

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

Rieth-Riley Construction Co., Inc.,
Employer,

and

Case Nos. 07-RD-257830
07-RD-264330

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

and

Rayalan A. Kent,
Petitioner.

PETITIONER’S BRIEF ON THE MERITS

Pursuant to NLRB Rules & Regulations §§ 102.67 and 102.71, Petitioner Rayalan Kent (“Mr. Kent”) files this Brief on the Merits, in support of the Board’s reversal of the Regional Director’s November 9, 2020 dismissal of his decertification election—an election that already has occurred.¹ Ex. 1, Order Granting Review (Feb. 8, 2021); Ex. 2, Reg’l Dir.’s Decision & Order (Nov. 9, 2020). Mr. Kent’s Request for Review involves the Region’s clear disregard for the Board’s new election rules that explicitly prohibit “blocking charges” from being used to deny employees’ decertification elections. The Board already has acknowledged its new rules “do not apply to petitions filed prior to” July 31, 2020, meaning they apply to petitions filed *after* that date. *Arakelian Enters., Inc.*, 21-RD-223309, 2020 WL 5658310, *1 n.1 (Sept. 22, 2020). Here, the second decertification petition was filed on August 7, 2020, *after* the new rules became effective.

¹ Mr. Kent is at a loss over whether Chairman McFerran supports granting his Request for Review since her dissent from the Board’s February 8, 2021 Order Granting Review failed to acknowledge, let alone address, his Request for Review of the denial of his decertification petition. Ex. 1, Order Granting Review pp. 1–2 (Chairman McFerran, dissent).

Despite Mr. Kent filing the second decertification petition *after* the new election rules went into effect, the Region insisted on quashing an election *that it already had allowed to take place* by suddenly applying the old rules. Indeed, the Regional Director’s dismissal order applying the old rules was issued a mere three-and-a-half hours before the ballots were to be counted. The Board should not permit a Region to flout its election rules to deny employees’ Sections 7 and 9 rights. This is especially true when the Region’s action is a belated and arbitrary midnight hour reversal of course.

Yet even under the old rules, the Region misapplied the law by dismissing the petitions. The unfair labor practice allegations do not relate to the election itself and occurred almost two years before the decertification petitions were filed. The Region also refused to conduct a *Saint-Gobain* hearing before it found—based on its own conclusions of guilt after its one-sided clandestine investigation—a causal connection between the Employer’s alleged conduct and the decertification petitions. The Board should not allow the Region to nullify Mr. Kent’s and his fellow employees’ Sections 7 and 9 rights in such an arbitrary fashion.

FACTS AND PROCEDURAL HISTORY

A. First Decertification Petition.

On March 10, 2020, Mr. Kent filed his first decertification petition, Case 07-RD-257830 (“March Petition”). The Region blocked that petition ten days later based on several unfair labor practices (“ULP”) being adjudicated at that time, including one that had been withdrawn before the Region issued its blocking decision. Mr. Kent sought review of that blocking decision on April 17, 2020, but the Board denied review on June 8, 2020, finding the old election rules then in effect permitted the Region to hold the petition in abeyance. Ex. 3, Order Denying Review. After noting the Region improperly had relied on a withdrawn charge, the Board recognized “that the Acting

Regional Director’s decision . . . raises many of the concerns that led the Board to recently adopt changes to the blocking charge policy.” Ex. 3, p.1 n.1.

B. New Election Rules.

The Board’s new election rules became effective on July 31, 2020. The new rules prohibit the use of ULP “blocking charges” to delay or cause the dismissal of an election. NLRB Rules & Regs. §§ 103.20, et seq. These rules specifically require the Region to process a decertification election and to only allow a ULP “blocking charge” to determine when the Region counts the ballots or certifies the results—not to dismiss the petition or hold the election in abeyance. *Id.*

C. Second Decertification Petition.

A week *after* the Board’s new election rules became effective, Mr. Kent filed a second decertification petition, Case 07-RD-264330, (“August Petition”) with the expectation it would be processed under those new rules. The Region confirmed his expectation by issuing a docketing letter and setting an August 28, 2020 Pre-Election Hearing. Ex. 4, Dck’g Ltr. (Aug. 10, 2020) (excluding enclosures); *see* also Ex. 5, E-mails to Bd. Agent (confirming Region was processing the second decertification under the new rules *no matter if Mr. Kent withdrew his March Petition*).

