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**Geodis Logistics, LLC and Cheryl Cathey<sup>1</sup> and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service-Workers Union, AFL-CIO-CLC.** Cases 15-RD-217294, 15-RD-231857

May 24, 2022

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING  
AND WILCOX

The National Labor Relations Act provides employees and employers separate and distinct procedures by which they may petition for an election to test whether an incumbent union remains the unit employees' bargaining representative. Employees may file such a petition pursuant to Section 9(c)(1)(A)(ii) of the Act. Employers may do so pursuant to Section 9(c)(1)(B). The Board held long ago that by providing these separate and distinct procedures, Congress indicated its intent "to preclude employers or their supervisory staffs from filing the decertification action set aside for the use of 'employees.'" *Doak Aircraft Co.*, 107 NLRB 924, 926 (1954). The issue before the Board in this case is whether the Act also precludes an employer from restarting the decertification process by requesting and securing reinstatement of its employees' decertification petition after the employer settles and resolves unfair labor practice charges on which a Regional Director relied in dismissing the petition. We explain today that permitting the employer to restart the decertification process in these circumstances would be inconsistent with the structure of Section 9(c)(1) of the Act and with Board precedent.

I. BACKGROUND

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union, AFL-CIO, CLC (Union) represents a unit of hourly production employees at the Employer's multi-building campus in Memphis, Tennessee. On March 27, 2018, the original Petitioner, Mary Alexis Ray, filed a decertification petition, in Case 15-RD-217294, to challenge the Union's status as the employees' collective-bargaining representative. The Petitioner filed a second decertification petition on November 29, 2019, in Case 15-RD-231857.

<sup>1</sup> We grant the Petitioner's unopposed motion to substitute Cheryl Cathey for Mary Alexis Ray as the petitioner in this proceeding. We have amended the caption to reflect the substitution.

On January 2, 2020, the Regional Director dismissed the decertification petitions based on unresolved unfair labor practice charges, Cases 15-CA-218543, et al., which alleged, among other things, that the Employer had provided its unit employees more than ministerial assistance in attempting to remove the Union as their representative. The Employer subsequently requested review of the Regional Director's order dismissing the decertification petitions. On April 13, 2020, the Board issued an Order denying review, in which the Board stated that the decertification petitions were subject to reinstatement, if appropriate, after the final disposition of the unfair labor practice proceedings.<sup>2</sup>

On October 5, 2020, after the Employer certified compliance with the affirmative action provisions of an informal agreement that settled and resolved the unfair labor practice charges on which the Regional Director had relied in dismissing the decertification petitions, the Employer requested that the Regional Director reinstate the decertification petitions.

On November 10, 2020, the Regional Director issued her Order Denying Employer's Second Renewed Request to Reinstate the RD Petitions. In response to the Employer's contention that *Truserv Corp.*, 349 NLRB 227 (2007), and its progeny warranted reinstatement of the petitions, the Regional Director stated that an Employer must achieve full compliance with the terms of a settlement agreement, and that the settled unfair labor practice case must be closed on compliance, before the Region can reinstate a decertification petition dismissed due to the allegations in the settled charges. The Regional Director then stated that the Region could not close the settled unfair labor practice case on full compliance until the Region concluded its investigation of new unfair labor practice charges that the Union had filed against the Employer in Cases 15-CA-264582, et al. Nevertheless, the Regional Director stated that "[a]fter full compliance has been achieved and the unfair labor practices have been fully remedied, the Employer may refile its request to reinstate the petitions." The Employer filed a timely request for review.

On June 30, 2021, the Board granted the Employer's request for review, finding that it raised substantial issues warranting review with respect to whether the remedial period associated with the settlement of the unfair labor practice charges was complete under *Truserv*, above.<sup>3</sup>

<sup>2</sup> *Geodis Logistics, LLC*, Cases 15-RD-217294 and 15-RD-231857, rev. denied 04/13/20.

