

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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|--------------------------------|---|-----------------------|
| RIETH-RILEY CONSTRUCTION CO., |) | |
| |) | |
| Employer, |) | |
| |) | |
| and |) | Case No. 07-RD-257830 |
| |) | Case No. 07-RD-264330 |
| LOCAL 324, INTERNATIONAL UNION |) | |
| OF OPERATING ENGINEERS (IUOE), |) | |
| AFL-CIO, |) | |
| |) | |
| Respondent. |) | |

**RIETH-RILEY CONSTRUCTION CO., INC.’S BRIEF IN SUPPORT OF REVIEW OF
THE REGIONAL DIRECTOR’S DECISION TO DISMISS DECERTIFICATION
PETITIONS DUE TO PENDENCY OF UNFAIR LABOR PRACTICE CHARGES**

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INTRODUCTION

Pursuant to Section 102.67(h) of the National Labor Relations Board's ("Board") Rules and Regulations, 29 CFR § 102.62(h),¹ Rieth-Riley Construction Co., Inc. ("Rieth-Riley") files this Brief in Support of the Board's Review of the Regional Director's Decision to Dismiss Decertification Petitions to decertify Local 324, International Union of Operating Engineers (IUOE), AFL-CIO ("Local 324" or the "Union") as the bargaining representative for all of Rieth-Riley's full and regular part-time asphalt plant employees, paving and grading employees in Michigan (the "Decision").²

The Regional Director's Decision is an affront to the rights of Rieth-Riley's employees under Sections 7 and 9 of the Act, to determine for themselves whether or not Local 324 should serve as their collective bargaining representative. First, the Decision is in complete abrogation of Rule 103.20, which the Regional Director has previously acknowledged is applicable to Case No. 07-RD-264330 (the "Second Decertification Petition"). Second, the Decision is necessarily predicated upon the determination that Rieth-Riley has committed an unfair labor practice, in violation of its substantive and procedural rights as defined by the Board's Rules, the NLRA, the

¹ Rieth-Riley's original Request for Review in this matter was filed pursuant to Rule 102.71, based on the Regional Director's express assertion that "it is the rules of Section 102.71 that govern this decision, and not Section 102.67." (*See* Er. Ex. 13, at 10 n.10). However, the Petitioner's Request for Review invoked Rule 102.67 in his Emergency Request for Review, which the Board has concurrently granted, and Chairman McFerran's dissent to the grant of review also expressly referenced Rule 102.67 as the underlying basis for review. Accordingly, Rieth-Riley believes the Board has granted permission for additional briefing from the parties in accordance with Rule 102.67(h), since the Board did not "rule[] upon the issues on review in the order granting review." *See also* Corporacion De Servicios Legales, 289 NLRB 612 (1988) (noting that where review was granted pursuant to Rule 102.71 without a concurrent ruling on the merits, the parties were allowed to submit supplemental briefing).

² Substantial portions of this brief are duplicated from Rieth-Riley's prior submission in support of the Request for Review, as permitted under Rule 102.67(h); however, the Argument section has been tailored to the particular issue of "whether the Regional Director's decision to dismiss the petitions is consistent with Section 103.20 of the Board's Rules and Regulations."

Administrative Procedures Act and the U.S. Constitution. Third, Chairman McFerran's dissent to the Board's grant of review, contrary to its intention, further supports that the Regional Director's dismissal of the Decertification Petitions was improper.

Accordingly, the Regional Director's decision to dismiss the decertification petitions should be reversed, and the Second Decertification Petition should proceed to a count and, ultimately, certification.

BACKGROUND

On May 29, 2019, Region 7 issued a complaint against Rieth-Riley in Case No. 07-CA-234085 (the "Lockout Charge"),³ limited to three issues (all of which Rieth-Riley has denied): (1) issuing a unilateral wage increase to Unit employees on July 23, 2018; (2) locking out Unit employees in September of 2018 to obtain multi-employer bargaining with Local 324; and (3) unilaterally deducting vacation and holiday fund monies from Unit employees paychecks. (*See* Er. Ex. 3, Lockout Charge Complaint). The complaint on the Lockout Charge was consolidated for trial with another complaint filed by the Region *against* Local 324, as to a ULP charge brought by Michigan Infrastructure and Transportation Association, Inc. ("MITA"), which alleges that Local 324 unlawfully refused to bargain with MITA as the designated bargaining representative of certain Michigan employers. (*See* Er. Ex. 4, MITA Charge Complaint).

On Tuesday, March 10, 2020, Rieth-Riley employee Rayalan Kent filed the Case No. 07-RD-257830 (the "First Decertification Petition"). (Er. Ex. 5). On the afternoon of the following Tuesday, March 17, 2020, field examiner Andrew Hampton informed Rieth-Riley by email that the First Decertification Petition would "be held in abeyance due to the outstanding unfair labor

³ Rieth-Riley's factual discussion is limited to information it believes relevant to its arguments here. Additional facts are included with Rieth-Riley's Position Statements submitted to Region 7 involving Local 324, which are attached as Employer Exhibits 1 and 2, respectively.

practice allegations against the Employer.” (See Er. Ex. 6, at 3). Mr. Hampton later confirmed that Local 324 had filed a request to “block” the First Decertification Petition based on the pending ULP charges, and that the Acting Regional Director had considered that request in determining to hold the First Decertification Petition in abeyance. (*Id.* at 1).

On Friday, August 7, 2020, Rieth-Riley employee Rayalan Kent filed the Second Decertification Petition. (Er. Ex. 7). This was following the NLRB’s enactment of Rule 103.20, imposing strict requirements on the invocation of a pending ULP charge to forestall an election petition. Nevertheless, on Tuesday, August 25, 2020, Mr. Hampton called counsel for Rieth-Riley, indicating that the Regional Director was investigating whether the pending ULP charges had any effect on the decertification petition, based on her position that Rule 103.20 granted her the authority to dismiss a petition tainted by ULPs, and requesting additional information in order to investigate the showing of interest proffered by Mr. Kent. (Er. Ex. 8).

Counsel for IUOE Local 324, Amy Bachelder, received a similar call from Mr. Hampton that same day, and requested a postponement of the pre-election hearing until such time as the investigation was complete. (Er. Ex. 9). Both Mr. Kent and Rieth-Riley opposed the request, on the grounds that Rule 103.20 did not permit any delay to the pre-election process. (Er. Ex. 10 & 11). Rieth-Riley further added that the time for investigating the adequacy of the showing of interest had expired. (Er. Ex. 11). The Regional Director denied the postponement request, and the matter proceeded to pre-election hearing on Friday, August 28, 2020. The parties then submitted pre-election hearing briefs on September 8, 2020, with respect to the issue of manual vs. mail-in balloting.

On September 25, 2020, the Acting Regional Director issued the Decision and Direction of Election (“DDE”) with respect to the pending Second Decertification Petition, ordering a

mail-ballot election, setting deadlines for the completion of voter lists and the mailing and submission of ballots, and scheduling the ballot opening for 1:00PM on Monday, November 9, 2020. (Er. Ex. 12). The DDE made no reference to any ongoing investigation of the election petition, or that there would be any potential revision or withdrawal of the DDE pending completion of the investigation. No party filed any immediate requests for review, or filed any objections related to the election process thereafter.

On the morning of November 9, 2020, just hours before the *already-cast ballots* were due to be opened and counted, the Regional Director issued the Decision, which consisted of a joint Decision and Order for Case No. 07-RD-257830 (which was held in abeyance) and “Supplemental” Decision and Order for Case No. 07-RD-264330, dismissing both decertification petitions. (Er. Ex. 13). Virtually all of the Decision was devoted to an analysis under Master Slack Corp., 271 NLRB 78 (1984), which is limited to application of the now-defunct “blocking charge” rule. However, a final paragraph addresses Rule 103.20, in cursory, circular fashion: “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 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.”

ARGUMENT

I. THE BOARD SHOULD REVERSE THE ACTING REGIONAL DIRECTOR’S DECISION TO DISMISS THE DECERTIFICATION PETITIONS.

The Acting Regional Director’s decision to dismiss the decertification petitions substantially prejudices both Rieth-Riley’s employees in the free exercise of their Section 7 rights and Rieth-Riley itself with respect to its proper role as their employer. Accordingly, the

Decision should be reversed and the Second Decertification Petition allowed to proceed forthwith.

A. The Regional Director’s Failure to Apply Rule 103.20 to the Second Decertification Petition Was Arbitrary and Capricious.

As the Regional Director was keenly aware, by its plain terms the NLRB’s new blocking charge rule applies to the Second Decertification Petition. *See* Rule 103.20(a) (stating this section applies “whenever any party to a representation proceeding requests that its previously [or concurrently] filed unfair labor practice charge block the election process.”); *see also* Er. Ex. 8. The Board has also been very clear in this regard. *See Arakelian Enterprises, Inc.*, No. 31-RD-223309, 2020 WL 5658310, at *1 n.1 (DCNET Sept. 22, 2020) (noting that the new blocking charge rule was applicable to representation petitions filed after July 31, 2020). Nevertheless, the Decision willfully and deliberately refused to abide by its provisions.

To begin, Rule 103.20(c) specifies a narrow band of ULP charges that are subject to a special procedure: alleged violations of Sections 8(a)(1) and 8(a)(2) or Section 8(b)(1)(A) of the Act which go *directly* to “the circumstances surrounding the petition or the showing of interest submitted in support of the petition.” Here, however, the Regional Director conceded that “[n]o evidence has been presented that the Employer in the instant matters engaged in unfair labor practices directly related to the decertification effort.” (Er. Ex. 13, at 4 n.4). Indeed, such a determination is self-evident, given that the alleged conduct giving rise to the ULP charge in question admittedly occurred *at least 11 months* prior to the very first signature in support of decertification.

Because they fall outside Rule 103.20(c), the Section 8(a)(5) charges in question are governed by Rule 103.20(b), which categorically states: “If charges are filed alleging violations other than those described in paragraph (c) of this section, the ballots will be promptly opened

and counted at the conclusion of the election.” That is precisely what did *not* occur here. The Regional Director denied the ballot count mere hours before it was to begin. This was a direct violation of applicable Board rules, and grounds for reversal.

Moreover, even assuming *arguendo* that the ULP charge in question could block the Second Decertification Petition, it cannot result in its dismissal. Rule 103.20(d) specifies that: “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.” The Board generally adheres to “the well settled principle of statutory construction—*expressio unius est exclusio alterius*,” which provides that when one or more things of a class are expressly mentioned in a statute or regulatory provision, others of the same class that are not mentioned are excluded. Sunland Const. Co., 309 NLRB 1224, 1226 (1992).

Here, dismissal of a representation petition based on the pendency of a ULP charge is nowhere mentioned in Rule 103.20. Rather, the sole limitation on election proceedings caused by a pending ULP is in 103.20(d), which only permits dismissal of a decertification petition via the Certification of Representation, which in turn can occur only after resolution of the pending unfair labor practice charge before the ALJ and ultimately the Board (as discussed below). The absence of any such authority is presumed intentional and restrictive, and thus again, dismissal of the Second Decertification Petition was in abrogation of applicable Board rules, and should be reversed.

B. The Regional Director Improperly Usurped the Authority of the Administrative Law Judge and the Board in the Lockout Charge, in Violation of Rieth-Riley’s Regulatory, Statutory and Constitutional Rights

Not only did dismissal of the decertification petitions exceed the Regional Director’s authority under Rule 103.20, but it usurped the Board’s authority to adjudicate the Lockout

Charge—effectively making the Regional Director judge, jury and executioner, violating every level of protection afforded Rieth-Riley under federal law. *See, e.g.*, Er. Ex. 13 at 2 (“Because I find that certain conduct by the Employer interferes with employee free choice in an election, I am dismissing the petitions . . .”); *id.* at 5 (“[T]he unremedied unfair labor practices led to the strike that continues to date . . .”); *id.* at 7 (“I find that the Employer’s conduct had a tendency to cause employee disaffection from the Union . . .”).

First, the Board’s Rules only empower a Regional Director to *issue* an unfair labor practice Complaint, not to rule upon it directly. That responsibility is charged to the Administrative Law Judge, subject to further review by the Board (and ultimately a federal Circuit Court of Appeals). *See* Rule 102.15 (empowering the Regional Director to “issue and serve on all parties a formal complaint in the Board’s name stating the alleged unfair labor practices and containing a Notice of Hearing before an Administrative Law Judge”); Rule 102.34 (“The hearing for the purpose of taking evidence upon a complaint will be conducted by an Administrative Law Judge”); Rule 102.35(a)(10) (“The Administrative Law Judge has authority, with respect to cases assigned to the Judge . . . to: . . . Make and file decisions[.]”); Rule 102.45(a) (“After a hearing for the purpose of taking evidence upon a complaint, the Administrative Law Judge will prepare a decision.”).

That is precisely because Regional Directors act within the *prosecutorial* arm of the NLRB, the General Counsel’s office, and there is an inherent conflict of interest in allowing the prosecutor to also rule on the merits of a case:

[O]nce the decision has been made to issue a complaint and to prosecute it, the General Counsel has embarked upon the judicial process which is reserved to the Board. If the General Counsel can control this process, then the General Counsel can indeed usurp the Board’s responsibility for establishing policy under the Act by simply withholding from the Board any issue which might precipitate a meaningful policy decision not in accord with the views of the General Counsel.

United Food & Commercial Workers Int’l Union Local No. 576, AFL-CIO v. NLRB (“Local 576”), 675 F.2d 346, 356 n.12 (D.C. Cir. 1982) (quoting Frito Co. v. NLRB, 330 F.2d 458, 463-64 (9th Cir. 1964); *see also* 5 U.S.C. § 554(d)(2) (expressly forbidding the Administrative Law Judge from being “responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency”); Int’l Tel. & Tel. Corp., Commc’ns Equip. & Sys. Div. v. Local 134, Int’l Bhd. of Elec. Workers, AFL-CIO, 419 U.S. 428, 445 (1975) (noting that hearings on ULP charges must be conducted in conformity with § 554’s requirements).

Second, both due process and Board rules demand that Rieth-Riley be afforded the right to defend against a ULP charge at a hearing prior to dismissal of the Decertification Petitions.⁴ Specifically, Rule 102.38 guarantees the right of any party charged with a ULP to a “hearing in person” with the aid of counsel, “to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence[.]” Yet the Regional Director provided Rieth-Riley no opportunity to submit even written argument or evidence as she determined her “findings” regarding the pending ULPs in question during a hearing or otherwise. Instead, she cobbled together a perfunctory statement of the “Positions of the Parties” from representations made as to other matters. (*See* Er. Ex. 13, at 3). A Regional Director’s “more limited and discretionary inquiry, though appropriate at the investigatory stage, is no substitute for the hearing necessary under the Act for a party faced with an unfair labor practice complaint.” Local 576, 675 F.2d at 355 (holding that party charged with ULP was entitled to present defense

⁴ This is a separate and distinct requirement from the hearing under Saint Gobain Abrasives, Inc., 342 NLRB 434 (2004), where a ULP has *already* been adjudicated, and the issue is its causal effect on the employees’ union preferences. *Saint Gobain* was discussed in more detail in Rieth-Riley’s original Request for Review, and that argument is incorporated herein by reference.

rejected during investigation by General Counsel’s office); *see also id.* at 354 n.10 (“[A] party’s right to a hearing in an unfair labor practice proceeding is [] grounded in the due process guarantees of the Constitution.”)

Third, it bears repeating that the Lockout Charge *has not yet been resolved*; it is currently proceeding before Administrative Law Judge Charles Muhl, and as the Regional Director correctly stated, “[t]he Employer takes the position in the litigation of Case 07-CA-234085 that it has not committed unfair labor practices.” (Er. Ex. 13, at 3). At this time there is thus nothing more than an *allegation* against Rieth-Riley of unfair labor practices under the Act, and Board precedent is clear that dismissing an election petition based on mere allegations would infringe upon the Section 7 rights of employees. Specifically, under the old blocking charge rule, the Board routinely cautioned that “absent a finding of a violation of the Act, or an admission by the employer of such a violation,” dismissal of a representation petition “would unfairly give determinative weight to allegations of unlawful conduct and be in derogation of employee rights under Section 7 of the Act.” Pinnacle Foods Group, LLC, 368 NLRB No. 97 (Oct. 21, 2019) (quoting In Re Truserv Corp., 349 NLRB 227, 228 (2007)); *accord* Cablevision Systems Corp., 367 NLRB No. 59, *5 n.13 (Dec. 19, 2018) (“[U]nless the General Counsel established, at a hearing, that there were unfair labor practices . . . a decertification petition could not be administratively dismissed based on allegations that employer conduct caused the disaffection[.]”) (citations and marks omitted). Indeed, this principle also served as one of the primary motivations for enacting the new blocking charge rule. *See* Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction- Industry Collective-Bargaining Relationships, 85 Fed.Reg. 18366, 18377 (April 1, 2020) (“[A] charge is not meritorious unless admitted or so found in litigation.”).

The Regional Director would likely dispute this line of argument on the grounds that she initially *framed* the dispute as one of “alleged” unfair labor practices, and thus her Decision was not a conclusive determination that Rieth-Riley actually committed a ULP – but such a position would be specious. A decision based on the *pendency* of an unfair labor practice charge implicates the Board’s “blocking charge” policy now embodied in Rule 103.20, which expressly forbids the type of dismissal contained in the Decision. Knowing this, the Regional Director attempted to avoid Rule 103.20 by determining *conclusively* that “the Employer’s unfair labor practices had a causal connection to the decertification petitions,” such that she could then dismiss the Second Decertification Petition outright. (Er. Ex. 13, at 8). The only way this logic holds is if the Regional Director *also* determined conclusively that the conduct alleged in the Lockout Charge *was an unfair labor practice*, and was not relying upon mere allegations.

Fourth, the Regional Director’s authority to investigate expired with the issuance of the *first* Decision and Direction of Election for the Second Decertification Petition. Specifically, Rule 102.63(a) states that a Notice of Hearing can be issued only *after* the Regional Director confirms that “an election will reflect the free choice of employees in an appropriate unit.” Likewise, Rule 102.67(a) states that following the pre-election hearing, the Regional Director may “direct an election, dismiss the petition, or make other disposition of the matter.” In contrast, no Rule permits investigation of the adequacy of the representation petition *after* issuance of the Decision and Direction of Election. Indeed, NLRB Casehandling Manual Part Two (CHM) (“R-Case Manual”) Section 11020 further 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.” Such a requirement is not only logical, it is

essential, because subjecting employees to the entire voting process only to have their ballots cast aside (which is what the Decision has done here) works a grave injustice upon employees' Section 7 rights, and their very faith in the election process.

Fifth, the specific rule that the Regional Director ostensibly invoked – 102.71 (*see* Er. Ex. 13 at 10 n.10) – does not authorize dismissal of the election petition under these circumstances. To the contrary, Rule 102.71(b) states, in relevant part: “Where the Regional Director dismisses a petition . . . , and such action is taken because of the pendency of concurrent unresolved charges of unfair labor practices,” parties are entitled to certain rights of review before the Board. Nowhere does this rule specify that the Regional Director can dismiss a petition based on a pending ULP charge as a matter of right, it merely explains what happens procedurally if a petition is dismissed on that basis.

This stands in stark contrast to 102.71(a), which does grant the Regional Director substantive dismissal authority: “If, after a petition has been filed and **at any time prior to the close of hearing**, it shall appear to the Regional Director that no further proceedings are warranted, the Regional Director may dismiss the petition by administrative action.” (emphasis added). But here again, this avenue was procedurally unavailable to the Regional Director, as the Decision was issued *well* after the close of the pre-election hearing on August 28, 2020. *See* R-Case Manual Sections 11240-11248 (specifying that the “close of hearing” for representation cases refers to close of the pre-election hearing). In short, not only did the Regional Director lack the authority to do what she did, she also lacked the authority to do it *when* she did it.

Put simply, the Decision usurped the Board’s authority to adjudicate charges of unfair labor practices, while disregarding the express limits of the Regional Director’s authority under Rule 103.20. And although the Regional Director allowed for reinstatement of the

decertification petition should the ALJ *reverse* her decision by finding Rieth-Riley committed no unfair labor practices in the Lockout Charge, she lacked authority to make that determination in the first instance. Such an end run around the Board's rules is expressly forbidden by the entire body of applicable law, and the Decision should be reversed accordingly.

C. Chairman McFerran's Dissent to the Board's Decision to Grant Review Further Supports that the Decertification Petitions were Improperly Dismissed.

While offered to justify the Regional Director's actions as permissible under the Act and standing Board precedent, Chairman McFerran's dissent actually *highlights* the various flaws in the Regional Directors' decision, confirming that both of the Decertification Petitions should be reinstated.

First, Chairman McFerran asserts that the second Decertification Petition should be subject to the prior blocking charge rule, based on the pendency of the *first* Decertification Petition, on the grounds that this subsequent filing constituted "an end run" by the Petitioner. But this flips the principle of retroactivity on its head. Under this standard, any election petition which derives its underlying facts or support from events preceding the effective date of the new blocking charge rule would be subject to the *old* rule, even though it has already expired. Put another way, Chairman McFerran would hold the new blocking charge rule must be denied *prospective* applicability in order for "the effective date of the new Rule . . . to have any meaning at all." The NLRB does not countenance such a position on rulemaking; it is well settled that in addressing representation petitions, the Board applies "the procedures that were in effect on the date it was filed." Cablevision, 367 NLRB No. 59, at n.1; *accord* Blommer Chocolate Co. of California, LLC, No. 32-RC-131048, 2016 WL 683222, at *2 n.2 (DCNET Feb. 17, 2016); Exemplar, Inc., 363 NLRB No. 157 n.3 (Mar. 31, 2016). As a result, the status of Case No. 07-RD-257830 should have absolutely no bearing on which rules are applied to Case No. 07-RD-

264330. Indeed, Rieth-Riley is unaware of any Board rules or precedents (nor did Chairman McFerran cite any) which would prohibit the successive decertification petitions filed by the Petitioner in this case. *See, e.g., In Re Overnite Transportation Co.*, 333 NLRB 1392, 1392 n.4 (2001) (noting that the same employee had filed four separate decertification petitions as to the same bargaining unit over a five-month period).

Second, Chairman McFerran claims that the Board has a “longstanding practice” of permitting regional directors to dismiss employee decertification petitions based on their *own* “merits determination” of pending unfair labor practice charges. To begin, such a “practice” cannot overcome the plain text of Rule 103.20, as described above. But moreover, Chairman McFerran cites three Board decisions supporting the *opposite* conclusion, that any merits determination is beyond the purview of the Regional Director. First, *In Re Overnight Transportation Co.*, the Board affirmed dismissal based on the employer’s proven unfair labor practices as adjudicated by an Administrative Law Judge and affirmed by the Board and the Fourth Circuit Court of Appeals, and expressly declined to rely upon a separate Complaint issued by the Regional Director that was resolved without a hearing. *See id.* at n.5. Likewise, in *Big Three Industries, Inc.*, 201 NLRB 197 (1973), the Board only affirmed dismissal of the petition after noting that the Administrative Law Judge had sustained allegations in the underlying complaint, then on review before the Board, that would appropriately be remedied by an affirmative bargaining order. And finally, *Brannan Sand & Gravel*, 308 NLRB 922 (1992) involved an *RM* petition filed by the Employer, not an *RD* petition from employees, where the underlying ULP charges were based on the Employer’s total refusal to recognize the Union as the representative of the bargaining unit, in which case dismissal of the Employer’s petition was found proper because “the Employer’s objective considerations are inextricably intertwined with

those presented in the pending unfair labor practice cases.” In short, Chairman McFerran has not cited – nor is Rieth-Riley aware of – a single Board decision which affirmed the Regional Director’s dismissal of an RD petition based on mere allegations in a Complaint – which is unsurprising, for as described above, Board law has clearly established that such reliance would be entirely improper, and particularly inconsistent with Rule 103.20.

Third, Chairman McFerran cites three subsections of the R-Case Manual, claiming that the Board “explicitly retains references to a Regional Director’s discretion to dismiss a petition, subject to reinstatement, under such circumstances” as those presented in this case. Not so. The only cited provision that would apply here, Section 11733.1(a)(3), expressly cross-references Section 11730.4, aptly titled “**Post** Election Effects of Meritorious Blocking Charges” (emphasis added), which states in relevant part:

Should the Regional Director determine that the allegations, if true, *did* affect the petition, then the Regional Director should consolidate the unfair labor practice allegation(s) with the election objection(s) and set the consolidated cases for hearing before an Administrative Law Judge. In order to assess the propriety of continuing to block the petition, the Region should seek that the ALJ determine the effect of the allegation(s) on the election petition, should one or more allegation be found meritorious.

(emphasis in original). Indeed, this is completely consistent with the Rules and Board precedent Rieth-Riley has identified above, in stating that at a bare minimum, there must be an adjudication by an ALJ that the employer has committed an unfair labor practice and a determination of the effect of those practices on the petition, *before* the Regional Director can dismiss the petition. This is further confirmed by the Board precedents cited within Section 11733.1(a)(3), namely Truserv Corp., 349 NLRB 227 (2007), which is also discussed above, and Williams Enterprises, 312 NLRB 937, 939 (1993), which affirmed an *ALJ*’s finding that an election petition had been tainted by unfair labor practices. Finally, it is well-settled that “the guidelines in the Manual are not Board rulings or directives and are not intended to be and should not be viewed as binding

procedural rules. . . . Thus, while the Casehandling Manual can be regarded as generally reflecting Board policies, in the event of conflict it is the Board's decisional law, not the Manual, that is controlling.” San Diego Gas & Elec., 325 NLRB 1143, 1146 n.5 (1998) (collecting cases; marks and citations omitted). Therefore, to the extent that Chairman McFerran has highlighted any inconsistencies between the new blocking charge rule and any vestigial provisions of the R-Case Manual, the latter should be disregarded.

Fourth, it is procedurally noteworthy that Chairman McFerran and the Regional Director *disagree* about the appellate posture of this review: the Regional Director explicitly limited Board review rights to Section 102.71 (*See* Er. Ex. 13 at 10, n.10), whereas Chairman McFerran stated that Rule 102.67 should apply. This distinction is relevant for the reasons described in section (B) above, namely, that Rule 102.67 only permits dismissal of the petition on administrative grounds *prior* to the issuance of a Decision and Direction of Election. Chairman McFerran’s exclusive invocation of Rule 102.67 is thus a concession that this dismissal determination (apart from being substantively improper) was untimely, which is itself independent grounds for reversal.

Fifth, Chairman McFerran claims that to the extent the issues discussed above are novel, they must be resolved through notice-and-comment rulemaking rather than a Board adjudication. Here again, her arguments betray themselves. Although none of the authority she cites actually supports her asserted propositions (for the reasons described above), Chairman McFerran has relied *exclusively* upon Board precedent and advisory manual provisions in her defense of this dismissal determination. The Board is perfectly capable of *interpreting* its own Rules as precluding the Regional Director’s dismissal of the Decertification Petitions, consistent with positions raised by Rieth-Riley and the Petitioner: “[T]he choice between rulemaking and

adjudication lies in the first instance within the Board's discretion." General Motors LLC, 368 NLRB No. 68 n.8 (Sept. 5, 2019) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974)).

II. CONCLUSION

For the foregoing reasons, the Regional Director's Decision should be reversed, and the First and Second Decertification Petitions should be allowed to proceed without further delay, or, at a minimum, to proceed to evidentiary hearing to determine what if any causal nexus exists between them and the Lockout Charge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Request has been served by electronic mail
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VIA E-Filing

February 22, 2019

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Re: Rieth-Riley Construction Co., Inc.
Case No. 07-CA-234085
Position Statement

Dear Ms. Nixon:

This is Rieth-Riley Construction Co., Inc.'s ("Rieth-Riley" or "the Company") position statement in response to the unfair labor practice charge ("Charge") filed by International Union of Operating Engineers Local 324 (the "Union"). The information set forth below is based upon the facts as presently known from Rieth-Riley's continuing investigation and may be supplemented in the event it becomes aware of additional facts.

I. FACTS

A. Background Information.

Rieth-Riley is an employee-owned company incorporated in Indiana engaged in the construction industry. Its principal office is located in Goshen, Indiana, and it has regional offices located throughout the states of Indiana and Michigan.¹ The instant charge concerns Rieth-Riley's operations in Michigan. Keith Rose is the President of the Company. Chad Loney

¹ In conducting its operations during the most recent 12 months, the Company purchased and received goods valued in excess of \$50,000 directly from points outside of the States of Indiana and Michigan.

is Regional Vice-President and is responsible for overseeing the Company's Michigan operations.

The Union has been the exclusive collective bargaining representative for all employees employed as operating engineers within the State of Michigan since at least November 2, 1993. **(Exhibit 1)** Typically, Rieth-Riley employs approximately 170 operating engineers in Michigan during the construction season.

Historically, Rieth-Riley has been a member of, and been represented for purposes of collective bargaining by, the Michigan Infrastructure & Transportation Association ("MITA") and its predecessors. MITA is a statewide construction trade association that represents union and non-union Michigan companies engaged in the construction industry, working in areas such as road and bridge, sewer and water, utility, railroad, excavation and specialty construction throughout the state of Michigan. MITA and its predecessors have served as the collective bargaining representative for its member employers with the Union since at least the 1960s.

The Union and MITA have been parties to a series of collective bargaining agreements, the last of which was effective from March 19, 2013 to June 1, 2018 (the Road Agreement). **(Exhibit 2)** MITA had a power of attorney ("POA") from 65 contractors signatory to the Road Agreement, including Rieth-Riley, during the term of the Road Agreement. Historically, the POA authorized a committee of MITA members called the Labor Relations Division to bargain with the Union on a multi-employer basis. But additional contractors were also signatory to the Road Agreement without POAs. Some of the signatory contractors had §8(f) relationships with the Union, while others, like Rieth-Riley, had, and continue to have, §9(a) relationships.

Rieth-Riley also has an agreement with the Union that covers its employees performing work at its asphalt plants in Michigan (the Winter Maintenance Agreement). **(Exhibit 3)** This agreement expires on February 29, 2020, and incorporates by reference the Road Agreement, including the Road Agreement's No-Strike/No Lockout provisions.

B. The Union Engages in Bad Faith Bargaining Prior to The Collective Bargaining Agreement Expiring.

On May 25, 2016, Rose and Loney met with Union President Doug Stockwell and Business Agent Heath Salisbury to discuss upcoming bargaining. In the weeks that followed, a group of approximately eight to ten signatory MITA-represented contractors, including Rieth-Riley and signatory contractor Ajax Paving, exchanged several emails with Union President Doug Stockwell in hopes of meeting and discussing concerns in anticipation of bargaining for a successor Road Agreement. **(Exhibit 4)** The contractors sought to discuss what were shaping up to be the main issues in successor contract bargaining: unfunded liability, subcontracting issues, and a proposed hiring hall. **(Exhibit 5)** The parties, including Rose from Reith-Riley, met on June 13, 2016.

That August the contractors reached out to the Union again to set up another meeting to discuss the issues for successor contract bargaining. The Union delayed in responding and scheduling the meeting until January 2017. Ultimately, the group of about ten signatory MITA-

represented contractors, including Loney from Rieth-Riley, met with Stockwell on January 25, 2017. **(Exhibit 6)**

In late 2017 or early 2018, the Union met with representatives of the labor relations committee for the road agreement to discuss the hiring hall and a stricter subcontracting clause.

With the Road Agreement set to expire on June 1, 2018, a slightly larger group of contractors, including Rose from Rieth-Riley, planned to meet with Stockwell in January 2018. However, in December 2017, Stockwell cancelled the pre-bargaining meeting, citing “current arbitration with MITA and other court dealings.” **(Exhibit 7)**

As in prior years, MITA and the Union exchanged reopener letters in mid-February 2018 that clearly stated their intention to bargain for successor agreements. Notably, the Union’s reopener letter stated that it “*hereby offers to meet and confer for the purpose of negotiating a new contract.*” **(Exhibit 8)** Similarly, MITA’s reopener letter stated that it is “*hopeful of successfully concluding the negotiations and reaching a new contract prior to the termination date.*” **(Exhibit 9)** The letters exchanged by the Union and MITA were similar to letters exchanged in the past prior to commencing negotiations for successor agreements. **(Exhibit 10)** On February 21, 2018, the Union also sent a termination letter to Rieth-Riley and filed a notice with the FMCS. **(Exhibit 11)** The Michigan Employment Relations Commission opened a case in response to the FMCS filing. **(Exhibit 12)**

On March 20, 2018, Stockwell and MITA’s Executive Vice-President Michael Nystrom were at a trust fund meeting. Nystrom asked Stockwell for bargaining dates and Stockwell told him that he would get back to him. Not hearing back from the Union, MITA sent an email to the Union on April 9, 2018, requesting dates to bargain over the distribution agreement. **(Exhibit 13)** The Union did not respond. On April 11, 2018, Nystrom sent an email to Stockwell informing him that the Road Agreement’s negotiations committee was ready to start scheduling negotiation sessions in May. **(Exhibit 14)** Again, the Union did not respond. There were eight contractors represented on the negotiating committee, including Rose from Rieth-Riley and Mark Johnston from Ajax Paving. Not hearing back from the Union, Johnston sent another email to Stockwell on May 1, 2018 requesting to meet with the Union to bargain. **(Exhibit 15)**

On May 2, 2018, the Union sent a letter to MITA stating that it “accepted” MITA’s termination of the Road Agreement and was withdrawing from multi-employer bargaining. **(Exhibit 16)** This was the *first time* that the Union had stated that it did not intend to continue bargaining with MITA and/or with a multi-employer bargaining unit. The contractors’ bargaining committee continued to request to bargain. **(Exhibit 17)**

On May 18, 2018, MITA sent the Union another proposal for a successor Road Agreement. **(Exhibit 18)** The Union did not respond.

The Road Agreement expired on June 1, 2018. On the same date, MITA sent the Union a proposal to extend the Road Agreement. **(Exhibit 19)** The Union refused the offer.

C. **The Union Continues Its Bad Faith Bargaining Post-Expiration of the Collective Bargaining Agreement.**

Between June and July 2018, Union business agents visited several job sites where operating engineers employed by MITA-represented contractors were working. The Union representatives stated in no uncertain terms that the Union would not negotiate a new collective bargaining agreement with the contractors, including Rieth-Riley, if MITA was their bargaining representative. The Region found this conduct to be an unfair labor practice. (*See* Complaint in Case 07-CB-226531) At the same time, during these same job site visits, Union representatives asked traveling operating engineers to leave job sites under the threat of being levied Union fines.

D. **The Union Fringe Benefit Funds Refuse to Accept Fringe Benefit Payments.**

Although the Union had engaged in the conduct set forth above, up until this point Rieth-Riley continued the status quo under the expired Road Agreement. This included continuing to make payments to the various fringe funds.

But, on July 16, 2018, Rieth-Riley received a letter from the Union's Fringe Benefit Fund Office stating that the Funds' Board of Trustees, of which Stockwell is a member, would not credit contribution payments and fringe reports from contractors who have a POA with MITA. The Funds made this retroactive to June 1, 2018 (the expiration of the Road Agreement) (**Exhibit 20**) This caused extreme hardship on Rieth-Riley's operators, many of whom would lose their benefits. It posed a particular problem with respect to the Vacation and Holiday Fund contributions, which contractors withhold from the taxable portion of operators' wages and remit to the Union Vacation and Holiday Fund, which, in turn, pays the vacation and holiday benefit to the operators. *See Exhibit 2*, Article IV, Sec. 5 (p.26). Because the Davis-Bacon Act, 40 U.S.C. 3141, *et seq.*, requires that Rieth Riley pay such a benefit on Davis Bacon covered jobs, the Funds' failure to credit its contributions and forward them to the employees would bring Rieth Riley out of compliance with the law. Acknowledging this, the Funds' letter noted that vacation fund contributions were taxable as wages and that the Funds disclaimed all liability resulting from the failure to pay those "wages."

In light of this, Rieth-Riley determined that the best way to comply with its Davis-Bacon obligations was to make employees whole for the impact of the Funds' decision. Accordingly, Rieth-Riley paid the vacation fringe amount via check to the operators and increased each operator's base wage by \$2.00 per hour during the time when the Funds would not be crediting the contributions Rieth-Riley made on their behalf. It communicated this decision to the operators via letter on July 23, 2018. (**Exhibit 21**)

To attempt to remedy quickly the problem caused by the Funds' decision, on August 8, 2018, MITA rescinded the POAs it had from contractors, including the POA from Rieth-Riley, effectively removing itself from bargaining. (**Exhibit 22**) The Union objected to MITA's rescission of the POAs as being ineffective, and, in response, each contractor rescinded its own POA. (**Exhibit 23**) Nevertheless, the Union continued to refuse to bargain with the contractors

and continued to block the Fringe Benefit Funds from accepting and crediting contributions from the contractors who had rescinded their POAs. **(Exhibit 24)** Additionally, the Fringe Benefit Funds Office continued to refuse (and returned) the Company's fringe benefit contributions. **(Exhibit 25)**

E. The Union Engages in Picketing and Strike Activity.

On August 25, 2018, the Union set up picket lines at an Ajax Paving job site. At one point, a group of about 10 picketers blocked ingress to an Ajax supervisor. Evidence concerning the picketing was previously submitted to the Region in Case 07-CC-228255. The Region found the allegation concerning the blocking of ingress had merit but dismissed it on non-effectuation grounds. Picketers had signs stating, "no contract" with "Elmers and Lois K" (Ajax's subcontractors) and "no contract with Ajax." Stockwell was one of the picketers and was heard yelling to tell Johnston to "hug his nuts." Stockwell also told an Ajax supervisor to tell Johnston that this was "strike one."

F. The Contractors Lock out Operators at Job Sites Statewide.

On August 31, 2018, Rieth-Riley informed its employees, by letter, that as a result of the strike against Ajax Paving, and in support of the Company's bargaining position and to protect against whipsaw strikes, the Company was locking out its employees effective September 4, 2018. **(Exhibit 26)** This letter was hand-delivered to employees. The Company also informed employees that the Union continued to refuse to bargain for a new labor contract or to accept and credit fringe benefit contributions on behalf of their employees. The Company informed employees that it had rescinded its POA with MITA to allow the fringe benefits contributions to be accepted but the Fringe Benefit Funds had returned all their payments to the Company. (*Id.*) The letter to employees included a copy of the labor contract that MITA had proposed to the Union. **(Exhibit 27)**

As of the week ending on September 1, 2018, Rieth-Riley had 170 operating engineers working at different job sites throughout Michigan. **(Exhibit 28)** The Company locked out 129 operating engineers as of September 4, 2018. **(Exhibit 29)** The only operating engineers that continued to work during the lockout were performing work at several Rieth-Riley asphalt plants and at a small job subject to the National Maintenance Agreement (NMA). The plant operators perform maintenance and other work that does not fall under the Road Agreement, are paid a blended rate, and perform work on the Winter Maintenance Agreement. **(Exhibit 3)** The Winter Maintenance Agreement is effective until February 29, 2020 and incorporates by reference the Road Agreement. Accordingly, the Road Agreement's no strike/no lockout clause remains in place for the Company's asphalt plants through February 2020. Similarly, the NMA has a no strike/ no lockout clause. **(Exhibit 30)**

The lockout ended on September 27, 2018. The Company informed its employees by telephone to report to work.

G. Rieth-Riley Proposes a Solution to the Vacation and Holiday Fund Payments, but the Union Does Not Request Bargaining.

On October 3, 2018, counsel for the Union Fringe Benefit Funds notified its trustees that they should have been accepting and crediting Rieth-Riley's contributions without any interruption. **(Exhibit 31)** Accordingly, the Funds began accepting Rieth-Riley's contributions again. This required that Rieth-Riley pay all Vacation and Holiday fringes to the Fund, even for the period of time when it had paid those benefits directly to employees. This would cause it to overpay its operators approximately \$800,000 in Vacation and Holiday benefits.

On October 11, 2018, Rose sent a letter to Stockwell proposing a solution to this problem through which it would gradually deduct from employees' paychecks the vacation and holiday benefits that had been paid directly to employees and submit these contributions to the Vacation Fund. The Company outlined its proposal in detail and also offered to work out an arrangement with the Union to allow employees to keep the benefits paid directly to them and get credit with the Funds for these payments. Rose informed Stockwell that the Company planned to finalize its procedures no later than October 15, and asked Stockwell to let him know before then if he wished to discuss the proposed solutions he had outlined. **(Exhibit 32)**

Stockwell replied by letter dated October 15, 2018. He did not ask to discuss the proposed solutions Rose had outlined or propose any alternatives. Instead, he flatly stated that all the funds, including the Vacation Fund, "need to be made whole immediately." The Union did not counter-propose or made any offer as to how the funds would be made whole other than to say that they would pursue any deductions made to employees' pay if made in violation of federal or state law, or in violation of "the contract." **(Exhibit 33)**

Rose replied to Stockwell by letter that same day, explaining further why he had made its previous proposal, and asking Stockwell to clarify whether he was asking to bargain over the deduction program. **(Exhibit 34)**

Stockwell replied by letter dated October 16, 2018 (now one day after Rieth-Riley had proposed that the deduction program begin). Stockwell stated that the Union had already stated its position regarding the Vacation Fund and wage deductions. Stockwell did not request any further bargaining over that issue, instead commenting that the Company was free to bring up any such subject it desired at successor contract negotiations—which had not even been scheduled yet. **(Exhibit 35)** Due to the Union's refusal to bargain over the Company's obligation to make whole the Vacation Fund by the end of December (*see Exhibit 2* at Art. V, Sec. 4(c)), and avoid significant double-payment, the Company informed its employees of the paycheck deduction program by a notice dated October 18, 2018. **(Exhibit 36)**

H. Rieth-Riley Responds to Information Requests from the Union.

By letter dated November 9, 2018, the Company received an information request from the Union (received on November 15, 2018). **(Exhibit 37)** The Union's information request had six items. Rieth-Riley responded to the Union's information request by letter dated November 15, 2018. **(Exhibit 38)** Rieth-Riley provided information responsive to items one

and five. It stated that it had no documents responsive to item six. The Company also replied that it had concerns with the relevance and burden of the requests, and that the information requested was confidential and proprietary in nature and invited the Union to contact the Company about its request.

The Company received a second information request by letter dated December 10, 2018. **(Exhibit 39)** With regard to the Company's concerns with the Union's November 9, 2018 requests three and four, the Union limited its request to any entities doing work in Michigan in the construction industry, but did not attempt to explain why the information was relevant or negotiate a solution to the Company's confidentiality concerns. With regard to item two, the Union simply reiterated its information request, again, without attempting to explain its relevance or negotiate a solution to the Company's confidentiality concerns. Additionally, the Union added a request for, *inter alia*, documents regarding any agreements with any Contractor or Association concerning bargaining with or entering into a contract with the Union.

The Company replied by letter dated December 14, 2018, stating that it would be unable to respond to the information request until after the holidays. **(Exhibit 40)** The Union, by letter dated December 19, 2018, informed Rieth-Riley that it expected to receive the information requested in items two and three immediately, and that the rest of the information be received by January 4, 2019. **(Exhibit 41)**

By letter dated January 3, 2019, Rieth-Riley responded to the Union's December 19, 2018 information request. **(Exhibit 42)** Concerning the Union's request for information related to the Company's, or its owners/shareholders', ownership in other entities, Rieth-Riley reiterated its confidentiality and relevance concerns, and requested that the Union provide an explanation as to why that information was relevant because the information did not relate to the bargaining unit employees. In response to the rest of the information requested, the Company noted that the law does not require an employer to provide a union with bargaining strategy documents and responded that in any event it had no relevant, non-privileged responsive documents.

The Union replied by letter dated January 4, 2019. **(Exhibit 43)** Once again, the Union made no effort to negotiate a solution to the Company's confidentiality concerns. In response to the relevancy issue, the Union simply stated that the information related to other entities was relevant "to determine the possibility of a related entity performing bargaining unit work." With regard to the request for documents related to the Company's intent in engaging in coordinated bargaining, the Union focused its request on any documents related to coordinated bargaining and argued that it was entitled to verify whether the Company was "lawfully" engaging in coordinated bargaining.

Rieth-Riley replied by letter dated January 10, 2019. **(Exhibit 44)** It reiterated its relevance and confidentiality concerns, and pointed out that the Union's "threadbare recital of relevance" did not meet its obligation to explain why it was requesting the information. Without waiving its objections, the Company disclosed that the only entity in Michigan in which it has ownership interest is Crackers Demo, LLC (which is also a Union contractor and has been known to the Union for years) and explained its ownership structure. The Company responded to the Union's newly-focused request for agreements related to coordinated bargaining by stating

that there are “no agreements between the Company and any entity related to coordinated bargaining.”

The Company received a letter from the Union dated January 23, 2019, in which the Union again requested any agreement the Company may have with any entity related to bargaining with the Union. (**Exhibit 45**) The Union also asserted that it was made aware that “such agreement(s) exist(s).” The Union added to its information request a request for any documents related to a contractor’s ability to withdraw its power of attorney from MITA. Finally, the Union requested a list of who the Company has subcontracted within the past year—an issue it had not addressed since the Company had provided its subcontracting form months before.

Rieth-Riley replied to the Union by letter dated January 28, 2019, reiterating that “there are no agreements between the Company and any entity related to coordinated bargaining.” (**Exhibit 46**) The Company also stated that there are no documents responsive to the Union’s request concerning its ability to withdraw its power-of-attorney with MITA as it relates to the Company’s 9(a) bargaining with the Union. It reiterated its relevance and privilege concerns. With regard to the subcontractors’ list, the Company replied that it had previously provided the Union with the subcontracting form it requires every subcontractor to sign, and raised relevancy concerns with the Union’s request for more specific information.

The Union has never responded since Rieth-Riley sent its letter dated January 23.

I. The Union Continues to Bargain in Bad Faith.

Presently, Rieth-Riley and the Union are in the process of bargaining for a successor contract. The first bargaining meeting was held on November 20, 2018. The Company requested to meet again in December 2018 and/or January 2019, but the Union refused to provide any bargaining dates prior to February 2019. The parties met for the second time on February 19, 2019. Although the parties had planned to begin negotiating at 9:00 a.m., **Exhibit 47**, Stockwell arrived at approximately 10:00am. And, after meeting for a little over one hour, Stockwell declared that he was done meeting for the day.

II. Analysis

A. Rieth-Riley Did Not Unlawfully Change Employees’ Terms and Conditions of Employment.

The Union alleges that the Company unilaterally increased employees’ wages and made deductions to employees’ wages. It claims that this conduct violated the Act. These claims are without merit. After the Union repudiated the parties’ bargaining relationship and refused to bargain with Rieth-Riley, the Company was free to make unilateral changes. Still, Rieth-Riley went to great lengths to maintain the status quo and did not make changes outside of its past practice. When it increased employees’ wages and deducted from their paychecks, it gave the Union notice and the opportunity to bargain, but the Union refused. In any case, legal requirements and exigent circumstances required Rieth-Riley to follow through with the changes.

Finally, with respect to the wage increase in particular, the Union knew outside of the 10(b) period that Rieth-Riley proposed such an increase, but did nothing until it filed the instant charge.

1. The Union's Bad Faith Conduct Privileged Rieth-Riley to Make Changes.

Typically, an employer is obligated to maintain the status quo and bargain in good faith until impasse is reached before it can make changes in wages, hours, and other terms and conditions of employment. Daily News of Los Angeles, 315 NLRB 1236 (1994). However, the instant case is not typical. Determining whether an employer is bargaining in good faith first requires the Board to look at the union's conduct. An employer's compliance with its duty under the Act cannot be challenged if the union has engaged in unlawful bargaining. See Louisiana Dock Co. v. NLRB, 909 F.2d 281 (7th Cir. 1990); Chicago Tribune Co., 304 NLRB 259 (1991); Remington Lodging, 359 NLRB No. 95 (Apr. 24, 2013) ("The Board has even held that an employer's take it or leave it position is not bad faith where the union refuses to compromise on any of its demands or pursue effective negotiations") (quoting Romo Paper Products, 208 NLRB 644 (1974)); United Food & Comm'l Workers Int'l Union v. NLRB, 1 F.3d 24 (D.C. Cir. 1993); NLRB v. Hi-Tech Cable Corp., 128 F.3d 271 (5th Cir. 1997).

A "totality of the circumstances" analysis applies to the union's conduct. See Leader Communications, 359 NLRB No. 90 (Apr. 10, 2013); Borg-Warner Controls, 198 NLRB 726 (1972). Basic points the Board considers include willingness to meet, consideration of proposals, making counterproposals, responses to information requests, explanations given for proposals, and sincerity with which a party's positions are taken and held. See St. George Warehouse Inc., 349 NLRB 870 (2007); Allied Mechanical Serv., Inc., 332 NLRB 1600 (2001); Sign & Pictorial Union Local 1175 v. NLRB, 419 F.2d 726 (D.C. Cir. 1969); NLRB v. Hi-Tech Cable Corp., above.

Here, the Union refused to meet with the Company, let alone bargain or exchange proposals, both before and after the expiration of the contract. Although Rieth-Riley and its designated representatives on the MITA-LRD repeatedly requested that the Union meet and bargain, the Union refused. They sent the Union a proposal, but the Union did not respond. The Union's focus was on having Rieth-Riley, and all the other MITA-represented contractors, sign a Union self-authored agreement, without bargaining. Among other things, the Union unlawfully insisted that Rieth-Riley bargain without designating MITA as its representative (which is the subject of the Complaint in Case 07-CB-226531). See Presbyterian Univ. Hosp., 320 NLRB No. 30 (1995) (stating that if a party is so adamant concerning its own initial positions on significant bargaining subjects, the Board may find bad faith by way of that party's "take it or leave it" approach to bargaining); Teamsters Local 418, 254 NLRB 953, 957 (1981) ("As noted by the Supreme Court, it was the intent of Congress when enacting Section 8(b)(3) of the Act to 'prevent employee representatives from putting forth the same 'take it or leave it' attitude that had been condemned in management.'").

This case is a pristine example of why a Union's bad faith conduct releases the employer from the restrictions of 8(a)(5). Here, the Union repudiated its relationship with Rieth-Riley. It

refused to bargain as long as Rieth-Riley designated MITA as its representative (which Rieth-Riley had every right to do). It engaged in a series of unlawful, bad-faith conduct. And ultimately, these events cornered the Company into an impossible situation when the Union Funds refused to accept Rieth-Riley's contributions, thus placing Rieth-Riley in potential violation of Davis Bacon.²

Even if the Region determines that the Union was not acting in bad faith, the unilateral changes were lawful. Under certain circumstances, unilateral employer action is justified. Thus, the Board recognizes exceptions to the rule against unilateral changes dealing with necessity, economic exigency, waiver, and past practice.

2. Rieth-Riley Granted Wage Increases and Deducted Holiday and Vacation Benefits Consistent With Past Practice.

In Raytheon Network Centric Systems, 365 NLRB No. 161 (2017), the Board held that unilateral employer actions consistent with past practices are lawful. The Board also ruled that actions taken consistent with an established practice do not constitute a change requiring bargaining merely because they may involve some degree of discretion. Just as in Raytheon, the Company here granted a wage increase to its employees consistent with its past practice. The Company has a long-standing practice of paying its employees above wage scale and the Union has never protested.

Similarly, Rieth-Riley has always deducted vacation and holiday fringes from employees. The Road Agreement required it to do so, and it has continued to do so to at all relevant times. See **Exhibit 2** at Art. V, Sec. 4(c).

The Company acted consistently with its past practice (and in compliance with the Road Agreement). The Union's allegations to the contrary are without merit.

3. Rieth-Riley Gave the Union Notice and the Opportunity to Bargain.

Section 8(a)(5) does not prohibit employers from changing terms and conditions of employment. Instead, it requires that an employer give the union *notice and the opportunity to bargain* before making such a change. Here, Rieth-Riley did exactly that. On May 18, MITA gave the Union a proposal on Rieth-Riley's behalf. (**Exhibit 18**) It proposed a \$2/hour wage increase. The Union did not respond. Similarly, before Rieth-Riley used a wage deduction to deduct vacation and holiday benefits from employees, it notified the Union of its exact plans on October 11, 2018. (**Exhibit 32**) Although Rieth-Riley made clear the urgency of the matter, Stockwell did not request bargaining at that time. (**Exhibit 33**) A waiver of the right to bargain

² The Union may mistakenly argue that the Union Funds could no longer accept the Company's contributions because the agreement had expired. However, it is unlawful for a union to put economic pressure on contractors by rejecting their fringe benefits contributions. See Ficken Const. Co., 276 NLRB 682 (1985) (where the Board found that the union was not prohibited from accepting benefit payments from multi-bargaining employers after the termination of an agreement). And ultimately, even the Funds concluded that it was wrong to reject contributions from a 9(a) contractor. See **Exhibit 31**.

may be found were a union has notice than an employer intends to implement changes in conditions of employment but fails to request bargaining concerning the changes. American Buslines, Inc., 164 NLRB 1055, 1056 (1967). This is exactly what occurred in this instance.

4. Economic Exigency Required Rieth-Riley to Act Regarding Vacation and Holiday Benefits.

In RBE Electronics of S.D., 320 NLRB 80 (1995), the Board held that an employer “confronted with an economic exigency compelling prompt action short of the type [which would entirely relieve] the employer of its obligations to bargain . . . will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain” over the particular matter. Bargaining in good faith in such time-sensitive circumstances need not be protracted and the employer can proceed to implementation of the particular matter after reaching impasse *on the matter*, or after a waiver of bargaining by the union. Thus, the Board recognizes the need to balance the interests of the union’s right to bargain with the employer’s need to run its business. RBE at 82. An employer is also not proscribed from unilaterally taking action to avoid loss of fringe benefits upon the expiration of a collective bargaining agreement. AAA Motor Lines, 215 NLRB 793 (1974).

Here, Rieth-Riley implemented the deduction from employee wages only because it was avoiding double-paying its employees’ vacation benefits. Under the Davis-Bacon Act (DBA), 40 U.S.C. 3141 *et seq.*, the Company is required to pay prevailing wage rates that include wages and fringe benefit rates, including a vacation rate. Failure to comply with DBA can result in the withholding of contract funds and payments, contract termination, and debarment from future contracts for up to three years. (40 U.S.C. 3142(c)(3) 29 CFR 5.5(a)(2) and 5.5(b)(3)) Additionally, because Vacation and Holiday fringes are wages, employees would have been able to sue Rieth-Riley under federal and state wage payment statutes if they did not receive such benefits.

Rieth-Riley has always paid the vacation rate on its employees’ paychecks and deducted the same amount as a contribution to the Union’s Vacation Fund. When the Union’s Funds decided not to accept the Company’s contributions, Rieth-Riley was required under the DBA to continue to pay its employees the fringe benefit rates, including the vacation rate (but stopped deducting the amount because the Union Funds would not accept the contributions). Then, when the Funds decided to credit the Company’s contributions, its CBA required that it pay those contributions in full to the Fund by the end of the year. By Michigan law, an employer may deduct from employee paychecks only gradually, so Rieth-Riley had to act swiftly to comply with its competing obligations without double-paying the benefit. Mich. Comp. Laws § 408.477(7)(4)(d).

As discussed above, the Union waived its right to bargain over this issue by failing to request bargaining after Rieth-Riley notified it of the course of action it was considering. And to the extent Stockwell’s repetition of his immutable position on the matter could be considered bargaining, the parties quickly reached impasse, privileging Rieth-Riley to act. See RBE, 320 NLRB 80.

5. The Wage Deduction Was Not a Material, Substantial And Significant Change.

The Board will not find a change is unlawful if it is not material, substantial, and significant. *See Toledo Blade Co.*, 343 NLRB 385 (2004) *citing Flambeau Airmold Corp.*, 334 NLRB 165 (2001) (a unilateral change in a mandatory subject of bargaining is unlawful only if it is material, substantial, and significant.) Any change made by Rieth-Riley in implementing these deductions was not unlawful because it is not material, substantial and significant. The Union complains about Rieth-Riley's deduction program, but, as discussed above, Rieth-Riley had always been deducting the Vacation and Holiday Benefit from employee wages—that is how the Road Agreement structured that particular benefit. **Exhibit 2** at Art. V, Sec. 4(c). To the extent there was any change in the way these funds were deducted from employee wages, it was not material, substantial, and significant. Notably, employees have not been harmed by the deduction process. They have received all of the monies to which they are entitled.

6. The Allegations Regarding The Wage Increase Are Time-Barred.

As discussed above, on May 18, MITA gave the Union a proposal on Rieth-Riley's behalf that proposed a \$2/hour wage increase. (**Exhibit 18**) But the Union did not respond. This all occurred outside the six (6) month statute of limitations period set by Section 10(b). Because the Union filed the instant charge more than six (6) months after it learned of the proposed wage increase, this particular allegation is time barred.

B. Rieth-Riley Did Not Bypass The Union Nor Deal Directly With Employees.

The Union alleges that the Company bypassed the Union and dealt directly with employees on August 31, 2018 and on October 29, 2018. The factors for establishing direct dealing are:

(1) the [employer] was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union. *Permanente Med. Grp., Inc.*, 332 NLRB 1143, 1144 (2000).

Clearly, the letters handed out to employees on the alleged dates do not constitute direct dealing.

The August 31, 2018 letter informed employees about the defensive lockout and included a copy of the terms of the agreement that MITA proposed to the Union. The Board has refused to find a violation where an employer communicated directly with its employees and accurately informed them of the terms of its collective bargaining proposals. *Emhart Industries, Hartford Div.*, 297 NLRB 215 (1987), *Machinists Dist. Lodge 190, Local 1414 (Putnam Buick) v. NLRB*,

827 F.2d 557 (9th Cir. 1987), *enforcing* 280 NLRB 868 (1986); NLRB v. United Techs. Corp., Pratt & Whitney Aircraft Div., 789 F.2d 121 (2d Cir. 1986) (where the Board found that the employer did not engage in unlawful direct dealing by publicizing to the employees its offer to the union and stating its position on the offer). *See also* Radio Broad. Co., 277 NLRB 1112 (1985), *review denied sub nom.* Teamsters Local 115 v. NLRB, 802 F.2d 448 (3d Cir. 1986).

On October 18, 2018, the Company handed out to its employees a notice about the paycheck deduction program after the Union had refused to engage in bargaining over this issue. The Company's notice was sent only after it specifically notified the Union that it was going to implement the change unless the Union informed it that it wanted to bargain. The Union clearly waived its right to bargain over this change and communicating the change to the employees in these circumstances is not unlawful.

In neither letter did Rieth-Riley seek to bargain with employees. It simply notified them of decisions it had already made after offering to consult with the Union. Therefore, the Region should dismiss the allegations regarding direct dealing.

C. **The Defensive Lockout Was Lawful.**

The Union alleges that the Employer "initiated and conducted [the lockout] pursuant to its insistence upon a permissive subject of bargaining, specifically multi-employer bargaining with the Charging Party Union." It further alleges that the lockout "was only a partial lockout which discriminated against employees based on their membership and activities on behalf of the Charging Party Union" and that the lockout "was also initiated and conducted pursuant to the Employer's bad faith bargaining conduct in connection with the Charging Party Union."

For the reasons discussed below, Rieth-Riley did not lock out employees to insist on multi-employer bargaining with the Union. And even if it had, it would not be unlawful.

1. **Rieth-Riley's Lockout Was Lawful.**

The Union presumably argues that the Act prohibits an employer from locking out "to force a change in the bargaining pattern from single-employer to multiemployer unit bargaining." Great Atl. & Pac. Tea Co. (Syracuse, N.Y.), 145 NLRB 361, 365 (1963). But such a theory is dead from the very start. The Board in that case clearly explained the lockout was unlawful because it was an "offensive tactic." At that time the Board permitted defensive lockouts only, but that changed shortly thereafter when the Supreme Court ruled that offensive lockouts are lawful. Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965). Under extant law, offensive lockouts are lawful.

Even if the Union were correct that an employer cannot lock out to force a change in bargaining from single-employer to multi-employer unit bargaining (which it is not), those facts are not present here. The unit in this case was not single-employer to begin with. The long-standing bargaining unit is multi-employer. The Union, not Rieth-Riley, was seeking to convert the status of the bargaining unit. And, to the extent the Union attempted to convert the bargaining relationship to a single-employer relationship it failed to do so by not following the requirements

of Retail Associates, 120 NLRB 388 (1958), to provide adequate written notice prior to the contractually established date for modification of the collective agreement. *See also* Roofers, Local 220 (Jones & Jones, Inc.), 177 NLRB 632, 653 (1969). The Road Agreement required that such changes be communicated in writing at least 60 days before the end of its term. Here, the Union first requested to withdraw from multi-employer bargaining on May 2—less than a month before that agreement expired. Accordingly, the Union untimely terminated the multi-employer bargaining relationship.

Further, Rieth-Riley did not lock out to try to dictate the format of bargaining (single vs. multi-employer). It provided its reasons in black and white in its August 31 letter to employees: to support its bargaining position and to protect against whipsaw strikes.

The Union may argue that Rieth-Riley’s bargaining position *was* to insist on multi-employer bargaining. That would have been lawful, given the Union’s failure to follow the Retail Associates requirements. But, at any rate, Rieth-Riley was not so insisting. At the time of the lockout the Union was unlawfully refusing to bargain with MITA as Rieth-Riley’s representative in any capacity (which the Region has already found to be unlawful). Because of that, the parties had not even begun to discuss whether Rieth-Riley wanted to bargain in a multi-employer group represented by MITA, or simply have MITA represent it as a single employer. Rieth-Riley proposed that the Union engage in multi-employer bargaining with it and other MITA contractors, but in no way was that the sticking point in the parties’ bargaining. *See* ACF Industries, 347 NLRB 1040, 1042 (2006) (“Further, we agree with the judge that the impasse was not invalidated by the fact that the Respondent’s final offer contained a nonmandatory subject of bargaining . . . neither the General Counsel nor the Union demonstrated that the Respondent’s insistence on the proposal contributed to the impasse in any discernible way.”) The sticking point in their relationship was the Union’s unlawful refusal to bargain—even on a single-employer basis—with any contractor who designated MITA as its bargaining representative. Complaint in 07-CB-226531 at ¶¶10-12. Rieth-Riley never insisted on multi-employer bargaining. Interestingly, after the NLRB issued Complaint, the Union returned to the bargaining table, where Rieth-Riley is attempting to bargain with the Union on a single-employer basis to this day.

Similarly, there is nothing unlawful with Rieth-Riley locking out to protect against whipsaw strikes. The Supreme Court has held that it is lawful for members of a multi-employer bargaining group to lock out their employees in response to a union’s strike against one of the employers (the so-called “whipsaw” strike). NLRB v. Brown, 380 U.S. 278 (1965). It is similarly permissible for a group of employers who share a common interest to lock out even if they do not formally constitute a multi-employer association. *See* Weyerhaeuser Co., 155 NLRB 921, 922 (1965) enforced sub nom. Woodworkers W. States Reg’l Council 3 v. NLRB, 398 F.2d 770 (D.C. Cir. 1968) (finding it lawful for a group of employers to lock out, whether it was “in order to preserve the integrity of the Association,” or as “economic action taken to further their own bargaining position.”). As there is no dispute that the Union struck Ajax, Rieth-Riley’s lockout in response was entirely lawful.

2. Rieth-Riley Chose Not to Lock Out Asphalt Plant Operators for Legitimate, Non-Discriminatory Reasons.

A lockout is a lawful form of economic pressure. See MSR Industrial Services, 363 NLRB No. 1 (2015) (“[In a 9(a) relationship] parties are ordinarily free, post-contract, to employ economic weapons such as strikes and lockouts in pursuit of their bargaining goals.”). Still, an employer may not lock out where motivated by anti-union animus in violation of 8(a)(3). Central Illinois Public Service Company, 326 NLRB 928, 930 (1988). The Supreme Court has set forth the relevant test:

First, if it can reasonably be concluded that the employer's discriminatory conduct was ‘inherently destructive’ of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is ‘comparatively slight,’ an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.

NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).

For the reasons discussed above, Rieth-Riley locked out all job site operators for lawful purposes. In such cases a lockout, “standing alone, cannot be considered inherently destructive of employee rights.” Central Illinois, 326 NLRB 928 at 931.

The Union accuses Rieth-Riley of discriminating against employees through a partial lockout. But Rieth-Riley had an obligation to comply with the NMA and the still-in-effect Winter Maintenance Agreement, which incorporated the expired Road Agreement’s no-lockout obligations. Per the NMA and the Winter Maintenance Agreement, Rieth-Riley *would have* violated the Act had it locked out its plant operators and NMA operators. The Union’s claim that Rieth-Riley’s failure to do so was unlawful has no merit.

Further, a partial lockout is not inherently discriminatory—an ALJ will analyze it through the second part of the Great Dane test. In this case, Rieth-Riley locked out job site operators, but not operators in its asphalt plants, for legitimate and substantial business reasons. The Union had engaged in whipsaw picketing on two public highway construction job sites. Rieth-Riley’s asphalt plants are privately owned and not on highway projects, and it estimated that whipsaw strikes there were not likely enough to justify locking out operators there. Also, Rieth-Riley had retail customers it had to continue serving from its asphalt plants. While it could continue some work on job sites with non-operators, it could not continue operating the asphalt plants without operators. In addition, the NMA operators were working on a small job that was not subject to the expired Road Agreement. These business reasons justify a partial lockout. See Hercules Drawn Steel Corporation, 352 NLRB 53, 54 (2008); Advice Memorandum re: Grain Processing Corporation, 37 NLRB AMR 74, 2009 WL 8166153 (2009).

Additionally, Rieth-Riley had no anti-union motivation for locking out operators at its job sites. Its operators at asphalt plants were Union members just as much as its operators at job sites. And none of them were involved in the Union’s bargaining tactics, which were imposed top-down from Douglas Stockwell. Instead of having anti-union motivations, Rieth-Riley was

trying to bring the Union back to the negotiating table. It made this clear to its employees at the time of the lockout. *See* August 31 Letter to Employees (“[O]ur company ha[s] had a long, positive relationship with [the Union] . . . Our goal remains to reach a new statewide labor contract with OE 324.”)

D. The Company Has Not Delayed In Providing, And Has Not Failed To Provide, Information Requested.

Under the National Labor Relations Act, an employer is obligated, upon request, to furnish the union with information that is potentially relevant and that would be useful to the union in discharging its statutory responsibilities. The Board has long held that information pertaining to the bargaining unit is presumptively relevant. Information concerning non-unit employees is not presumptively relevant and must be produced only upon a showing of relevance. Brazos Electric Power Cooperative, Inc. 241 NLRB 1016 (1979). Similarly, when information is confidential, proprietary or otherwise privileged, the employer may raise such concerns and seek to bargain an accommodation. Pacific Bell Tel. Co., 344 NLRB 243 (2005); *see also* Detroit Edison v. NLRB, 440 U.S. 301 (1979).

In the instant case, the Company replied to each of the Union’s information requests in a timely manner. It is lawful for Rieth-Riley to assert, as it did, that some of the information requested was irrelevant and/or that it was confidential and proprietary in nature. Despite the relevancy and confidentiality concerns, Rieth-Riley provided the Union with information in response to all the information requests.

Concerning the Union’s November 9, 2018 information request, as modified by the Union’s December 10, 2018 and January 23, 2019 letters, the Company (1) provided the Union with all of the contracts from other bargaining units; (2) informed the Union that there are no agreements with any entity regarding coordinated bargaining and that it has no agreements that affect the Company’s ability to bargain with the Union as a 9(a) employer; (3) disclosed that the only entity operating in Michigan that is owned by Rieth-Riley is Crackers Demo, LLC; (4) informed the Union that the Company’s owners or shareholders do not own any other entity in Michigan; (5) provided the Union with the subcontracting form it uses for all subcontracts; (6) informed the Union that it does not have hiring procedures or guidelines; (7) informed the Union that there are no documents responsive to the Union’s request related to the Company’s ability to withdraw its POA as this Company is a 9(a) contractor; and (8) requested that the Union provide it with the relevancy of requesting a list of subcontractors.

When Rieth-Riley raised relevance concerns, in most areas the Union did not attempt to justify its requests at all. And, in the limited communications where it did so, it did so in the most general terms. Under the Act, a party must offer more than “mere suspicion or surmise” to be entitled to the information requested; there must be more than a general theory as to why the information would be useful or necessary. Teamsters Local 117 (Imperial Parking), Case 19-CA-143328, 2015 WL 4870182, at *2 (July 6, 2015); *see also* Mondelez Global, LLC, 13-CA-170125, 2017 WL 3485229 (Aug. 14, 2017) (holding union “must show more than a mere concoction of some general theory which explains how the information would be useful.”).

The Union may assert that it believes the Company is withholding information about agreements related to coordinated bargaining. However, such documents do not exist, and it is well established that there is no duty to provide information that does not exist. See American Benefit Corp., 354 NLRB 1039, 1053 (2010) (“There is, of course, no duty to provide information that does not exist.”); Whittier Area Parents’ Ass’n, 296 NLRB 817, 819 n.2 (1989) (explaining that there is no violation of the Act in refusing to give union information that does not exist).

The Union may also assert that the Company has delayed in providing information regarding its subcontractors, however, Rieth-Riley responded to the Union’s November 9, 2018 information request by providing a copy of the subcontractor’s agreement. The Union did not follow-up or request an explanation or additional information regarding subcontractors in its December 10, 2018 information request. Thus, Rieth-Riley was under the impression that the Union was satisfied with its response, and it was not until after the Union filed the instant charge, in its January 23, 2019 information request that the Union requested a list of subcontractors. The Company promptly responded by asking for the relevancy of this information because subcontractors’ information is not presumptively relevant.³ (See Pence Construction Corp., 281 NLRB 322 (1986), citing Pfizer, Inc., 268 NLRB 916 (1984), holding that when a union requests information with respect to matters occurring outside the bargaining unit represented by the union, the burden is on the union to demonstrate more precisely that the information is relevant). To date, the Union has not replied to the Company’s request for relevancy. Thus, these allegations have no merit, and should be dismissed.

E. Section 10(j) Injunctive Relief Is Not Warranted.

You have inquired as to the Company’s position concerning the appropriateness of injunctive relief in the above-referenced matter. “To grant such relief, the district court is required to find both (1) ‘reasonable cause’ to believe an unfair labor practice has occurred; and (2) that injunctive relief with respect to such practices would be ‘just and proper.’” Muffley ex rel. NLRB. v. Voith Indus. Servs., Inc., 551 F. App’x 825, 827 (6th Cir. 2014) (citations omitted). As discussed above, in this case there is no reasonable cause to believe Rieth-Riley has committed any unfair labor practice, so, for that reason alone, injunctive relief is inappropriate.

Even if the Union could show that there is reasonable cause to believe that the Company committed an unfair labor practice, which there is not, injunctive relief is not “just and proper” in this case because the Board’s normal processes would be effective in remedying the effects of any of the allegations the Union has made. “[T]he temporary relief granted under § 10(j) should be only that which is ‘reasonably necessary to preserve the ultimate remedial power of the Board and is not to be a substitute for the exercise of that power.’” Id. at 833 (citation omitted). See also Fleischutz v. Nixon Detroit Diesel, Inc. 859 F.2d 26, 30 (6th Cir. 1988).

The only time that interim relief is warranted is when the circumstances of the case “create a reasonable apprehension that the efficacy of the Board’s final order may be nullified or

³ Rieth-Riley is also concerned with the likelihood that the Union will attempt to harass its subcontractors in view of the Union’s bad faith conduct.

the administrative procedures will be rendered meaningless.” Sheeran v. American Commercial Ines, Inc., 683 F.2d 970, 979 (6th Cir. 1982). *Accord*, Fleischut at 30-31. Absent extraordinary circumstances, the Board’s remedial power is sufficient to remedy the unilateral changes alleged, direct dealing allegations, the delaying or refusing to provide information allegations, and the lockout allegations involved here.

The Board’s 10(j) Manual contains a checklist to help determine when extraordinary circumstances make 10(j) relief “just and proper.” 10(j) Manual Appendix B at 1. The considerations for cases involving the unlawful employer refusal to recognize and bargain (including...insistence on nonmandatory subject) set forth therein are absent from the allegations here:

- Rieth-Riley has a long history of collective-bargaining with the Union.
- There is no evidence of actual loss of support for the Union (and in fact the evidence shows that Rieth-Riley has never stopped reaching out to the Union to bargain).
- The lockout started on September 4, 2018, and ended on September 27, 2018. No employee was replaced. There is currently no threat of a strike.
- The parties are currently engaged in bargaining for a successor agreement.
- There are no serious or “hallmark” violations alleged (no discharges, no threats to close, no 8(a)(1) violations allegedly committed by any senior employer agents).
- Rieth-Riley does not have a history of prior unfair labor practices.

Id. at 4.

With regard to unlawful unilateral changes and the unlawful refusal to provide relevant information, a review of the 10(j) Manual’s checklist also reveals that 10(j) relief is not “just and proper” in this case:

- Employees are not upset with the changes.
- The Company has not discontinued healthcare coverage.
- The Company has not eliminated benefits at the core of the Union’s representational status.
- The Company has not failed to pay benefit fund contributions.
- The Company has not made unlawful demands in grievance handling or negotiations.
- No unilateral changes are posing a major stumbling block to the parties’ negotiations.

- There is no history of prior unilateral changes.
- The Union has not made clear that it wants prior working conditions restored.
- The Union is not pursuing a Section 301 remedy.
- The information requested is not a major issue in dispute and has no impact on the likelihood that parties will reach agreement.

Id. at 4 and 5.

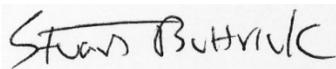
Furthermore, Courts have refused to grant injunctive relief in similar cases. In Muffley, the Sixth Circuit considered unilateral change allegations, and held that there was no “reason to doubt that, if the Board accepts the ALJ's recommendations, the remedies [of rescinding the unilateral changes and making employees whole] will be effective . . . we cannot conclude that interim injunctive relief is reasonably necessary to protect the Board’s power to remedy the harm from the unfair labor practices once a final administrative decision is issued.” Muffley, 551 F. App’x 825 at 836 (6th Cir. 2014). With regard to the lockout, the Office of Advice has found the need for injunctive relief was moot after a lockout ended because the only practical reason for Section 10(j) relief would have been to return the employees to work. *See* Advice Memorandum Re: Stepan Co, Case 04-CA-34417 (June 21, 2006).

Injunctive relief is not just and proper in this case. The Board’s remedies would be effective and none of the extraordinary concerns identified by the 10(j) Manual are present in this case. The Board’s remedial powers are sufficient to remedy the allegations of the type alleged by the Union here. Further, in this case there is no reasonable cause to believe those allegations have occurred. 10(j) is inappropriate.

III. Conclusion

For all of the foregoing reasons, the Charge should be dismissed, absent withdrawal. Please feel free to contact me with any questions or concerns or if you require any additional information. Thank you.

Sincerely,



Stuart R. Buttrick
Rebekah Ramirez
Ryan Funk

Enclosures

Exhibit 2

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VIA E-Filing

April 8, 2019

Ms. Donna Nixon
Field Attorney
National Labor Relations Board, Region 7
477 Michigan Ave., Rm 300
Detroit, MI 48226-2569

Re: Rieth-Riley Construction Co., Inc.
Case No. 07-CA-234085
Supplemental Position Statement

Dear Ms. Nixon:

This is Rieth-Riley Construction Co., Inc.'s ("Rieth-Riley" or "the Company") supplemental position statement in response to the unfair labor practice charge ("Charge") filed by International Union of Operating Engineers Local 324 (the "Union"). It responds to a number of questions you asked regarding:

- Rieth-Riley's willingness to bargain with the Union outside multi-employer bargaining;
- the Union's refusal to bargain with Rieth-Riley, even on a single-employer, coordinated basis;
- whether multi-employer bargaining is a permissive or mandatory subject of bargaining; and
- if multi-employer bargaining is permissive, whether it was lawful to lock out and condition the end of the lock out on the acceptance of the MITA-proposed collective bargaining agreement.

The Company is submitting this supplemental position statement in response to your request for additional information and evidence received from the Region, and to assist the Region in its investigation of the allegations in the Charge. It reserves the right to modify or further supplement this position statement.

I. Rieth-Riley Was Not Motivated by a Permissive Subject of Bargaining in the Lockout.

Rieth-Riley discussed this issue at length in its February 22, 2018 position statement. It incorporates that discussion here and adds to it, pursuant to your request for more information. There are numerous reasons why Rieth-Riley was not motivated by a permissive subject of bargaining in the lockout, any one of which should result in dismissal of this allegation. In other words, to prevail on this allegation the Union would have to defeat all of the following arguments with sufficient evidence to support its position. It cannot do so, and this allegation should be dismissed.

A. The Proper Bargaining Format at the Time of the Lockout was Multi-Employer, Because the Union's Purported Withdrawal Was Neither Timely nor Unequivocal.

As discussed below, Rieth-Riley did not lock out employees to force multi-employer bargaining. But even if it had, to do so would not have been to insist on a permissive subject of bargaining. Although the Union purported to withdraw from multi-employer bargaining, a party's withdrawal from a multi-employer unit is effective only if it is timely and unequivocal. Retail Associates, Inc., 120 NLRB 388, 393 (1958). The right of withdrawal from a multiemployer unit is not free and uninhibited, or exercisable at will or whim. Id. at 393. The element of good faith is a necessary requirement in any such decision to withdraw, because of the destabilizing and disrupting effect of withdrawal from multiemployer collective bargaining. Id. at 394. In the instant case, the Union's withdrawal was neither timely nor unequivocal, and it was not made in good faith. Accordingly, the proper bargaining format at the time of the lockout was multi-employer, so a proposal to preserve that multi-employer bargaining is a proposal on a mandatory subject of bargaining.

1. The Union's Purported Withdrawal Was Untimely.

A withdrawal is timely if it occurs before the time set for negotiations to start or before the time set by the expiring collective bargaining agreement for modification. Id. at 395. Here, the expiring collective bargaining agreement (the "Road Agreement") set such a deadline, and the Union did not meet it. And even if the Road Agreement had not set the deadline, the Union did not withdraw before negotiations began.

Article XIII of the Road Agreement established that the contract's expiration date was June 1, 2018, and that it would continue from year to year "unless either party hereto shall notify the other party in writing at least sixty (60) days prior to the end of the current term . . . of its intention to make changes or terminate this Agreement." Thus, the parties had until April 3, 2018, to indicate their desire to modify or terminate the agreement.

MITA sent its reopener letter on February 19, 2018, expressing its desire to reach a new contract prior to the termination date. The Union sent its own letter on February 21, 2018, stating its desire to make changes to the current agreement and offering "to meet and confer for the purpose of negotiating a new contract." It is well established that a withdrawal from *multi-*

employer bargaining is an action that is distinct from terminating a collective bargaining agreement. See Rome Electrical Systems, 349 NLRB 745 (2007) *enfd.* 286 Fed Appx. 697 (11th Cir. 2008). Neither one of these letters reflects a withdrawal from multiemployer bargaining. To the contrary, both letters unconditionally indicate a desire to meet and bargain for a successor contract on a *multi-employer basis*.