But three days before that scheduled hearing, Local 324 requested that it be postponed while the Region conducted its investigation into the effects of pending unfair labor practices on that petition, an investigation the Region had informed Local 324’s counsel it was conducting. Ex. 6, Local 324 Postponement Request. Mr. Kent and Employer both opposed Local 324’s request for a postponement to conduct an investigation, since it was in essence a “blocking” charge request and the new rules do not permit such a postponement. Ex. 7, Kent Opp’n; Ex. 8, Employer Opp’n.

After denying Local 324’s postponement request, the Region held the Pre-Election hearing on August 28, 2020, and all parties submitted Pre-Election Briefs on September 8, 2020 addressing whether to have a manual or mail ballot election. The Region continued to process the election by

issuing its September 25, 2020 Decision & Direction of Election (“DDE”) for a mail ballot election to begin on October 13, 2020, with all ballots due to the Region by November 2, 2020. Ex. 9, DDE (Sept. 25, 2020).

While it held the mail ballot election as scheduled, the Region apparently proceeded with its confidential “administrative investigation” of the petition signers. Ex. 2, p. 2. The Region did so by, among other things, targeting those employees who had exercised their Section 7 rights by signing the decertification petition, and asking selected signers to provide affidavits about their reasons for signing that petition. Ex. 2, p. 7. As is evident from its confidential nature, the Region did not allow Mr. Kent to participate in its “investigation” of the signers’ motivations. Nor did the Region provide Mr. Kent with the questions it asked the pro se petition signers, with information about whether the questions were impartial, or whether the pro se petition signers’ affidavits were obtained by threats of subpoenas or court action if an employee refused to cooperate.

With the mail ballot election’s conclusion, the “virtual ballot count” over Zoom was set for November 9, 2020 at 1:00 p.m. Ex. 9, p. 17. Yet at 9:39 a.m. on the day of the ballot count, the Region issued a Decision and Order dismissing *both* decertification petitions. Ex. 10, Emails from Region; *see also* Ex. 2. In that Order, the Region resurrected the March Petition and dismissed both petitions, holding that the pending ULP charges filed against the Employer in 2018 in Case 07-CA-234085 (“2018 Blocking Charge”) and the union’s sixteen-month strike tainted *both* of Mr. Kent’s petitions two years later, including his August Petition filed under the new rules. Ex. 2.

D. 2018 Blocking Charge.

The 2018 Blocking Charge dealt with a Complaint and Notice of a Hearing that the Region issued on December 26, 2018, and later issued a second Complaint and Notice of a Hearing on May 29, 2019. Ex. 2, p. 2; Docket Activity, <https://www.nlrb.gov/case/07-CA-234085> (noting initial complaint); Ex. 11, Complaint.

Boiled down, the Region claims, among other things, the Employer violated Section 8(a)(5) in three ways. First, by unilaterally giving a wage increase to employees on or about July 23, 2018. Ex. 11. Second, by deducting money from their paychecks for vacation and holiday fund contributions the Employer had made since about October 27, 2018. *Id.* And third, from September 4–27, 2018, by insisting on multi-employer bargaining and a multi-employer contract and then by locking out employees to further those objectives. *Id.* Almost two-and-a-half years later, the Region is still holding hearings in the 2018 Blocking Charge case, and it is unclear when the litigation will end since the hearings keep being continued, with the latest hearings being held on February 18 and 19, 2021 and more scheduled in March 2021. *See* Rieth-Riley’s Em. Mot. to Postpone Hr’g, available at <https://www.nlr.gov/case/07-CA-234085>.

E. Local 324’s Strike and Newsletter.

Two months after the Region issued the second 2018 Blocking Charge complaint, Local 324 went on strike against the Employer because Employer would not sign an agreement requiring any subcontractor it hires to be unionized under Local 324. Ex. 12, Kent Decl. Ex. A, Newsletter p. 34 (noting “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”). In that same newsletter, Local 324 claimed 170 other employers already had signed contracts containing the restrictive subcontracting language, and it refused to negotiate a contract with the Employer without that language. Ex. 12, Kent Decl. Ex. A, Newsletter p. 17. Finally, that same newsletter publicized Mr. Kent’s and many other employees’ as “scabs” who have crossed the Union and its picket line, an action guaranteed to not endear the Union to those employees. *Id.*, Ex. A, Newsletter p. 3. The strike is still ongoing—nineteen months later.