<sup>3</sup> Chairman McFerran would have denied the Employer's request for review for the reasons stated in her dissent from the Order granting review. *Geodis Logistics, LLC*, 371 NLRB No. 1 (2021). Member

Thereafter, the Employer, Petitioner, and Union filed briefs on review. In addition, the Petitioner filed a request for the Board to take administrative notice of Region 15's records, and the Employer filed a request for the Board to take administrative notice of the Regional Director's fourth consolidated complaint.

The Board has delegated its authority in this proceeding to a three-member panel. Having carefully considered the entire record, including the briefs on review and requests to take administrative notice, we affirm the Regional Director's decision not to reinstate the petitions, but only for the reasons stated herein. We conclude that an employer may not restart the decertification process by requesting and securing reinstatement of its employees' decertification petition. Rather, as explained below, the right to request and secure reinstatement of a decertification petition in these circumstances belongs exclusively to employees.<sup>4</sup>

## II. ANALYSIS

Section 9(c)(1)(A)(ii) of the Act states that the Board shall direct a decertification election when a petition has been filed "by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a)" of the Act. 29 U.S.C. §159(c)(1)(A)(ii). The Board long ago held that the decertification procedure set forth in Section 9(c)(1)(A) "provide[s] a remedy exclusively for and on behalf of employees, and not of employers." *Morganton Full Fashioned Hosiery Co.*, 102 NLRB 134, 134 (1953). Thus, the Board long has interpreted the Act to prohibit an employer from providing direct assistance to, or acting on behalf of, its employees in connection with the processing of decertification petitions.<sup>5</sup> See generally *Gold Bond, Inc.*, 107 NLRB 1059, 1060 (1954) (dismissing petition where employer "took an active part in, and

Wilcox did not participate in the underlying decision and expresses no view as to whether review was properly granted.

<sup>4</sup> We deny the Petitioner's request for the Board to take administrative notice of Region 15's records, as the attached record, an email dated January 23, 2019, is not relevant to the propriety of the Employer's October 5, 2020, request to reinstate the decertification petitions, and the Petitioner's brief on review adequately reflects the current status of the Petitioner. We grant the Employer's request for the Board to take administrative notice of the Regional Director's fourth consolidated complaint.

<sup>5</sup> The Employer is, of course, free to express its views on unionization to its employees, so long as it does not engage in unlawful or objectionable conduct when doing so. See *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477 (1941).

fostered, the filing of the decertification petition, by advising the employees about the matter and furnishing them with the legal advice" of the employer's attorneys) (citing *Morganton Full Fashioned Hosiery*, above).

Despite this well-established precedent, the Employer contends that *Truserv* and its progeny require reinstatement of the petitions here. In *Truserv*, the Board held that when a decertification petition is dismissed based on an unresolved unfair labor practice charge, "after the unfair labor practice case has been settled, the decertification petition can be processed and an election can be held after the completion of the remedial period associated with the settlement of the unfair labor practice charge." 349 NLRB at 227. With respect to the request for reinstatement, the Board stated that "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." *Id.* at 228 (emphasis added). In cases both preceding and following *Truserv*, the Board has repeatedly indicated that the right to restart the decertification process by requesting reinstatement of a dismissed decertification petition belongs to the petitioner, i.e., the employee who filed the petition.<sup>6</sup>

Consistent with this precedent, a Regional Director may reinstate a decertification petition *at the employee petitioner's request*, following the parties' settlement and resolution of the unfair labor practice charge on which the Regional Director relied in dismissing the petition.<sup>7</sup> The employer may express its view of the propriety of the petitioner's request to reinstate the decertification petition (just as it may express its views on unionization

