Cablevision Systems Corp. and Tiffany Oliver *and* Communications Workers of America, AFL−CIO. Case 29–RD–138839

December 19, 2018

DECISION ON REVIEW AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The question presented in this case is whether the Regional Director erred in dismissing a decertification petition, filed in 2014, on the basis of unfair labor practice charges that were settled after administrative law judges had found them meritorious but before they had been resolved by the Board.[1] This issue has significant consequences for the right of the unit employees to express their views concerning representation. Because the parties' settlement includes agreement on a new 3-year collective-bargaining agreement effective June 15, 2016, dismissal of the petition could potentially prevent an election in this unit until, at the earliest, 2019.[2] Contrary to the Regional Director, we find that the Board's decision in *Truserv Corp.*, 349 NLRB 227 (2007), precludes the dismissal of an election petition on the basis of settled unfair labor practice charges in the circumstances presented here. Accordingly, we grant the Employer's request for review, reverse the Regional Director's decision, and remand the case for the purpose of processing the petition.

I. FACTS

The Employer provides cable television and telecommunications services at various locations, including in Brooklyn, New York, the sole location at issue here. On February 7, 2012, the Union was certified as the exclusive collective-bargaining representative of the Employer's Brooklyn employees. Beginning early in 2013, the Union filed a series of unfair labor practice charges, alleging that the Employer had violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act on numerous occasions from May 2012 through August 2013. The Regional Director investigated, found merit in the charges, and issued complaints, which were ultimately consolidated for hearing before Administrative Law Judge Steven Fish. While these cases were pending before Judge Fish, the Union filed further charges, alleging additional violations of Section 8(a)(5), (3), and (1) during July through December 2014. Again, the Regional Director found merit in the charges and issued complaints, which were consolidated for hearing before Administrative Law Judge Raymond P. Green.

It is undisputed that, as early as July 31, 2014, the Employer was informed that several unit employees were collecting signatures in support of a decertification petition, and in August 2014 the Employer learned that there were in excess of 100 signatures supporting the petition. Those signatures were gathered despite the Union's unlawful threats to sue the employees who solicited them.[3] On October 16, 2014, before either Judge Fish or Judge Green had issued a decision, the Petitioner filed the instant decertification petition. On November 12, 2014, the Regional Director dismissed the petition, subject to reinstatement, pursuant to the Board's blocking charge policy, based on complaint allegations in the cases pending before Judges Fish and Green. The Employer timely requested review of the Regional Director's decision to dismiss the petition.

On December 4, 2014, while the Employer's request for review was pending with the Board, Judge Fish issued his decision in *CSC Holdings, LLC and Cablevision Systems New York City Corporation*, JD(NY)-47-14, 2014 WL 6853881 (2014) (*Fish JD*). Judge Fish concluded that (i) in January 2013, the Employer unlawfully refused to reinstate economic strikers who had not been permanently replaced, albeit all of the employees were returned to work over the next 2 months; (ii) also in January 2013, two supervisors made isolated comments restricting employees' union activity and threatening that bargaining would be futile; and (iii) in July and August 2013, the Employer changed employees' terms and conditions of employment without affording the Union notice or an opportunity to bargain when it implemented and then cancelled training for unit employees on a new technology that it had previously provided to nonunit employees. Judge Fish also

[1] The Regional Director issued her Decision and Order on November 23, 2016. The Employer filed a timely request for review, and the Union filed a statement in opposition. The Employer's motion to strike the Union's statement in opposition is denied.

The Board adopted certain changes to its representation-case procedures effective April 14, 2015. We have considered the instant petition under the procedures that were in effect on the date it was filed, October 16, 2014.

[2] See, e.g., *General Cable Corp.*, 139 NLRB 1123 (1962).

[3] See *Communication Workers of America Local 1109, AFL-CIO (Cablevision Systems New York City Corp.)*, JD(NY)-22-16, 2016 WL 3213006 (2016) (finding that a union agent threatened to sue three employees for circulating a decertification petition and thereafter, in a letter disseminated to all employees for whom the union had email addresses, reiterated a threat to take unspecified legal action against employees for collecting signatures for decertification). On July 21, 2016, the Board adopted the judge's decision in the absence of exceptions. *Communication Workers of America Local 1109, AFL−CIO (Cablevision Systems New York City Corp.)*, 2016 WL 3964994 (2016).

found that the Employer violated Section 8(a)(1) in numerous other respects at its Bronx, New York facilities, outside of the Brooklyn bargaining unit at issue here. The judge dismissed other complaint allegations, including the 8(a)(5) surface bargaining allegations. Thereafter, the Employer filed exceptions, as did the other parties to the case.

On April 19, 2016, Judge Green issued his decision in *CSC Holdings, LLC and Cablevision Systems, New York City Corporation*, JD(NY)-9-16, 2016 WL 1580001 (2016) *(Green JD)*. Judge Green found that, on September 10, 2014, the Employer conducted an unlawful coercive poll asking employees whether they wanted to continue to be represented by the Union. Judge Green also found that, on July 7, 2014, the Employer unlawfully threatened to cause the arrest of an employee who was playing prounion songs on his car stereo in the parking lot of the Employer's headquarters. Judge Green dismissed several other complaint allegations that the Employer had violated Section 8(a)(5), (3), and (1), including allegations involving postpetition conduct. Thereafter, the Board granted two extensions of time to file exceptions to Judge Green's decision, the second of which extended the filing deadline to July 22, 2016.[4]

On June 30, 2016, the Board denied the Employer's 2014 request for review. In denying review, the Board primarily relied on allegations in the case before Judge Fish that the Employer had engaged in surface bargaining. On July 1, 2016, the Employer and the Union submitted to the Board a joint motion for approval of a non-Board settlement agreement, providing for settlement of the charges addressed in *Fish JD*, *Green JD*, and *Landow JD 1*.[5] The joint motion stated, inter alia, that the Employer agreed to make whole the employees discharged on January 30, 2013, for lost wages resulting from their removal from the Employer's payroll, and that the parties agreed to enter into a new 3-year collective-bargaining agreement effective June 15, 2016.[6] On July 14, 2016, the Board approved the settlement and remanded the matter to the Regional Director for further appropriate action. Thereafter, the Union withdrew the unfair labor practice charges that were litigated in *Fish JD* and *Green JD.*

On August 26, 2016, the Petitioner requested that the Regional Director reinstate the decertification petition.