ARGUMENT

The Regional Director defied the Board's new election rules when she dismissed Mr. Kent's decertification petition and found that "a question concerning representation cannot be appropriately raised at this time" based on the alleged 2018 Blocking Charge, the Union's strike, and the Region's own confidential investigation. Ex. 2, p. 2. The Board should not permit a Region to deny employees' Sections 7 and 9 rights by ignoring rules that were put in place precisely to protect those rights—rules that prohibit ULPs from blocking a decertification election.

Moreover, even if the old election rules applied, the Region cannot dismiss a decertification petition either based on ULP charges unrelated to any claim of employer taint in the election or by unilaterally finding a causal relationship between the Employer's alleged conduct and the decertification petition without holding an independent evidentiary hearing on that issue. *Cablevision Sys. Corp.*, 367 NLRB No. 59, *5 n.13 (Dec. 19, 2018) (noting "longstanding precedent provides 'that a Regional Director may only dismiss a petition as tainted on the basis of his or her administrative investigation of the petition's showing of interest where that investigation has revealed *direct* employer involvement with the petition'" (quoting *Canter's Fairfax Rest.*, 309 NLRB 883, 884 n.1 (1992))).

The Board should apply its new rules and reverse the Regional Director's decision, order Mr. Kent's election to proceed under the new rules, and order the Region to count the already duly cast ballots. *Cablevision Sys. Corp.*, Case 29-RD-138839, *1 n.1 (June 30, 2016) (Order Denying Review), *dismissal rev'd, rem'd for pet. processing*, 367 NLRB No. 59 (2018), available at <https://www.nlr.gov/case/29-RD-138839>.

I. The Board Should Not Permit Regions to Ignore Its Rules.

Given its well-founded concern over the misuse of blocking charges, the Board issued its new election rules permitting elections to proceed even in the face of such charges. 29 C.F.R. §

103.20; *see also* Repr.-Case Procedures: Elect. Bars; Proof of Maj. Supp. in Constr.-Industry Coll.-Barg. Relationships, 85 Fed. Reg. 70 (Apr. 10, 2020) (codified at 29 C.F.R. pt. 103). Under these new rules, Regions must hold the election, promptly open and count the ballots at the election's conclusion, and then wait to issue the certification results until (1) final disposition of a blocking charge and (2) a determination of a blocking charge's effect, if any, on the election petition. 29 C.F.R. § 103.20. This new process is subject only to one set of narrow exceptions, which has no application here.²

Mr. Kent and his co-workers have a right to have their already-submitted ballots counted under the new rules despite the 2018 Blocking Charge. Yet the Region denied these employees' rights *three hours before the ballot count* by dismissing their decertification petitions. Ex. 2. In doing so, the Region ignored the Board's new rules and returned to the old rules on the effect, if any, of an outstanding ULP charge—blocking charge—on a decertification petition. *Id.* Relying on *Master Slack Corp.*, 271 NLRB 78 (1984), the Region conducted a secret investigation and, based on its conclusions and hand-picked facts from interviews with a tiny number of unit employees, held the alleged 2018 Blocking Charge and the Union's strike tainted Mr. Kent's 2020 petitions. Ex. 2, pp. 2, 7.

² Regions are required to impound ballots for sixty-days after the election's conclusion but before counting the ballots if a live blocking charge (1) challenges the showing of interest in support of the petition or the circumstances surrounding the petition in violation of NLRA Sections 8(a)(1), 8(a)(2), or 8(b)(1)(A); or (2) alleges an employer has dominated the union in violation of NLRA Section 8(a)(2) and seeks to disestablish a bargaining relationship. 29 C.F.R. § 103.20. If a complaint is issued on that ULP charge before the sixty-day impoundment expires, then the ballots will remain impounded until (1) the final determination on that ULP charge and (2) its effect, if any, on the election petition. *Id.* If, however, the ULP charge is withdrawn or dismissed or no complaint is issued before the sixty-day impoundment expires, then the Region promptly will open and count the ballots but still then wait to issue the certification results until (1) final disposition of the blocking charge and (2) a determination of the blocking charge's effect, if any, on the election petition. *Id.*