<sup>6</sup> See *Pinnacle Foods Group, LLC*, 368 NLRB No. 97, slip op. at 2 (2019) (quoting *Truserv*, above); *Cablevision Systems Corp.*, 367 NLRB No. 59, slip op. at 3 (2018) (quoting *Truserv*, above); *Nu-Aimco, Inc.*, 306 NLRB 978, 979 (1992) ("[T]he policy of dismissing a petition or holding it in abeyance because of pending unresolved unfair labor practice charges . . . postpones processing the petition until the unfair labor practice charges are resolved, at which time *the petitioner is entitled to request reinstatement of the petition.*") (emphasis added); *City Markets*, 273 NLRB 469, 470 (1984) (dismissing a decertification petition in the face of unremedied refusal-to-bargain charges "merely indicates that the petitioner must await the outcome of the unfair labor practice litigation, at which time he [the petitioner] is entitled to request reinstatement of the petition").

<sup>7</sup> The Board recognizes that, under Sec. 9(c)(1)(A)(ii), the petitioner in a decertification case merely acts "[on] behalf of employees" and that accordingly such a petitioner does not "obtain any individual status or recognition" but instead acts "in a representative capacity." *Weyerhaeuser Timber Co.*, 93 NLRB 842, 844 (1951). The employees of the employer "are principally involved rather than the [individual] Petitioner." *Id.* Nothing in our decision today should be understood to require that only the previously-named decertification petitioner may request reinstatement.

upon reinstatement). An employer, however, may not attempt, either directly or through its counsel, to secure reinstatement of its employees' decertification petition. This is precisely the type of conduct Congress implicitly precluded when it established in the Act separate and distinct procedures for employees and employers to test the status of an incumbent union. We accordingly affirm the Regional Director's decision not to reinstate the instant decertification petitions because it was only the Employer—and not an employee or group of employees or individual or labor organization acting in their behalf—that requested reinstatement of the petitions.<sup>8</sup>

The Employer and Petitioner contend in their briefs on review that the employer in a decertification proceeding has a right to request reinstatement of its unit employees' decertification petition after the completion of the remedial period associated with the settlement of the unfair labor practice charge. This contention is contrary to the precedent already discussed, and it is belied by the plain language of *Truserv*, above, emphasizing the petitioner's right to request reinstatement. Moreover, none of the Board decisions cited in the Employer's and Petitioner's briefs recognize any employer right to request and secure reinstatement of the decertification petition after the completion of the remedial period associated with the settlement of the unfair labor practice charge. We are not aware of any decisions that do so.<sup>9</sup>

The apparent absence of such precedent is not surprising. Giving an employer the right to reinstate an employee-filed petition would be in tension with the struc-

ture of Section 9(c) of the Act, which gives *employees* the right to file decertification petitions, while providing employers with a separate electoral mechanism to test an incumbent union's continued majority status.<sup>10</sup> Indeed, finding that the employer could restart the decertification process for its employees seemingly would permit an employer to manipulate the decertification process: an employer could indirectly assist its unit employees in filing a decertification petition, settle any unfair labor practice charges resulting from such conduct, complete the remedial period under *Truserv*, and then restart the decertification process by requesting and securing reinstatement of its employees' decertification petition. The Board does not permit an employer to engage in such actions and abridge employees' rights under Section 9(c)(1)(A)(ii) by doing indirectly what it may not do directly. *Morganton Full Fashioned Hosiery*, above at 134. By requiring the petitioner in a decertification proceeding to request reinstatement of the decertification petition to restart the process of testing the status of the unit employees' bargaining representative, we ensure that the electoral mechanism provided under Section 9(c)(1)(A)(ii) of the Act remains exclusively for employees, as Congress envisioned.

We emphasize that our holding here is a narrow one. Nothing in this decision precludes employer participation in other aspects of the decertification process, so long as that participation does not otherwise exceed the bounds of permissible conduct. But in order for a previously-dismissed decertification petition to be reinstated and processed following the parties' settlement and resolution of the unfair labor practice charge on which the Regional Director relied in dismissing the petition, the request must come from the employee petitioner, not the employer.<sup>11</sup>

<sup>8</sup> We accordingly disavow the Regional Director's statement that the Employer may request reinstatement of its unit employees' decertification petitions following full compliance with the settlement agreement.