II. THE REGIONAL DIRECTOR'S DECISION AND THE REQUEST FOR REVIEW

The Regional Director denied the Petitioner's request to reinstate the petition and dismissed it solely on the basis of the settled charges that Judges Fish and Green found had merit in *Fish JD* and *Green JD*.[7] Applying the Board's causation analysis described in *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the Regional Director found that a causal relationship between the Employer's conduct and the loss of support for the Union tainted the petition and warranted its dismissal. The Regional Director also found that she was not required to reinstate the petition under *Truserv*, supra. There, the Board held that when the processing of a decertification petition has been blocked by unfair labor practice charges, the petition should normally be reinstated and processed when the charges are resolved by a settlement because a settlement does not constitute a finding or an admission that an employer had engaged in unfair labor practices, unless such an admission is an express part of the agreement. See 349 NLRB at 228. The Regional Director reasoned that, unlike in *Truserv*, the unfair labor practice allegations here were extensively litigated, voluminous evidentiary records were developed, and multiple administrative law judges found that the Employer had committed numerous egregious and widespread violations of the Act impacting the bargaining unit. Thus, she concluded that *Fish JD* and *Green JD* constitute a finding of a violation of the Act

[4] Two other cases against the Employer were also litigated before Administrative Law Judge Mindy E. Landow. On May 20, 2016, Judge Landow issued her decision in one of them: *CSC Holdings, LLC, and Cablevision Systems Corp.*, JD(NY)-15-16, 2016 WL 2957329 (2016) (*Landow JD 1*) (finding that, on June 8, 2015, the Employer unlawfully discharged an employee from its Jericho, New York facility because of her union activity).

[5] It was not until September 23, 2016 that Judge Landow issued her decision in the second case against the Employer litigated before her: *CSC Holdings, LLC and Cablevision Systems New York City Corp.*, JD(NY)-37-16, 2016 WL 5351178 (2016) (*Landow JD 2*) (finding that, on May 7, 2014, the Employer unlawfully transferred six employees out of its Bronx, New York facility). On May 11, 2017, the Board affirmed the judge's unlawful transfer finding in *Landow JD 2* in *CSC Holdings, LLC and Cablevision Systems New York City Corp.*, 365 NLRB No. 68 (2017).

[6] The Regional Director's Decision and Order dismissing the petition states that the parties "agreed that the collective-bargaining agreement then in effect between the Employer and the Union would be modified, renewed and extended for an additional 3-year period beginning June 15, 2016."

[7] The Regional Director cited the decisions in *Landow JD 1* and *Landow JD 2*, acknowledged that they involved alleged unfair labor practices affecting employees outside the Brooklyn unit, and made no finding that the alleged conduct affected Brooklyn unit employees' support for the Union. No party contends that the Regional Director erred in this respect. The Regional Director also made no finding that alleged conduct affecting non-Brooklyn unit employees addressed in *Fish JD* and *Green JD* caused disaffection from the Union among Brooklyn unit employees, and no party has requested review of her failure to do so. In its opposition to the 2016 request for review, the Union states that unfair labor practices found by Judge Fish involving facilities outside Brooklyn "had a lasting effect on employees in Brooklyn discouraging support for the Union there as well." However, the Union points to no evidence that would support such a finding.

sufficient to support dismissing the petition under *Master Slack* and *Truserv*.

The Employer requests review of the Regional Director's Decision and Order.[8] It argues that the Regional Director erred both by misapplying Board law and by finding a causal relationship between the Employer's alleged conduct and the decertification petition without holding an independent evidentiary hearing on that issue. For the reasons set forth below, we find merit to the Employer's contention that the petition should be reinstated pursuant to *Truserv.* Accordingly, we grant the Employer's request for review and reverse the Regional Director's administrative dismissal of the petition.

III. ANALYSIS

In *Truserv*, the Board held that when a decertification petition has been blocked by subsequently settled unfair labor practice charges, "a timely filed decertification petition that has met all of the Board's requirements should be reinstated and processed at the petitioner's request following the parties' settlement and resolution of the unfair labor practice charge."[9] As in *Truserv*, this case involves "the following sequence of events: allegedly unlawful conduct; the filing of a decertification petition; the settlement of the unfair labor practice case alleging the unlawful conduct, which settlement does not include an admission of unlawful conduct on the part of the Employer." Id. at 227. As the Board recognized in *Truserv*, "a settlement agreement is not an admission that the employer's actions, alleged but not found to be unlawful, constituted an unfair labor practice unless such an admission is an express part of the agreement. Consequently, the fact that the alleged actions occurred prior to the filing of the decertification petition provides no basis for a conclusion that the petition was tainted by unlawful conduct." Id. at 228. Accordingly, "absent a finding of a violation of the Act, or an admission by the employer of such a violation, there is no basis for dismissing a petition based on a settlement of alleged but unproven unfair labor practices. To do so would unfairly give determinative weight to allegations of unlawful conduct and be in derogation of employee rights under Section 7 of the Act." Id.

Consistent with *Truserv*, the unfair labor practice allegations addressed in *Fish JD* and *Green JD*, which were settled by agreement of the parties with no admission of wrongdoing by the Employer, furnish no basis for refusing to reinstate the petition. Simply put, *Truserv* requires that a petition be reinstated after a settlement agreement is executed "absent a finding of a violation of the Act, or an admission by the employer of such a violation." *Truserv*, supra at 228. A judge's violation finding is insufficient to render *Truserv* inapplicable where, as here, the charges were settled prior to final action by the Board. See *Nu-Aimco, Inc.*, 306 NLRB 978, 979 (1992) ("[N]either withdrawal of the charge and complaint, nor the execution of an informal settlement agreement, constitutes an admission by the employer, or an adjudication *by the Board*, that an unfair labor practice has been committed in violation of the Act.") (emphasis added).[10]

Neither *Fish JD* nor *Green JD* was a final decision by the Board that the Employer had committed any unfair labor practices, and neither imposed any obligation on the Employer absent further action by the Board.[11] To the contrary, those decisions became a nullity when the Employer and Union settled the relevant charges, the Board remanded the cases to the Regional Director, and the Regional Director approved the Union's request to conditionally withdraw the charges pending the Employer's compliance with its financial obligations under the settlement. See *St. Vincent Medical Center*, 338 NLRB 888, 888 (2003) (refusing to rely on findings by an administrative law judge in a case pending before the Board on

[8] We reject the Union's contention that the Employer lacks standing to file the request for review because it was acquired by Altice USA in 2016. The Board's rules in effect prior to April 14, 2015, which we apply here, provide for review of a Regional Director's decision upon request by "any party." Board's Rules and Regulations Sec. 102.67(b) (2014). The Union has failed to establish that Cablevision, the entity named in the petition, is no longer a party to this case, or that the instant request for review was not filed by, or on the authority of, the entity that currently employs the unit employees.