The Board, in this case of first impression before it, should reverse the Region’s actions as they are wrong for at least two reasons. First, *Master Slack* applies only under the old blocking charge policies—when there is a question whether a causal connection exists between a prior ULP charge and the later decertification election.³ *Master Slack*, 271 NLRB at 84. Since the old blocking charge policies do not apply to the August Petition, *Master Slack* has no application.⁴

³ While the old blocking charge rules may apply to the March Petition, that petition already was held in abeyance since March 20, 2020 based on the 2018 Blocking Charge. Thus, nothing new was needed until final adjudication of the 2018 Blocking Charge.

⁴ Even if the Board finds *Master Slack* applies in this case, the 2018 Blocking Charge’s claims are not “hallmark violations” nor do they allege serious widespread unilateral changes by the Employer that improperly affected the bargaining relationship or essential employment terms and conditions. The Board has found “hallmark” violations to occur where the employer grants “an unprecedented wage increase,” and threats that the employees “would lose their jobs” and it “would close” if the employees voted for the union. *Overnite Transp. Co.*, 333 NLRB 1392, 1394 (2001); *see also Goya Foods*, 347 NLRB 1118, 1122 (2006) (finding hallmark violations are those “issues that lead employees to seek union representation”). But the violation types alleged here, the majority occurring in 2018, are not the type that cause dissatisfaction. *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 650 (D.C. Cir. 2013) (finding employer’s refusal to provide union addresses of replacement employees, requirement that employees obtain company permission before posting materials, and discipline of union advocate did not taint petition). While it is alleged Employer unilaterally gave a wage increase and recouped monies from certain employees that it had paid out in 2018, nothing in the record suggests either was “unprecedented” or serious widespread changes. Nor does the record establish Employer threatened employees with loss of jobs or closure if Local 324 continued to represent them.

In addition, the Employer’s conduct from twenty-one to almost twenty-four months before the August Petition’s filing is not the type that encourages employees “to seek union representation.” *Goya Foods*, 347 NLRB at 1122. The passage of time “between the last credited ULP and the submission of the employees’ petition for decertification” is vital, and “is obviously an important consideration.” *Tenneco Auto.*, 716 F.3d at 649. “This temporal factor typically is counted as weighty only when it involves a matter of days or weeks. However, a lapse of months fails to support, and typically weighs against, a finding of close temporal proximity.” *Id.* Here, the Region attempts to claim the timing is relevant because you look to the date the employees signed the petition and not when the petition is filed. Ex. 2, p. 5. Not only does such argument misstate the law, use of the alleged September 28, 2019 signature date actually establishes that the temporal factor is missing when eleven to fourteen months had passed since the alleged misconduct occurred. Simply stated, there is no “possibility of their detrimental or lasting effect on employees” almost two years later and no “possible tendency to cause employee disaffection from the union.” *Master Slack*, 271 NLRB at 84; *see also Tenneco*, 716 F.3d at 650.

Instead, the new election rules apply, requiring the Region to process Mr. Kent's decertification election and count the ballots. Yet the Region refused to do so in a blatant attempt to get around the new rules and undermine employees' Sections 7 and 9 rights. *Pattern Makers' League v. NLRB*, 473 U.S. 95, 104 (1985) (noting NLRA's paramount policy is to protect employees' Section 7 free choice rights); *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (noting Section 7 confers rights only on employees, not unions and their organizers); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (noting employee free choice is the "core principle of the Act" (quotation marks and citation omitted)). But even under the old rules, the Region's dismissal was improper—at least until the 2018 Blocking Charge is fully adjudicated. *See infra*. Part II.