<sup>9</sup> In *Rieth-Riley Construction Co.*, Cases 07-RD-257830 and 07-RD-264330, the status of the decertification petitions is currently before the Board on the employer's and petitioner's request for review of the Regional Director's decision to dismiss the decertification petitions. In *Cablevision*, the status of the decertification petition was before the Board on the employer's request for review of the Regional Director's decision, which denied the *petitioner's* request to reinstate a decertification petition after the employer and union settled the unfair labor practice allegations on which the Regional Director relied in dismissing the petition. 367 NLRB No. 59, slip op. at 2-3. In *Pinnacle Foods*, the status of the decertification petition was before the Board on the petitioner's request for review of the Regional Director's letter, which dismissed a decertification petition based on the settlement agreement's extension of the certification year. 368 NLRB No. 97, slip op. at 1-2. And, in *Truserv*, the status of the decertification petition was before the Board on the employer's and petitioner's separate requests for review of the Acting Regional Director's administrative dismissal of the decertification petition. 349 NLRB at 227. Thus, none of the decisions the Employer and Petitioner cite in their respective briefs even concerned an employer requesting that a Regional Director reinstate dismissed decertification petitions after the completion of the remedial period associated with the settled unfair labor practice charge.

<sup>10</sup> Here, the Employer has never filed a petition under Sec. 9(c)(1)(B) of the Act.

<sup>11</sup> In light of our holding, we find it unnecessary to pass on the Regional Director's findings concerning the other requirements of *Truserv*. In turn, we do not reach the Union's argument that *Truserv* does not apply in light of the Region's subsequent revocation of the parties' settlement agreement and issuance of amended complaints notably, these developments do not speak to the circumstances at the time of the Employer's request for reinstatement). Nor do we reach the Employer's argument that *Truserv* does not preclude reinstatement of the decertification petitions because the fourth consolidated complaint does not specifically allege that the Employer breached the settlement agreement.

For the same reason, it is unnecessary to reach the Union's contention in its brief on review that the Board should reverse *Truserv* and return to the standard set forth in *Douglas-Randall, Inc.*, 320 NLRB 431 (1995). We also note, however, that this case would not be an appropriate one for reconsidering *Truserv* even if we were inclined to do so, because the parties' settlement agreement did not require the Employer to recognize and bargain with the Union. See generally *BOC*

For the reasons discussed above, we affirm the Regional Director's decision to not reinstate the decertification petitions.<sup>12</sup>

#### ORDER

The Regional Director's Order Denying Employer's Second Renewed Request to Reinstate the RD Petitions is affirmed.

Dated, Washington, D.C. May 24, 2022

\_\_\_\_\_  
Lauren McFerran, Chairman

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Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD  
MEMBER RING, concurring.

Four years have passed since employee Mary Alexis Ray filed two petitions to decertify the Union with her coworkers' support, yet the petitions remain stuck in an interminable limbo. The Region blocked the processing of the petitions in 2018 based on a charge of unlawful assistance but still has taken no discernable step beyond issuing a complaint covering the charge and has even postponed the unfair labor practice hearing for that complaint indefinitely. So much time has passed that Ms. Ray is no longer employed in the unit. Ms. Ray, and the other employees who supported the petitions, committed no misconduct and did nothing other than attempt to exercise their right to choose their representative. It is hard to look at the facts of this case and come to any other conclusion than that they have been denied that right.

*Group, Inc.*, 323 NLRB 1100, 1100 (1997) (finding petition should not be dismissed, where settlement agreement did not "contain a requirement that the [e]mployer recognize and bargain with the [u]nion and [did] not involve the type of unfair labor practices that would preclude a question concerning representation under *Douglas-Randall*").