After the reopener letters, MITA and MITA’s Labor Relations Division (the “LRD”) unequivocally invited the Union to continue to meet and bargain prior to the expiration of the agreement. (See February 22, 2019 Position Statement page 3). It was not until May 2, 2018, that the Union, for the first time, stated that it was withdrawing from multi-employer bargaining and that it “accepted” MITA’s termination of the agreement. Plainly, MITA never withdrew from multi-employer bargaining and the Union first attempted to do so only on May 2—about one month too late.

Even if the Union’s alleged withdrawal had met the Road Agreement’s modification deadline, which it did not, the Union’s purported withdrawal was untimely because bargaining had already begun. For purposes of the Retail Associates rule, the Courts and the Board have held that “bargaining” has begun when parties meet to discuss a new contract, “no matter how speculative the discussion is.” NLRB v. Spun-Jee Corp., 385 F.2d 379, 382 (2d Cir. 1967). See also Simplex Grinnel, 251 F.Supp.2d 1201 (2003), citing Sunrise Undergarment Co., Inc. v. Undergarment & Negligee Workers Union, 419 F.Supp. 1282, 1284-85 (S.D.N.Y. 1976) (withdrawal not effective even after only first negotiation session in which “proposals and counterproposals for the renewal of the contract were exchanged and discussed”) and Carvel Co. v. NLRB, 560 F.2d 1030, 3034-35 (1st Cir.1977) (bargaining began when multiemployer unit answered union letter related to bargaining proposals).

Here, the LRD and the Union began discussing a successor contract, on a multi-employer basis, as early as May 2016. The LRD and the Union met on June 13, 2016, and on January 25, 2017, during which the Union provided the LRD with its hiring hall proposal. In November 2017, Doug Stockwell reached out to the LRD again to meet in January 2018, although the meeting was eventually cancelled. (The events prior to the expiration of the Road Agreement are detailed in the February 22, 2019 Position Statement, Pages 2 and 3).

Thus, the Union did not timely withdraw from multi-employer bargaining because it did so within the 60 days prior to the expiration of the contract. Further, the Union did not withdraw before bargaining began back in June 2016 and January 2017. Under Retail Associates, the Union’s purported withdrawal was untimely. Accordingly, multi-employer bargaining was the proper bargaining format.

2. The Union’s Purported Withdrawal Was Not Unequivocal and Was Made in Bad Faith.

Even if the Region finds that the Union’s withdrawal was timely, which it was not, the withdrawal was not unequivocal, and was instead made in bad faith. When a party purports to withdraw from multi-employer bargaining, the Board looks beyond that particular claim and

examines the party's conduct. For instance, in Retail Associates, *supra*, the union picketed one member of an employer-association, forcing that member to resign from the association and enter into a separate bargaining agreement, then proceeded to picket another single member of the association while indicating it was withdrawing from multi-employer bargaining. The Board found that the union did not engage in bargaining on an individual basis, and that it was using the "whipsaw" strategy of picketing one member and "thereby threatening the other employers with future picketing if all of them did not accept the contract terms demanded by the union." Therefore, the Board held that "the attempted withdrawal cannot be accepted as unequivocal and on good faith where, as here, it is obviously employed only as a measure of momentary expedience, or strategy in bargaining" Id. at 394.

This is precisely what the Union did in this case. Although it initially claimed to be abandoning multi-employer bargaining in favor of single-employer bargaining, the Union refused to bargain even on a single-employer basis, all while seeking to effect multi-employer bargaining on the contractors. The Union's own statements from the past year show this, and if there were any doubt about the Union's intentions, the Union has now made it clear that it truly did seek a multi-employer agreement—it recently reached a multi-employer agreement with a group of contractors who had been signatory to the MITA Road Agreement. Thus, any notion that the Union did not want to continue having a multi-employer bargaining relationship is pure fiction.

a) The Union Refused to Bargain on a Single-Employer Basis.

The Union's claim that it withdrew from multi-employer bargaining with the objective of engaging in single employer bargaining is simply untrue. Instead of seeking single-employer bargaining, the Union simply refused to bargain with any MITA POA contractor generally, and with Rieth-Riley in particular, even on a single-employer basis:

- On June 19, 2018, at a special Board of Trustees Meeting for the Union's Fringe Benefit Funds, Stockwell stated that:
 - "The Union will not be negotiating with MITA **or the employers who have a Power of Attorney (POA) with MITA.**" (Emphasis added here and in the rest of this Section 2).
 - The Union "will continue to negotiate with the employers who **do not** have a Power of Attorney with MITA under the Road and Utility Distribution Agreements and because the Union is bargaining with **these** employers in good faith the fringe contributions should be accepted by the Fund and credited to the employees from these employers."
 - In response to a recommendation that the fringe benefit payments **from the POA employers** be held after expiration of the contract, Stockwell stated that MITA terminated the agreement and "**there are no negotiations taking place.**"

- Stockwell stated that since “the MITA contract is an 8(f) contract **it is done** and contributions should not be accepted,” “the Funds cannot accept contributions from **MITA POA contractors.**” (Exhibit A)
- On August 8, 2018, at a special Board of Trustees Meeting for the Union’s Fringe Benefit Funds, Stockwell motioned and passed a vote to return all fringe benefits contributions received by the Funds from **MITA POA contractors.** (Exhibit B)
- On August 8, 2018, MITA rescinded all POAs for the Road and Distribution Agreements’ contractors. The Union replied that it had not only accepted MITA’s termination and withdrawn from multi-employer bargaining but “[a]lso important is the fact that Local 324 timely terminated its contract with each and every one of the Power of Attorney contractors . . . There have not been any negotiations and there are no planned negotiations with the POA contractors. Therefore, as stated in the Trustee meeting, there is no basis to accept contributions from these entities.” (Exhibit C)
- Based on the Union’s position, the Funds concluded that the Union “**disavowed**” **engaging in any negotiations with the MITA POA employers** and had not agreed to extend the terminated collective bargaining agreements on a formal or informal basis. (Exhibit B)
- On August 8, 2018, Mark Johnston from Ajax Paving (a MITA POA contractor) reached out to Stockwell to “get us all back at the bargaining table” and arrange a meeting between **a group of contractors that dropped the POAs** (which included Rieth-Riley) and the Union. Stockwell replied on August 10, 2018:
 - At this time we have an agreement in place the [sic] covers the work in question. **I would agree to sit down with you but not to negotiate** (Exhibit D)
- Due to the Union’s position that it would not bargain with contractors who held a POA with MITA, the contractors rescinded those POAs. But the Union still refused to bargain with these contractors even on an individual basis. Johnston wrote back to Stockwell on August 10, stating that the contractors dropped the POAs with MITA because they all believed that was the right direction to go for employees, and would agree **to sit down with the Union to talk about the path forward for the union contractors and the Union.** Stockwell initially agreed to meet on August 22. But when Johnston sent several emails following up regarding the time and place for the meeting, Stockwell ignored his emails. (Exhibit D)
- Then, on August 10, 2018, the Union wrote to the Funds again, stating that:

- **“Local 324 has not negotiated and/or reached out to the POA contractors whose contract was terminated. There are no plans to do so.** Therefore, the situation between these two groups is completely different.” (Exhibit E)
- On August 15, Stockwell finally replied to Johnston’s emails, cancelling the meeting and stating:
 - **“There’s no reason for me to talk to anyone that had power of attorney with Mita.”** (Exhibit D)
- On August 16, Johnston asked Stockwell what he wanted to do, if not meet. Stockwell replied that he was clear to the contractors that the Union did not want an agreement with MITA . . . the Union “severed” the relationship, and after their latest move **“I don’t have anything to say to any of the POA contractors.”** (Exhibit D)
- On August 20, Johnston again asked Stockwell to meet with a group of contractors, which included Rieth-Riley, *without MITA involved in any negotiations*, to talk about a path forward. Stockwell did not reply. Johnston again emailed Stockwell on August 22, and Stockwell replied he was booked. Johnston asked to meet another day, and Stockwell replied to “hug my nuts” and stated that **“you and Mita have severed this relationship with the local 324 which I don’t think you can fix . . . [w]e don’t need to talk.”** (Exhibit D)
- On August 23, Johnston again asked to meet to come to an understanding on how to move forward **without** MITA. He listed 11 contractors, one of whom was Rieth-Riley, who would like to be on a negotiating team and meet with the Union. Stockwell’s response was:
 - **“Hold on to that list and call me back in three years. That boat is [sic] already set sail and will not be back into port till that time.”** (Exhibit D)
- Two days later, on August 25, 2018, the Union struck Ajax Paving. Notably, the Region determined that the Union unlawfully blocked ingress at Ajax’s jobsite. MITA contractors decided to engage in a defensive lockout starting on September 4, 2018.
- On August 29, 2018, Stockwell responded to the lockout notice stating that the Union was **“not obligated to bargain with employers with whom it has a relationship under 8(f).”** (Exhibit F)
- On September 19, 2018, Stockwell sent a letter to the Michigan Unemployment Agency (MUA) stating that there was no labor dispute because **“[t]here is no contract in place and no plans to negotiate a new contract with MITA . . . MITA contractors are non-union contractors at this point their employees are at-will and thus can be laid off”** (Exhibit G)

- On November 1, 2018, the Union sent another letter to the MUA regarding unemployment filings due to the lockout. Notably, the Union admitted that some contractors involved in the lockout were §9(a) contractors (which would include Rieth-Riley) but argued that the lockout was not due to a labor dispute because at the time of the alleged “layoffs,” **the Union did not believe that it had any duty to bargain with these contractors.” (Exhibit H)**

Thus, based on all of the foregoing evidence, there should be no doubt that at the time of the lockout the Union wrongly believed that it had no duty to bargain with Rieth-Riley and refused to bargain on a single employer basis with Rieth-Riley prior to the lockout. The Union mistakenly believed that Rieth-Riley was an §8(f) contractor and that it had no statutory bargaining obligation. The Union did not agree to bargain with Rieth-Riley until it informed the Union of its §9(a) status, well after the lockout. **(Exhibit I)** At the time of the lockout, the Union had consistently refused to bargain even on a single-employer basis with Rieth-Riley. This conduct was fully inconsistent with the Union’s claim to be abandoning multi-employer bargaining in favor of single-employer bargaining.

b) The Union Pursued, and Ultimately Achieved Multi-Employer Bargaining.

Further, as in Retail Associates, *supra*, the Union applied economic pressure and engaged in unlawful tactics to force Rieth-Riley and the other MITA POA contractors to sign its self-authored agreement, a “common” agreement that sought to approximate multi-employer bargaining. Retail Associates, *supra*. These tactics were inconsistent with the Union’s claim that it was abandoning multi-employer bargaining.

As the Region already knows, the Union sent business agents to the jobsites of various MITA-represented contractors and informed them that the Union would not negotiate with MITA as their bargaining representative, all to pressure the MITA contractors to sign its self-authored common contract. This conduct was found by the Region to be an unfair labor practice. Furthermore, the Union also threatened operating engineers with fines if they continued to work for MITA POA contractors and refused to accept MITA POA contractor’s fringe benefits contributions. Additionally, the Union’s own statements reveal its intent to approximate multi-employer bargaining:

- On May 18, 2018, on Dan’s Excavating, Inc.’s (a MITA POA contractor) Facebook page, Stockwell wrote a response to a post regarding the Union starting to negotiate a successor Road agreement that was multi-employer in nature, given his unwillingness to bargain with individual potential signatories:
 - **“There is an agreement in place that all they have to do is sign that has been negotiated. We are **not going to negotiate with them** against ourselves. Mita contractors are just mad because **they** didn’t get to negotiate this agreement.” (Exhibit J)**

- On July 10, 2018, on the Union’s Facebook page, a Rieth-Riley employee named Rob Nevins posted that he was upset with working without a contract and asked who were the alleged contractors that had signed an agreement with the Union. Stockwell replied that **“we will win this battle it’s just gonna take time it’s gonna take patients [sic]. He accused Nevins of drinking Keith Rose’s (Rieth-Riley’s President and CEO) Kool-Aid, and told him to “go back and bitch at Keith Rose tell him to sign the new agreement and you have your health care ... start bitching at your employer that’s the person you should be mad there’s a fucking contract out there and all they got to do is sign onto it if you put this much effort in bitching at Keith Rose . . .” (Exhibit K)**
- On July 23, the Union sent an update to its members, describing its “new contract” as having been signed by **various contractors throughout the state.” (Exhibit L)**
- On August 2, 2018, on the Union’s Facebook page, Stockwell, replying to posts made by Nevins and others, stated **“there is a contract in place it was negotiated and ratified by the membership . . . you should be bitching at R&R to sign the agreement . . . if you go to our website you can read the contract . . . [t]here is a contract in place get on your employer to sign.” (Exhibit K)**
- On August 8, 2018, the Union sent a letter to the Michigan Delta County Road Commission stating that the reason work was slowed on U.S. 2 was that Zenith Tech (a MITA POA contractor that had terminated its contract with the Union) had **“refused to sign on to the Road and Bridge contract that has since been put in place statewide.”** The Union further stated that this was the reason it would not supply Zenith Tech with operating engineers. **(Exhibit M)**
- In the August 10, 2018 email with Johnston mentioned above, Stockwell replied:
 - . . . At this time we have **an agreement in place the [sic] covers the work in question.** I would agree to sit down with you but not to negotiate... **(Exhibit D)**
- In the August 20, 2018 email with Johnston mentioned above, Stockwell mentioned “Shaw.” When Johnston asked who Shaw was, Stockwell replied that “it may be the contractor that you see this weekend with their name **on a sign** that replace [sic] the contractor you may have threatened not to sign **my agreement.**” He referred to **“the agreement that is in place that covers the work that a lot of people do on roads. (Exhibit D)**

If there were any doubt about the Union’s intentions over the past year, the Union has now made clear that the “battle” it was “patiently” trying to win was not to abandon multi-employer bargaining, but to force contractors to leave MITA and sign a different multi-employer agreement with the Union. It recently reached a collective bargaining agreement with a group of MITA contractors that is expressly multi-employer. **(Exhibit N)**

In the absence of a timely and unequivocal withdrawal from multi-employer bargaining made in good faith, the Union was obligated to bargain on a multi-employer basis. Moreover, the Union's conduct demonstrates it was pursuing multi-employer bargaining and refusing to bargain on a single employer basis. A proposal for a multi-employer collective bargaining agreement would therefore not have been permissive.

B. Rieth-Riley Did Not Lock Out Employees to Force Multi-Employer Bargaining.

For the reasons discussed above, the multi-employer status of bargaining with the Union was not a permissive subject of bargaining. But even if it were, the Region's analysis could not end there. The legal test applied by the Board in a situation where the employer insists upon a permissive subject of bargaining is to determine if the issue *materially motivated the decision to lockout* employees. Delhi-Taylor Refining Div., 167 NLRB 115 (1967). In Delhi-Taylor, the Board held a lockout lawful despite the employer insisting on a permissive subject of bargaining – the exclusion of certain job classifications from the certified unit. The Board noted that the employer's insistence was not designed to frustrate collective bargaining on other issues and did not contribute to the impasse between the parties, and there was no evidence that the employer would refuse to sign any and all proposed agreements simply on the ground that they did not include the terms insisted upon by the employer. Further, the Board noted that the parties were far apart on items both parties deemed to be of fundamental importance, and in these circumstances the employer would have locked out its employees even if the unit issue had been withdrawn from bargaining. *See also C-E Natco*, 272 NLRB 502 (1984) (finding a lockout lawful despite the employer's proposal of a nonmandatory subject of bargaining prior to the lockout, because the proposal was not the item on which bargaining stalemated, nor was it the catalyst for the lockout.)

To support its allegation, the Union would have to show that Rieth-Riley was materially motivated to lock out by a desire to force multi-employer bargaining in particular. Not only does the evidence not support this allegation, there is ample evidence that Rieth-Riley was not motivated to force multi-employer bargaining. Like the other MITA POA contractors, Rieth-Riley was demonstrably agnostic regarding the format of bargaining—it simply wanted to sit down with the Union in any format. And it is abundantly clear what actually precipitated the lockout—the Union's whipsaw strikes and related pressure tactics.

1. Rieth-Riley Was, and Remains, Agnostic Regarding the Format of Bargaining.

As discussed above and in Rieth-Riley's February 22, 2019 Position Statement, Rieth-Riley consistently attempted to engage in bargaining with the Union, regardless of the bargaining format. In 2016 and 2017 contractors, including Rieth-Riley, emailed and met with the Union to discuss bargaining issues. From February through June 2018 MITA (acting on behalf of Rieth-Riley and all other POA contractors) asked to bargain a successor (multi-employer) collective bargaining agreement. But in August 2018, Rieth-Riley rescinded its MITA POA, and Johnson repeatedly asked Stockwell to bargain with contractors, including Rieth-Riley, on a *coordinated* basis rather than a multi-employer basis. Coordinated bargaining is not the same as multi-

employer bargaining, and it is a lawful, single-employer, bargaining strategy. *See General Electric, Co.*, 173 NLRB 253 (1968), *enfd.* 412 F.2d 512 (2d Cir. 1969). Stockwell rebuked MITA and Johnston at every turn and consistently refused to bargain. Rieth-Riley did not require multi-employer bargaining. It demonstrated its willingness to bargain in any format. It simply wanted the Union to bargain with it, but the Union consistently refused.

The facts during and after the lockout further demonstrate that Rieth-Riley was not motivated by a desire to force multi-employer bargaining. In a letter to the Governor of Michigan, MITA outlined in detail all of the Union's tactics that caused the lockout – none of which was that the Union was refusing to bargain on a multi-employer basis. **(Exhibit O)** Notably, when the lockout ended, the MITA POA contractors agreed to bargain with the Union, and neither party insisted on the other signing their proposed agreements, multi-employer or not. The agreement to end the lockout was made with the understanding that the Union would not continue to refuse to bargain with the MITA contractors. **(Exhibit P)** When Rieth-Riley requested to bargain by letter dated October 11, 2018, it clearly indicated its desire to engage in lawful coordinated bargaining – exactly what Johnston had been requesting to do since August 2018. To this day Rieth-Riley is bargaining with the Union on a coordinated, rather than multi-employer, basis.

2. Rieth-Riley Was Motivated to Lock Out for Lawful Reasons.

The timing of the lockout, which MITA announced on August 29, 2018, underscores that the catalyst for the lockout was the Union's unlawful August 25, 2018 picketing and strike activities. It is clear from this context and the relevant communications that MITA and the contractors were responding to whipsaw strike action and to the Union's economic tactics, including the Union's stance of absolute refusal to bargain while pressuring contractors to sign its self-authored contract. These motivations are entirely lawful.

MITA notified the Union about the lockout in a letter dated August 29, 2018. **(Exhibit Q)** In its letter MITA described its contractors' efforts to bargain with the Union, including by rescinding the POAs, twice, once by MITA and a second time by each MITA contractor. The letter noted that the Union's refusal to bargain and to accept MITA contractors' fringe benefits contributions remained unchanged. It further noted that instead of bargaining, the Union initiated a strike against Ajax Paving. Thus, MITA stated **“your strike action and other related activities, has resulted in the initiation of a defensive lockout in response to the union strike activity.”** Similarly, Rieth-Riley's notice to its employees stated that **“As a result of the strike, we are sorry to inform you that our company, in support of our bargaining position and to protect against whipsaw strikes, is locking out you and other employees represented by OE 324.”** Additionally, Rieth-Riley, which works across the state of Michigan, stated in its notice that **“[o]ur goal remains to reach a new statewide labor contract with OE 324.”** Thus, the lockout was designed to protect MITA members from the Union's refusal to bargain, whipsaw strike action, and other economic inside tactics.

It is well established that a lockout for the purpose of applying economic pressure on a union in support of a legitimate bargaining position is not unlawful and is not inherently

destructive of employee rights. American Ship Building Co., v. NLRB, 380 U.S. 300, 310 (1965); NLRB v. Brown, 380 U.S. 278 (1965). Accordingly, a lockout is lawful if an employer has a substantial and legitimate business reason for the lockout and the lockout was not unlawfully motivated.

Here, Rieth-Riley, along with all of the MITA contractors, had substantial and legitimate reasons for the lockout. Rieth-Riley and the other contractors simply wanted the Union to stop its tactics and bargain with them. A lockout for these purposes is entirely lawful. See Central Illinois Public Services, 326 NLRB 928 (1998) (finding lawful a lockout in response to “inside game” tactics implemented by the union to pressure the employer to reach agreement on terms for a successive collective-bargaining agreement, reasoning that the union’s strategy was an alternative to a strike and was used as an economic bargaining weapon in support of their contractual demands, and concluding that the lockout was both a weapon in support of the employer’s bargaining position and a weapon in opposition to the union’s weapon, i.e., its inside game strategy).

To comply with established Board law, the contractors provided a proposal as a “key” to the lockout. The Union argues that “key” contained a permissive subject of bargaining, i.e., a multi-employer unit. Even if that were true, there is no evidence that that issue *materially motivated the decision to lockout* employees. Delhi-Taylor Refining Div., supra. The Union cannot claim that Rieth-Riley insisted on multi-employer bargaining to impasse - since the Union refused to even meet starting in May of 2018 - there is no impasse to even consider. Instead, the facts show that Rieth-Riley was not motivated by a desire to bargain on a multi-employer basis. As discussed above, the evidence shows that Rieth-Riley was agnostic on that point before, during, and after the lockout. Nor did the lockout notices suggest that the MITA contractors would bargain *only* on a multi-employer basis. And, perhaps most importantly, it is not true that the MITA-proposed contract contained a multi-employer unit. The agreement never states that it is multi-employer, and instead states: “The Association is acting only as the collective bargaining agent in the negotiation and administration of this Agreement for those individual Contractor members of the Association who have authorized it so to act” (February 22, 2018 position statement **Exhibit 27 at 3**) The proposed agreement is as applicable in coordinated bargaining as it is in multi-employer bargaining. This is consistent with the factual context, in which the MITA POA contractors had been for months attempting to bargain with the Union on a single-employer basis in a coordinated fashion.

In summary, because the Union cannot show that a multi-employer bargaining format materially motivated Rieth-Riley to lock out, and because the evidence shows otherwise, the Region should dismiss this allegation.

II. The Lockout Was Not a Partial Lockout.

The Union alleges that the lockout was a partial lockout that discriminated against employees on the basis of their union membership. The evidence plainly demonstrates that this is not true. As discussed in our February 22, 2018 position statement, on page 5, the only employees that were not locked out were working either under the National Maintenance

Agreement (“NMA”) or at Rieth-Riley’s asphalt plants. These employees were Union members just as the employees that were locked out. It is well established that the Board will not find an employer’s partial lockout unlawful if the employer can establish a legitimate business justification for its decision, and if there is no showing that the selection of employees was based on union affiliation or activity. *See Hercules Drawn Steel Corp.*, 352 NLRB 53 (2008) (Board found a partial lockout lawful because the employer showed it could not maintain production during the lockout without specific employees to operate its machinery, and thus, clearly established a legitimate and substantial business justification) and *Bali Blinds Midwest*, 292 NLRB 243 (1988) (Board sanctioned an employer’s decision to lock out some unit employees but not others because it had a valid business justification for doing so).

Here, the employees working under the NMA could not be locked out because the NMA has a no strike/no lock out clause. Thus, Rieth-Riley had a legitimate business reason, and a contractual obligation, not to lock them out. The operating engineers at the asphalt plants work under the Winter Maintenance Agreement, which also has a no strike/no lock out clause by incorporation from the Road Agreement. Further, the asphalt plants are not a part of the expired Road Agreement bargaining unit. Article 1 of the Road Agreement states – “this Agreement shall govern . . . asphalt plants, concrete plants and aggregate plants **which are dedicated for a specific project**, which the Contractors perform in the State of Michigan which comes within the jurisdiction of the International Union of Operating Engineers.” (emphasis added) The work performed at the asphalt plants during the lockout did not fall under the Road Agreement because it was not for any specific project, but rather for a host of projects and the Company’s general customer needs. In short, the asphalt plant work was not covered work under the Road Agreement. Thus, the decision not to lockout this group of employees does not constitute a “partial lockout” because these employees were not working under the Road Agreement. However, even if the Region considers this situation a partial lockout, Rieth-Riley had a legitimate and substantial business justification to not lock out these employees based on the terms of the NMA and the Winter Maintenance Agreement.

The Region requested more information about the type of work performed by the operating engineers at the asphalt plants, and whether their work was pre-production or production work. In September 2018, the plant operators were engaged in production and maintenance work. As noted above, such work did not fall under the Road Agreement because it was not performed for a specific construction project. A list of the asphalt plants in Michigan and a payroll report for employees that worked during the lockout is included, as requested. **(Exhibit R)** As previously mentioned, the only employees that worked during the lockout were working at a project under the NMA and at the asphalt plants, with the exception of three employees that worked on September 27, 2018, the day the lockout ended. Two of these employees worked on restarting duties and one worked as a laborer with the acquiescence of the Union.

Furthermore, even if the Region considers the asphalt plant work as falling under the Road Agreement, which it does not, it is undisputable that Rieth-Riley did not select employees to be locked out on the basis of their union affiliation or activity. The locked-out employees, and

those not locked out at the asphalt plants, were both members of the Union. There is absolutely no evidence of anti-union animus in relation to this decision.

III. Rieth-Riley's Conduct Was Especially Lawful in Light of the Union's Unlawful Conduct.

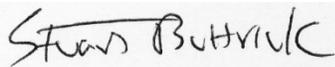
The Company's February 22, 2018 Position Statement explains why the Union's bad faith conduct privileged Rieth-Riley to make unilateral changes. The same rationale is a defense to the Union's allegations discussed in this supplemental position statement. For the reasons discussed above, Rieth-Riley did not violate the Act in any way. But even if it had, it is excused by the Union's unlawful conduct. At the time of the lockout, the Union had committed numerous unfair labor practices:

- The Union violated §8(b)(1)(B) when it pressured the fringe benefit funds to reject the MITA POA contributions. See Ficken Const. Co., 276 NLRB 682 (1985) (holding that by rejecting the health and welfare benefit funds payments the union was putting pressure on the employer-members to sign a contract with a different member association, therefore violating §8(b)(1)(B), and finding that the union violated §8(b)(1)(B) and (3) when it questioned the authority of and refused to meet with the employer's association as their bargaining representative.)
- The Union violated §8(b)(3) by unlawfully refusing to bargain with Rieth-Riley and all other §9(a) contractors. It consistently refused to meet, let alone bargain, with any of the MITA POA contractors. The Union did not differentiate between §8(f) and §9(a) MITA contractors, insisting that it was free to walk away from any bargaining relationship after the expiration of the Road Agreement.
- The Union violated §8(b)(1)(B) and §8(b)(3) when it refused to negotiate with MITA contractors, even in a coordinated fashion, if their bargaining representative was MITA.

IV. Conclusion

For all of the foregoing reasons, the Charge should be dismissed, absent withdrawal. Please feel free to contact me with any questions or concerns or if you require any additional information. Thank you for your assistance.

Sincerely,



Stuart R. Buttrick
Rebekah Ramirez
Ryan Funk
Carita Austin

Enclosures

Exhibit 3

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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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



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 4

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

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

Respondent

and

Case 07-CB-226531

**MICHIGAN INFRASTRUCTURE AND
TRANSPORTATION ASSOCIATION, INC.**

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. (a) The charge in this proceeding was filed by the Charging Party on August 28, 2018, and a copy was served on Respondent by U.S. mail on August 30, 2018.
 - (b) The first amended charge in this proceeding was filed by the Charging Party on September 13, 2018, and a copy was served on Respondent by U.S. mail on September 14, 2018.
 - (c) The second amended charge in this proceeding was filed by the Charging Party on November 26, 2018, and a copy was served on Respondent by U.S. mail on November 28, 2018.

2. (a) At all material times, the Charging Party has been a corporation with an office and place of business in Okemos, Michigan, and has been an organization composed of various employers in the road construction industry, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with Respondent.
 - (b) During the calendar year ending December 31, 2017, the Charging Party provided services valued in excess of \$50,000 for its employer-members within the State of Michigan.

(c) During the calendar year ending December 31, 2017, collectively Charging Party's employer-members including but not limited to Zenith Tech Inc., Hoffman Bros, Inc., Payne and Dolan, Inc., and R.L. Coolsaet Construction Co., in conducting their business operations, purchased and received at their facilities in the State of Michigan goods and services valued in excess of \$50,000 from points outside the State of Michigan.

(d) At all material times, the Charging Party, and its employer-members have been an employer and/or person engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

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

| | |
|------------------|----------------------|
| Dan Kroll | Union representative |
| Keith Salisbury | Union representative |
| George Edwardson | Union representative |
| John Hartwell | Business Agent |
| Joe Shippa | Union representative |

5. (a) At all material times, Zenith Tech Inc., has been an employer-member of the Charging Party described above in paragraph 2(a) and has authorized the Charging Party to represent it in negotiating and administering collective-bargaining agreements with Respondent.

(b) At all material times, Hoffman Bros. Inc., has been an employer-member of the Charging Party described above in paragraph 2(a) and has authorized the Charging Party to represent it in negotiating and administering collective-bargaining agreements with Respondent.

(c) At all material times, Payne and Dolan, Inc., has been an employer-member of the Charging Party described above in paragraph 2(a) and has authorized the Charging Party to represent it in negotiating and administering collective-bargaining agreements with Respondent.

(d) At all material times, R.L. Coolsaet Construction Co., has been an employer-member of the Charging Party described above in paragraph 2(a) and has authorized the Charging Party to represent it in negotiating and administering collective-bargaining agreements with Respondent.

6. (a) At all times since May 23, 1995, based on Section 9(a) of the Act, Respondent has been the exclusive collective-bargaining representative of employer-member Payne and Dolan Inc.'s employees in Unit 1 described below:

All full time and regular part time Operating Engineers, including equipment operators, mechanics, mechanics' helpers, oilers, apprentices and on the job trainees employed by Payne and Dolan, Inc., within the State of Michigan in building, heavy, underground, highway, bridge and airport construction work at the site of construction, assembly and erection; (and rock, sand and gravel material processing plants) excluding all office clerical and professional employees, and guards and supervisors as defined under the Act.

(b) The following employees of Zenith Tech Inc., Hoffman Bros, Inc., and R.L. Coolsaet Construction Co., constitute a unit (Unit 2) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees performing work in the classifications covered under Article IV, number 4 of the collective bargaining agreement between the Charging Party and Respondent within the jurisdiction of Respondent as defined in Article I of the collective bargaining agreement.

7. (a) Since about March 19, 2013, and at all material times, the Charging Party has recognized Respondent as the exclusive collective-bargaining representative of Unit 1, described above in paragraph 6(a). This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from March 19, 2013 through June 1, 2018.

(b) At all times since May 23, 1995, based on Section 9(a) of the Act, Respondent has been the exclusive collective-bargaining representative of Unit 1, described above in paragraph 6(a).

8. About March 19, 2013 Respondent entered into a collective-bargaining agreement with the Charging Party effective from March 19, 2013 through June 1, 2018, recognizing Respondent as the exclusive collective-bargaining representative of Unit 2 described above in paragraph 6(b) without regard to whether Respondent's majority status had ever been established under Section 9(a) of the Act.