Second, the Region's ad hoc creation of a "loophole" in the new rules contravenes the Board's intent in creating them. In issuing the new rules, the Board acknowledged "one of [its] principal duties . . . is to resolve questions of representation by holding elections, and that duty is not discharged where the Board does not process a representation petition, especially where there is no legitimate bases for delaying an election." Repr.-Case Procedures, 85 Fed. Reg. 63,18378. Rather, "the better policy protective of employee free choice is to eliminate blocking elections based on any pending unfair labor practice charge, even those that may ultimately be found to have

Finally, even if Employer committed the alleged violations, "[t]he wrongs of the parent should not be visited on the children, and the violations of [the employer] should not be visited on these employees." *Overnite Transp. Co.*, 333 NLRB at 1398 (Member Hurtgen, dissenting); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) ("To presume that employees are such fools and sheep that they have lost all power of free choice based on the acts of their employer, bespeaks the same sort of elitist Big Brotherism that underlies the imposition of the invalid bargaining order in this case."); *see also* Ex. 12, Kent Decl. ¶¶ 3 & 4 (noting Mr. Kent was unaware of some of the alleged Employer unfair labor practices when he filed the petition and the strike did not influence his actions, but that he was aware the Union had demeaned him and sullied his name by distributing it on a well-publicized "scab" list).

merit.” *Id.* at 63,18379. “[R]evising the blocking-charge policy to end the practice of delaying an election represents a more appropriately balanced approach to the issue of how to treat election petitions when relevant unfair labor practice charges are pending.” *Id.* “It ensures that employees are able to express their preference for or against union representation in a timely held Board election, while maintaining effective means for addressing election interference.” *Id.*

The Board also acknowledged several federal appellate courts’ concern with how the old blocking charge rules allowed meritless ULP charges to block elections. *Id.* at 63,18376. For example, one circuit court forcefully instructed the Board to ensure that unions are not allowed to arbitrarily stifle employee free choice:

The Board is [not] relieved of its duty to consider and act upon an application for decertification for the sole reason that an unproved charge of an unfair practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented.

NLRB v. Minute Maid Corp., 283 F.2d 705, 710 (5th Cir. 1960).⁵ Indeed, the new election rule makes plain that “it would be inappropriate for the Board to continue to disregard these valid concerns that the current blocking-charge policy encourages such gamesmanship, allowing unions to dictate the timing of an election for maximum advantage in all elections presenting a test of representative status.” Repr.-Case Procedures, 85 Fed. Reg. 63,18376.

Here, the Region is perpetuating the gamesmanship the Board and federal appellate courts have condemned, refusing to follow the new rules by dismissing Mr. Kent’s petitions because of

⁵ See also *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1159 (D.C. Cir. 2017) (criticizing use of blocking charges as a tactic for delay); *Surratt v. NLRB*, 463 F.2d 378 (5th Cir. 1972) (rejecting applying the blocking charge policy); *Templeton v. Dixie Printing Co.*, 444 F.2d 1064 (5th Cir. 1971) (same); *NLRB v. Gebhardt-Vogel Tanning Co.*, 389 F.2d 71, 75 (7th Cir. 1968) (quoting *Minute Maid Corp.*, 283 F.2d at 710); *T-Mobile USA Inc. v. NLRB*, 717 F. App’x 1, 4 (D.C. Cir. 2018) (Sentelle, J., dissenting) (noting the Board’s blocking charge policy causes “unfair prejudice”).

speculation, unproven allegations,⁶ and a confidential “investigation” to which Mr. Kent was not privy. *See Overnite Transp. Co.*, 333 NLRB 1392, 1392 (2001) (upholding Region’s dismissal of decertification petition solely based on the Board’s prior *decision* holding the employer committed extensive and egregious unfair labor practices, which the Fourth Circuit Court of Appeals had enforced). The Board should not permit such derogation of its rules, and should reverse and remand with orders that the Region process Mr. Kent’s August Petition under the new rules and count the ballots.

II. The Board Should Hold the Region Erred in Dismissing the Petitions Even Under the Old Rules.

A. The Region erred in dismissing the petitions with no evidence of direct employer involvement with the petitions.

“[L]ongstanding precedent provides ‘that a Regional Director may only dismiss a petition as tainted on the basis of his or her administrative investigation of the petition’s showing of interest where that investigation has revealed *direct* employer involvement with the petition.’” *Cablevision Sys. Corp.*, 367 NLRB No. 59, *5 n.13 (quoting *Canter’s Fairfax Rest.*, 309 NLRB at 884 n.1). In issuing its Supplemental Order, the Region explicitly stated, “[n]o evidence has been presented that the Employer in the instant matters engaged in ULPs directly related to the decertification effort.” Ex. 2, p. 4 n.4. The Regional Director therefore lacked *any* lawful grounds to do what she did here—where no direct or indirect Employer involvement was presented, let alone occurred.