[9] *Truserv*, 349 NLRB at 228. A decertification petition will not be reinstated if "(a) the execution of the settlement of the unfair labor practice charge comes before the filing of the petition; (b) the Regional Director finds that the petition was instigated by the employer or that the employees' showing of interest in support of the petition was solicited by the employer; or (c) the settlement of the unfair labor practice charge includes an agreement by the decertification petitioner to withdraw the petition." Id. at 227. None of these exceptions applies here: in this case, the settlement agreement was executed in 2016, long after the petition was filed in 2014; there is no claim or indication that the Employer was involved in the petition in any way; and the settlement agreement did not provide for the withdrawal of the petition.

[10] In *Nu-Aimco*, the Board carefully distinguished between unfair labor practice allegations settled "prior to a *final litigation* on the merits" and "a successfully litigated prosecution of unfair labor practices culminating in *a finding of a violation* based on evidence introduced at a hearing and subjected to cross-examination." 306 NLRB at 979 fn. 7 (emphasis added) (citing *Mine Workers (Island Creek Coal)*, 302 NLRB 949 (1991)).

[11] See Board's Rules and Regulations in effect prior to April 14, 2015, Sec. 102.48(b) (providing that when, as here, timely exceptions are filed, "the *Board* may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a Member of the Board or other Board agent or agency, or may make other disposition of the case") (emphasis added). As noted above, at the time of the settlement, *Fish JD* was pending before the Board on exceptions, and the period of time for filing exceptions in *Green JD* had yet to expire.

exceptions because "the judge's findings therein are not binding authority"), enf. denied and remanded 463 F.3d 909 (9th Cir. 2006). Subsequently, the Region administratively closed the cases. There is simply no valid basis for refusing to reinstate a petition based on alleged unfair labor practices when, as here, the relevant charges have been withdrawn.

Our dissenting colleague assumes that the findings described in *Fish JD* and *Green JD* must be taken as irrefutably true. Building on this assumption, our colleague concludes that the conduct undermined the Union, interfered with employees' organizational activities, and tended to erode support for the Union, and that the Employer intended all this. The scale and scope of this misconduct warrants dismissal of the petition, the dissent contends.

The dissent correctly acknowledges that the parties' settlement precludes any finding that the Employer violated the Act, and that the Regional Director erred in finding otherwise. Our colleague errs, however, in her view that the judges' factual findings stand on a different footing than their conclusions of law. The parties settled the unfair labor practice allegations, the Employer did not admit wrongdoing, and the nonadmission of wrongdoing applies to both findings of fact and conclusions of law. Unfair labor practice allegations that administrative law judges have adjudicated but the Employer has *settled* without admitting wrongdoing cannot, as *Truserv* is properly understood, be considered "evidence presented" that the Employer committed the unfair labor practices alleged. *Truserv*, 349 NLRB at 233. To the contrary, it would contravene due process to give determinative effect to these allegations, which the Employer merely agreed to settle, "nothing more and nothing less." Id. at 232.[12] The implications for the decertification petitioner would be especially harsh: her petition would be dismissed based on findings that she will never have any opportunity to challenge in any forum. Accordingly, rather than "abdicat[ing]" our duty to determine the validity of election petitions, as the dissent charges, we are safeguarding employees' Section 7 rights by reinstating a decertification petition after allegations potentially tainting it have been settled. Id.[13]

In sum, the parties' settlement of those cases without final action by the Board precludes any conclusion that the Employer's conduct at issue there violated the Act. And no such finding can be made in this proceeding, consistent with the long-established rule that the Board will not make a determination on unfair labor practices in a representation proceeding. *Times Square Stores Corp.*, 79 NLRB 361, 365 (1948). Accordingly, the petition must be reinstated. See *Truserv*, supra; *Nu-Aimco*, supra.[14]

CONCLUSION

In this case, a decertification petition timely filed in 2014 has been blocked by pending unfair labor practice charges for more than three years. Were the Regional Director's refusal to reinstate the petition to prevail, the parties' 2016–2019 collective-bargaining agreement could potentially prevent a new petition from being processed until 2019 pursuant to the Board's contract-bar doctrine.[15]

[12] We disagree with the dissent that the Board's failure to vacate the judges' decisions warrants a different result. Nothing in *Truserv* justifies this distinction, which would improperly elevate form over substance in a case where, as here, the underlying charges were withdrawn.

[13] In finding otherwise, the dissent relies on inapposite cases dealing with election objections and that did not involve allegations that were settled, as here. See *Virginia Concrete Corp.*, 338 NLRB 1182, 1184 (2003) (withdrawn unfair labor practice allegation did not require overruling coterminous election objection); *ADIA Personnel Services*, 322 NLRB 994, 994 fn. 2 (1997) (dismissed unfair labor practice allegation did not require overruling coterminous election objection). The dissent also mistakenly relies on *Canter's Fairfax Restaurant*, 309 NLRB 883, 884 (1992). In approving a settlement of unfair labor practice charges in that case, the Board noted that nothing prevented the Regional Director from dismissing the decertification petition if his investigation revealed the employer's direct involvement in the decertification effort. Contrary to the dissent, the Board there specifically noted that longstanding precedent provides "that a Regional Director may only dismiss a petition as tainted on the basis of his or her administrative investigation of the petition's showing of interest where that investigation has revealed *direct* employer involvement with the petition." Id. at 884 fn. 1 (emphasis in original). The dissent's claim that *Canter's* is applicable to allegations of indirect taint is thus without merit. Here, as previously noted, there is no indication that the Employer was involved in the decertification effort.