Finally, we reject the Union's contention that the Board's decision in *Canter's Fairfax Restaurant*, 309 NLRB 883 (1992), provides an alternative basis for affirming the Regional Director's decision to not reinstate the instant decertification petitions. In *Canter's Fairfax*, the Board clarified that it is still appropriate to *dismiss* a petition that is tainted by "direct employer involvement with the petition, e.g., supervisors circulating the petition, or supervisors threatening individual employees with discharge if they failed to sign the petition." *Id.* at 884 fn. 1. The Regional Director's dismissal of the petitions is not at issue here, however, nor has any conduct comparable to *Canter's Fairfax* been alleged.

<sup>12</sup> We note that our concurring colleague does not take issue with the Board's resolution of the issue before it in this case, and we do not express any views regarding Board policies and rules not presented for adjudication in this matter.

When these petitions were filed, the Board's old blocking-charge policy was still in effect. "[T]he Board is required to balance the statutory goal of promoting labor relations stability against its statutory responsibility to give effect to employees' wishes concerning representation,"<sup>1</sup> but as the Board explained in its Election Protection Rule, the blocking-charge policy failed to strike the proper balance because it "rests on a presumption that even an unlitigated and unproven allegation of any one of a broad range of unfair labor practices justifies indefinite delay because of a discretionary administrative determination regarding the potential impact of the alleged misconduct on employees' ability to cast a free and uncoerced vote on the question of representation."<sup>2</sup> That is precisely what has happened here. An unlitigated and unproven allegation of unlawful assistance has been used to justify a 4-year-and-counting delay through a series of discretionary administrative determinations.

My colleagues nevertheless affirm the Regional Director's decision not to reinstate the decertification petitions, on the grounds that the Employer cannot request and secure reinstatement of its employee's petitions. While I concur with this disposition and with the approval of the motion to substitute Cheryl Cathey for Mary Alexis Ray as the petitioner in this proceeding, I am deeply troubled by the delays in this case and the part actions by this agency have played in that delay. Fairness to the parties demands that those problems be acknowledged.

#### I. FACTS

On March 27, 2018, employee Mary Alexis Ray filed a petition for decertification. Shortly thereafter, the Regional Director for Region 15 approved a stipulated election agreement between Ms. Ray, the Employer, and the Union that scheduled the election for April 26, 2018. On April 17, however, the Regional Director canceled the election and suspended processing of the petition pending investigation of an unfair labor practice charge the Union filed in Case 15-CA-218543, alleging violations of Section 8(a)(1) and (3) of the Act and requesting that the charge block the petition. On October 31, 2018, the Region issued a complaint in Case 15-CA-218543, alleging *inter alia* that the Employer provided more than ministerial assistance to employees in the collection of signatures in support of the March 27 decertification petition, in violation of Section 8(a)(1) of the Act. It is this

<sup>1</sup> *Silvan Industries, a Division of SPVG*, 367 NLRB No. 28, slip op. at 3 (2018).

<sup>2</sup> See "Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships," 85 Fed. Reg. 18367 (Apr. 1, 2020) (Election Protection Rule).

single allegation, regarding conduct occurring in early 2018, that constitutes the blocking charge.

On November 30, 2018, Ms. Ray tried again and filed another petition for decertification, in Case 15–RD–231857. Although there was no allegation that the Employer unlawfully assisted the collection of signatures in support of the second petition, the Region also held this petition in abeyance on the grounds that the signatures were collected while the blocking charge was unremedied.

An entire year then passed while Ms. Ray’s petitions remained blocked. Over the course of the year—2019—the Union filed multiple charges, amended charges, second amended and third amended charges, against the Employer in Cases 15–CA–226722, 15–CA–232539, 15–CA–239440, and 15–CA–239492. The Region consolidated the new charges with the blocking charge and issued a consolidated complaint on March 26 and a second consolidated complaint on October 9, 2019. The Region did not find that any the new charges affected Ms. Ray’s petitions.

