including dozens of Michigan Department of Transportation road projects across the state, and keep them on track by using its staff and temporary workers. Rieth-Riley has refused to say what training these replacement workers have, or whether the work would meet the exacting standards public roads require.

“While it seems unlikely that Rieth-Riley has been operating at the 80-percent capacity it claims, we certainly expect MDOT to hold Rieth-Riley to the same standards of safety, workmanship, and timetables as any other contractor,” said Operating Engineers 324 President Ken Dombrow. “Rieth-Riley should be held accountable for any delay, as well as the quality of their work. Taxpayers need to know who’s been working on the roads and bridges that our families will be using and whether they’re safe.”

Rieth-Riley has not ratified a contract with OE324. Despite starting negotiations in late 2018, the company has repeatedly ended discussions early without an agreement, including twice since the strike began. Rieth-Riley is one of only two union road construction companies out of **over 170** in Michigan that have not signed contracts for the 2019 construction season.

The OE324 members, who operate heavy machinery for Rieth-Riley, including those at their asphalt producing facilities, have faced a number of aggressive activities alleged to be unlawful by the NLRB from the company since June 2018 that could result in the company paying more than \$1.8 million in back pay. They include:

- A controversial lockout after Labor Day that stalled construction projects across Michigan. Workers who travel to worksites with company vehicles were stranded at locations throughout Michigan, sometimes hundreds of miles from home. The National Labor Relations Board investigated and alleges that Rieth-Riley committed an unfair labor practice because the lockout violated the National Labor Relations Act. The lockout ended only after Michigan’s governor intervened.
- Engaging in what appears to be a bait-and-switch with wages when Rieth-Riley docked workers’ pay – to take back money it had given to the workers in 2018. The practice of taking away pay to offset money paid to workers in an earlier period is alleged to violation of the National Labor Relations Act. Rieth-Riley’s shell game with workers’ wages is scheduled for an NLRB hearing in October before an administrative law judge.

Rieth Riley also denied the locked-out workers unemployment benefits. The State of Michigan ruled in the workers favor allowing them to receive benefits for the period of the lockout. The OE324 contract expired on June 1, 2018. The lockout occurred Sept. 4, 2018, which is a violation of the National Labor Relations Act and punishable with a fine that could reach \$1.8 million.



Heath Salisbury
 Financial
 Secretary
 Business
 Representative

Well, I would like to start by thanking the membership for your continued support with all the battles we have been in the last year. I believe that by the time you are reading this that we will be in a better spot with Rieth Riley and Michigan Paving. The members have continued to support the Local and believe that we will fight to the end. We must take care of each other!

We have met with the underground contractors and I believe that by the time you are reading this that

we will have that agreement done as well. There was some delay at the beginning as to what direction those contractors wanted to go. To have the Underground as a separate agreement to the MUCG Highway Agreement? Or did the contractors want to combine the two? All said like the Road Agreement, as the contractors know what we were looking for, which is subcontracting and the Hiring Hall. Revising the subcontracting language will ensure that the company you work for cannot subcontract their awarded work to companies that don't pay the rates, terms and conditions of the agreement. This does two things: first, it keeps manhours with Operating Engineers, keeping you employed and on the job. Second, it supports the fringe benefit funds by retaining those dollars in 324's Plans. This helps lower health care costs and strengthens the Pension Fund by capitalizing on manhours - currently being lost.

Please understand that we are trying to be honest with the membership and do everything we can to see this Union and members prosper for years to come. The surrounding midwestern states already have this type of subcontracting language in their contracts and they are better than 90% union density. Proof is there that adhering to this language

will not harm the contractors. They thrive in these states and will continue to thrive in Michigan under the same terms. Please understand that we want the contractors to be prosperous. If they are, they can employ more of our members. We have, and will continue to, work with the contractors to ensure the longevity for all! Please feel free to call me if there is something you need clarified in the new contract.

We are starting to see movement at the 2.2 billion-dollar Gordie Howe Bridge. We have contractors starting to mobilize onsite and getting started on the preliminary work. I-75 has been underway in numerous locations in the state. I-94 in Jackson continuation from last year and various other locations East to West across the state. Metro Airport has many projects. Even looking at some nice work in the Upper Peninsula on US-2 in various locations. There are also a couple nice jobs on US-41. Please see the MDOT Letting listing in this issue to see where your company stands! It was a wet spring and a dry summer that let most contractors catch up and we hope for a dry and late fall and winter.

We are still in need of GPS Grader and Dozer Operators. Please take the time to update your skills at the Training Center. The Instructors out there are the best around and would love to teach you what they can to help you succeed in your career. Take the time to get comfortable on the Loaders, Rollers, Off Road Trucks, Rubber Tire Backhoes, Skid Steers and Broom Tractors. These machines tend to get the most hours on road jobs.

Thank you to the members who continue to inform the Road Business Reps. of things going on at your jobsites. That knowledge is invaluable. We will continue to do our best to support you and the industry in 2019. Thank you again for your professionalism during the past year.

Fraternally Yours,
Heath Salisbury
 Financial Secretary
 Business Representative

STANTE B&V



Stante B&V - Ken Risden and second generation 324 member Cody Risden working in Auburn Hills. Stante B&V has many 2nd generation Operators at their company. Great job Stante B&V for looking to the future of your company and Local 324.



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LABOR DAY