Saint Gobain Abrasives, Inc., 342 NLRB 434 (2004), also cited by the dissent, does not support her position. Our colleague posits that the Board there affirmed that a petition could be found to be tainted "on the basis of unfair labor practice proceedings," but in fact the Board required much more than a "proceeding." Instead, the Board held that, unless "[t]he General Counsel established, at a hearing, that there were unfair labor practices and that there was a causal nexus between that unlawful conduct and the employee disaffection," a decertification petition could not be administratively dismissed based on allegations that employer conduct caused the disaffection absent a hearing at which the parties to the representation case—including the decertification petitioner—could present evidence on the issue of taint. Id. at 434. Moreover, a Regional Director's findings at such a hearing may be appealed to the Board. The dissent, in contrast, would hold that the factual findings in *Fish JD* and *Green JD* are binding on all of the parties to this case, even though the decertification petitioner was not a party to the unfair labor practice case and had no opportunity to contest the judges' findings, and the General Counsel has not established that there were unfair labor practices or a causal nexus between them and the employee disaffection.

[14] Accordingly, we need not pass on the Regional Director's *Master Slack* analysis as that analysis presupposes a finding by the Board that the employer has committed unfair labor practices.

[15] See *General Cable Corp.*, supra; *Deluxe Metal Furniture Company*, 121 NLRB 995 (1958). As noted above, the Regional Director stated that the parties "modified, renewed and extended" their agreement as part of the 2016 settlement. We do not reach or pass on whether the extant

Preventing the employees from expressing their own wishes concerning continued union representation for more than four years on the basis of charges settled without any final adjudication of their merits and subsequently withdrawn would constitute a failure to protect the employees' statutory right to choose for themselves whether to engage in collective bargaining and represent an abdication by the Board of its responsibilities under the Act. It would also be inconsistent with the Board's current blocking-charge policy as explicated in *Truserv*, supra. Accordingly, we shall reinstate the petition and remand this case to the Regional Director for further appropriate action.

ORDER

The Regional Director's administrative dismissal of the petition is reversed, the petition is reinstated, and the case is remanded to the Regional Director for further actions consistent with this Decision.

Dated, Washington, D.C. December 19, 2018

John F. Ring,	Chairman
Marvin E. Kaplan,	Member
William J. Emanuel	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

The question presented here should be an easy one to answer: Consistent with the Board's statutory duty to safeguard employee free choice, can the Board safely assume that a decertification petition fairly reflects employees' *uncoerced* desires about continued union representation, where three administrative law judges, after conducting hearings, have found that the employer engaged in serious and widespread misconduct in the weeks and months surrounding the filing of the petition? The answer should be no. My colleagues say yes, pointing out that the Employer settled unfair labor practice charges related to the misconduct without admitting wrongdoing. But while such a settlement resolves the issue of unfair labor practice liability, it does not erase the credited evidence of the underlying misconduct or change its likely impact on employees. That is the crucial question now, in this representation case. Recognizing as much, the Regional Director decided to dismiss the decertification petition. Unlike my colleagues, I would affirm that common-sense decision, instead of arbitrarily treating the Employer's conduct as if it never happened.

I.

This case centers on a decertification petition covering the Employer's Union-represented Brooklyn employees, but it also implicates facts that were litigated in related unfair labor practice cases in both Brooklyn and the Bronx. After a combined 54 days of evidentiary hearings, Administrative Law Judges Stephen Fish, Raymond P. Green, and Mindy Landow issued five decisions addressing unfair labor practice charges filed by the Union (and the Employer) over events occurring between April 2012 and June 2015.[1] The decertification petition was filed in the middle of that period, on October 16, 2014.

The scope and scale of the Employer's alleged and litigated misconduct is striking, and encompassed both repeated, serious incidents of retaliation against the Employer's unionized workforce in Brooklyn for their union activities and a steady stream of unlawful actions seeking to undermine support for the Union among the Employer's nearby employees in the Bronx, where the Union was also organizing.[2]

contract would be deemed a premature extension for purposes of the Board's contract-bar doctrine. See *Deluxe Metal Furniture Company*, supra at 1001-1002.

[1] See *CSC Holdings, LLC and Cablevision Systems New York City Corp.*, Cases 02−CA−085811 et al., JD(NY)-47-14 (2014) (*Fish JD*); *CSC Holdings, LLC and Cablevision Systems, New York City Corp.*, Cases 29−CA−134419 et al., JD(NY)-9-16 (2016) (*Green JD*); *CSC Holdings, LLC, and Cablevision Systems Corp.*, Case 29−CA−154544, JD(NY)-15-16 (2016) (*Landow JD 1*); *Communications Workers Local 1109 (Cablevision Systems)*, Case 29−CB−134066, JD(NY)-22-16 (2016) (*Landow JD 2*); *CSC Holdings, LLC and Cablevision Systems New York City Corp.*, Cases 02−CA−138301 et al., JD(NY)-37-16 (2016) (*Landow JD 3*). On July 14, 2016, the Board approved the parties' non-Board settlement of the charges at issue in *Fish JD*, *Green JD*, and *Landow JD 1*. The Board adopted *Landow JD 2* in the absence of exceptions on July 21, 2016, and affirmed *Landow JD 3* in *CSC Holdings, LLC and Cablevision Systems New York City Corp.*, 365 NLRB No. 68 (2017).

[2] As detailed below, Judges Fish and Landow found that the Employer violated Sec. 8(a)(3) and (1) numerous times at various Employer facilities besides the Brooklyn location where the decertification petition was filed. Contrary to my colleagues' suggestion, Brooklyn employees were not somehow oblivious to the Employer's coercive anti-union campaign in the Bronx and elsewhere. A Bronx supervisor credibly testified before Judge Fish that as early as 2011 the Employer sought to determine whether Brooklyn organizing activity was spreading to the Bronx because it regularly transferred technicians between the two locations, many technicians from both locations knew each other, and there was "a close relationship between the Bronx and Brooklyn employees." Thus, the Employer's coercive conduct in the Bronx is clearly relevant to its Brooklyn employees' disaffection from the Union, apart from the finding

First, in a 271-page decision, Judge Fish found that in April 2012, shortly after the Union was certified as the representative of the Employer's Brooklyn employees, the Employer began an effort to undermine the Union's support among its nearby employees in the Bronx, where the Union was also organizing. These efforts included: soliciting employee complaints, promising and granting improved wages and benefits, and threatening loss of training, loss of work, reduced benefits, and more onerous working conditions.