9. At all material times the Charging Party has been an organization composed of various employers and held the position of bargaining representative for employer-members Zenith Tech Inc., Hoffman Bros, Inc., Payne and Dolan, Inc., and R.L. Coolsaet Construction Co., and has been the representative of these employer-members for the purpose of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

10. Respondent, by its agents and on the dates listed below, verbally notified employer-members of the Charging party (listed below) that they would not negotiate a new collective bargaining agreement with them if the Charging Party was their bargaining representative.

| <u>Agent</u> | <u>Date</u> | <u>Employer-Member</u> |
|---------------------|--------------------------------|----------------------------------|
| a) Dan Kroll | - on or about June 14, 2018 | - Zenith Tech Inc. |
| b) Keith Salisbury | - on or about early June, 2018 | - Hoffman Bros., Inc. |
| c) George Edwardson | - on or about June 30, 2018 | - Payne and Dolan, Inc. |
| d) John Hartwell | - on about early July, 2018 | - R.L. Coolsaet Construction Co. |
| e) Joe Shippa | - on about mid July, 2018 | - Hoffman Bros., Inc. |
| f) George Edwardson | - on or about July 12, 2018 | - Zenith Tech Inc. |

11. By the conduct described in paragraph 10, Respondent has been restraining and coercing an employer in the selection of its representative for the purposes of collective bargaining or adjustment of grievances in violation of Section 8(b)(1)(B) of the Act.

12. By the conduct described in paragraph 10 c, Respondent has been failing and refusing to bargain collectively and in good faith with the Charging Party, in violation of Section 8(b)(3) 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 paragraph 9 and 10, 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, as the exclusive collective bargaining representative of Unit 1, bargain collectively and in good faith with the Charging Party with respect to rates of pay, wages, and hours of employment; and if an understanding is reached, embody such an understanding in a signed agreement.

(b) Post appropriate notices at its offices, and at all worksites of these Employer-members:

| | |
|--------------------------------|--|
| Zenith Tech, Inc. | N3 W23650 Badinger Rd, Waukesha, WI 53188 |
| Hoffman Bros, Inc. | 8574 Verona Road in Battle Creek, MI 49014 |
| Payne and Dolan, Inc. | N3 W23650 Badinger Rd Waukesha, WI 53188 |
| R.L. Coolsaet Construction Co. | 28800 Goddard Road, Romulus, MI 48174 |

(c) Mail notices, at its own expense, to all current and former employees of the Employer-members, listed above in subparagraph (b), who were employed at any time since June 1, 2018.

(d) Mail notices, at its own expense, to all current and former members since June 1, 2018.

(e) Post a copy of the Notice on its Intranet.

(f) Post a copy of the Notice on its Facebook page.

The General Counsel further prays for such other relief as may be just and proper to remedy the unfair labor practice 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 January 9, 2019, or postmarked on or before January 8, 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 April 17, 2019, 10:00 a.m., at the Patrick V. McNamara Federal Building, 477 Michigan Avenue, Room 300, Detroit, MI 48226, 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: December 26, 2018



Terry Morgan
Regional Director
National Labor Relations Board- Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, MI 48226

Attachments

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- **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 5

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
RD PETITION

| | |
|---------------------------------|-------------------------------------|
| Case No. 07-RD-257830 | Date Filed March 10, 2020 |
|---------------------------------|-------------------------------------|

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 7 below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE) - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

| | | | |
|--|------------------------------------|--|---|
| 2a. Name of Employer Rieth-Riley Construction Co., Inc. | | 2b. Address(es) of Establishment(s) involved (Street and number, city, state, ZIP code) 3626 Elkhart Rd, PO Box 477 Goshen, IN 46526 | |
| 3a. Employer Representative - Name and Title Chad Loney, Regional Vice President | | 3b. Address (if same as 2b - state name) 2100 Chicago Dr SW, Wyoming, Mi 49519 | |
| 3c. Tel. No. 616-248-0920 | 3d. Fax No. 616-248-0928 | 3e. Cell No. 616-262-0029 | 3f. E-Mail Address cloney@rieth-riley.com |

| | |
|--|--|
| 4a. Type of Establishment (Factory, mine, wholesaler, etc.) Asphalt paving and production, excavating, road building | 4b. Principal product or service Asphalt paving and production |
|--|--|

| | |
|---|---|
| 5a. Description of Unit Involved Included: All full and regular part-time asphalt plant employees, paving and grading employees in Michigan Excluded: Guards and Supervisors | 5b. City and State where unit is located: various locations throughout Michigan |
|---|---|

| | |
|--|---|
| 6. No. of Employees in Unit 161 | 7. Do a substantial number (30% or more) of the employees in the unit no longer wish to be represented by the certified or currently recognized bargaining representative? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
|--|---|

| | |
|--|--------------------------------|
| 8a. Name of Recognized or Certified Bargaining Agent International Union of Operating Engineers, Local 324 | 8b. Affiliation, if any |
|--|--------------------------------|

| | | |
|--|-------------------------------------|---------------------------|
| 8c. Address 500 Hulet Drive Bloomfield Township, Mi 48302 | 8d. Tel. No. 248-451-0324 | 8e. Cell No. |
| | 8f. Fax No. 248-454-1766 | 8g. E-Mail Address |

| | |
|--|---|
| 9. Date of Recognition or Certification 11/02/1993 | 10. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year) 5/31/2018 |
|--|---|

| | |
|---|---|
| 11a. Is there now a strike or picketing at the Employer's establishment(s) involved? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No | 11b. If so, approximately how many employees are participating? 12 |
|---|---|

| | |
|---|--|
| 11c. The Employer has been picketed by or on behalf of (Insert Name) International Union of Operating Engineers, Local 324 (Insert Address) 500 Hulet Drive, Bloomfield Township, MI 48302 | a labor organization, of since (Month, Day, Year) 8/1/2019 |
|---|--|

12. Organizations or individuals other those named in items 8 and 11c, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5 above. (If none, so state)

| | | | |
|--------------------------|---------------------|----------------------|----------------------------|
| 12a. Name None | 12b. Address | 12c. Tel. No. | 12d. Fax No. |
| | | 12e. Cell No. | 12f. E-Mail Address |

| | |
|---|--|
| 13. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election. Decertification | 13a. Election Type: <input checked="" type="checkbox"/> Manual <input type="checkbox"/> Mail <input type="checkbox"/> Mixed Manual/Mail |
|---|--|

| | | |
|---|---|--|
| 13b. Election Date(s) 4/16/2020 4/17/2020 | 13c. Election Time(s) 4:30 to 6:30 pm | 13d. Election Location(s) Petoskey, Lansing, Grand Rapids, Kalamazoo |
|---|---|--|

14. Full Name of Petitioner
Rayalan A. Kent

| | | |
|---|--------------------------------------|---|
| 14a. Address (Street and number, city, state, ZIP code) 1280 Russell Lea Drive Charlotte, Mi 48813 | 14b. Tel. No. 616-835-2031 | 14c. Fax No. |
| | 14d. Cell No. 616-835-2031 | 14e. E-Mail Address raykent65@yahoo.com |

14f. Affiliation, if any Employee/Member

15. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

| | | | |
|--|----------------------|----------------------------|--|
| 15a. Name | 15b. Title | | |
| 15c. Address (Street and number, city, state, ZIP code) | 15d. Tel. No. | 15e. Fax No. | |
| | 15f. Cell No. | 15g. E-Mail Address | |

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

| | | | |
|--|---|--------------|--------------------------------|
| Name (Print) Rayalan A. Kent | Signature  | Title | Date Filed 3/10/2020 |
|--|---|--------------|--------------------------------|

**WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

RECEIVED
NLRB

2020 MAR 10 PM 1:50

RESIDENT OFFICE
REGION 7
GRAND RAPIDS, MI

Exhibit 6

From: "Hampton, Andrew" <Andrew.Hampton@nlrb.gov>
Date: March 18, 2020 at 8:47:37 AM EDT
To: "Ramirez, Rebekah" <rebekah.ramirez@faegredrinker.com>
Subject: RE: 07-RD-257830 Rieth Riley Construction Co., Inc.

Yes, the unfair labor practices charges blocking the petition were filed prior to the petition. The Union filed a request to dismiss or block the petition based on those unfair labor practice charges and an acceptable offer of proof. The request to dismiss or block the petition and offer of proof was considered by the Acting Regional Director in reaching the decision to hold the petition in abeyance.

Thanks,

Drew Hampton (NLRB Region 7)

From: Ramirez, Rebekah <rebekah.ramirez@faegredrinker.com>
Sent: Tuesday, March 17, 2020 6:44 PM
To: Hampton, Andrew <Andrew.Hampton@nlrb.gov>
Subject: RE: 07-RD-257830 Rieth Riley Construction Co., Inc.

Hi Drew,

As a follow-up to my earlier email, we are a little confused about the procedural aspects of blocking the petition on the basis of the ULPs. My understanding is that the ULP charges were filed prior to the petition being filed. Further, according to the CHM Section 11730, if a party desires to block the processing of a petition, "the party must file a request that the petition be blocked and must simultaneously file a written offer of proof in support of the charge that contains the names of the witnesses and a summary of each witnesses' s anticipated testimony." Did the Union request to block the petition and file the appropriate offer of proof? We just want to understand so that we can fully explain this to our client.

Thanks,

Rebekah

Rebekah Ramirez

Counsel

Admitted to Practice in Puerto Rico and Indiana

rebekah.ramirez@faegredrinker.com

Connect: vCard

+1 317 237 8230 direct

Faegre Drinker Biddle & Reath LLP

300 N. Meridian Street, Suite 2500

Indianapolis, Indiana 46204, USA

Welcome to **Faegre Drinker Biddle & Reath LLP (Faegre Drinker)** - a new firm comprising the former Faegre Baker Daniels and Drinker Biddle & Reath. Our email addresses have changed with mine noted in the signature block. All phone and fax numbers remain the same. As a top 50 firm that draws on shared values and cultures, our new firm is *designed for clients*.

From: Hampton, Andrew <Andrew.Hampton@nlrb.gov>

Sent: Tuesday, March 17, 2020 4:23 PM

To: Ramirez, Rebekah <rebekah.ramirez@faegredrinker.com>

Subject: RE: 07-RD-257830 Rieth Riley Construction Co., Inc.

Yes, the petition is blocked. The statement of position is no longer due tomorrow.

Thanks,

Drew Hampton (NLRB Region 7)

From: Ramirez, Rebekah <rebekah.ramirez@faegredrinker.com>

Sent: Tuesday, March 17, 2020 3:48 PM

To: Hampton, Andrew <Andrew.Hampton@nlrb.gov>

Subject: RE: 07-RD-257830 Rieth Riley Construction Co., Inc.

Andrew,

Does this mean that we no longer have to file a statement of position by noon tomorrow?

Does this mean that the petition is "blocked" by the ULP's alleges in the outstanding Complaint?

I would appreciate any guidance please.

Thanks,

Rebekah

Rebekah Ramirez

Counsel

Admitted to Practice in Puerto Rico and Indiana

rebekah.ramirez@faegredrinker.com

Connect: vCard

+1 317 237 8230 direct

Faegre Drinker Biddle & Reath LLP

300 N. Meridian Street, Suite 2500

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From: Hampton, Andrew <Andrew.Hampton@nlrb.gov>

Sent: Tuesday, March 17, 2020 3:36 PM

To: raykent65@yahoo.com; Amy Bachelder <abachelder@michlabor.legal>; Ramirez, Rebekah <rebekah.ramirez@faegredrinker.com>

Subject: 07-RD-257830 Rieth Riley Construction Co., Inc.

This is to advise the parties that the above-referenced petition will be held in abeyance due to the outstanding unfair labor practice allegations against the Employer.

Tomorrow's hearing is also postponed indefinitely.

Thanks,

Drew Hampton (NLRB Region 7)

Exhibit 7

FORM NLRB-502 (RD)
(2-18)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
RD PETITION

DO NOT WRITE IN THIS SPACE
Case No. 07-RD-264330
Date Filed Aug 7, 2020

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 7 below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-503); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE) - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer
Rietz-Riley Construction Co., Inc.
2b. Address(es) of Establishment(s) involved (Street and number, city, state, ZIP code)
3626 Elkhart Rd., P.O. Box 477, Goshen, IN 46526

3a. Employer Representative - Name and Title
Chad Cloney, Regional Vice President
3b. Address (if same as 2b - state same)
2100 Chicago Dr., SW, Wyoming, MI 49519

3c. Tel. No. 616-248-0920 **3d. Fax No.** 616-248-0928 **3e. Cell No.** 616-262-0029 **3f. E-Mail Address** cloney@rietz-riley.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.)
Asphalt paving and production, excavating, road building
4b. Principal product or service
Asphalt paving and production

5a. Description of Unit Involved
Included:
All full and regular part-time asphalt plant employees, paving and grading employees in Michigan.
Excluded:
Guards and Supervisors
5b. City and State where unit is located:
Various locations throughout Michigan

6. No. of Employees in Unit 161 **7. Do a substantial number (30% or more) of the employees in the unit no longer wish to be represented by the certified or currently recognized bargaining representative?** Yes No

8a. Name of Recognized or Certified Bargaining Agent
International Union of Operating Engineers, Local 324
8b. Affiliation, if any:

8c. Address
500 Hulet Drive, Suite 110
Bloomfield Township, MI 48302
8d. Tel. No. 248-451-0324 **8e. Cell No.**
8f. Fax No. 248-454-1766 **8g. E-Mail Address** dstockwell@iuoc324.org

9. Date of Recognition or Certification 11/02/1993 **10. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)** 5/31/2018

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes No **11b. If so, approximately how many employees are picketing?** 0

11c. The Employer has been picketed by, or on behalf of (insert Name) International Union of Operating Engineers, Local 324 **a labor organization, of (insert Address)** 500 Hulet Drive, Bloomfield Township, MI 48302 **since (Month, Day, Year)** 08/1/2019

12. Organizations or individuals other than those named in items 8 and 11c, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5 above. (If none, so state) None

12a. Name **12b. Address** **12c. Tel. No.** **12d. Fax No.**
12e. Cell No. **12f. E-Mail Address**

13. Election Details: If the NLRB conducts an election in this Decertification matter, state your position with respect to any such election. **13a. Election Type:** Manual Mail Mixed Manual/Mail

13b. Election Date(s) August 31, 2020 **13c. Election Time(s)** 4:30 to 6:30 p.m. **13d. Election Location(s)** Potoskey, Lansing, Grand Rapids, Kalamazoo

14. Full Name of Petitioner: Raylan A. Kent

14a. Address (Street and number, city, state, ZIP code)
1280 Russell Lea Drive
Charlotte, MI 48813
14b. Tel. No. 616-835-2031 **14c. Fax No.**
14d. Cell No. 616-835-2031 **14e. E-Mail Address** raykent65@yahoo.com

14f. Affiliation, if any
15. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

15a. Name Amanda K. Freeman **15b. Title** Staff Attorney

15c. Address (Street and number, city, state, ZIP code)
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Rd., Ste. 600
Springfield, VA 22151
15d. Tel. No. 703-321-8510 **15e. Fax No.** 703-321-9319
15f. Cell No. **15g. E-Mail Address** nkl1@nrtw.org

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) Raylan Kent **Signature** *Raylan Kent* **Title** **Date Filed** 8/7/2020

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 10, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information may cause the NLRB to decline to invoke its processes.

Exhibit 8

Preller, Alexander E.

From: Preller, Alexander E.
Sent: Tuesday, August 25, 2020 11:06 AM
To: Buttrick, Stuart R.
Cc: Funk, Ryan J.
Subject: Call from Region 7 re decert petition

Stuart,

Drew Hampton called me, and said the following [REDACTED]

“The Regional Director has asked me to investigate the effect that the pending ULP charges might have had on the petition. The blocking charge rule has been eliminated, yes, but under the new Rule 103.20(d), she believes she retains the discretion to dismiss the petition if it has been tainted by ULPs. Accordingly, we would like to request that Rieth-Riley provide contact information, including phone numbers, of all employees on payroll from September 28, 2019 to March 10, 2020, as that information is relevant to investigation of the showing of interest.”

[REDACTED]

[REDACTED]

Thanks,

Alex

Exhibit 9

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 10



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.

Amanda K. Freeman

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

Exhibit 11

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
Detroit, MI 48226
abachelder@michlabor.legal

Amanda K. Freeman
National Right to Work
8001 Braddock Road, Suite 600
Springfield, VA 22160
akf@nrtw.org,



Stuart R. Buttrick

Exhibit 12

**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 13

**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.nlrb.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.nlrb.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.

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



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