On January 2, 2020, the Region dismissed both petitions based on the unlawful assistance charge—by this time almost 2 years old.<sup>3</sup> The Board denied the Employer’s request for review of the dismissal but noted that while the Regional Director’s decision to dismiss the petitions was permissible under the representation-case procedures currently in effect (i.e., the blocking-charge policy) her decision raised many of the concerns that led the Board to change those procedures in its Election Protection Rule. The Board also explained that the petitions were subject to reinstatement after final disposition of the unfair labor practice proceedings and accordingly made Ms. Ray a party-in-interest to the unfair labor practice cases solely for the purpose of receiving notification of the final outcome of those cases.

On January 22, 2020, the Regional Director approved a settlement that contained a non-admissions clause and covered all the charges in the five cases mentioned above, including the unlawful assistance charge blocking the petitions. The Employer thereafter requested reinstatement of the decertification petitions, citing the settlement and its non-admissions clause. The Union requested to withdraw from the settlement, however, claiming that it had mistakenly believed that the petitions could not be reinstated upon completion of the settlement. Although the Union’s request was based on nothing more than its own mistaken understanding of Board

law,<sup>4</sup> the Regional Director nevertheless granted the Union’s request and revoked the settlement, citing the Union’s mistaken belief and the history of unfair labor practices at the facility. Shortly thereafter, the Regional Director denied the Employer’s request for the petitions to be reinstated based on the revocation of the settlement.

The Board vacated the Regional Director’s order revoking the settlement, finding that she abused her discretion because there was no basis for her finding that the parties did not have a meeting of the minds on the settlement. No party misrepresented the agreement to the Union and the Employer had not breached it. Moreover, the history of unfair labor practices predated the agreement and was thus known to all parties when they agreed to the settlement.

The Regional Director reinstated the settlement on July 27, 2020. Shortly thereafter, the Employer renewed its request to reinstate the decertification petitions, citing the reinstatement of the settlement. The Regional Director denied the request as premature because the 60-day notice posting period had not finished but assured the Employer that it could request reinstatement again once it had achieved full compliance with the settlement.

On October 5, 2020, the Employer again requested reinstatement of the decertification petitions, citing its compliance with the settlement and the notice-posting period. The Regional Director denied the request again, however, because the Region was investigating additional unfair labor practice charges the Union filed that alleged unlawful conduct during the notice-posting period. The Regional Director explained that if found meritorious, the charges could constitute non-compliance with the settlement and thus denied the Employer’s request pending its investigation of the charges. The Employer timely requested review of the Regional Director’s decision.

Over 6 months then passed before the Region apparently completed its investigations.<sup>5</sup> On April 29, 2021, the Region finally acted and issued an order partially revoking the settlement and reissuing a consolidated complaint including the charges covered by the settlement as well as new charges that allegedly violated its terms. Specifically, the complaint alleges that the Employer violated the terms of the settlement by engaging in over 20 instances of unlawful conduct. A quick inspection of the complaint, however, reveals that only *two*

<sup>3</sup> The Regional Director’s order dismissing the petitions neglected to specify that they were subject to reinstatement, as Board precedent requires. See *Tru-Serv Corp.*, 349 NLRB 227 (2007).

<sup>4</sup> See *Tru-Serv Corp.*, supra at 228 (“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.”).

<sup>5</sup> The charges were filed in August 2020 so the investigations lasted 8 months.

of those instances cover conduct that occurred while the settlement was active and thus could conceivably have breached it. In the only two pertinent allegations, the Region alleges the Employer unlawfully discharged an employee on August 6, 2020, in violation of 8(a)(3) and unlawfully removed a different employee from performing specific duties on September 24, 2020, in violation of 8(a)(4). These charges, which allegedly violate the settlement agreement that also contains the blocking charge and are thus the basis for the continued delay of Ms. Ray's petition, occurred 2½ years after the blocking charge and are thus not remotely proximate to the alleged tainting of the employees' decertification effort.