Judge Fish also concluded that the Employer directly attacked the Union's support in Brooklyn. Specifically, the Employer discharged numerous employees because of their union activity.[3] Further, the Employer, also in January 2013, prevented new employees, who were not on working time or in working areas, from speaking with a union representative, stating "You can't do this. These are my guys, I own them." He also found that on January 31, 2013—the day after the 22 discharges—the Employer threatened employees that bargaining would be futile, telling employees that the Union was "leading the people down a rabbit hole, where they would not have a way out because [the] company wasn't going to give [the Union] anything at the table, anything different than what they gave to anybody else, except that we were going to bargain for it one piece at a time." And he found that in July and August 2013, the Employer unilaterally implemented and then cancelled new-technology training for union-represented employees it had previously provided to non-unit employees, effectively communicating to unit employees that they would have obtained this training but for the Union.[4]

Next, Judge Landow found that the Employer transferred six employees out of its Bronx facility in May 2014 in retaliation for their union activity.[5]

Judge Green subsequently found that, on July 7, 2014, the Employer threatened to cause the arrest of an employee who was playing prounion songs on his car stereo in the parking lot of the Employer's headquarters.[6] Judge Green also found that, on September 10, 2014, little more than a month prior to the filing of the decertification petition, the Employer coercively polled Brooklyn employees, asking whether they wanted to continue to be represented by the Union. The judge found the poll coercive in part because employees might assume that their votes were discoverable by the Employer.

II.

In sum, the administrative law judges determined that the Employer fired 22 Brooklyn workers for supporting the Union, threatened that bargaining in Brooklyn would be futile, and coercively polled the Brooklyn employees about their union support—all while engaging in other misconduct aimed at the Brooklyn workers and their Bronx colleagues, with whom they had a close relationship. In this highly-charged context of reprisals against prounion employees and efforts to undermine the Union, the decertification petition was filed. Unsurprisingly, the Regional Director promptly dismissed the petition, concluding that it was not a reliable, untainted indication of employees' disaffection from the Union. The Employer filed a request for review of that dismissal, which the Board denied.

The Employer and the Union then submitted a joint motion for approval of a non-Board settlement agreement providing for the Union's withdrawal of the unfair labor practice charges in three of the cases before the administrative law judges (*Fish JD*, *Green JD*, and *Landow JD 1*), which the Board ultimately granted (although it did not vacate the administrative law judges' decisions).[7] The

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of the Regional Director that the Employer's Brooklyn conduct was independently sufficient to warrant declining to reinstate the petition.

[3] Specifically, the judge found that, on January 30, 2013, the Employer discharged 22 Brooklyn employees who were "on strike or, at least, engaging in a work stoppage" by advising them that they had been permanently replaced when they had not, in fact, been replaced. The judge found that the discharged employees were returned to work over the next 2 months and recommended a make-whole remedy for their loss of pay or benefits resulting from their discharge.

[4] The judge also concluded that the General Counsel had failed to prove other complaint allegations, including allegations of surface bargaining in violation of Sec. 8(a)(5).

[5] Judge Landow also found that in July 2014 the Union unlawfully threatened to sue employees in Brooklyn for their activities in soliciting signatures for the decertification petition. As noted above, the Union did not contest Judge Landow's conclusion that it unlawfully threatened to sue employees or her recommended Order that it cease and desist from doing so, which the Board subsequently adopted pro forma pursuant to Sec. 10(c). Notably, however, as of the date of the Union's unlawful threat, unit employees had already been subjected to the Employer's continuing unremedied coercive conduct—including its discharge of 22 union supporters and its unilateral implementation and cancellation of employee training—for more than 2 years without a contract, a condition that would continue through the filing of the petition and beyond. Without in any way condoning the Union's unlawful conduct, I therefore disagree with my colleagues' suggestion that the Union's isolated conduct somehow neutralized the cumulative corrosive effect of the Employer's protracted anti-union campaign.

In a separate decision, Judge Landow also found that the Employer unlawfully discharged an employee from its Jericho (Long Island), New York facility on June 8, 2015, because of her union activity. *Landow JD 1*, supra. I do not rely on any implication in the Regional Director's decision that this discharge, which post-dated the October 16, 2014 petition, could have contributed to the employee disaffection underlying the petition.

[6] Judge Green dismissed several other complaint allegations that the Employer had violated Sec. 8(a)(5), (3), and (1), including allegations involving post-petition conduct.

[7] Compare *CSC Holdings, LLC and Cablevision Systems Corp.*, Cases 29−CA−097013 et al., 2016 WL 4376614 (unpublished order

Employer did not admit any wrongdoing in the settlement. But the settlement agreement did not address the dismissed decertification petition or limit the use of the evidence from the unfair labor practice cases in the representation case. As further explained below, there is nothing unusual about the absence of such a prohibition, given the distinct inquiries in unfair labor practice proceedings (Was there a violation of the Act?) and in representation proceedings (Can a petition or election fairly reflect employees' uncoerced wishes concerning union representation?).[8]

Following the settlement, the Petitioner requested that her decertification petition be reinstated, but the Regional Director denied that request. Fully considering the hearing records developed before Judges Fish, Green, and Landow, she determined that the Employer's proven misconduct was causally related to the Union's loss of support, tainting the decertification petition and warranting its final dismissal.

In making that determination, the Regional Director found (correctly, as I will explain) that she was not required to reinstate the petition under the Board's decision in *Truserv Corp.*, 349 NLRB 227 (2007). In *Truserv*, the Board considered whether to dismiss a decertification petition where unfair labor practice allegations were settled, without an admission of liability, before they had been litigated (i.e., there was no hearing record, much less an administrative law judge's decision). The *Truserv* Board held that a petition filed in those circumstances should be processed, after the remedial period associated with the settlement, because the employer conduct is "only alleged to be unlawful." Id. Expanding on that point, the Board concluded that processing the petition was proper because "[t]here has been no admission by the [e]mployer, finding by the Board, or *evidence presented* that the [e]mployer in fact committed the unfair labor practices alleged." Id. at 233 (emphasis added). The Regional Director distinguished *Truserv* on the grounds that it "did not address the situation presented here, where the settlement of the unfair labor practice charges occurred after multiple administrative law judges found that the employer had committed numerous egregious and widespread violations of the Act impacting the bargaining unit." In short, as the *Truserv* Board had put it, there was "evidence presented"—indeed, a voluminous hearing record of evidence independently assessed by three administrative law judges—resulting in factual findings by these adjudicators establishing an alarming course of misconduct by the Employer that was highly likely to erode the Union's support (apart from violating the Act).

III.