⁶ In dismissing the petitions, the Regional Director concluded “the weight of evidence supports, and I conclude, that a causal relationship exists between the Employer’s unlawful conduct and employee disaffection, . . .” Ex. 2, p. 8. However, contrary to the Regional Director’s conclusions, the alleged Employer ULP’s in the 2018 Blocking Charge are just that—allegations with no causal nexus to the election and petitions and merely allegations since no decision has even been issued.

B. In the alternative, the Board should require the Region to conduct a *Saint-Gobain* hearing to address whether a “causal nexus” actually exists between the alleged Employer infractions and the employees’ decertification desire.

If the Board agrees with the Region that a dismissal based on any type of ULP charge is proper and that application of the old blocking charge policies is appropriate before application of the new blocking charge rules, Mr. Kent asks the Board to reverse, remand, and order the Region to conduct a *Saint-Gobain* “causation” hearing as a prerequisite to dismissal of his decertification petitions. As the Board held in reliance on *Saint-Gobain*:

[U]nless “[t]he General Counsel established, at a hearing, that there were ULPs and that there was a causal nexus between that unlawful conduct and the employee disaffection,” a decertification petition could not be administratively dismissed based on allegations that employer conduct caused the disaffection absent a hearing at which the parties to the representation case—including the decertification petitioner—could present evidence on the issue of taint. Moreover, a Regional Director’s findings at such a hearing may be appealed to the Board.

Cablevision Sys. Corp., 367 NLRB No. 59, *5 n.13 (quoting *Saint-Gobain*, 342 NLRB at 434); *see also CPL (Linwood) LLC*, 365 NLRB No. 24, 2017 WL 510604, at *1 (noting a *Saint-Gobain* hearing may be required if a Regional Director dismisses a petition). If both of Mr. Kent’s petitions are to be dismissed, it is the Union’s burden to prove at a *Saint-Gobain* hearing that intolerable Employer taint actually occurred. *See, e.g., Roosevelt Mem’l Park, Inc.*, 187 NLRB 517, 517–18 (1970) (holding a party asserting a bar’s existence bears the burden of proof).

The Regional Director’s finding of a causal nexus here—without a hearing—deprived the employees “at least for now, . . . of their Section 7 rights on the question of union representation.” *Saint-Gobain*, 342 NLRB at 434. “[I]t is not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection. To so speculate is to deny employees their fundamental Section 7 rights.” 342 NLRB at 434.

With no *Saint-Gobain* hearing, the Region improperly shifted to Mr. Kent the burden to prove no Employer taint occurred on appeal to the Board. In doing so, Mr. Kent is forced into a

Kafkaesque procedure where he must rebut the Region’s secret investigation and its limited hand-picked statement of facts from that investigation in support of its position that a causal connection exists. “[S]uch a factual determination of causal nexus should not be made without an evidentiary hearing.” *Id.* At such an evidentiary hearing, Mr. Kent could present evidence on the issue. *See* Ex. 12, Kent Decl. ¶ 4 (noting the alleged Employer unfair labor practices and strike did not affect his decertification petition). Even under the old rules, the Regional Director erred by failing to order a *Saint-Gobain* hearing before it dismissed Mr. Kent’s petitions. Mr. Kent and his fellow employees’ Sections 7 and 9 rights should not be so carelessly ignored.

III. The Case Properly Is Before the Board on Review.

A. Mr. Kent merely asks the Board to process his petition under the applicable rules at the time of filing.

In her dissent, Chairman McFerran found Mr. Kent’s sole purpose for filing his August Petition was to “attempt an end run around the prior blocking-charge policy and the Board’s holding in *Arakelian Enterprises*.” Ex. 1, p. 1 (Chairman McFerran, dissent). Implying such a “nefarious” intent or motive, however, lacks any support in the record. All the record establishes is that Mr. Kent filed the August Petition after the new rules became effective. Ex. 2, p. 2. Meaning, the new rules apply in keeping with *Arakelian Enterprises*’ holding that the rules do not apply to petitions filed *before* July 31, 2020. 2020 WL 5658310, *1 n.1.