The delay does not stop there. On September 14, 2021, the Region issued a fourth consolidated complaint, which, after amendment, set the hearing for December 6, 2021. Even this indication of progress proved illusory, however. Only 10 days later, the Region postponed the hearing indefinitely, based on a *new* charge filed by the Union.<sup>6</sup> Now, over 6 months later, the Region still has not made a determination on that charge or set a new hearing date on the pending complaint. The blocking charge is thus in the same place it was years ago when the Region issued its first complaint, with no end in sight.

## II. DISCUSSION

Section 9(c) of the Act provides that the Board “shall direct an election by secret ballot” if the Board finds that a question of representation exists. The Supreme Court has explained that “[i]n carrying out this task” of determining employees’ desires regarding representation, “the Board must act so as to give effect to the principle of majority rule set forth in [Section] 9(a), a rule that ‘is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions,’” and “[i]t is within this democratic framework that the Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.”<sup>7</sup>

Contrary to the Supreme Court’s directive, the Board’s former blocking-charge policy allowed incumbent unions to delay decertification elections for months and years, and even to block them entirely. As the Board explained in the Election Protection Rule, the blocking-charge policy has resulted in long delays in processing employee-filed decertification petitions in a significant number of

cases.<sup>8</sup> Many circuit courts also have criticized the blocking-charge policy for being too open to abuse and manipulation by incumbent unions seeking to avoid a challenge to their representative status.<sup>9</sup>

This case presents yet another example of the untenable delays that could occur under the former blocking-charge policy. Here, Ms. Ray filed her first petition over 4 years ago, on March 27, 2018, and the parties agreed to an election on April 26, 2018. The employees were never able to vote on their representation, however, because the Union filed a blocking charge. That charge, despite being a simple allegation of unlawful assistance occurring in early 2018, has been parlayed into a 4-year delay of the election with no end in sight by the Union’s repeated filing of additional charges. The Region has not found that *any* of these additional charges should them-

<sup>8</sup> See, e.g., *Cablevision Systems Corporation*, 367 NLRB No. 59 (2018). See also *Apple Bus Co.*, Case 19–RD–216636, 2019 WL 7584368 (Nov. 18, 2019); *ADT Security Services*, No. 18–RD–206831, 2017 WL 6554381 (Dec. 20, 2017); *Arizona Public Service Company* No. 28–RD–194724, 2017 WL 2794208 (June 27, 2017); *Pinnacle Foods Group, LLC* No. 14–RD–226626, 2019 WL 656304 (Feb. 2, 2019).

<sup>9</sup> See *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420 (8th Cir. 1971) (“[I]t appears clearly inferable to us that one of the purposes of the [u]nion in filing the unfair practices charge was to abort [r]espondent’s petition for an election, if indeed, that was not its only purpose.”); *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1069 (5th Cir. 1971) (“The short of the matter is that the Board has refused to take any notice of the petition filed by appellees and by interposing an arbitrary blocking[-]charge practice, applicable generally to employers, has held it in abeyance for over 3 years. As a consequence, the appellees have been deprived during all this time of their statutory right to a representative ‘of their own choosing’ to bargain collectively for them, 29 U.S.C. 157, despite the fact that the employees have not been charged with any wrongdoing. Such practice and result are intolerable under the Act and cannot be countenanced.”); *NLRB v. Midtown Service Co.*, 425 F.2d 665, 672 (2d Cir. 1970) (“If . . . the charges were filed by the union, adherence to the [blocking-charge] policy in the present case would permit the union, as the beneficiary of the [e]mployer’s misconduct, merely by filing charges to achieve an indefinite stalemate designed to perpetuate the union in power. If, on the other hand, the charges were filed by others claiming improper conduct on the part of the [e]mployer, we believe that the risk of another election (which might be required if the union prevailed but the charges against the [e]mployer were later upheld) is preferable to a three-year delay.”); *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960) (“Nor is the Board relieved of its duty to consider and act upon an application for decertification for the sole reason that an unproved charge of an unfair practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented.”); *Pacemaker Corp. v. NLRB*, 260 F.2d 880, 882 (7th Cir. 1958) (“The practice adopted by the Board is subject to abuse as is shown in the instant case. After due notice both parties proceeded with the representation hearing. Possibly for some reasons of strategy near the close of the hearing, the [u]nion asked for an adjournment. Thereafter it filed a second amended charge of unfair labor practice. By such strategy the [u]nion was able to and did stall and postpone indefinitely the representation hearing.”).

<sup>6</sup> Although the Region postponed the hearing indefinitely “due to a newly filed charge in Case 15–CA–282543,” that charge was filed on September 2, 2021, around 2 weeks before the Region issued the fourth consolidated complaint and 3 weeks before it set the hearing date.

<sup>7</sup> *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946) (quoting S. Rep. No. 74–573, at 13).

selves block the petition, but they nevertheless have, and have done so for years.

While the Union was free to file charges, and the Region was obligated to investigate them, there is no indication that those investigations were pursued with the urgency one might expect for charges that are delaying an election. Accordingly, these employees were “deprived during all this time of their statutory right to a representative ‘of their own choosing’ to bargain collectively for them, 29 U.S.C. 157, despite the fact that the employees have not been charged with any wrongdoing.”<sup>10</sup> Moreover, those delays were accompanied by a series of errors, including the unjustified dismissal of the petitions without providing for their reinstatement in January 2020, the unjustified revocation of the settlement in March 2020, for the sole purpose of preventing an election, and the assurance in August 2020 that the Employer could request the petitions’ reinstatement at the appropriate time, which the Board now repudiates. While I do not question the Region’s impartiality, it is easy to understand why the Petitioner might.

A policy that allows an employee’s petition regarding representation, supported by a significant number of her coworkers, to be delayed for over 4 years without any resolution in sight cannot be said to be a policy that protects employees’ right to choose their representation. It is a symptom of a flawed process that, whatever its aims, failed in practice to protect employees’ rights under the Act. The Board was correct to remedy those flaws with its Election Protection Rule. If that rule had been in force when these petitions were filed, an election would have been held in 2018, when Ms. Ray was still in the unit. She, and the other employees then in the unit, would have had the opportunity to have their votes counted, depending on how the unfair labor practice allegations were resolved. Instead, they have been denied that right—even if the charges are ultimately found to be without merit.

<sup>10</sup> *Templeton v. Dixie Color Printing Co.*, 444 F.2d at 1069.

The Board’s disposition of this request for review reinforces this point. The majority’s opinion states that only a decertification petitioner can request reinstatement of a petition that has been dismissed subject to reinstatement. But decertification petitioners are rank and file employees who are generally unaware of the intricacies of labor law. As in the case of Ms. Ray, decertification petitioners are also often unrepresented by counsel.<sup>11</sup> If the Board is to place on decertification petitioners the burden of managing their petition, as today’s decision indicates, then the Board is obligated to adopt procedures that effectuate their statutory right to an election rather than stifle it.

The Election Protection Rule does just that, by assuring that no charge can prevent a timely election from being held. The former blocking charge policy, in contrast, fails this test, as this case aptly illustrates. It is manifestly unfair to suppose that any rank-and-file employee could have navigated the unrelenting series of obstacles thrown in their path by the Union in this case on their own, much less the missteps and delays of the region. Instead, the employees in this case are still waiting for their election with no end in sight. For them, at least, the Act’s guarantee that they have a right to refrain from supporting a union is little more than an illusion.

Accordingly, I respectfully concur.

Dated, Washington, D.C. May 24, 2022

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John F. Ring,

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Member

(SEAL)

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NATIONAL LABOR RELATIONS BOARD

<sup>11</sup> Counsel entered an appearance on behalf of Ms. Ray and Ms. Cathey on July 29, 2021, well after the critical events in this case and after Ms. Ray had been promoted out of the unit.