Mistakenly relying on *TruServ*, and neglecting the important distinction between litigated findings of misconduct and mere allegations, my colleagues now reverse the Regional Director and reinstate the decertification petition. As I will explain, there is no good reason here to treat employer misconduct (established through litigated factual findings by three administrative law judges) as if it never happened, or to treat the settlement of the unfair labor practice cases as if it disposed of the crucial issue in this separate representation proceeding: whether the decertification petition here was tainted. The Board has an independent duty under the National Labor Relations Act to protect employee free choice concerning union representation. The majority abdicates that duty today.

A.

The Regional Director's decision must be understood in its statutory context. Section 9 of the Act requires the Board to safeguard and effectuate employees' Section 7 right to choose freely whether to select or reject a collective-bargaining representative. The Board's duty under Section 9 of the Act exists independently of the Board's duty under Section 10 of the Act to investigate and adjudicate unfair labor practice charges. Accordingly, whenever an election petition is filed, the Board must independently determine whether, under the circumstances, it should process the petition. The Board's rules commit this inquiry, in the first instance, to the discretion of the Regional Directors.[9]

The Regional Directors' discretion, in turn, is guided by the well-established and court-approved principle of Board law that no legitimate question concerning representation is raised where it may reasonably be concluded that a union's apparent loss of majority support has been caused by the employer's own misconduct.[10] Where there

issued July 14, 2016) (remanding without vacating), with, e.g., *Wingate of Dutchess, Inc.*, Cases 03−CA−140576 et al., 2017 WL 3229260 (unpublished order issued July 19, 2017) (remanding and vacating); *New York State Nurses Association*, Case 03−CA−027723, 2011 WL 2110300 (unpublished order issued May 26, 2011) (same).

[8] Thus, the Board has held that the withdrawal of an unfair labor practice charge does not waive a party's right to file election objections based on the same conduct. *Virginia Concrete Corp.*, 338 NLRB 1182, 1184 (2003). The dismissal of an unfair labor practice charge, similarly, does not require overruling an election objection concerning the same conduct, because "the effect of preelection conduct on an election is not tested by the same criteria as conduct alleged by a complaint to violate the Act." *ADIA Personnel Services, Inc.*, 322 NLRB 994, 994 fn. 2 (1997) (quoting *Texas Meat Packers, Inc.*, 130 NLRB 279, 280 (1961)).

[9] See Board's Rules & Regulations, Secs. 102.63–102.67.

[10] See *Master Slack Corp.*, 271 NLRB 78, 84 (1984); *Lee Lumber Building Material Corp. v. NLRB*, 117 F.3d 1454, 1459 (D.C. Cir. 1997) (quoting *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 51 fn.18 (1987)) (Board's presumption that employer's refusal to bargain taints union's subsequent loss of majority "is both rational and consistent

is a causal relationship between the employer's conduct and the petition, the Board normally dismisses the petition without directing an election.[11]

Determining such a causal relationship naturally means that a Regional Director must have access to all available, reliable information that might bear on the issue—which obviously may include the record in an unfair labor practice proceeding. Of course, had the three judges' unfair labor practice findings here culminated in a final decision by the Board, the Regional Director could properly have considered the Employer's conduct and any related unfair labor practice findings in deciding whether the petition should be processed. But it simply does not follow that the absence of final Board action forecloses such consideration. Thus, the fact that a final Board decision constitutes a *sufficient* evidentiary basis for the resolution of the representation question[12] does not support a corollary finding that a Board unfair labor practice finding is a *necessary* requisite for a Regional Director's dismissal of a decertification petition.

Accordingly, the Board has acknowledged that a judge's factual findings in an unfair labor practice proceeding may be relied upon by a Regional Director to dismiss a resulting decertification petition, even without conducting a separate hearing in the representation proceeding itself.[13] In fact, a Regional Director may dismiss a petition based on conduct that could not even support the issuance of an unfair labor practice complaint at all because of the Section 10(b) 6-month limitations period.[14] Relatedly, as noted above, the Board has held that "the withdrawal of an unfair labor practice charge does not operate as a waiver of [a] party's right to file objections based on the same conduct."[15] The Board still will consider "*any* substantial evidence" of relevant interference, whether or not that conduct is the basis of a pending unfair labor practice charge.[16] Even the dismissal of a charge does not bar consideration of the alleged misconduct in a related representation proceeding because, as the Board has explained, the question presented by a charge is fundamentally distinct from the question presented by an election petition.[17]

So, here, it was perfectly appropriate for the Regional Director to look to the hearing records created before the administrative law judges in deciding whether to reinstate the decertification petition. Indeed, it is hard to imagine how the Regional Director otherwise could have fulfilled her duty under Section 9 of the Act to determine the validity of the petition.

B.

Contrary to the majority, the fact that the parties had settled the allegations against the Employer before final action by the Board does not compel a different result. To be sure, the settlement (absent an admission of wrongdoing) precludes any legal conclusion that the Employer violated the Act. But that is not the issue here. Rather, as recognized by the Regional Director, there remains the separate statutory question whether the Employer's conduct tainted the decertification petition.[18] The majority

with the Act. . . . [and] supports employee free choice because it prevents an employer from 'pointing to an intervening loss of employee support for the union when such loss of support is a foreseeable consequence of the employ[er]'s unfair labor practice.'"), affg. in relevant part 322 NLRB 175 (1996).

[11] See *Master Slack Corp.*, above, at 84; NLRB Casehandling Manual (Part Two) Representation Proceedings (CHM 2) Sec. 11733.2(a)(3).

[12] See *Saint Gobain Abrasives, Inc.*, 342 NLRB 434, 434 (2004); *Overnite Transportation Co.*, 333 NLRB 1392, 1392 (2001).

[13] See, e.g., *Saint Gobain Abrasives*, above, 342 NLRB at 434. My colleagues misinterpret *Saint Gobain* when they claim that the Board there determined that a decertification petitioner must be given an opportunity to present evidence and appeal any findings to the Board. To the contrary, while the *Saint Gobain* Board set aside the regional director's dismissal of a petition prior to *any* evidentiary hearing, it explicitly reaffirmed the Board's line of decisions finding petitions tainted on the basis of unfair labor practice proceedings. Id. ("The procedure in [*Master Slack*, 271 NLRB 78 (1984), and its progeny unfair labor practice cases] was proper."). Of course, a decertification petitioner is not entitled to intervene in an unfair labor practice proceeding, or, absent permissive intervention, to present evidence or appeal the judge's findings to the Board. See Act, Sec. 10(b), 29 U.S.C. §160(b) (providing generally for intervention in unfair labor practice at Board's discretion). Cf. *Overnite Transportation Co.*, above, at 1392 (dismissing decertification petitions found tainted based on separate unfair labor practice proceedings to which petitioners were not parties).