Indeed, when the Board denied Mr. Kent’s Request for Review of the Region’s dismissal of his first petition, it recognized “that the Acting Regional Director’s decision . . . raises many of the concerns that led the Board to recently adopt changes to the blocking charge policy.” Ex. 3, p.1 n.1. The Region thus was well aware the Board considered Mr. Kent’s situation to fall squarely within the new rules. As Chairman McFerran put it so succinctly, “[i]f 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” Ex. 1, p. 1 (Chairman McFerran, dissent). Such circumvention occurred here at the Region’s hands—not Mr. Kent’s.

B. The Board can address application of the new rules here.

This case provides the Board with the first opportunity to address when, if at all, its new election rules apply and what affect, if any, *Master Slack* and old pre-existing ULPs have on those rules. Despite this case being a perfect vehicle for such a determination, Chairman McFerran reconfigures the case as one that could require further rulemaking or alteration of procedures, not Board adjudication. Ex. 1, p. 2 (Chairman McFerran, dissent). But contrary to Chairman McFerran’s argument, the Board is not precluded from announcing a new principle, procedure, or rule in an adjudicative proceeding. The determination to proceed via rulemaking or adjudication solely lies within the Board’s discretion. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (acknowledging caselaw “make[s] plain the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion”).⁷

Chairman McFerran’s reliance on the Casehandling Manual for further support likewise fails. Ex. 1, p. 2 (Chairman McFerran, dissent). As is well known, the NLRB’s Casehandling Manual is merely a guideline for Regions and is not binding authority on the Board’s interpretation of its own rules. NLRB Casehandling Manual, Part Two, Purpose of Manual (stating the Manual “is intended to provide procedural and operational guidance,” “has been neither reviewed nor

⁷ See also *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) (stating “[m]ost norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication, . . . and accordingly agencies have ‘very broad discretion whether to proceed by way of adjudication or rulemaking’” (citations omitted)); 32 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure Judicial Review* § 8123 (1st ed. 2020) (Westlaw database updated Oct. 2020) (stating “[t]he law clearly establishes that an agency may choose to define the law or policy through adjudication even if it has rulemaking authority”).

approved by the Board,” “is not a form of binding authority, and the procedures and policies set forth in the Manual do not constitute rulings or directive of the General Counsel or the Board,” and its “guidelines are not intended to be and should not be viewed as binding procedural rules.” “[I]n the event of conflict, it is the Board’s decisional law, not the Manual, that is controlling”); *London’s Farm Dairy, Inc. v. NLRB*, 323 NLRB 1057, 1058 n.3 (1997) (noting the manual does not constitute “a form of authority binding . . . on the Board”); *Children’s Nat’l Med. Ctr., D.C. Nurses Ass’n a/w Am. Nurses Ass’n*, 322 NLRB 205, 205 (1996) (noting the “Manual is not binding on the Board or the General Counsel”).⁸

C. The Regional Director’s dismissal conflicted with Board law.

In another attempt to justify the Region’s dismissal under *Master Slack*, Chairman McFerran argues the Board has a longstanding practice of dismissing petitions based on the mere issuance of a complaint—a so called “merit determination”—alleging some conduct, such as a Regional Director’s finding of a causal connection between the complaint’s allegations and the petition, or where the General Counsel seeks an affirmative bargaining order against the employer. Ex. 1, pp. 1–2, 2 n.2 (Chairman McFerran, dissent). Yet the Chairman provides no direct support for such claimed “longstanding practice,” instead relying on cases that lack any support or application to the facts here.

None of the cases cited by Chairman McFerran support her argument. First, in *Overnite Transportation*, the Board explicitly stated throughout that it only relied on an actual Board decision, which was later enforced by the Fourth Circuit, to find *Master Slack* had been met. 333

⁸ See also *N.L.R.B. v. Cedar Tree Press, Inc.*, 169 F.3d 794, 796 (3d Cir. 1999) (acknowledging the “manual is not binding on the Board”); *Sioux City Foundry Co. v. N.L.R.B.*, 154 F.3d 832, 838 (8th Cir. 1998) (acknowledging “[t]he Casehandling manual is not binding on this court or the NLRB”); *Kwik Care Ltd. v. N.L.R.B.*, 82 F.3d 1122, 1126 (D.C. Cir. 1996) (noting the manual “provides nonbinding guidance”)