[14] *Canter's Fairfax Restaurant*, 309 NLRB 883, 884 (1992). Contrary to my colleagues, the principle illustrated by *Canter's Fairfax Restaurant*—that an unfair labor practice finding is not a necessary prerequisite for dismissal of a tainted petition—does not depend on the specific employer conduct involved. Thus, the relevance of *Canter's* here is not undermined by the fact that the Board there considered a petition directly tainted by an employer's support, rather than, as here, a petition tainted indirectly by the employer's coercive conduct aimed at the union and its employee supporters.

[15] *Virginia Concrete Corp.*, 338 NLRB 1182, 1184 (2003).

[16] Id. (emphasis added).

[17] *ADIA Personnel Services, Inc.*, 322 NLRB 994, 994 fn. 2 (1997) (quoting *Texas Meat Packers, Inc.*, 130 NLRB 279, 280 (1961)) (the dismissal of a charge does not require the pro forma overruling of an election objection because "'the effect of preelection conduct on an election is not tested by the same criteria as conduct alleged by a complaint to violate the Act.'"). The majority misses the point in asserting that *ADIA Personnel Services* and *Virginia Concrete Corp.*, above, have no bearing here because they involved election objections (rather than a decertification petition) and unfair labor practice charges that were withdrawn or dismissed (rather than settled). What matters, rather, is that in these cases, the Board recognized the different concerns at issue in the unfair labor practice and representation contexts.

[18] Contrary to the majority, considering whether the conduct at issue in the settled cases tainted the petition does not deny due process to the Employer. Finding that the petition was tainted is not tantamount to a conclusion that the Employer violated the Act—and would impose no

erroneously ignores this fundamental point in mechanically applying *Truserv* to reinstate the petition. Indeed, the majority's reflex is contrary to *Truserv* itself, which recognizes that whether to dismiss a decertification petition based on alleged, but settled, unfair labor practices depends on the particular circumstances presented. In the circumstances here, dismissal is proper.

Truserv concluded that bare allegations of employer violations—settled before a Regional Director has investigated and issued a complaint—do not warrant dismissing an otherwise proper petition because, in that posture, there is "no admission by the Employer, finding by the Board, *or evidence presented* that the Employer in fact committed the unfair labor practices alleged."[19] As the italicized phrase indicates, the *Truserv* Board contemplated that along the continuum of cases there would be yet another category of cases—beyond bare, unlitigated allegations, but short of a Board finding—in which reliable "evidence presented" of employer misconduct may warrant dismissing a decertification petition. The present case fits comfortably within this category of cases and in fact highlights why this category must exist.

There is no basis for questioning the reliability of the records made before the administrative law judges. The "evidence presented" was introduced in extensive administrative proceedings that were conducted with all the requisite procedural safeguards to ensure the reliability of the records created. The administrative law judges then made careful credibility determinations and detailed factual findings based on those proceedings, at which the parties had every opportunity and incentive to present evidence and cross-examine witnesses.[20] A party's conduct has rarely been more thoroughly litigated. The mere fact that the parties later settled the allegations cannot logically affect the reliability of the judges' fact-finding. Nor does the Employer's refusal to admit wrongdoing mean that the parties agreed that evidence from the unfair labor practice proceedings could not be considered by the Regional Director in the representation case.[21]

In those circumstances, the majority's refusal to permit the Regional Director to even evaluate those existing, reliable records to inform her decision is simply irrational, not to mention administratively wasteful.[22] Rather, consistent with Section 9, the Board should conclude that the Regional Director properly looked to those records in fulfilling her duty to examine the appropriateness of proceeding with an election.

IV.

The gravity of the majority's error is even clearer when one actually considers the scale and scope of the Employer's misconduct in this case, ranging from a mass discharge to a threat of arrest to a coercive poll. Even a cursory review demonstrates that there can be little, if any, dispute that the Regional Director correctly concluded that the misconduct warrants dismissing the petition.

The Board has identified several relevant factors in determining whether there is a causal relationship between an employer's coercive conduct and employee disaffection from a union leading to a decertification petition. These factors include: (1) the length of time between the coercive conduct and the petition; (2) the nature of the conduct, including the possibility of detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the conduct on employee morale, organizational activities, and membership in the union.[23] Applying these

remedial obligation upon the Employer beyond the terms of its settlement agreement.

[19] 349 NLRB at 233 (emphasis added). The Board's decision in *Truserv* reversed the then-controlling policy articulated in *Douglas-Randall, Inc.*, 320 NLRB 431, 435 (1995), to return to what *Truserv* characterized as the doctrine enunciated in *Passavant Health Center*, 278 NLRB 483 (1986), and its progeny: *Island Spring*, 278 NLRB 913 (1986); *Nu-Aimco, Inc.*, 306 NLRB 978 (1992); and *Jefferson Hotel*, 309 NLRB 705 (1992). 349 NLRB at 228.

[20] The Board delegates its initial fact-finding responsibility in unfair labor practice cases to administrative law judges and reviews their credibility resolutions under a deferential standard. See, e.g., *United States Postal Service*, 365 NLRB No. 51, slip op. at 1 fn. 1 (2017) (citing *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)) ("The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect."); see also *Adams and Associates, Inc. v. NLRB*, 871 F.3d 358, 372 (5th Cir. 2017) (citations omitted) ("[an] ALJ's credibility determinations are binding except in rare instances"). The majority correctly observes that judges' decisions pending on review by the Board are not binding authority. *St. Vincent Medical Center*, 338 NLRB 888, 888 (2003). But while final Board action would be necessary to establish that the Employer had violated the Act, as discussed above, the administrative law judges' conclusions of law are not necessary predicates for resolving the representation question before us. I do not rely upon any contrary implication in the Regional Director's decision.

[21] Such a finding would unfairly and unwisely discourage unions from settling unfair labor practice cases voluntarily. In order to win relief for represented employees who were targeted by the employer, unions would be required to risk their representative status, based on an erosion of majority support likely caused by the same employer conduct.

[22] Certainly, the Regional Director could have exercised her discretion under Sec. 9(c) of the Act to conduct a separate hearing to determine the validity of the petitioner's showing of interest (see *Saint Gobain Abrasives*, above), but further hearings in this case could add little to the detailed map of relevant factual findings already charted by the administrative law judges.