NLRB 1392, 1394 (2001); *id.* at 1392 n.5 (stating it “unnecessary to rely on [a case informally settled and closed in compliance] in reaching our finding”); *id.* at 1393 n.8 (noting two other cases ended in settlement agreements); *id.* at 1396–97 (stating “our *Master Slack* analysis is based solely on the unfair labor practices litigated and found by the Board and the Fourth Circuit” and “we do not rely, for purposes of our *Master Slack* analysis, on the . . . settlement agreement[s]”). The Board went to great lengths to ensure that its decision was not based on a mere complaint, thus undercutting any claimed support for such a proposition. *See also Pinnacle Foods Grp., LLC*, 368 NLRB No. 97 (Oct. 21, 2019) (finding that a settlement agreement with a non-admissions clause should not block an election).

Second, in *Big Three Industries*, the Board, *sua sponte*, reconsidered whether a Region properly dismissed a decertification petition because a complaint had been issued against the employer alleging surface bargaining during the union’s first certification year. 201 NLRB 197, 197–98 (1973). In determining dismissal was proper, the Board explicitly noted it was making its determination on the facts of the case, which were that the union’s “certified representative status was not subject to direct or collateral attack” at the time of the employer’s alleged refusal to bargain nor could it be if an affirmative bargaining order was issued. *Id.* at 197. Contrary to Chairman McFerran’s assertion, the mere possibility of an affirmative bargaining order standing alone did not lead to the Board’s holding, nor is it applicable here where no surface bargaining has been alleged and Local 324 is not in its first certification year.

Last, in *Brannan Sand & Gravel*, the Board denied review of a Region’s dismissal of an employer’s RM petition, finding “the issues presented by this RM petition as to the [e]mployer’s objective considerations are inextricably intertwined with those presented in the pending unfair labor practice cases.” 308 NLRB 922, 922 (1992). Then, relying on *Big Three Industries*, it noted

that if the General Counsel prevailed in the ULP cases, the union will have been the representative when the RM petition was filed and the resulting affirmative bargaining order would preclude any representation questions at that time. *Id.* In reaching that conclusion, the Board made clear that it “affirms the Regional Director’s dismissal solely on the foregoing grounds, without passing on the merits of any other contentions, but subject to the reinstatement of the petition after disposition of the pending unfair labor practice cases.” *Id.* As is self-evident, this case is an RD petition, not an RM petition, and thus does not involve any employer’s objective considerations.

Lacking any true support, Chairman McFerran’s argument in dissent crumbles, especially when one considers the caselaw addressing the issue and declining to apply “findings” based solely on a complaint where no true merit determination from an adjudication or hearing has taken place. *Cablevision Sys. Corp.*, 367 NLRB No. 59, *5 n.13 (noting longstanding precedent provides a Regional Director can only dismiss a petition as tainted where his or her investigation reveals direct employer involvement with that petition (citation omitted)); *Pinnacle Foods Grp.*, 2019 WL 5422952, at *3 (citing *Cablevision* and noting under the old blocking charges rules the Board has held “absent a finding of a violation of the Act, or an admission by the employer of such a violation, there is no basis for dismissing a petition based on a settlement of alleged but unproven unfair labor practices” and that “[t]o do so would unfairly give determinative weight to allegations of unlawful conduct and be in derogation of employee rights under Section 7 of the Act” (quoting *Truserve Corp.*, 349 NLRB 227, 228 (2007))).

CONCLUSION

For years, too many employees have been denied their right to decide for themselves whether to be represented by a union simply based on unfair labor practice allegations filed against their employer. Following many courts of appeals’ rulings, the Board chose to amend the blocking

charge rules so that situations such as this would no longer occur—situations where gamesmanship and speculation continue to deny employees their Sections 7 and 9 rights. The Board should correct the denial of employees’ rights and reverse the Regional Director’s decision, order Mr. Kent’s August Petition to proceed under the new rules, and order the Region to count the ballots at once. Alternatively, the Board should reverse the Regional Director’s decision and remand with orders that the Region conduct a *Saint-Gobain* hearing.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Brief on the Merits was e-filed with the NLRB's Executive Secretary and served via email on the following parties or counsel this 22nd day of February, 2021:

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