[23] See *Williams Enterprises*, 312 NLRB 937, 939 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995); *Master Slack*, supra, 271 NLRB at 84. See also *Overnite Transportation Co.*, above, 333 NLRB at 1397 fn. 22 ("Except for the fourth factor, [this] analysis weighs the objective tendency of the unfair labor practices to undermine union support, and evidence of the actual impact of the [e]mployer's unfair labor practices is not

factors, I agree with the Regional Director that the timing, nature, tendencies, and effects of the Employer's conduct found by Judges Fish and Green demonstrate a causal relationship between the conduct and the present decertification petition.[24]

Employees faced with the decision to support or oppose decertification had been subjected to almost 2 years of continuing, serious, unremedied coercive conduct beginning with the Employer's discharge of 22 union supporters and culminating in its arrest threat and coercive polling of employees in the months immediately preceding the filing of the decertification petition. The Board has found that discharges of union supporters in particular tend to have a lasting detrimental effect on employees' support for a union.[25] The Employer's later conduct would only tend to reinforce the coercive effect of those discharges.[26]

The Board has also found that an employer effectively undermines a union by conduct like the Employer's attributing its decision to revoke training opportunities to the Union.[27] In addition, the statements found unlawful by Judge Fish, and the arrest threat found unlawful by Judge Green, would also reasonably tend to interfere with employees' organizational activities and undermine their support for the Union—as the Employer clearly intended. Further, I agree with Judge Green that the Employer's polling tended to erode support for the Union both by suggesting to employees that the Employer would find out how they had voted, and by undermining the Union's ongoing bargaining for a first contract—at that time almost 2 years after certification.

Finally, I agree with the Regional Director about the impact of the coercive employee poll—which Judge Green found could have caused employees to fear that their individual votes would become known to the employer—conducted shortly before the decertification petition was filed. The dramatic erosion of employee support for the Union between the 2012 Board election, which the Union won by a 180 to 86 margin, and the 2014 poll, which it lost 115 to 129, strongly supports the inference that the Employer's intervening coercive conduct contributed substantially to the filing of and support for the decertification petition.

For all of those reasons, I agree with the Regional Director that there was a causal relationship between the Employer's conduct and employee disaffection from the Union that fatally tainted the decertification petition. Consequently, the petition must be dismissed.

V.

The Board has a statutory duty to determine whether an election petition—any election petition—actually presents a legitimate question concerning representation. The notion that the Board's full inquiry into that question may be frustrated by the parties' non-Board settlement of relevant alleged unfair labor practices defies both the statute and common sense. This is particularly true where, as here, there has been reliable "evidence presented" that the

required"). Here, as discussed below, the Union's loss of support between the 2012 Board election and the Employer's 2014 poll evidences the actual impact of the Employer's conduct.

[24] Because the analysis is an objective one, and the Employer's conduct and the Union's loss of support are objectively established, the inquiry does not require asking employees why they stopped supporting the Union. See *Saint Gobain Abrasives*, above at 434 and fn. 2 ("The *Master Slack* test is an objective one . . . [t]he relevant inquiry at the hearing does not ask employees why they chose to reject the Union.").

As to the Employer's argument that the dismissal was erroneous because the Petitioner did not have an opportunity to proceed to a hearing on the petition, the Petitioner waived and forfeited any argument that such a hearing is necessary by failing to seek review of the Regional Director's decision. Only the Employer sought review here. Accordingly, had the parties *not* settled the unfair labor practice cases, it is unlikely that the Petitioner could have successfully challenged the petition's dismissal. See Case Handling Manual 2 Sec. 11733.2(b) ("A petition is subject to reinstatement only if the allegations in the unfair labor practice case, which caused the petition to be dismissed, are ultimately found to be without merit"). Moreover, the majority's assertion that affirming the Regional Director's decision here would be "especially harsh" for the Petitioner because the Petitioner did not have an opportunity to challenge the ALJ's factual findings similarly misses the mark. The majority's criticism is not unique to the circumstances of this case, but instead would apply any time a decertification petitioner has not been given an opportunity to participate in an unfair labor practice proceeding where the alleged violations could potentially taint her petition. Yet, it is well-established Board law, that an unfair labor practice decision—or the settlement of an unfair labor practice case (at least where liability is admitted by the respondent employer)—can result in the dismissal of a decertification petition, regardless of whether the petitioner was a party to the unfair labor practice proceeding. This is because, as explained, Sec. 10(b) of the Act makes intervention in such a proceeding discretionary with the Board, and decertification petitioners are typically not permitted to intervene in an unfair labor practice proceeding where their interests would essentially be identical to those of the employer. See, e.g., *Veritas Health Services, Inc.*, 363 NLRB No. 108, slip op. at 1 (2016), enfd. in relevant part 895 F.3d 69 (D.C. Cir. 2018); *Latino Express*, 360 NLRB 911, 911 fn. 2 (2014). Here, of course, the Petitioner did not even *seek* to intervene in any of the relevant unfair labor practice proceedings (or seek review of the Regional Director's dismissal of the petition in this representation proceeding).

[25] See, e.g., *Vincent Industrial Plastics, Inc.*, 328 NLRB 300, 302 (1999) (unlawful discipline and discharge of key union supporters is "likely to have a long lasting effect on the bargaining unit and to discourage employees from supporting the union"), enfd. in relevant part, 209 F.3d 727, 737−738 (D.C. Cir. 2000).

[26] Cf. *Williams Enterprises, Inc.*, above, 312 NLRB at 939−940 (finding decertification petition unreliable where intervening conduct (though lawful) "served to remind many employees" of single coercive statement made four months before petition).

[27] See *Grouse Mountain Lodge*, 333 NLRB 1322, 1323−1324 (2001) (respondent employer's attributing its delay in implementing new benefits to the union "had the effect of undermining the Union by creating the impression that but for the ongoing campaign, the Respondent would have implemented the benefits"), enfd. mem. 56 Fed. Appx. 811 (9th Cir. 2003).

Employer in fact engaged in conduct that, even if it cannot be the basis for unfair-labor-practice liability, clearly contributed to the filing of the decertification petition. Instead of coming to grips with this reality, the majority treats the settlement, and the Employer's refusal to admit liability, as wiping the slate clean for purposes of this representation case. In short, "nothing to see here" seems to be the majority's answer. But that simply cannot be right in light of the Board's duty under Section 9 to protect employee free choice from employer coercion.

Dated, Washington, D.C. December 19, 2018

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD