

No. _____

In the
Supreme Court of the United States

J.G. KERN ENTERPRISES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

**On Petition for Writ of Certiorari to United
States Court of Appeals for the District of
Columbia Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the National Labor Relations Act (“NLRA”), the National Labor Relations Board (“NLRB” or the “Board”) is charged with protecting the right of employees to engage in concerted, protected activity including union representation, and to *refrain* from such activity/representation. 29 U.S.C. § 157. The NLRB reviews complaints of unfair labor practices under the NLRA to determine if any such unlawful conduct has occurred by preponderant evidence. 29 U.S.C. § 160(c). The Board is bound by the Administrative Procedure Act (“APA”) to adhere to valid and consistent precedents and policies, absent a non-arbitrary explanation for reversing the agency’s applications of the law. 5 U.S.C. § 706(2)(A). This Court has recently held that reviewing courts should not defer to interpretations of law by agencies governed by the APA; rather, courts must independently decide a statute’s “best meaning.” *Loper Bright Enterprises v. Raimondo*, Nos. 22-451 and 22-1219, 144 S. Ct. 2244 (2024) (overruling *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

With this background, the questions presented here, on which the circuits are split, are:

1. Whether the NLRB is precluded from relying on precedent vacated by a court of appeals in issuing an order that is arbitrary and capricious;
2. Whether courts of appeal following *Loper Bright* are precluded from enforcing NLRB orders that ignore court rulings under the NLRB’s so-called “non-acquiescence” doctrine.

CORPORATE DISCLOSURE STATEMENT

Petitioner J.G. Kern Enterprises, Inc. (“J.G. Kern”) is a manufacturing site that machines close tolerance powertrain/drivetrain components along with other assemblies to service the automotive industry. J.G. Kern does not have any parent companies, is not publicly traded, and no publicly-held companies own any portion of J.G. Kern stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings:

- *J.G. Kern Enterprises, Inc.*, Nos. 22-1287, 22-1993 (D.C. Circuit), petition for review denied Mar. 1, 2024, petition for rehearing en banc denied May 23, 2024.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner J.G. Kern respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The D.C. Circuit's opinion denying Petitioner's Petition for Review is available at 94 F.4th 18 (D.C. Cir. 2024) and reproduced at Pet.App.1a. The D.C. Circuit's opinion denying Petitioner's Petition for Rehearing En Banc is unpublished and reproduced at Pet. App.28a.

JURISDICTION

The D.C. Circuit denied Petitioner's Petition for Rehearing En Banc on May 23, 2024 and issued the formal mandate on May 31, 2024. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

Section 7 of the NLRA, 29 U.S.C. § 157, provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a

condition of employment as authorized in section 158(a)(3) of this title.

Section 10(c) of the NLRA, 29 U.S.C. § 160(c), provides in relevant part:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

Section 10(e) of the NLRA, 29 U.S.C. § 160(e), provides in relevant part:

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28.

Section 706 of the APA, 5 U.S.C. 706(2)(A), provides in relevant part,

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—(2) hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

STATEMENT OF THE CASE

This case is the ideal vehicle for resolving a clean circuit split over whether the NLRB may use its non-acquiescence doctrine to justify its reliance on vacated precedent and avoid applying long-standing, court-approved controlling precedent.

In this case, the Board stifled the express wishes of an overwhelming majority of Petitioner's employees who signed a petition asking to be no longer represented by a union. The NLRB refused to allow the Petitioner to withdraw recognition from the previously certified Local 228, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (the "Union") as the bargaining representative for Petitioner's employees. Although employers may not withdraw recognition from a union during the year following the union's certification, or certification year, Petitioner withdrew recognition from the Union more than a month after the certification year concluded, upon receipt of 205 employee signatures (80% of the unit) asking for such withdrawal. Under

longstanding Board precedent *Master Slack*, 271 NLRB 78 (1984) and its progeny, the withdrawal of recognition was lawful. Nevertheless, notwithstanding *Master Slack*, and in direct conflict with them, the NLRB (and the D.C. Circuit) chose to apply the vacated holding of *Whisper Soft Mills*, 267 NLRB 813 (1983), *vacated*, 754 F.2d 1381 (9th Cir. 1984) resulting in a new, but previously unacknowledged, change in Board policy. Justifying its reliance on *Whisper Soft*, the Board claimed its non-acquiescence policy allowed it to rely on *Whisper Soft*, despite vacatur. (Pet.App.158a).

In enforcing the NLRB's decision notwithstanding the Board's reliance on a judicially vacated precedent, the D.C. Circuit created a split with the Third Circuit Court of Appeals. The latter court held in *NLRB v. New Vista Nursing & Rehab.*, 870 F.3d 113, 133-34 (3d Cir. 2017) that the Board is not entitled to rely on vacated precedents in issuing its orders. The implications of this split are broad, and call for this Court's review and resolution. Under the NLRB's non-acquiescence policy, the NLRB declines to follow appellate court precedent with which it disagrees. But following this Court's decision in *Loper Bright*, the NLRB's non-acquiescence policy is untenable, as courts following *Loper Bright* must now apply the "best meaning" of the NLRA. See *Loper Bright*, 144 S. Ct. at 2266.

This Court's involvement is critical. In recent years, the NLRB has sought to expand its reach far beyond the NLRA's original language. E.g., *Stern*

Produce Co. v. NLRB, 97 F.4th 1, 11 (D.C. Cir. 2024). Reliance on the non-acquiescence doctrine further expands that power, permitting the NLRB to unexpectedly deviate from precedent on a whim, including in this case by relying on precedents vacated by the courts of appeals. This Court’s involvement is further critical, as the courts of appeal are already split regarding how *Loper Bright* impacts NLRB orders. *E.g., Rieth-Riley Constr. Co., Inc. v. NLRB*, Case Nos. 23-1899, 23-1946, 2024 U.S. App. LEXIS 20470, ____ 4th ____ (6th Cir. 2024); *Hosp. de la Concepcion v. NLRB*, 106 F.4th 69, 76 (D.C. Cir. 2024). In sum, this Court should grant certiorari to resolve the circuit splits at issue here and provide clarity to the regulated community.

A. Appellate Court Review of NLRB Orders

NLRB orders “cannot be enforced” without court approval under the NLRA. 29 U.S.C. § 160(e); *Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 475 (D.C. Cir. 2020). The Administrative Procedure Act (“APA”) binds the NLRB. *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359 (1998). In this regard, the APA prohibits administrative agencies, including the NLRB, from issuing orders that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.*, *see also ABM Onsite-Servs.-West, Inc. v. NLRB*, 849 F.3d 1137, 1142 (D.C. Cir. 2017) (quoting 5 U.S.C. § 706(2)(A)).

In the past, appellate courts reviewing NLRB orders “defer[red] to the Board’s reasonable

interpretations of the National Labor Relations Act under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*” See *Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 313 (D.C. Cir. 2015); *see also Associated Builders and Contrs. of Tex. v. NLRB*, 826 F.3d 215 (5th Cir. 2016). Even under this deferential standard, the Third Circuit denied the NLRB’s petition for enforcement of its order in *NLRB v. New Vista Nursing & Rehab.*, 870 F.3d 113, 133-34 (3d Cir. 2017), concluding “[b]y relying on a vacated NLRB precedent...the Board applied the wrong legal standard.” *See id.*

This Court recently explained, however, in *Loper Bright*, 144 S. Ct. at 2266, that an agency’s interpretation of a statute does not receive deference; instead, a court must independently decide a statute’s “best meaning.” *See also Rieth-Riley Constr. Co., Inc.*, 2024 U.S. App. LEXIS 20470, at *9. The court of appeals did not exercise its statutory responsibility in this case.

B. Certification Year Principles

Under the NLRA, an employer must withdraw recognition from a union when it receives objective evidence the union has lost majority support of the bargaining unit it represents. *See Tenneco Auto. v. NLRB*, 716 F.3d 640, 648 (D.C. Cir. 2013). The NLRB and courts have recognized certain exceptions to this rule, three of which are relevant here.

First, the employer may not withdraw recognition during the calendar year after the date of a union’s certification (the certification year). *Id.*

Second, the employer may not withdraw recognition when the employer commits certain unfair labor practices during (or after) the certification year. *Id.* Because not all unfair labor practices taint a union's loss of majority support, the NLRB, with court approval, has applied *Master Slack*, which uses four factors, to determine whether unfair labor practices have caused the loss of majority support. *See id.*¹

Third, an employer may not withdraw recognition if the Board or an appellate court extended the certification year by prior remedial order in response to prior unfair labor practices. *See Veritas Health Servs. v. NLRB*, 895 F.3d 69, 79 (D.C. Cir. 2018).

C. Factual Background

The NLRB certified the Union as the bargaining representative for unit employees at Petitioner's manufacturing facility on October 3, 2018. (Pet.App.2a). Petitioner withdrew recognition from the Union upon receipt of 205 employee signatures (80% of the unit) asking for such withdrawal on November 22, 2019—more than a month after the certification year concluded. (Pet.App.66a, 116a).

¹ Those factors are: "(1) The length of time between the unfair labor practices and the employee petition; (2) the nature of the unfair labor practices, including whether they are of a nature that would cause a detrimental or lasting effect on the employees; (3) the tendency of the unfair labor practices to cause employee disaffection with the union; and (4) the effect of the ... unfair labor practices on the employees' morale, organizational activities, and membership in the union." *See Tenneco*, 716 F.3d at 648-49 (internal citations omitted).

Petitioner's withdrawal of recognition, which occurred more than one year after the NLRB certified the Union, was lawful. The NLRB alleged Petitioner committed three unfair labor practices by delaying bargaining, refusing to bargain over a Union-administered employee benefit plan, and failing to provide information the Union requested. (Pet.App.31a-32a). The unfair labor practices of which the NLRB accused Petitioner did not occur close in time to the withdrawal of recognition and were not the types of unfair labor practices that typically cause employee disaffection, revealing under *Master Slack*, the withdrawal was lawful. *See, e.g., See, e.g., Champion Home Builders*, 350 NLRB 788, 791-92 (2007); *Garden Ridge Mgmt.*, 347 NLRB 131, 134 (2006); *Lexus of Concord, Inc.*, 343 NLRB 851, 852 (2004); *Renal Care of Buffalo*, 347 NLRB 1284, 1297 (2006); *Gulf States Mfrs.*, 287 NLRB 26, 26 (1987).

Indeed, the Board found prior withdrawals of recognition lawful in cases with indistinguishable facts—*i.e.*, in cases where employers, like Petitioner, committed unfair labor practices related to bargaining during the certification year. For example, in *Champion Home Builders, Co.*, the Board applied *Master Slack* when the employer withdrew recognition of the union after the certification year, even though, like here, the employer did not meet with the union during the first three months following its certification. *See Champion Home Builders Co.*, 350 NLRB 788. Similarly, in *Garden Ridge Management*, the Board applied *Master Slack* after an employer withdrew recognition of a union after the certification

year expired, even though the employer violated the NLRA by unreasonably failing to meet with the union to bargain. *See Garden Ridge Management*, 347 NLRB at 134.

D. Procedural Background

An administrative law judge (“ALJ”) concluded Petitioner violated the Act by delaying bargaining, refusing to bargain, and failing to provide requested information. (Pet.App.119a-131a). Citing longstanding Board precedent *Master Slack*, the ALJ concluded unfair labor practices tainted Petitioner’s withdrawal of recognition. (Pet.App.133a). The ALJ was wrong to do so: application of the *Master Slack* factors reveals Petitioner did not violate the NLRA by withdrawing its support from the Union.

The NLRB affirmed the ALJ’s conclusion but instead of applying *Master Slack* to assess whether Petitioner’s withdrawal of recognition after the certification year was lawful, the Board retroactively extended the certification year because it concluded Petitioner did not bargain in good faith with the Union, *automatically* rendering Petitioner’s withdrawal of recognition unlawful. (Pet.App.38a). In this regard, the Board applied the vacated precedent of *Whisper Soft*, while at the same time, the Board expressly declined to modify or overrule *Master Slack*. (Pet.App.43a). Board Member Ring filed a vigorous dissent, where he explained he would have applied *Master Slack*, and under *Master Slack*, would not have concluded Petitioner violated the NLRA by

withdrawing recognition from the Union. (Pet.App.62a).

Petitioner petitioned for review in the D.C. Circuit; which the D.C. Circuit ultimately denied, primarily on the ground that the NLRB was entitled to rely on the vacated precedent of *Whisper Soft*. (Pet.App.24a).

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided Over Whether the NLRB May Rely on Vacated Precedent and the Issue Is Likely to Recur

In denying Petitioner’s petition for review, the D.C. Circuit erroneously relied on the Board’s vacated decision in *Whisper Soft*. The D.C. Circuit concluded *Whisper Soft* retained precedential value because the Ninth Circuit never “criticize[d] the underlying principle applied by the Board that an unlawful bargaining delay may warrant extension of the certification year.” (Pet.App.22a). But the D.C. Circuit’s analysis was plainly wrong: following the Ninth Circuit’s decision—in which the Ninth Circuit concluded that the certification year should not have extended because the employer did not commit the unfair labor practice at issue—the Board’s discussion of a retroactive extension of the certification year no longer constituted “the result” of the case or a “portion[] of the opinion necessary to that result.” *Int’l Union, Sec. Police & Fire Professionals of Am. v. Faye*, 828 F.3d 969, 974 (D.C. Cir. 2016). Accordingly, *Whisper Soft* lacked precedential

value, but the D.C. Circuit allowed the NLRB to rely on it anyway.

The D.C. Circuit action is in direct conflict with the Third Circuit's decision in *New Vista Nursing & Rehab.*, where the Third Circuit faulted the Board for relying on a legal test that it "derived...from an NLRB opinion" that was "later vacated." *New Vista*, 870 F.3d at 133. Notably, just as occurred when the Ninth Circuit reversed the Board's decision and vacated the Board's order in *Whisper Soft* on grounds other than the Board's discussion of a retroactive extension of the certification year, the vacated NLRB opinion on which the Board relied in *New Vista Nursing* was "vacated on other grounds." See *id.* Nevertheless, the Third Circuit still faulted the Board for "relying on a vacated NLRB precedent." See *id.* at 134.

The D.C. Circuit's decision to allow the NLRB to rely on vacated precedent was not just contrary to the Third Circuit's decision; it was plainly error. This Court has expressly concluded vacatur renders a judgment "null and void." See *United States v. Ayres*, 76 U.S. 608 (1869); see also *Action on Smoking & Health v. Civil Aeronautics Board*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("To 'vacate' ... means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.'").

Finally, this issue is likely to recur. For example, the Fifth Circuit recently vacated the NLRB's decision

in *Tesla Inc.*, 371 NLRB No. 131 (2022). *See Tesla, Inc. v. NLRB*, 86 F.4th 640, 644 (5th Cir. 2023). Nevertheless, the NLRB has continued to apply the vacated decision. *See Home Depot USA, Inc.*, 373 NLRB No. 25 (2024). Accordingly, this Court’s intervention is needed to resolve the disagreement between the Third and D.C. Circuits.

II. The Question of Whether the NLRB May Continue to Rely on Its Nonacquiescence Policy Following *Loper Bright* Is Recurring, Important, and Already Presents a Split Among the Circuits

The implications of this case are broad. The NLRB used its nonacquiescence policy to justify its reliance on *Whisper Soft*. The nonacquiescence policy, however, is no longer legally sound following this Court’s decision in *Loper Bright*.

A. The NLRB’s Justifications for its Decision, Other Than Nonacquiescence, All Fail

Although the NLRB did not rely solely on its nonacquiescence policy to justify its use of *Whisper Soft*, its other justifications do not withstand scrutiny. The NLRB argued *Whisper Soft* is good law; as discussed above, that argument fails.

The NLRB argued two other cases which postdated *Master Slack—New Madrid Nursing Center*, 325 NLRB 897, 900-02 & n.31 (1998) and *Bryant & Stratton Business Center v. NLRB*, 140 F.3d

169, 185-87 (2d Cir. 1998)—supported its retroactive extension of the certification year, but neither do. But *New Madrid* relied solely on *Whisper Soft*, which is not good law. *See New Madrid*, 1997 NLRB LEXIS 259, at *27-31 (Apr. 9, 1997). As for *Bryant & Stratton*, that case involved a prior remedial order extending the certification year (not a retroactive extension of the certification year). In *Bryant & Stratton*, an ALJ concluded on June 23, 1994 that the employer had violated the NLRA and ordered an extension of the union’s certification year, which the NLRB subsequently adopted on August 23, 1996. *See Bryant & Stratton*, 140 F.3d at 173-74; *see also Bryant & Stratton Bus. Inst.*, 321 NLRB 1007 (1996). The NLRB ordered prospective relief: namely, that the employer stop refusing to meet with the union and that the employer should “[o]n request, bargain collectively” with the union. *See Bryant & Stratton*, 321 NLRB at 1009-10. Only because the employer “was obligated to comply with the [NLRB’s] order...to extend the [u]nion’s certification and the consequences flowing therefrom,” the Second Circuit concluded that *Master Slack* did not apply. *See Bryant & Stratton*, 140 F.3d at 187. Petitioner here, unlike the employer in *Bryant & Stratton*, did not ignore a remedial NLRB order when it withdrew recognition of the Union.

The NLRB also argued *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), *Lamar Hotel*, 137 NLRB 1271 (1962), *NLRB v. Commerce Co.*, 328 F.2d 600, 601 (5th Cir. 1964), and *Brooks v. NLRB*, 348 U.S. 96, 97, 103-04 (1954) supported its decision, but each of these cases predate *Master Slack* and could not justify a decision to deviate from *Master Slack*.

Because the NLRB is incorrect to argue *Whisper Soft* was good law, or that cases other than *Whisper Soft* supported its decision, the only remaining rationale to support the NLRB's decision is nonacquiescence.

B. The Nonacquiescence Doctrine Cannot Justify NLRB Orders Following *Loper Bright*

The only justification for the Board's reliance on *Whisper Soft* here was its non-acquiescence policy. But that policy is no longer tenable following this Court's decision in *Loper Bright*. The NLRB has recently described its non-acquiescence policy as follows: "The non-acquiescence policy involves the Board's discretionary application of its expertise to adhere to its view on a matter *when it perceives that a contrary court ruling is inconsistent with the Act's policies.*" *Valley Hosp. Med. Ctr., Inc.*, 371 NLRB No. 160, n.8 (2022) (emphasis in original).

For years, the NLRB's non-acquiescence policy has garnered controversy. *E.g.*, *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 23-24 (D.C. Cir. 2016); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980). Nevertheless, following this Court's decision in *Loper Bright*, the NLRB's non-acquiescence policy is not just controversial; it is inconsistent with the APA and this Court's holding. Courts following *Loper Bright* must now apply the "best meaning" of the NLRA. *See Loper Bright*, 144 S. Ct. at 2266. It follows then, that any post-*Loper Bright*

non-acquiescence by the Board to a contrary court ruling is an impermissible effort to deviate from the NLRA’s “best meaning.” *See id.*

C. The Application of *Loper Bright* Already Presents a Split Among the Circuits

This Court’s intervention in the present case is further called for now because the application of *Loper Bright* to NLRB orders has already split the circuits. As noted above, the Sixth Circuit has expressly applied (and cited) *Loper Bright*, explaining: “We do not defer to the NLRB’s interpretation of the NLRA, but exercise independent judgment in deciding whether an agency acted within its statutory authority.” *See Rieth- Riley Constr. Co.*, 2024 U.S. App. LEXIS 20470, at *9. This interpretation makes sense: courts of appeal have routinely concluded *Chevron* deference applied to NLRB decisions. *See Hyundai Am. Shipping Agency, Inc.*, 805 F.3d at 313; *see also Associated Builders and Contrs. of Tex.*, 826 F.3d at 219. It follows then that *Loper Bright*’s explicit overruling of *Chevron* results in less deference to NLRB decisionmaking. *See Loper Bright*, 144 S. Ct. at 2273.

Nevertheless, the D.C. Circuit has reached an alternative conclusion. In *Hospital de la Concepcion v. National Labor Relations Board* (a post-*Loper Bright* decision), the D.C. Circuit declined to cite *Loper Bright*, and instead explained: “We review [NLRB] decisions with a ‘very high degree of deference.’” *See* 106 F.4th at 76.

The difference between the Sixth and D.C. Circuit's analyses is not a matter of semantics; the standard of review applied to review of an NLRB decision is often outcome determinative. Both the Sixth Circuit in *Rieth-Riley* and the D.C. Circuit in *Hospital de la Concepcion* denied petitions for review of NLRB decisions. *See Rieth- Riley Constr. Co.*, 2024 U.S. App. LEXIS 20470, at *9; *Hosp. de la Concepcion*, 106 F.4th at 76. Appellate courts pre-*Loper Bright* routinely noted the deference accorded to NLRB decisions that were otherwise considered "reasonable.". *See, e.g., Casino Pauma v. NLRB*, 888 F.3d 1066, 1075 (9th Cir. 2018); *Arrow Elec. Co. v. NLRB*, 155 F.3d 762, 765 n.1 (6th Cir. 1998). A court of appeal following *Loper Bright*, however, may not simply rely on a reasonable interpretation by the NLRB, it must rely on the best interpretation. *See Loper Bright*, 144 S. Ct. at 2271. Accordingly, this Court's intervention is further required to address the split between how the circuits are applying *Loper Bright*.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — OPINION OF THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT,
FILED MARCH 1, 2024**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1287
Consolidated with 22-1293

J.G. KERN ENTERPRISES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Argued November 16, 2023
Decided March 1, 2024

OPINION

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: PILLARD and CHILDS, *Circuit Judges*, and
EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge*
EDWARDS.

Appendix A

EDWARDS, *Senior Circuit Judge*: It is well settled that, after a union has been certified by the National Labor Relations Board (“Board” or “NLRB”) to represent employees in an appropriate bargaining unit, the union enjoys “a conclusive presumption of majority status for one year.” *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37 (1987). This policy, denominated the “certification year bar,” “promotes stability in collective-bargaining relationships, allowing a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying about the immediate risk of decertification, and relieving the employer of any temptation . . . to avoid good-faith bargaining in an effort to undermine union support.” *Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 79 (D.C. Cir. 2018) (quotations omitted). Thus, it is understood that, when an employer “take[s] from the Union a substantial part of” the first 12 months after certification “largely through its refusal to bargain,” the Board may remedy the “inequit[y]” by extending the certification year. *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785, 787 (1962). This case involves an application of the certification year bar.

On October 3, 2018, the Board certified Local 228, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (“Union”) as the collective-bargaining representative for a unit of employees at a manufacturing facility operated by J.G. Kern Enterprises, Inc. (“Company”). However, despite the Union’s repeated requests to bargain after its certification, the Company failed to meet with Union agents until almost three months after the start of the

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certification year. When the parties finally commenced negotiations, the Company refused to provide the Union with requested information related to employees' benefit plans, thus effectively foreclosing any meaningful bargaining on this matter. By the end of the certification year, the parties had failed to reach agreement on the terms of a collective-bargaining contract. About two months after the certification year expired, the Company withdrew recognition from the Union, purportedly because the Union had lost its majority status.

The Union filed unfair labor practice charges with the NLRB, and the Board's General Counsel issued consolidated Complaints against the Company. After a hearing before an Administrative Law Judge ("ALJ"), the Board found that the Company had violated Sections 8(a) (1) and (5) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(1), (5), by: (1) delaying bargaining for nearly three months after the start of the certification year; (2) refusing to consider any proposal for a Union-administered benefit plan; (3) refusing to furnish information to the Union regarding the Company's existing employee benefit plans; and (4) withdrawing recognition from the Union during the extended certification year. *See J.G. Kern Enters., Inc.*, 371 N.L.R.B. No. 91 (Apr. 20, 2022) ("Board Decision"), reprinted in Joint Appendix ("J.A.") 277-307. The Board, *inter alia*, ordered the Company to cease and desist from the unfair labor practices, extended the certification year by six months from the date good-faith bargaining resumed, and required the parties to bargain during that period. *Id.* at 8-9. The Board then denied the Company's motion for reconsideration.

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In its petition for review before this court, the Company challenges all of the Board's findings in connection with the contested unfair labor practices. The Company's principal arguments to this court are: first, that the Board erred in finding an unlawful withdrawal of Union recognition based on a retroactive extension of the original certification year; and, second, that the Board had no legal basis to order the Company to bargain with the Union for an additional six months.

We find no merit in the Company's petition for review. Substantial evidence supports the Board's findings that the Company committed the unfair labor practices as alleged. The Company contends that, in finding an unlawful withdrawal, the Board mistakenly followed the remedial rule set forth in *Whisper Soft Mills, Inc.*, 267 N.L.R.B. 813 (1983), rather than the approach used in *Master Slack Corp.*, 271 N.L.R.B. 78 (1984). We disagree. The Board's General Counsel raised both remedial approaches in pursuing the Complaints against the Company. Furthermore, the remedial approaches taken in *Whisper Soft* and *Master Slack* serve different purposes and do not conflict. Therefore, the Board was free to choose which legal theory to rely on in addressing the unfair labor practice charges against the Company. Finally, we hold that the Board acted within its discretion when it ordered an extension of the certification year and required the parties to bargain to remedy the Company's unfair labor practices. An extension of the certification year is a "standard remedy" when an employer refuses to bargain for a significant part of that year. *Veritas Health*, 895 F.3d at 80. Accordingly, we deny the Company's

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petition for review and grant the Board's cross-petition for enforcement of its order.

I. BACKGROUND***A. Statutory Background***

“The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between” employees and employers. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996). In support of these ends, Section 8(a)(5) of the Act generally makes it an unfair labor practice for an employer to refuse to bargain in good faith with the lawful representative of its employees. 29 U.S.C. § 158(a)(5). An employer who violates Section 8(a)(5) also violates Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of [their statutory] rights.” *Id.* § 158(a)(1); *see also Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 n.5 (D.C. Cir. 2003). Under Section 10(c) of the Act, the Board has remedial authority to order a violator “to take such affirmative action . . . as will effectuate the policies” of the Act. 29 U.S.C. § 160(c).

B. Factual and Procedural History

On October 3, 2018, the Board certified the Union as the lawful bargaining agent for a unit of employees at the Company's manufacturing facility for automotive parts in Sterling Heights, Michigan. On October 15, 2018,

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Union officials contacted the Company’s representative, Jonathan Sutton, offering to begin negotiations “anytime” at Sutton’s “earliest convenience.” J.A. 97. Sutton indicated that he could meet with the Union on November 5 to 7 or November 26 to 28. The Union promptly replied the next day that it was “ready and willing to meet” on all those dates. J.A. 94. The Union requested the first block of dates available, November 5 to 7, indicated that they could “go from there,” and asked where to meet. J.A. 95. Sutton never responded. About two weeks later, the Union again inquired about the meeting location. Again, Sutton failed to answer.

On November 5, 2018, the first day of scheduled negotiations, Sutton emailed the Union announcing he could no longer meet in November. He stated that he was in Guam for another client and also had just sold his house in Houston. He offered to “ask someone else to step in and fill [his] spot.” J.A. 116. The Union replied within half an hour on the same day, saying they “need[ed] to get the ball rolling,” that “it ma[de] no difference” with whom the Union negotiated, and that the Union would file charges with the NLRB if the Company failed to set a negotiation date by November 8. J.A. 115. Noting that it had “waited over a month to start the process,” the Union made it clear that it could not “wait any longer” and “look[ed] forward to hearing from someone, whoever that may be.” *Id.* Later in November, the Company designated someone to replace Sutton, but no meetings took place.

On November 27, 2018, the Union filed an unfair labor practice charge with the Board, accusing the

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Company of failing to bargain in good faith by continually postponing negotiations. The same day, the Union sent a letter to the Company proposing 15 bargaining dates between December 4 and 20. The Company did not offer to schedule any bargaining sessions. Sutton later testified that he could not meet in December because of his house sale, and because “December is a very difficult month to meet, anyway.” J.A. 30. On January 10, 2019, nearly three months after the start of the certification year, the parties finally met to begin bargaining.

On February 21, 2019, the Board’s General Counsel issued a Complaint against the Company, alleging that it failed to bargain in good faith with the Union. The Complaint requested that the Board extend the certification year. J.A. 56 at ¶ 2(b) (citing *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962)).

Once the parties finally commenced bargaining in January 2019, the Union requested information regarding the cost of various employee benefits provided by the Company. The Union explained that it needed this information to propose alternative, Union-administered benefits. In response, the Company provided information on the costs to employees of various plan options, rather than the cost to the Company as the Union requested. When the Union followed up, the Company refused to provide any more information. The Company’s representative, Sutton, emailed the Union to say: “[T]here is a limit to the information we will be providing. . . . In light of as much, there seems [to be] no need for [the Union] to put further effort into working up

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a proposal for union provided benefits. We will stick with the present plan.” J.A. 100. After more unsuccessful back-and-forth, the Union filed a second unfair labor practice charge with the Board on July 29, 2019, alleging that the Company had failed to furnish requested information.

On October 8, 2019, the Board’s General Counsel issued a consolidated Complaint against the Company alleging, as additional violations, that the Company unlawfully refused to consider any proposal for Union-administered benefit plans, and that the Company unlawfully refused to furnish relevant information. As with the first Complaint, the General Counsel’s consolidated Complaint also requested that the Board remedy the violations by extending the certification year. J.A. 69 at ¶ 2(b) (citing *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962)).

The parties did not agree on a collective bargaining contract by the end of the certification year. Less than two months after the certification year expired, on November 25, 2019, the Company withdrew recognition of the Union and refused to continue bargaining. Company officials claimed that they had received a petition signed by a majority of the employees in the bargaining unit indicating the employees no longer wished to be represented by the Union. In response, the Union filed a third unfair labor practice charge alleging that the Company had unlawfully withdrawn recognition of the Union.

On June 22, 2020, the Board’s General Counsel issued a second consolidated amended Complaint. Incorporating all of the Union’s charges, the Complaint alleged that the

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Company violated Sections 8(a)(1) and (5) of the Act by: (1) refusing to meet and bargain in good faith; (2) refusing to bargain over Union-administered benefit plans; (3) failing to respond to a request for information about employee benefits; and (4) withdrawing recognition of the Union. J.A. 77, 79 at ¶¶ 9, 10, 14, 15.

The General Counsel presented two theories to the ALJ to support the claim of unlawful withdrawal of Union recognition. First, the General Counsel argued that the Company's withdrawal was unlawful under the analysis adopted in *Master Slack Corp.*, 271 N.L.R.B. 78 (1984), which considers whether an employer's unfair labor practice caused the loss of union support. *See* J.A. 199. Second, the General Counsel argued, in the alternative, that if the Board granted an extension of the certification year of greater than 53 days—i.e., the number of days from the certification-year expiration after which the Company withdrew recognition—“then [the Company] unlawfully withdrew recognition during the [extended] certification year notwithstanding whether the factors in *Master Slack* have been met.” J.A. 203. This second theory of unlawful withdrawal is consistent with the approach followed by the Board in cases such as *Whisper Soft Mills, Inc.*, 267 N.L.R.B. 813 (1983).

On October 6, 2020, the ALJ found merit in all of the unfair labor practice charges raised by the General Counsel. J.A. 229-30. The ALJ applied the approach set forth in *Master Slack* and determined that the withdrawal of recognition was unlawful because the Company's unfair labor practices had caused the Union to lose its majority status. J.A. 227-29.

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On April 20, 2022, the Board accepted the ALJ’s factual findings. However, the Board found it unnecessary to determine whether the Company’s unfair labor practices had caused the Union to lose its majority status. Rather, the Board relied on the General Counsel’s alternative theory of liability, as exemplified by the approach followed in *Whisper Soft*, in determining the appropriate remedy for the unfair labor practices committed by the Company. Following *Whisper Soft* and other like cases, the Board found that the unfair labor practices committed during the original certification year supported extension of the certification year as well as invalidation of the Company’s withdrawal of recognition during that extension. *See Board Decision*, at 2-3. To remedy the unfair labor practices, the Board, *inter alia*, ordered the Company to cease and desist from violating the Act; extended the certification year by six months from the date that good-faith bargaining resumed; and required the parties to bargain for 40 hours a month, for at least eight hours per session, until they reach an agreement or good-faith impasse. *Id.* at 8-9. The Board then denied the Company’s motion for reconsideration. *See J.A. 308-12.* The Company now petitions this court for review, and the Board cross-petitions for enforcement of its order.

II. ANALYSIS***A. Jurisdiction and Standard of Review***

The court has jurisdiction over this appeal pursuant to Sections 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). This court’s role in reviewing a Board decision is “limited.”

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Wayneview Care Ctr. v. NLRB, 664 F.3d 341, 348 (D.C. Cir. 2011). We must uphold the Board’s judgment unless “the Board’s findings are not supported by substantial evidence, or . . . the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case.” *Id.* (quoting *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000)). To determine whether evidence is substantial, this court must “ask whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion.” *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (quotation marks omitted). “[T]he Board is to be reversed only when the record is ‘so compelling that no reasonable factfinder could fail to find’ to the contrary.” *United Steelworkers of Am. v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 484 (1992)).

B. The Company’s Unfair Labor Practices Committed During the Original Certification Year

The Board found that, during the original certification year, the Company violated Sections 8(a)(1) and (5) of the Act by: (1) “delaying bargaining for a period of almost three months at the start of the certification year”; (2) “refusing to furnish requested employer cost information regarding the existing benefit plans for unit employees”; and (3) “notif[ying] the Union via email that it would not consider any proposal for a union-administered benefit plan and would stick with its present benefit plan.” *Board Decision*, at 1. Although the Company challenges these findings, there is no serious dispute that the record supports the Board’s determinations.

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Substantial evidence supports the Board's first finding that the Company unlawfully delayed negotiations. An employer's refusal to bargain with a union during the certification year "is *per se* an unfair labor practice under §§ 8(a)(1) and 8(a)(5) of the [Act]." *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 778 (1990). Here, following the Union's certification on October 3, 2018, the Union promptly requested bargaining on October 15, 2018. However, as the ALJ found, the Company responded "by cancelling bargaining dates in November and then making a blanket refusal to bargain at all in December." *Board Decision*, at 25. It was not until after the Union filed an unfair labor practice charge that the Company agreed to its first bargaining session on January 9, 2019, almost three months after the start of the certification year. In other cases, the Board has found delays of similar or even shorter lengths to be inconsistent with the duty to bargain. *See, e.g., Ne. Ind. Broad. Co.*, 88 N.L.R.B. 1381, 1390-91 (1950) (finding five-week delay unreasonable); *Fruehauf Trailer Servs., Inc.*, 335 N.L.R.B. 393, 393 (2001) (finding three-month delay unreasonable).

Substantial evidence also supports the Board's second finding that the Company violated Sections 8(a)(1) and (5) of the Act by failing to bargain over Union-administered benefits. "[A] refusal to bargain on a mandatory subject of bargaining" may be challenged as an unfair labor practice. *Loc. Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 685 (1965). Under the Act, "mandatory subjects of collective bargaining include," as relevant here, "insurance benefits for active employees." *Allied Chem. & Alkali Workers v. Pittsburgh*

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Plate Glass Co., 404 U.S. 157, 159 (1971). The Union requested information from the Company regarding the cost the Company incurred to provide employee benefits, explaining that the Union intended to “cost the package” and “provide the company with an option” to administer insurance through a Union benefit plan. J.A. 100. In reply, the Company declared there was “no need for [the Union] to put further effort into working up a proposal for union provided benefits,” because the Company would “stick with the present plan.” *Id.* The record thus plainly supports the Board’s determination that the Company impermissibly foreclosed bargaining over a mandatory subject.

Finally, substantial evidence supports the Board’s third finding that the Company refused to provide requested information relevant to mandatory subjects of bargaining. The duty to bargain collectively under the Act “includes a duty to provide relevant information needed by a labor union for the proper performance of its duties.” *Detroit Edison Co., v. NLRB*, 440 U.S. 301, 303 (1979). Information considered “presumptively relevant to collective bargaining” includes matters “related to . . . benefits” of represented employees. *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000); *see also The Nestle Co.*, 238 N.L.R.B. 92, 94 (1978) (finding company committed unfair labor practice by “refusing to furnish the [u]nion with the requested information concerning claims and premiums” the company paid for employees’ health insurance). Relevant information must be disclosed unless the employer provides a “valid countervailing interest.” *Oil, Chem. & Atomic Workers*

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Loc. Union No. 6-418 v. NLRB, 711 F.2d 348, 360 (D.C. Cir. 1983). Here, the Company refused repeated requests for information on the cost to the Company of its benefit plans, asserting that “[c]ost information will not be shared.” J.A. 106. In this case, the ALJ found, and the Board agreed, that the Company “provided no explanation other than its own obstinacy” for “refusing to provide most of this presumptively relevant cost information.” *Board Decision*, at 27; *see also id.* at 1.

In sum, substantial evidence clearly supports the Board’s findings that, during the original certification year, the Company committed three unfair labor practices and impaired the Union’s ability to bargain during that protected year.

C. The Company’s Withdrawal of Union Recognition After the Original Certification Year

The primary contention on appeal concerns the Board’s fourth finding, that the Company unlawfully withdrew Union recognition and refused to bargain less than two months after the expiration of the original certification year. The Board reasoned that the unfair labor practices committed during the original certification year warranted an extension of the certification year by at least nearly three months, the length of time that the Company delayed bargaining during the original certification year. *See id.* at 3. Therefore, the Board concluded that the Company’s withdrawal of recognition less than two months after the original certification year, occurring during the extended certification year,

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violated the Company's duty to bargain in good faith and constituted an unfair labor practice under Sections 8(a) (1) and (5) of the Act. The Board's reasoning is eminently reasonable and supported by longstanding precedent.

It is well established that, "after a union has been certified by the Board as a bargaining-unit representative, it usually is entitled to a conclusive presumption of majority status for one year following the certification." *Fall River*, 482 U.S. at 37. An employer must bargain in good faith during these first 12 months and cannot withdraw recognition of the union, even if the union allegedly loses majority support through no fault of the employer. *See Auciello Iron Works*, 517 U.S. at 786; *Brooks v. NLRB*, 348 U.S. 96, 98-99 (1954). As explained above, this certification-year bar "enable[s] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying" about the immediate risk of decertification. *Fall River*, 482 U.S. at 38. It also "remove[s] any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees." *Id.* After the certification year expires, "the presumption of majority status becomes a rebuttable one." *Auciello Iron Works*, 517 U.S. at 786.

When an employer has, "largely through its refusal to bargain, taken from the Union a substantial part of the period when Unions are generally at their greatest strength[,] the 1-year period immediately following the certification," the Board may remedy the "inequit[y]" by extending the certification year. *Mar-Jac*, 136 N.L.R.B.

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at 787; *see also Loc. Union No. 2338, IBEW v. NLRB*, 499 F.2d 542, 544 & n.3 (D.C. Cir. 1974) (per curiam) (noting with approval the *Mar-Jac* remedy). The Board, with this court's approval, has long treated extension of the certification year as the "standard remedy" for an employer's refusal to bargain in good faith during a union's first 12 months as the employees' representative. *Veritas Health*, 895 F.3d at 80 (citing *Dominguez Valley Hosp.*, 287 N.L.R.B. 149, 149 (1987)).

The Board may grant an extension of the certification year when the employer or an employee files a petition with the Board seeking to decertify the Union, and the Board determines that the employer failed to bargain in good faith for the full certification year. *See, e.g., Mar-Jac*, 136 N.L.R.B. at 787 & n.6 (dismissing decertification petition filed after original certification year had expired and extending certification year by six months because employer had refused to bargain for that length of time). The Board has also granted certification-year extensions where the employer unilaterally withdraws recognition from the union during the certification year, and the union files an unfair labor practice charge against the employer in response. *See, e.g., Dominguez Valley Hosp.*, 287 N.L.R.B. at 151 (extending certification year by six months because employer refused to bargain during part of the certification year and prematurely withdrew union recognition).

In some cases, an employer withdraws union recognition during the certification year. *See, e.g., id.; Veritas Health*, 895 F.3d at 80; *Bryant & Stratton Bus.*

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Inst., Inc. v. NLRB, 140 F.3d 169, 186 (2d Cir. 1998). In other cases, like the instant matter, an employer withdraws recognition of the union shortly after the certification year's expiration. *See, e.g., Whisper Soft*, 267 N.L.R.B. at 816; *New Madrid Nursing Center*, 325 N.L.R.B. 897, 902 (1998), *enf'd*, 187 F.3d 769 (8th Cir. 1999). The Board must bar the withdrawal if it occurs during the unextended certification year. And, where the Board finds that the employer failed to bargain in good faith for a significant portion of the certification year, it can remedy the inequity by extending the certification year and barring withdrawal during the extension period. *See, e.g., Veritas Health*, 895 F.3d at 80; *Bryant & Stratton*, 140 F.3d at 186; *Whisper Soft*, 267 N.L.R.B. at 816; *New Madrid*, 325 N.L.R.B. at 902.

In this case, the Board relied in part on *Whisper Soft* and *New Madrid* to find that the Company unlawfully withdrew recognition of the Union during the extended certification year. *See Board Decision*, at 3. In *Whisper Soft*, the employer refused to bargain for four and a half months of the certification year and then withdrew recognition within a month after the certification year expired. *Whisper Soft*, 267 N.L.R.B. at 816. The Board held that the employer's unlawful refusal to bargain entitled the union to an extension of the certification year by at least four and a half months from the date that the certification year expired. *Id.* The Board held that the employer's withdrawal of recognition before the extended certification year expired constituted a violation of the Act. *Id.*

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Similarly, the Board in *New Madrid* found an employer's withdrawal the day after the end of the certification year unlawful, because the employer's conduct during the year precluded "a full year of bargaining" by 10 days. *New Madrid*, 325 N.L.R.B. at 902. The ALJ (whose findings and conclusions the Board adopted) explained that whether there existed a causal relationship between the employer's conduct and the loss of majority status "has no impact on [the] decision." *Id.* Rather, because "[t]he Union was entitled to 1 year of good-faith bargaining from the date of certification," "an extension of the certification year by at least 10 days . . . [was] warranted." *Id.* Thus, the Board concluded that the withdrawal of recognition impermissibly occurred before the expiration of the extended certification year. *Id.* (citing *Whisper Soft*, 267 N.L.R.B. at 816).

Whisper Soft and *New Madrid* are directly on point and support the Board's disposition of this case. The extension ensures that the Union in fact receives one full year of good-faith bargaining with the employer. In this case, the Company does not contest that, under *Whisper Soft* and *New Madrid*, its withdrawal of Union recognition two months after the certification year would be unlawful, where it committed unfair labor practices during the certification year that impeded bargaining for longer than two months. Rather, the Company contends that the Board was required to apply *Master Slack Corp.*, 271 N.L.R.B. 78 (1984). The Company argues that *Master Slack* superseded *Whisper Soft*, and also that *New Madrid* was wrongly decided because it applied *Whisper Soft* instead of *Master Slack*.

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Contrary to the Company's view, *Master Slack* does not replace the well-established line of precedents instructing that when an employer impedes the union's ability to bargain during the certification year, the Board may remedy the inequity by extending the year. *See, e.g., Veritas Health*, 895 F.3d at 80; *Bryant & Stratton*, 140 F.3d at 186; *Loc. Union No. 2338*, 499 F.2d at 544; *New Madrid*, 325 N.L.R.B. at 902; *Dominguez Valley Hosp.*, 287 N.L.R.B. at 151; *Whisper Soft*, 267 N.L.R.B. at 816; *Mar-Jac*, 136 N.L.R.B. at 787.

Instead, *Master Slack* offers another, independent legal theory for determining the legality of an employer's withdrawal of recognition. Importantly, *Master Slack* did not concern certification-year principles. In *Master Slack*, an employer withdrew recognition from the union eight years after the union's certification, following the expiration of a collective-bargaining agreement. *See Master Slack*, 271 N.L.R.B. at 79 & n.5, 85. The Board articulated a four-factor test to determine whether the employer's unfair labor practices tainted the union's loss of majority status. The test consists of the following elements:

- (1) [t]he length of time between the unfair labor practices and the withdrawal of recognition;
- (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

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Id. at 84; *see also Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 648 (D.C. Cir. 2013) (noting this court’s endorsement of *Master Slack*’s four-factor test).

The approaches taken by the Board in *Master Slack* and *Whisper Soft/New Madrid* serve different purposes. *Whisper Soft/New Madrid* guarantees that a union receives one full year of good-faith bargaining after certification. Thus, if the employer commits an unfair labor practice during the certification year that impairs the union’s ability to bargain, the Board may remedy the inequity by extending the certification year. In comparison, *Master Slack* concerns whether an employer caused a union’s loss of majority support, and can be applied to analyze withdrawals of recognition without reference to the certification year. *See, e.g., Tenneco*, 716 F.3d at 643, 648.

The Company points out that the Board has at times applied *Master Slack* in cases in which the unfair labor practices were committed during the certification year, when it presumably could have applied the approach followed in *Whisper Soft/New Madrid*. In these cases, the Board decided whether to invalidate an employer’s withdrawal of union recognition shortly after the end of the original certification year based on whether the employer’s unfair labor practices caused the union’s loss of majority support. *See* Final Brief (“Br.”) of Petitioner 15-16 (citing *Denton Cnty. Elec. Coop., Inc.*, 366 N.L.R.B. No. 103, at 2-3 (2018), *enf’d in relevant part*, 962 F.3d 161 (5th Cir. 2020); *Champion Home Builders Co.*, 350 N.L.R.B. 788, 788 (2007); *Garden Ridge Mgmt.*, 347 N.L.R.B. 131,

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134 (2006); *Tritac Corp.*, 286 N.L.R.B. 522, 537-40 (1987)). The Company argues that the Board's reliance on *Master Slack* in these cases indicates that the Board has overruled *Whisper Soft/New Madrid*, or impermissibly ignored without explanation a square conflict between those cases and *Whisper Soft/New Madrid*. We disagree.

The decisions the Company highlights do not say anything about *Whisper Soft/New Madrid*. As the Board here notes, neither the General Counsel nor the parties in those cases raised that theory with the Board. *See Board Decision*, at 5. And the Board itself never stated in any of those cases that *Master Slack* superseded or otherwise modified *Whisper Soft/New Madrid*. Furthermore, as discussed above, *Master Slack* and *Whisper Soft/New Madrid* pose no irreconcilable conflict, as they provide distinct ways to assess a union's loss of representative status. Even if there are cases in which both theories might apply, this provides no basis for us to invalidate *Whisper Soft/New Madrid*. The General Counsel and the Board may use any available theory deemed appropriate to assess unfair labor practice allegations. *See, e.g., NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (5th Cir. 1959) (enforcing Board decision that found violation based on a theory of wrongdoing different from the theory relied upon by the ALJ); *Jefferson Electric Co.*, 274 N.L.R.B. 750, 750-51 (1985), *enf'd.*, 783 F.2d 679 (6th Cir. 1986) (affirming ALJ's conclusion but on different grounds). We can find no relevant case law suggesting that a Board's decision to use one legal theory implies the rejection of another, independent legal theory.

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The Company argues that the certification-year principles in *Whisper Soft* hold no precedential value because the Ninth Circuit vacated and reversed the Board's decision. *See* Final Br. of Petitioner 32-35 (citing *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1388 (9th Cir. 1984)). We disagree. The Ninth Circuit simply rejected the Board's holding that the Company had a duty to bargain. *Whisper Soft*, 754 F.2d at 1387. The Ninth Circuit did not, however, criticize the underlying principle applied by the Board that an unlawful bargaining delay may warrant extension of the certification year. *See id.* (noting that the Board extended the certification year to remedy unlawful delay, but that “[s]ince . . . [the employer's] method of making a wage proposal did not result in any illegality, the certification year should not have been extended”). Nowhere in its decision did the Ninth Circuit reject the longstanding principle that the Board may extend the certification year if the employer unlawfully impairs bargaining during that year.

Finally, the Company protests that its due process rights have been violated because the General Counsel did not rely on *Whisper Soft*. The Company also urges that it would have prevailed in this case if the Board had adhered to the approach followed in *Master Slack*. These claims are belied by the record. As detailed above, the General Counsel did present the *Whisper Soft* theory to the ALJ, arguing that if an extension of sufficient duration were granted, “then [the Company] unlawfully withdrew recognition during the [extended] certification year notwithstanding whether the factors in *Master Slack* have been met.” J.A. 203. Furthermore, the ALJ applied

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Master Slack and ruled against the Company. See J.A. 227-29. Regardless, the main point here is that we need not decide the merits of this case under the *Master Slack* theory.

The Company was neither surprised nor disadvantaged in defending itself with respect to the alternative theories of liability raised by the General Counsel. And the Board acted within its authority in choosing which of the alternative theories to apply in determining how best to redress the unfair labor practices committed by the Company. The Board's reliance on *Whisper Soft* certainly did not cause manifest injustice or violate any due process rights of the Company.

There is thus no basis for the Company's challenge to the Board's remedial order here, and no support for its claim that it lacked notice in violation of due process. The Board acknowledges that it could have alternatively (or additionally) considered whether the Union's loss of majority status was caused by the Company's unfair labor practices per *Master Slack*, but that it was not required to do so. J.A. 277-78. And it is noteworthy that even though dissenting Board Member Ring disagreed with the part of the Board's order granting retrospective relief from decertification without a *Master Slack* showing, he recognized that proof of taint under *Master Slack* is not necessarily available in all circumstances in which an employer has unlawfully impaired the benefits of the certification year. On this point, the dissent tellingly observes that: “[p]roof of causation under *Master Slack* requires that unit employees are aware of their employer's

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unfair labor practices, and employees typically may not know what is going on in collective bargaining. As a result, the General Counsel may find it difficult to prove that the unfair labor practices caused employees to abandon the union, and the withdrawal of recognition will be lawful [if reviewed only under *Master Slack*] . . . even if the employer, by its unlawful bargaining conduct, has deprived the union of the 12 full months of good-faith bargaining to which the certification-year doctrine entitles it.” *Board Decision*, at 15 n.28 (Ring dissent). This fortifies the point that the approaches followed in *Whisper Soft* and *Master Slack* may be more or less appropriate depending on the circumstances before the Board. And it is for the Board to decide, within its broad discretion, which remedial approach to follow.

The essential point here is that the Board has indicated no intention to walk away from its well-established precedent. It is settled Board law that if an employer deprives the union of one full year of good-faith bargaining, the Board may remedy the inequity by extending the certification year. *See, e.g., Veritas Health*, 895 F.3d at 80. An employer is on notice that if it refuses to bargain with the union during that year, it does so at its own peril. In future cases, it would be useful for the Board to explain why it chooses to apply the *Master Slack* theory when it could apply *Whisper Soft/New Madrid*. Nevertheless, the Board’s choice to base its decision on one valid theory presented, as opposed to another, falls squarely within its lawful discretion.

*Appendix A****D. Six-Month Extension of the Certification Year and Affirmative Bargaining Order***

To remedy the unfair labor practice violations, the Board, *inter alia*, extended the certification year by six months and imposed an affirmative bargaining order that required the Company to bargain with the Union for those six months, 40 hours per month, for at least eight hours per session. *Board Decision*, at 9. The Company argues the Board's reasoning is conclusory and fails to take account of the employees' disaffection with the Union. Final Br. of Petitioner 42. We find no merit in this argument.

Section 10(c) of the Act gives the Board authority to order a violator "to take such affirmative action . . . as will effectuate the policies" of the Act. 29 U.S.C. § 160(c). This court has held that "the Board's remedial authority is 'a broad discretionary one, subject to limited judicial review,' and a remedy 'will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *United Food & Com. Workers Union Local 204 v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006) (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964)). Nevertheless, "an affirmative bargaining order is an extreme remedy." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000). To justify its imposition, the Board must explicitly balance three considerations: "(1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and

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(3) whether alternative remedies are adequate to remedy the violations of the Act.” *Id.*

The Board acted squarely within its broad discretion in extending the certification year by six months and ordering the parties to bargain. As the Board noted, “the extension of the certification year is a standard remedy where, as here, an employer has refused to bargain for a significant part of the certification year.” *Board Decision*, at 6 (citing *Veritas Health*, 895 F.3d at 80 and *Loc. Union No. 2338*, 499 F.2d at 544). The Board explained that the six-month extension vindicates the rights of employees “who were denied the benefits of collective bargaining during the initial certification year.” *Id.* at 7. The Board further reasoned that the six-month extension did not unduly prejudice employees opposed to Union representation, as “the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the bargaining violations” and simply “restore[s] the status quo ante.” *Id.* Observing that the Company’s unlawful conduct will be rewarded absent a six-month extension and accompanying affirmative-bargaining order, the Board reasonably concluded that the imposed remedy eliminates incentive to delay bargaining, whereas a cease-and-desist order alone would not provide the Union with “the same protection it should have rightfully enjoyed during its first year following certification.” *Id.* at 8. Since we find that the Board acted within its broad remedial discretion, we decline to disturb the Board’s remedial order.

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III. CONCLUSION

For the reasons set forth above, we deny the Company's petition for review and grant the Board's cross-application for enforcement of its order.

So ordered.

**APPENDIX B — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT,
FILED MAY 23, 2024**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1287

J.G. KERN ENTERPRISES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

September Term, 2023

NLRB-07CA231802, NLRB-07CA24
5744, NLRB-07CA252759

Filed On: May 23, 2024

Consolidated with 22-1293

BEFORE: Srinivasan, Chief Judge; Henderson,
Millett, Pillard, Wilkins, Katsas, Rao,
Walker, Childs, Pan, and Garcia, Circuit
Judges; and Edwards, Senior Circuit
Judge

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ORDER

Upon consideration of petitioner's petition for rehearing en banc, the supplement, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

**APPENDIX C — DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD,
DATED APRIL 20, 2022**

NATIONAL LABOR RELATIONS BOARD

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

J.G. Kern Enterprises, Inc. and Local 228, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO. Cases 07-CA-231802, 07-CA-245744, and 07-CA-252759

April 20, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING
AND WILCOX

On October 6, 2020, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the judge's recommended Order as modified and set forth in full below.²

Introduction

This case involves three alleged bargaining-related violations in the 12-month period immediately following the Union's October 3, 2018 certification, and an alleged unlawful withdrawal of recognition less than 2 months after the 1-year anniversary of the Union's certification.³

1. The Respondent has excepted to some of the judge's credibility findings. 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. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

2. We shall modify the judge's recommended Order to conform to the Board's findings and standard remedial language, and in accordance with our decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

3. Unless otherwise noted, "the Union" refers individually and collectively to both the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (the "International Union"), which the Board certified as the collective-bargaining representative of the Respondent's production and maintenance employees, and its designated servicing representative, Local 228, International Union, United Automobile,

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We adopt the judge's findings, for the reasons set forth in his decision, that the Respondent violated Section 8(a)(5) and (1) of the Act by (1) delaying bargaining for a period of almost three months at the start of the certification year and (2) refusing to furnish requested employer cost information regarding the existing benefit plans for unit employees.⁴ We also find, in agreement with the judge, that the Respondent violated Section 8(a)(5) and (1) when, on April 10, 2019, it notified the Union via email that it would not consider any proposal for a union-administered benefit plan and would stick with its present benefit plan.⁵ Finally,

Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO ("Local 228").

4. However, in adopting the finding of an unlawful refusal to furnish the cost information, we do not rely on *B & B Trucking, Inc.*, 345 NLRB 1, 1 fn.1 (2005), cited by the judge, as there were no exceptions in that case to the administrative law judge's finding regarding the employer's refusal to furnish per-employee health care cost information.

5. We agree with the reasons stated by the judge for finding the violation, and additionally note that the finding is supported by the fact that (1) the Respondent's email specifically linked the refusal to consider union-administered benefit plans to its unlawful refusal to furnish employer cost information for its benefit plans; (2) the Respondent at all times persisted in its refusal to furnish the employer cost information that the Union needed to inform proposals for union-administered benefit plans; and (3) there has been no showing that the Respondent subsequently bargained in good faith—or even advised the Union that it would bargain in good faith—over union-administered benefit plans. We further note that although the complaint alleged that the Respondent refused to furnish the requested information on April 17 and July 9, the record shows, and the Respondent concedes, that the Respondent informed the Union of its refusal to furnish the cost prior to April 17.

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although we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, we do not rely on his reasoning.

As explained below, the case law provides for several independent and alternative modes of analysis for determining the legality of employer withdrawals of recognition based on disaffection petitions. Thus, an employer's withdrawal of recognition can be deemed

The Respondent claims that its statement refusing to bargain over union-administered benefits did not violate Sec. 8(a)(5) and (1) because the Respondent bargained over health benefits in subsequent communications with the Union. The Respondent's contention is without merit.

The specific finding here concerns the Respondent's refusal to bargain over *union-administered* benefit plans, not health (or other) benefit plans in general. Significantly, the Respondent did not specifically except to the judge's factual finding that "the Respondent never reversed its unlawful refusal to negotiate over *union-administered* employee benefits." (emphasis added). Moreover, the Respondent points to no credited testimony or documentary evidence showing that it ever bargained over *union-administered* health benefit plans after it sent the April 10 email. The Respondent points only to the testimony of its attorney, Sutton, that he told the Union that, notwithstanding the Respondent's refusal to furnish the employer cost information, he would look at whatever the Union wanted to put forward. Although the judge did not reference Sutton's testimony on this point, the judge stated elsewhere in his decision that Sutton was "an unusually biased and unreliable witness" and, as noted above, the judge also found that "the Respondent never reversed its unlawful refusal to negotiate over union-administered employee benefits." We therefore find that Sutton's testimony provides no basis for reversing the judge's finding.

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unlawful because, for example, the withdrawal of recognition occurred during the certification (or extended certification) year when the union's presumption of majority support is irrebuttable; because the disaffection petition was tainted by the employer's unfair labor practices; or because the employer failed to show that the union had, in fact, lost the support of the majority of the unit employees at the time the employer withdrew recognition. Each of those theories, by itself, provides a legally sufficient, independent basis for finding a withdrawal of recognition unlawful (as noted below).

Here, we find the Respondent's withdrawal of recognition unlawful because it occurred during the extended certification year.⁶

The Withdrawal of Recognition

The Union was certified on October 3, 2018. As noted above, the Respondent thereafter unlawfully delayed bargaining for almost 3 months, from October 15, 2018,

6. Contrary to our dissenting colleague, we have not acted arbitrarily and capriciously in finding a violation solely on that basis; the Board is not required to apply a taint analysis where, as here, the withdrawal of recognition occurs during the extended certification year. We have not deviated from the General Counsel's theory of the case in finding a violation on that basis because—as explained below—the General Counsel invoked alternative theories for finding the Respondent's withdrawal of recognition unlawful in this case. That in certain other cases the General Counsel has chosen not to invoke alternative theories for finding a withdrawal of recognition unlawful hardly impairs the validity of those theories in this case.

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through January 9, 2019. After receiving a disaffection petition purportedly signed by a majority of the unit employees,⁷ the Respondent withdrew recognition from the Union on November 25, 2019. Applying *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the judge reasoned that the disaffection petition was tainted by the Respondent's unfair labor practices, and therefore concluded that the Respondent's withdrawal of recognition based on the petition was unlawful. Although we affirm the judge's withdrawal of recognition finding, we do not rely on the judge's analysis.⁸ Instead, we find, in agreement with an alternative argument raised by the General Counsel, that the Respondent was not permitted to withdraw recognition when it did, regardless of whether the Union retained majority support and regardless of whether employee disaffection from the Union was caused by the Respondent's unfair labor practices. As we will explain, the withdrawal of recognition here came during an insulated period when a union's majority status may not be challenged: the extended certification year made necessary by the Respondent's unlawful delay in bargaining following Board certification, as well as its other bargaining violations.

7. Although the Respondent did not authenticate the signatures on the disaffection petition or establish the size of the unit at the time of its withdrawal, the judge assumed for purposes of his analysis that the disaffection petition was signed by a majority of the unit employees.

8. Because we do not rely on the judge's *Master Slack* analysis, we need not respond to the dissent's attack on that analysis.

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Normally, an employer is required to honor a certification and bargain with the representative of its employees for a period of 1 year from certification, even if the union has lost majority support in a context entirely free of any unfair labor practices by the employer. *Brooks v. NLRB*, 348 U.S. 96, 99-104, 75 S. Ct. 176, 99 L. Ed. 125 (1954). See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987) (“[A]fter a union has been certified by the Board as a bargaining-unit representative, it usually is entitled to a conclusive presumption of majority status for 1 year following the certification.”)⁹ Accordingly, “when an

9. As the Supreme Court has explained:

The[] [conclusive presumption of majority status during the certification year, like the rebuttable presumption of majority support after the certification year], are based not so much on an absolute certainty that the union’s majority status will not erode following certification, as on a particular policy decision. The overriding policy of the NLRA is ‘industrial peace.’ *Brooks v. NLRB*, 348 U.S., at 103, 75 S.Ct., at 181. The presumptions of majority support further this policy by ‘promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees.’ *Terrell Machine Co.*, 173 NLRB 1480 (1969), enf’d, 427 F.2d 1088 (1970), cert. denied, 398 U.S. 929, 90 S.Ct. 1821, 26 L.Ed.2d 91 (1970). In essence, they enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified. See *Brooks v. NLRB*, 348 U.S., at 100, 75 S.Ct., at 179. The presumptions also remove any temptation on the part of the employer

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employer's refusal to bargain during the certification year deprives a union of the 12 months of good-faith bargaining to which it is entitled, the Board has long held that the certification year is extended to remedy the unfair labor practice." *Whisper Soft Mills, Inc.*, 267 NLRB 813, 816 (1983) reversed on other grounds, 754 F.2d 1381 (9th Cir. 1984).¹⁰ And it is well settled that an employer may not withdraw recognition during the *extended* certification year, even if it has evidence that the incumbent union has lost its majority. *Whisper Soft Mills, Inc.*, 267 NLRB at 816; *New Madrid Nursing Center*, 325 NLRB 897, 898, 900, 902 & fn. 31 (1998), enfd. 187 F.3d 769 (8th Cir. 1999).¹¹

to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees. See *ibid.*, see also R. Gorman, *Labor Law* 53 (1976). The upshot of the presumptions is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace.

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. at 38-39 (internal footnote omitted).

10. Accord *Dominguez Valley Hospital*, 287 NLRB 149, 149 (1987) ("[W]hen an employer has, during part or all of the year immediately following the certification, refused to bargain with the elected employee representative and thereby 'taken from the Union' the opportunity to bargain during 'the period when Unions are generally at their greatest strength,' the Board will take measures to assure a period of at least a year of good-faith bargaining during which the bargaining representative need not fend off claims that it has lost its majority support."), enfd. 907 F.2d 905 (9th Cir. 1990).

11. See also *Veritas Health Services, Inc. v. NLRB*, 895 F.3d 69, 80-82, 437 U.S. App. D.C. 69 (D.C. Cir. 2018) (employer's withdrawal

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We find *Whisper Soft Mills* instructive here, though we recognize that its rationale has not always been invoked to evaluate the legality of employer withdrawals of recognition or refusals to bargain that occur more than 12 months after union certification. In *Whisper Soft Mills*, the employer unlawfully failed to make a wage counterproposal for approximately 4-1/2 months of the certification year, and then withdrew recognition on December 16, 1980, more than 1-calendar year after the union's November 29, 1979 certification. 267 NLRB at 813-816. The Board found that the employer's failure to make a wage counterproposal "clearly frustrated bargaining," and deprived the union of the 12 months of good-faith bargaining to which it was entitled. *Id.* at 815-816. The Board therefore concluded that the bargaining violation "warrant[ed] the extension of the certification year for at least a similar period of time," such that the union "was entitled to at least 4-1/2 months of bargaining from" the November 29, 1980 anniversary date of the certification. *Id.* at 816. Accordingly, the Board found that the Respondent's withdrawal of recognition and refusal to bargain on December 16, 1980, during the Board-extended certification year, "was a *prima facie* violation of the Act." *Id.*

of recognition was unlawful because it occurred three days before the end of the extended certification year). Cf. *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785, 787 (1962) (dismissing election petition filed by employer more than 12 months after the union was certified but before the employer had bargained for 12 months; "to permit the Employer now to obtain an election would be to allow it to take advantage of its own failure to carry out its statutory [bargaining] obligation, contrary to the very reasons for the establishment of the rule that a certification requires bargaining for at least 1 year.")

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Similarly, in *New Madrid Nursing Center*, decided after *Master Slack*, the employer unlawfully withdrew bargaining proposals on July 1, 1996, 10-days before the 1-year anniversary of the union's July 10, 1995 certification, and then withdrew recognition from the union on July 11, 1996, the day after the 1-year anniversary. 325 NLRB at 898, 900, 902. The Board affirmed the judge's finding that the employer's unlawful withdrawal of bargaining proposals 10 days before the end of the 1-year anniversary of the union's certification deprived the union of at least 10 days of bargaining during the certification year and warranted "at an absolute minimum, an extension of the certification year by at least 10 days." Id. at 900-902 & fn. 31. Accordingly, the Board found that the employer's "withdrawal of recognition on July 11, during the extended certification year, constituted 'a *prima facie* violation of the Act.'" Id. at 902 & fn. 31 (quoting *Whisper Soft Mills*, 267 NLRB at 816).¹²

12. See also *NLRB v. Commerce Co.*, 328 F.2d 600, 601 (5th Cir. 1964) (upholding Board's finding that employer unlawfully refused to bargain more than 12 months after union's original certification, because the Board "had the right, because of [employer's] failure to bargain during part of the first year, to extend the year for a period equivalent to that part of the year in which the respondent had failed to bargain."); *Bryant & Stratton Business Institute, Inc. v. NLRB*, 140 F.3d 169, 174, 186-187 (2d Cir. 1998) (upholding Board's finding that employer's April 1996 withdrawal of recognition was unlawful because employer withdrew recognition prior to the expiration of the extension of the certification year that the Board ordered to remedy employer's bargaining violations during the 12-month period following the union's November 1989 certification).

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The Respondent's withdrawal of recognition was similarly impermissible based on its timing, in light of the unfair labor practices found here. Although the withdrawal of recognition occurred about 7 weeks beyond the 1-year period following the Union's certification, the Respondent had unlawfully delayed bargaining for about 3 months at the start of the certification year, from October 15, 2018 to January 9, 2019. This conduct plainly deprived the Union of nearly 25 percent of the 12 full months of bargaining to which the Union was entitled. Accordingly, the Respondent's unlawful delay in bargaining (even apart from the additional bargaining violations) warrants an extension of the certification year for at least the same amount of time, beyond the October 3, 2019 anniversary date. (As explained below, we actually order a 6-month extension.) It follows, therefore, that the Respondent's withdrawal of recognition and refusal to bargain on November 25, 2019, occurred during the extended certification year ordered here and, as such, was a *prima facie* violation of the Act.¹³

13. Our dissenting colleague does not seriously dispute that under well settled law it would have been proper for the Board to extend the certification year by at least three months if, prior to the date (November 25, 2019) on which the Respondent withdrew recognition, a Board decision had issued with respect to either the February 2019 unfair labor practice complaint (alleging that the Respondent unlawfully delayed bargaining by some three months) or the October 2019 consolidated unfair labor practice complaint (alleging (as additional violations) that the Respondent unlawfully informed the Union that that it would not consider any proposal for a union-administered benefits plan, and that the Respondent unlawfully refused to furnish information). (Both of those pre-withdrawal-of-recognition complaints specifically requested that

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the Respondent be ordered to bargain in good faith with the Union “for the period required by *Mar-Jac Poultry*, 136 NLRB 785 (1962).”

And if the Board had extended the certification year prior to November 25, 2019, then the Respondent plainly would *not* have been entitled to withdraw recognition on November 25, 2019, notwithstanding the disaffection petition. See *Veritas Health Services, Inc. v. NLRB*, 895 F.3d at 80-82 (employer’s withdrawal of recognition was unlawful because it occurred three days before the end of the extended certification year when the Union’s presumption of majority support was irrebuttable); *Bryant & Stratton Business Institute, Inc. v NLRB*, 140 F.3d at 174, 186-187 (employer’s withdrawal of recognition was unlawful because it occurred during the extended certification year when the union’s majority status is beyond challenge).

Our dissenting colleague does not truly contest that *if Whisper Soft* is properly applied here, it follows that the Respondent’s withdrawal of recognition was unlawful. Instead, he seems to imply that in choosing to apply *Whisper Soft*, rather than *Master Slack*, we somehow engage in circular reasoning. Certainly, analyzing these facts under *Whisper Soft* makes the timing of the withdrawal of recognition of different significance than it would be under a *Master Slack* analysis, but pursuing a choice between alternative legal theories does not presuppose the outcome of the analysis as the dissent seems to suggest. Nor do we see any reason—and our colleague does not explain—why a different result should obtain simply because the decision on the outstanding, pre-withdrawal unfair labor practice complaints issued after the withdrawal. Cf. *Lamar Hotel*, 137 NLRB 1271, 1271-1273 (1962) (dismissing decertification petition filed more than 12 months after union’s certification because the employer had ceased bargaining for approximately the last 6 months of that 12-month period, even though there had been no prior extension of the certification year and no prior unlawful-refusal-to-bargain-finding). In claiming that the employer was not on notice that its withdrawal of recognition

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might be found to be premature, the dissent simply ignores that, as noted above, both of the pre-withdrawal-of-recognition complaints specifically requested that the Respondent be ordered to bargain in good faith with the Union “for the period required by *Mar-Jac Poultry*,” which would render premature a withdrawal occurring during that period. Contrary to the dissent, there is no “dissonance” between the *Whisper Soft/New Madrid* analysis and the Board’s well-established *Mar-Jac* remedy. Thus, the dissent misreads the relevant precedent in claiming that the *Mar-Jac* extension is not added to the end of the calendar certification year, but simply commences on the date the parties resume good-faith bargaining following issuance of the Board’s decision. If the Board had not added the *Mar-Jac* extension to the end of the 12-month calendar year, the Board would not have dismissed the petitions in cases such as *Mar-Jac* itself and *Lamar Hotel*. Those petitions were filed more than 12-calendar months after the union certifications in those cases.

The dissent takes the commencement/ resumption of bargaining language out of context. That the extended period does not begin to run until the resumption of collective bargaining—for purposes of determining the legality of *subsequent* employer actions—does not mean that *preextension* petitions, or withdrawals of recognition/ refusals to bargain, are somehow permitted. See *Lamar Hotel*, 137 NLRB at 1273 (“following the *Mar-Jac Poultry* doctrine,” Board dismisses decertification petition filed more than 12 months after union’s certification because employer had refused to bargain during the last 6 months of that period, and Board further “grant[s] the Union an additional period of 6 months from the resumption of negotiations in which to engage in collective bargaining”); *Mar-Jac Poultry*, 136 NLRB at 786-787 & fn. 6 (Board dismisses RM petition filed by employer more than 12 months after union’s certification because employer had bargained for only 6 months and further orders employer to bargain for “an additional 6 months from the resumption of negotiations.”); *New Madrid Nursing Center*, 325 NLRB at 902 & fn. 31, 903 (applying *Whisper Soft*, Board finds that, because the employer’s unlawful withdrawal of bargaining proposals before the

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Response to the Dissent

We have addressed certain arguments made by our dissenting colleague already; others are addressed below in the Amended Remedy section. Here we respond to the dissent's arguments that (1) we have failed to engage in reasoned decision-making in choosing not to apply *Master Slack* here; (2) that in doing so, we have improperly deviated from the General Counsel's theory of the case; and (3) that we have failed to address and resolve inconsistencies in Board precedent. None of these claims are correct.

The dissent starts from the premise that the *Master Slack* test must govern not only cases which do not involve extension of the certification year, but also cases (like this one) that do. But *Master Slack* itself says no such thing, nor does the dissent cite any statement in the decision suggesting that it was meant to apply in the present context. Indeed, *Master Slack* did not involve a situation like this one. There, an employer withdrew recognition a few weeks after expiration of a collective-bargaining agreement that was the product of good-faith bargaining—and eight years after the union's certification. See *Master Slack Corp.*, 271 NLRB 78, 78 fn. 1, 79& fn. 5, 85 (1984).

end of the 1-year anniversary of the union's certification warranted an extension of the certification year, the employer's withdrawal of recognition during the extended certification year was *prima facie* unlawful, and Board further requires the employer to “[r]ecognize the Union upon resumption of bargaining in good faith and for 6 months thereafter as if the initial year of Board certification has not expired”).

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As the Second Circuit has observed, the Board is *not* required to apply *Master Slack* where certification year principles apply. See *Bryant & Stratton Business Institute, Inc. v NLRB*, 140 F.3d at 174, 186-187 (finding that employer's withdrawal of recognition was unlawful because it occurred during the *extended* certification year and rejecting employer's reliance on *Master Slack*, noting that *Master Slack* applies "in circumstances where an employer is not precluded, under certification-year principles, from withdrawing recognition"). The reason is clear. Although both the *Master Slack* and extended certification year analyses address whether the employer may withdraw recognition from the union, they involve fundamentally different inquiries. Applying *Master Slack*, the Board asks whether the evidence of employee disaffection from the union (i.e., its loss of majority support) is tainted by the employer's unfair labor practices. Applying *Whisper Soft*, in contrast, the Board inquires whether, when the employer withdrew recognition, the union's presumption of majority support remained irrebuttable. Under *Whisper Soft*, whether or why the union may have lost majority support is immaterial. There is no inconsistency between *Master Slack* and *Whisper Soft*. Rather, they represent different, independent inquiries.¹⁴

14. To be sure, the case law makes clear that the *Master Slack* and *Whisper Soft* inquiries are not mutually exclusive: the Board may find a withdrawal of recognition unlawful by applying *both* analyses. See, e.g., *Veritas Health Services, Inc. v. NLRB*, 895 F.3d at 77, 80-84 (upholding Board's finding that employer's withdrawal of recognition was unlawful based on independent grounds: the withdrawal was untimely, because it occurred during the extended certification year,

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The dissent also errs in suggesting that we have improperly deviated from the General Counsel's theory of the case in finding a violation on grounds other than *Master Slack*. The short answer is that here the General Counsel has presented alternative theories for finding the withdrawal of recognition unlawful. Thus, the General Counsel argues in his answering brief to the Respondent's exceptions, just as he argued in his brief to the judge, that if the certification year is extended for a period longer than 53 days (to remedy the Respondent's unlawful failure

and it also was tainted by the employer's unfair labor practices). However, the Board also may find a withdrawal of recognition unlawful because it occurred during the extended certification year, *without* also finding it unlawful under *Master Slack*. See *Bryant & Stratton Business Institute, Inc. v NLRB*, 140 F.3d at 186-187; See also *Veritas Health Services, Inc. v. NLRB*, 895 F.3d at 77, 79-80 (Board's extended certification year and *Master Slack* analyses "independently—whether separately or together—provide ample basis" for Board's withdrawal of recognition finding). The dissent's complaint—that a different result might obtain depending upon which legal theory the General Counsel invokes—proves too much. Under that view, the Board, contrary to the Supreme Court's holding in *Brooks*, would not be able to find a withdrawal of recognition unlawful on the grounds that it occurred during the certification year if the Board could not also find the withdrawal of recognition unlawful on the grounds that the employer had committed other unfair labor practices tending to cause disaffection from the union. See *Brooks v. NLRB*, 348 U.S. at 97-98, 104 (upholding Board's finding that employer unlawfully refused to bargain with the union during the certification year notwithstanding that the certified union, "without the employer's fault," had lost its majority during the certification year). In any event, cases are often won or lost before tribunals based on the litigation choices made by prosecutors or other parties to the case.

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to bargain during the initial 3 months of the certification year), “then Respondent unlawfully withdrew recognition during the certification year notwithstanding whether the factors in *Master Slack* have been met.” In short, while the General Counsel did not cite either *Whisper Soft Mills* or *New Madrid Nursing* specifically, the General Counsel *did* expressly raise the theory articulated in those cases.¹⁵

The dissent likewise misses the mark in criticizing us for supposedly failing to reconcile the *Whisper Soft Mills/New Madrid Nursing Center* analysis with certain

15. Nothing in the Act or the Administrative Procedure Act precludes the Board or a reviewing court from finding an employer’s withdrawal of recognition unlawful based on one theory presented by the General Counsel, while declining to pass on other theories argued by the General Counsel. Indeed, our dissenting colleague has sanctioned that very practice. See, e.g., *Valley Health System, LLC d/b/a Desert Springs Hospital Medical Center*, 369 NLRB No. 16, slip op. 1-2 & fn. 6, 21, 22, 25 (2020) remanded on other grounds, 832 Fed.Appx. 514 (9th Cir. 2020). See also *Veritas Health Services, Inc. v. NLRB*, 895 F.3d at 77-84 (upholding Board’s finding that employer’s withdrawal of recognition was unlawful on two independent grounds, but finding it unnecessary to address third alternative basis).

The dissent implicitly suggests that the Board should adopt a single theory so that employers can more easily calculate whether a unilateral withdrawal of recognition will be upheld by the Board, if challenged as an unfair labor practice. We reject any such suggestion. To ensure that it may withdraw recognition lawfully, an employer need only bargain in good faith for a year following the union’s certification without committing any unfair labor practices and then petition for an election. Here, of course, the Respondent withdrew recognition after unlawfully depriving the union of about 3 months of bargaining and then committing two more bargaining violations.

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cases “where—if [our approach] is correct—[the Board] should have applied *Whisper Soft*.¹⁶ In those withdrawal-of-recognition cases, the Board instead applied a different (but not inconsistent) analysis. But that fact creates no conflict in our precedent. None of the 5 cases cited by the dissent even cites *Whisper Soft Mills* or *New Madrid Nursing*,¹⁷ much less deliberately rejects the analysis applied in those decisions, in favor of a different approach. Indeed, unlike the instant case, the dissent concedes that there is no indication that the General Counsel even presented the *Whisper Soft Mills/New Madrid Nursing* analysis to the Board in the cited cases. And there is no evidence that any other party did either.¹⁸ Certainly, the

16. The five cases cited by the dissent are *Champion Home Builders*, 350 NLRB 788 (2007); *Denton County Electric Cooperative, Inc. d/b/a Coserv Electric*, 366 NLRB No. 103 (2018); *Tritac Corp.*, 286 NLRB 522 (1987); *Garden Ridge Management* 347 NLRB 131 (2006); and *Furr's Cafeterias, Inc.*, 251 NLRB 879 (1980).

17. We note that one of the cases (*Furr's Cafeterias, Inc.*) cited by our colleague pre-dates both *Whisper Soft Mills* and *New Madrid Nursing*, while a second case (*Tritac Corp.*) cited by the dissent pre-dates *New Madrid Nursing Center*.

18. Although no party had presented to the Board the *Whisper Soft Mills/New Madrid* analysis in the cases the dissent cites, the dissent nevertheless claims that the Board was obligated to apply it if it were still good law at the time. But the dissent's claim is contrary to well-settled law. See, e.g., *David Saxe Productions, LLC and V Theater Group, LLC*, 370 NLRB No. 103, slip op. at 3 fn. 11 (2021) (In dismissing allegation, Board notes that it does “not pass on whether Kostew's favorable assignment could amount to an independent 8(a)(1) violation based on a theory other than the one on which the General Counsel relied.”); *Grane Healthcare Co.*, 357 NLRB 1412,

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Board did not expressly overrule *Whisper Soft Mills* or *New Madrid Nursing* in those (or any other) cases. Nor were those decisions implicitly overruled. In short, *Whisper Soft Mills* has remained good law (as has *New Madrid Nursing*). And, in any event, as shown, the Board is not required to apply *Master Slack* where, as here, extended certification year principles are applicable.

1412 fn. 3 (2011) (in dismissing unfair labor practice allegation, Board does not address theory not raised by General Counsel), enfd. 712 F.3d 145 (3d Cir. 2013). Under the dissent's view, an administrative agency should be deemed to have sub silentio overruled any legal theory which could have been—but was not-invoked to find a violation. Obviously, that is not the law.

Contrary to the dissent's suggestion, the Third Circuit's decision in *MCPC, Inc. v. NLRB*, 813 F.3d 475 (3d Cir. 2016), does not stand for the proposition that, in evaluating the legality of challenged conduct, the Board is obligated to apply every legal standard that could properly be applied, even if no party has raised the standard in question. Rather that case stands for the much more limited proposition that the Board must evaluate under *a correct legal standard*, the merits of “any claim” that *is* “properly before” the Board. *Id.* at 490 fn. 12. Thus, the court remanded the Board's unfair labor practice finding in that case because the Board had failed to evaluate under a correct legal standard the merits of the employer's defense that the employer had preserved before the Board. *Id.* at 487, 490 & fn. 12 (noting that the employer had “preserved its argument that its stated rationales for Galanter's discharge[-including Galanter's improperly obtaining confidential salary information and his dishonesty about where he obtained the information-] were not pretextual,” and further noting that both the ALJ and the Board “applied the wrong legal test in analyzing the first rationale and did not apply any test to the second.”).

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AMENDED REMEDY

To remedy the Respondent's unlawful refusal to provide requested cost information regarding the existing benefit plans for bargaining unit employees, the judge recommended that the Respondent be required to furnish all the information requested in the union information requests of April 17, 2019, and July 9, 2019. However, some of the information that the Union requested on those dates did not concern costs, and the judge found that the Respondent did provide some of the requested information, though not the employer's cost of providing the benefits. Accordingly, we shall conform the remedy to the judge's conclusion of law, and require the Respondent to provide the requested cost information.

The judge's recommended remedy also included an affirmative requirement that the Respondent rescind, upon request of the Union, any changes to terms and conditions of employment made as a result of the withdrawal of recognition and make bargaining unit employees whole for losses suffered as a result of any such changes. In the absence of any allegation of unilateral changes, we shall delete this requirement. See, e.g., *United Site Services of California, Inc.*, 369 NLRB No. 137, slip op. at 17 (2020).

The judge also recommended that the certification year be extended by 6 months. As the judge noted, the extension of the certification year is a standard remedy where, as here, an employer has refused to bargain for a significant part of the certification year. See *Veritas Health Services, Inc. v. NLRB*, 895 F.3d 69, 80, 437 U.S.

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App. D.C. 69 (D.C. Cir 2018) (extensions of the certification year “are a standard remedy when an employer’s refusal to bargain has consumed all or a substantial part of the original post-election certification year.”); *Local Union No. 2338, IBEW v. NLRB*, 499 F.2d 542, 544, 162 U.S. App. D.C. 406 (D.C. Cir. 1974) (extension of certification year remedy “is designed to make up to the union any opportunity lost by it to reach agreement during the certification year by reason of dilatory tactics on the part of the employer[and has been] recognized by the courts as an appropriate addition to the Board’s arsenal of remedies”). We agree with the judge, for the reasons stated by him, that a 6-month extension of the certification year is appropriate to remedy the Respondent’s breaches of its bargaining obligation, which included not just the almost 3-month unlawful delay in bargaining at the outset of the certification year—which deprived the Union of nearly one quarter of the 12 full months of bargaining to which the Union was entitled—but also the unlawful refusal to bargain over union-administered benefit plans and the refusal to furnish information. The latter two unfair labor practices occurred 6 months into the certification year and remained unremedied as of the unfair labor practice hearing. Accordingly, we shall require the Respondent to recognize and, upon request, bargain with the Union as if the certification year has been extended by 6 months. See *Dominguez Valley Hospital*, 287 NLRB at 151-152 (6-month extension of bargaining year to remedy unlawful withdrawal of recognition and refusal to bargain 2 months before end of certification year); *New Madrid Nursing Center*, 325 NLRB at 902-903 (to remedy unlawful withdrawal of bargaining proposals

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during the certification year, employer required to recognize the union and resume bargaining for 6 months as if initial year of Board certification has not expired).¹⁹

Although, as shown, the United States Court of Appeals for the District of Columbia Circuit has recognized that an extension of the certification year is a standard remedy for an employer's refusal to bargain for all or a substantial part of the original post-election certification year, another line of D.C. Circuit cases requires the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order, which that court has defined as an order to bargain for a reasonable period of time that is accompanied by a decertification bar (and which the court views as an extraordinary remedy).

19. See also *Valley Inventory Service*, 295 NLRB 1163, 1167 (1989) (5-month extension of certification year to remedy refusal to furnish information during certification year); and *Burnett Construction Company* 149 NLRB 1419, 1421, 1422 (1964) (7-month extension of certification year to remedy refusal to bargain during last 7 months of certification year), enfd. 350 F.2d 57 (10th Cir. 1965).

The Respondent's duty to bargain will not automatically end after the 6-month extension of the certification year expires. Rather, at that point, the Union will enjoy a rebuttable presumption that its majority status continues. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 37-38 ("after this [certification year] period, the union is entitled to a rebuttable presumption of majority support.").

We also adopt the judge's recommendation to require the Respondent to bargain in accordance with a schedule of at least 40 hours per calendar month, for at least 8 hours per session. We note that the Respondent does not make any specific arguments with respect to the propriety of the bargaining schedule remedy.

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See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738-739, 341 U.S. App. D.C. 99 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462, 326 U.S. App. D.C. 104 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248, 307 U.S. App. D.C. 376 (D.C. Cir. 1994). In *Vincent*, *supra* at 738, the court summarized its requirement that an affirmative bargaining order “must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees’ § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.”

Although we do not believe that this latter line of cases is applicable when the Board orders an extension of the certification year to remedy an employer’s unlawful refusal to bargain for all or a substantial part of the certification year, and although the Respondent does not argue that the judge failed to justify the 6-month extension of the certification year remedy here, we nevertheless have examined the particular facts of this case and find that a balancing of the three factors warrants extending the certification year by 6 months, which carries with it a decertification bar for that limited period.

(1) The 6-month extension of the certification year and its accompanying 6-month decertification bar in this case vindicate the Section 7 rights of the unit employees who were denied the benefits of collective bargaining during the initial certification year prior to the

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Respondent's withdrawal of recognition. By this conduct, the Respondent substantially undermined the Union's opportunity effectively to bargain, without unlawful interference, on behalf of the unit employees during the period when unions are generally at their greatest strength. Indeed, the Respondent's unlawful delay in bargaining meant that the Union had *no* opportunity to bargain for an initial contract for almost the first 3 months of the certification year. Moreover, even after bargaining commenced, the Respondent unlawfully refused to bargain over union-administered benefit plans and unlawfully refused to provide requested cost information regarding the Respondent's benefit plans for the last 6 months of the certification year, unfair labor practices that remained unremedied through the date of the unfair labor practice hearing. Those two additional unfair labor practices plainly impaired bargaining over centrally important terms and conditions of employment. The Respondent's unlawful conduct thereby undermined the collective-bargaining process, defeating the policy behind the special status given to the Union during the certification year, a status meant to ensure that the parties' bargaining relationship will be allowed to function free from distraction for the full year. Moreover, because of the ensuing litigation over the Respondent's unfair labor practices, which to date has lasted for more than two years, it would be unrealistic to expect that the parties could pick up precisely where they left off when the Respondent withdrew recognition in November 2019. Rather, the Union needs time to reestablish its representative status with the unit employees. Because the Union was never given a truly fair 12-month opportunity

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to reach an overall collective-bargaining agreement with the Respondent, it is only by requiring the Respondent to bargain with the Union for 6 months—without threat of decertification—that the employees can be afforded the benefits of the 12 months of bargaining to which they were entitled by virtue of exercising their Section 7 rights to select the Union as their collective-bargaining representative.

At the same time, extending the certification year by 6 months, with its attendant 6-month bar to raising a question concerning the Union’s continuing majority status, does not unduly prejudice the Section 7 rights of employees who may oppose continued representation by the Union because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the bargaining violations. Indeed, if the Respondent had abided by the National Labor Relations Act and refrained from committing any unfair labor practices, any employees who wished to rid themselves of the Union would have had to wait until after the expiration of the 12-month bargaining period following the Union’s certification to do so. Accordingly, the 6-month decertification bar that accompanies the 6-month extension of the certification year order in this case does not put the employees in any worse position than they would have occupied had the Respondent not violated the Act.²⁰ Moreover, it is

20. In arguing against the imposition of an affirmative bargaining remedy, the Respondent relies on *Conair Corp. v. NLRB*, 721 F.2d 1355, 232 U.S. App. D.C. 194, 232 U.S. App. D.C. 195 (D.C. Cir. 1983). The Respondent’s reliance is misplaced. In that case, the court merely held that the Board lacks authority to

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only by restoring the status quo ante and requiring the Respondent to bargain in good faith with the Union for 6 months that the employees will be able to fairly assess the Union's effectiveness as a bargaining representative in an atmosphere free of the Respondent's unlawful conduct. The employees can then determine whether continued representation by the Union is in their best interest.

(2) The 6-month extension of the certification year and its accompanying 6-month decertification bar serve the purposes and policies of the Act by fostering meaningful collective bargaining and industrial peace. Such an order ensures that the Union will be afforded the full 12-month period to bargain to which it was entitled and will not be pressured to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order. The order removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. Without the 6-month extension of the certification year and its accompanying 6-month decertification bar, the Respondent's unlawful conduct will be rewarded and

issue a bargaining order where there is no proof that the union *ever* enjoyed majority support. *Id.* at 1359-1360, 1365, 1383-1384. *Conair* is clearly inapposite because here it is undisputed that the Union *was* certified as the employees' representative following the Union's election victory. See, e.g., *New Madrid Nursing Center*, 325 NLRB at 900, 902, 903-904 (Board orders 6-month extension of certification year—notwithstanding employer withdrew recognition based on a disaffection petition signed by a majority of the unit employees—where employer withdrew recognition during the extended certification year).

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the purposes and policies underlying the certification-year rule will be undermined.

(3) A cease-and-desist order alone would be inadequate to remedy the Respondent's bargaining violations and withdrawal of recognition because it would not return the parties to the status quo. While a cease and desist order requires the offending employer to bargain, it does so in a context outside the protective range of the 1-year conclusive presumption afforded to the certified representative. Had the Respondent not committed any bargaining violations, the Respondent would have been precluded from questioning the Union's majority status and withdrawing recognition for 12 full months even if every unit employee had signed a disaffection petition. Because the 6-month extension of the certification year/decertification bar is tailored to restore the Union to that part of the 1-year period that it was denied by the Respondent's unfair labor practices, the 6-month decertification bar simply affords the Union the same protection it should have rightfully enjoyed during its first year following certification. In other words, if we were to refrain from imposing the limited decertification bar, we would permit the Respondent to frustrate the core purpose of the protected period simply by refusing to bargain for a significant portion of the certification year. And this would naturally encourage similar bargaining violations by employers that wished to rid themselves of the very unions that their employees had chosen to represent them for the purposes of collective bargaining through the congressionally sanctioned process of a secret-ballot election. We find that these circumstances

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outweigh the temporary impact that the 6-month extension of the certification year and its corresponding 6-month decertification bar will have on the rights of employees who oppose continued union representation.²¹

For all the foregoing reasons, we find that the 6-month extension of the certification year with its corresponding 6-month decertification bar is necessary to fully remedy the violations in this case.²²

21. We recognize that, if the parties execute a collective-bargaining agreement during the 6-month extension of the certification year, the decertification bar may extend for as much as 3 years of the contract term. But the same contract bar would have arisen if the Respondent had bargained to agreement with the Union during the initial certification year, rather than engaging in unfair labor practices. We see no reason why the Union, and the employee majority which previously supported it, should be deprived of the prospect of a stable bargaining relationship during the term of any contract reached during the extended certification year solely because of the Respondent's wrongdoing during the initial certification year. Thus, "[t]he object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785, 116 S. Ct. 1754, 135 L. Ed. 2d 64 (1996). And, as noted, the very purpose of the insulated certification year period is to permit unions to concentrate on obtaining the collective-bargaining agreements that facilitate industrial peace and stability. *Id.* at 786; *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 38-39.

22. The preceding analysis refutes the dissent's suggestion that we have not taken into account the Sec. 7 rights of employees who may wish to rid themselves of union representation.

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ORDER

The Respondent, J.G Kern Enterprises, Inc., Sterling Heights, Michigan, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (the International Union), the exclusive certified representative, and/or Local 228, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (Local 228), the International Union's designated servicing representative, for employees in the bargaining unit by failing to meet at reasonable times for purposes of collective bargaining.

(b) Withdrawing recognition from the International Union and/or Local 228 and failing and refusing to bargain with the International Union and/or Local 228 as the exclusive collective-bargaining representative of unit employees.

(c) Refusing to bargain collectively with the International Union and/or Local 228 by failing and refusing to furnish requested information that is relevant and necessary to the performance of their respective functions as the bargaining representative and designated servicing representative for the Respondent's unit employees.

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(d) Informing the International Union and/or Local 228 that there is no need to make a proposal on union-administered benefit plans because the Respondent will not change its current benefit plans.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain with the International Union and/or Local 228 as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production and maintenance employees, including quality inspectors, shipping and receiving employees, material handler employees, leaders, environmental assistants, and tool room employees employed by Respondent at its facility located at 44044 Merrill Road, Sterling Heights, Michigan; but excluding office clerical employees, professional employees, managers, temporary staffing agency employees, time study engineers, confidential employees, salaried employees, and guards and supervisors as defined by the Act.

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The certification year is extended for an additional 6 months from the date that good faith bargaining resumes.

(b) Meet and bargain collectively and in good faith with the International Union and/or Local 228 in accordance with a bargaining schedule of at least 40 hours per calendar month for at least 8 hours per session until the parties reach a complete collective-bargaining agreement or good-faith impasse in negotiations.

(c) Furnish to the International Union and/or Local 228 in a timely manner the cost information requested in the union information requests of April 17, 2019, and July 9, 2019.

(d) Within 14 days after service by the Region, post at its facility in Sterling Heights, Michigan, copies of the attached notice marked "Appendix."²³ Copies of the

23. If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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notice, on forms provided by the Regional Director for Region Seven, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 15, 2018.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 20, 2022

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

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MEMBER RING, dissenting in part:

“The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of ‘reasoned decisionmaking.’”¹ The federal court of appeals with plenary jurisdiction over the Board’s decisions has plainly said that “random use of inconsistent precedents . . . surely is not reasoned decisionmaking.”² That, unfortunately, is what my colleagues have done here. The majority disregards the Board’s established precedent, which is *Master Slack Corp.*, 271 NLRB 78 (1984), for determining whether a union-disaffection petition was tainted by an employer’s unfair labor practices. The majority instead chooses to rely on the holding of another, rather obscure pre-*Master Slack* case, *Whisper Soft Mills, Inc.*, 267 NLRB 813 (1983),³ to find that the Respondent’s withdrawal of recognition from the Union was a violation of the Act.

The *Master Slack* framework was relied on by the General Counsel in litigating the withdrawal allegation, applied by the judge to find the withdrawal unlawful

1. *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374, 118 S. Ct. 818, 139 L. Ed. 2d 797 (1998) (quoting *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 52, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)).

2. *Daily News of Los Angeles v. NLRB*, 979 F.2d 1571, 1574, 298 U.S. App. D.C. 361 (D.C. Cir. 1992).

3. Reversed 754 F.2d 1381 (9th Cir. 1984).

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(wrongly, as I will show), and reiterated by the General Counsel on brief. There really was no question what precedent applied. The majority sets all this aside. They say that *Master Slack* and *Whisper Soft Mills* represent “alternative modes of analysis,” as though it does not matter which analysis is chosen. Not so. *Master Slack* applies if, at the time recognition was withdrawn, the Union’s continuing majority status was rebuttably presumed. By applying *Whisper Soft* instead, the majority *makes* the presumption of majority status irrebuttable, rendering *Master Slack* inapplicable. Moreover, the choice of standard dictates the outcome. Apply *Whisper Soft*, and the withdrawal of recognition is unlawful; apply *Master Slack*, and the withdrawal is lawful if the Respondent proves actual loss of majority status.

My colleagues do ultimately explain why they choose to apply *Whisper Soft*: because, they say, this case “involve[s] extension of the certification year.” This explanation begs the question. The case “involve[s] extension of the certification year” *as a result* of the majority’s decision to apply *Whisper Soft*.⁴

Critically, the majority fails to reconcile their decision with at least two Board cases that are in direct conflict with it, not to mention other cases in which the Board applied *Master Slack* where—if the majority is correct—it

4. Whether, as a remedial matter, an additional period of insulated majority status under *Mar-Jac Poultry*, 136 NLRB 785 (1962), should be granted the Union if the Respondent fails to establish actual loss of majority status is a separate matter. Addressing that question would be premature at this point.

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should have applied *Whisper Soft*. This does not bode well for the likely fate of their decision. “[W]hen the Board fails to explain—or even acknowledge—its deviation from established precedent, its decision will be vacated as arbitrary and capricious.”⁵ Moreover, arbitrary application of a standard where the choice of standard determines the outcome, as is the case here, can only breed cynicism regarding our decisions and contempt of the Board itself.

Facts

On October 3, 2018, following its victory in a Board-conducted election in Case 07-RC-226264, the Union was certified as the collective-bargaining representative of the Respondent’s production and maintenance employees employed at its Sterling Heights, Michigan facility. The Union requested bargaining on October 15, 2018. The Respondent replied, indicating its availability on several dates in November. The Union agreed to all those dates, but the Respondent subsequently cancelled the November meetings, and it refused to schedule any bargaining sessions in December.

The Union filed an unfair labor practice charge alleging that the Respondent was failing and refusing to bargain. Thereafter, the parties met for their first bargaining session on January 10 and 11, 2019. The Union was considering making a proposal to replace the

5. *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137, 1146, 428 U.S. App. D.C. 63 (D.C. Cir. 2017) (citation and internal quotation marks omitted).

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unit employees' current benefits with a union benefit plan, and it requested information regarding the costs incurred by the Respondent to provide various benefits. The Respondent furnished the Union with information regarding the cost *to employees* of various options under its health insurance plan.

On April 2, 2019, the Union informed the Respondent that the information it had provided was insufficient and reiterated its need for information regarding the Respondent's costs. In its April 10 reply, the Respondent said that it would not provide that information, adding that it would "stick with the present plan" so there was "no need for [the Union] to put further effort into working up a proposal for union provided benefits." The Union repeated its request for this information on April 17 and again in July. The information was never furnished.

The parties met for bargaining in May, June, and July 2019. The record is incomplete regarding what transpired in collective bargaining later in the summer and during the fall of 2019, but there is no evidence that the Respondent was at fault for any lack of progress in negotiations during that time. By the time the certification year expired on October 2, 2019, the parties had reached tentative agreements on 35 items. Among these was a tentative agreement on a 401(k) defined-contribution plan. The record also shows that the parties were negotiating over short-term disability benefits, despite the Respondent's failure to furnish the cost information the Union had requested.

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On November 25, 2019, the Respondent withdrew recognition from the Union based on a disaffection petition signed by employees about a week earlier and bearing 205 signatures.

Judge's Decision

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to meet for collective bargaining for nearly three months following the Union's post-certification request to commence negotiations. He found that the Respondent additionally violated Section 8(a)(5) and (1) by refusing to consider any proposal for union-administered employee benefits and by refusing to furnish the cost-of-benefits information the Union requested.

Applying *Master Slack*, the judge further found that these three unfair labor practices tainted the disaffection petition on which the Respondent relied to withdraw recognition. He also raised questions regarding whether the petition, if untainted, established actual loss of majority status, but he did not decide that issue. Based on his finding of taint under *Master Slack*, the judge found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union.

*Appendix C*Discussion⁶

Under the certification-year doctrine, a union's majority status is irrebuttably presumed for one year following the Board's issuance of a certification of representative, absent unusual circumstances.⁷ After

6. I agree with my colleagues that the Respondent violated Sec. 8(a)(5) by failing to meet with the Union for roughly the first 3 months of the certification year, by refusing to furnish requested information regarding how much it cost the Respondent to provide benefits to the unit employees, and by telling the Union that it would not consider any proposal for a union-administered benefit plan. Regarding the last of these violations, I adhere to the view that the Board must exercise caution in determining whether isolated comments made in the course of collective bargaining violate the Act. See *ExxonMobil Research & Engineering Co., Inc.*, 370 NLRB No. 23, slip op. at 5-6 & fn. 15 (2020) (dismissing allegation that comments made by employer's lead negotiator violated the Act, where union's negotiators would have understood the comments, in context, as sarcasm and not seriously meant). But the Respondent's statement was not an isolated comment. The credited evidence supports the judge's finding that the Respondent refused to consider any proposal from the Union regarding union-administered employee benefits and never changed its position on that issue. For the reasons stated by the judge and my colleagues, the Respondent thereby Sec. 8(a)(5).

7. *Brooks v. NLRB*, 348 U.S. 96, 75 S. Ct. 176, 99 L. Ed. 125 (1954). The majority cites *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987), for the certification-year doctrine, and they include, in footnote 9 of their decision, a lengthy quotation from that case discussing the policies that doctrine serves. But as that quotation shows, the Supreme Court was addressing *two* presumptions of majority status—irrebuttable during the certification year, rebuttable thereafter—and explaining that *both* presumptions serve the same policy: "The overriding

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the certification year expires, the union's majority status continues to be presumed, but rebuttably so.⁸ Thus, assuming the employer and union have not concluded a collective-bargaining agreement,⁹ the employer may withdraw recognition from the union after the certification year has ended based on evidence that the union has lost majority status.¹⁰ Indeed, the employer must do so, since recognizing a minority union violates Section 8(a)(2).¹¹ If, however, the employer committed unfair labor practices during the certification year that caused its unit employees

policy of the NLRA is industrial peace. The presumptions of majority support further this policy by promoting stability in collective-bargaining relationships, without impairing the free choice of employees." Id. at 38. *Fall River Dyeing* makes clear that both presumptions of majority support further industrial peace. Accordingly, that decision provides no support for the majority's decision to treat the Union's majority status in this case as conclusive rather than rebuttable.

8. *Guerdon Industries, Inc.*, 218 NLRB 658, 659 (1975).

9. Under the Board's contract-bar doctrine, a labor agreement ordinarily renders the union's majority status immune from challenge for the duration of the agreement, up to a maximum of three years. See *Mountaire Farms, Inc.*, 370 NLRB No. 110, slip op. at 1 (2021); *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). See also *Shaw's Supermarkets*, 350 NLRB 585, 587 (2007) (holding that an employer may withdraw recognition from the union after the third year of a contract of longer duration).

10. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001).

11. *Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731, 738-739, 81 S. Ct. 1603, 6 L. Ed. 2d 762 (1961).

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to become disaffected with the union, the withdrawal of recognition will be found unlawful.¹²

Where an employer actively involved itself in the decertification effort, the Board conclusively presumes that the resulting petition is tainted.¹³ Where an employer unlawfully refuses to recognize and bargain with an incumbent union, the causal relationship between that unfair labor practice and the union's loss of majority support is presumed,¹⁴ provided the loss of support "arises during the course of the employer's unlawful conduct."¹⁵ Here, no party claims that the Respondent unlawfully assisted in the preparation or circulation of the unit

12. *Bunting Bearings Corp.*, 349 NLRB 1070, 1071-1072 (2007); *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) (*Lee Lumber II*) (holding that evidence in support of a withdrawal of recognition "must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself"), enfd. in relevant part and remanded 117 F.3d 1454, 326 U.S. App. D.C. 104 (D.C. Cir. 1997) (per curiam).

13. See *SFO Good-Nite Inn, LLC*, 357 NLRB 79 (2011), enfd. 700 F.3d 1, 403 U.S. App. D.C. 75 (D.C. Cir. 2012); *Hearst Corp.*, 281 NLRB 764 (1986), enfd. mem. 837 F.2d 1088 (5th Cir. 1988). I agree with former Member Hayes that the *Hearst/SFO Good-Nite Inn* presumption should be rebuttable, leaving open the possibility "that the representational desires of a majority of employees unaffected by, or possibly even unaware of, unlawful employer involvement can be honored." *SFO Good-Nite Inn*, 357 NLRB at 83 (Member Hayes, concurring in part and dissenting in part).

14. *Lee Lumber II*, 322 NLRB at 177.

15. *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 399 (2001) (*Lee Lumber III*), enfd. 310 F.3d 209, 354 U.S. App. D.C. 13 (D.C. Cir. 2002).

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employees' petition, and the General Counsel did not allege, and the judge did not find, that the Respondent refused to recognize and bargain with the Union before it withdrew recognition.

Where, as here, an employer has not participated in the decertification effort and has not refused to recognize and bargain, but has committed other violations of the Act, there must be specific proof of a causal relationship between the unfair labor practice or practices and the ensuing loss of union support.¹⁶ To determine the causation-of-disaffection issue, the Board applies the four-factor standard set forth in *Master Slack*: (1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union.¹⁷ Accordingly, *Master Slack* is applicable here to determine whether the Respondent's unremedied unfair labor practices tainted the disaffection petition.

The majority's Whisper Soft Mills rationale

My colleagues take an entirely different tack. Ignoring *Master Slack*, they instead find that the Respondent's

16. *Williams Enterprises*, 312 NLRB 937, 939 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995); see also *Lee Lumber II*, 322 NLRB at 177; *Vincent Industrial Plastics, Inc.*, 328 NLRB 300, 301-302 (1999), enfd. in part 209 F.3d 727, 341 U.S. App. D.C. 99 (D.C. Cir. 2000).

17. *Master Slack*, 271 NLRB at 84.

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unlawful failure to meet with the Union from October 15, 2018, to January 10, 2019, warrants refusing to give effect to the union-disaffection petition, based on a *per se* rule under which the withdrawal of recognition is automatically invalidated because of that unfair labor practice.

Applying two cases plucked from obscurity and not cited by the General Counsel, the Charging Party, or the judge—*Whisper Soft Mills*, *supra*, and *New Madrid Nursing Center*¹⁸—the majority holds that the certification year had not yet expired when the Respondent withdrew recognition because its unlawful nearly 3-month failure to meet for bargaining warrants extending the certification year through the date of withdrawal. Under this approach, the Union’s presumption of majority status remained irrebuttable on November 25, 2019, and the withdrawal of recognition was unlawful, not because the disaffection petition was tainted, but because the withdrawal was premature.¹⁹

Master Slack and *Whisper Soft Mills* represent fundamentally different approaches to determining the lawfulness of a withdrawal of recognition. Under *Master*

18. 325 NLRB 897 (1998), enfd. sub nom. *NLRB v. Beverly Health & Rehabilitation Services, Inc.*, 187 F.3d 769 (8th Cir. 1999). As explained below, the Board in *Whisper Soft Mills* provided a rationale for extending the certification year. In *New Madrid Nursing Center*, the Board adopted the decision of the administrative law judge, who cited *Whisper Soft* without referring to its supporting rationale, let alone modifying or bolstering it. *New Madrid* adds nothing to *Whisper Soft* other than to furnish a second fact pattern for its application, and the fact pattern in *New Madrid* bears no similarity to the facts of this case.

19. Until today, *New Madrid Nursing Center* was the *only* case that had cited *Whisper Soft Mills* for this proposition.

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Slack, the point of departure for the analysis is that the presumption of the union's majority status was rebuttable on the date recognition was withdrawn. In *Whisper Soft*, even though the calendar certification year had expired, the Board extended the duration of the union's irrebuttable presumption of majority status through the date of withdrawal. The majority says that *Master Slack* and *Whisper Soft* simply represent "alternative modes of analysis," as though the choice of standard is inconsequential. It is anything but. *Master Slack* only applies if the presumption of majority status was rebuttable at the time recognition was withdrawn. But if *Whisper Soft* is applied, majority status becomes irrebuttably presumed, rendering *Master Slack* inapplicable.

Deciding whether the presumption of majority status is to be treated as rebuttable or irrebuttable is no small matter. Employees have the right, under Section 7 of the Act, to freely choose whether to be represented by a labor organization, and precluding the exercise of this right raises obvious concerns. On the other hand, the Board has long deemed it appropriate to treat the presumption of majority status as conclusive during certain periods of time in order to promote stable relations between management and organized labor.²⁰ Decisions regarding how best to strike the balance between labor-relations stability and

20. See *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-363, 70 S. Ct. 166, 94 L. Ed. 161 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.") (citations omitted); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (A "basic policy of the Act [is] to achieve stability of labor relations.").

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employee free choice are among the most important the Board makes. But, however the Board decides to strike that balance in particular circumstances, it must do so with reasoned decision-making and consistently by deciding like cases alike.

The majority fails to distinguish cases applying *Master Slack* where, like in the instant case, the employer violated Section 8(a)(5) during the certification year and then withdrew recognition soon after the year expired. For example, in *Champion Home Builders Co.*, 350 NLRB 788 (2007), the Board applied *Master Slack* on facts quite similar to those presented here. In that case, the union was certified April 10, 2001, and the employer withdrew recognition April 18, 2002, based on a disaffection petition. The parties failed to meet for the first three months following the date the union was certified. Additionally, during the certification year, the employer violated Section 8(a)(5) by failing to furnish requested information and by laying off unit employees without giving the union notice and opportunity to bargain. Applying the four-factor *Master Slack* taint analysis, the Board concluded that the prior unfair labor practices did not taint the petition.²¹

21. Additionally, in *Denton County Electric Cooperative, Inc. d/b/a CoServ Electric*, 366 NLRB No. 103 (2018), enfd. in relevant part 962 F.3d 161 (5th Cir. 2020), the union survived a decertification election held October 28, 2013, and as a result secured a second certification year under *Americare-New Lexington Health Care Center*, 316 NLRB 1226 (1995), enfd. 124 F.3d 753 (6th Cir. 1997). During the second certification year, the employer unilaterally discontinued its past practice of increasing wages (and blamed the union for the lack of an increase). Based on a disaffection petition,

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In addition to making no attempt to distinguish *Champion Home Builders* and others that apply *Master Slack*, the majority likewise fails to justify or explain its selection of *Whisper Soft* from among the multiple other standards the Board has applied over time to determine whether employers' unfair labor practices warrant finding a subsequent withdrawal of recognition unlawful.²²

the employer withdrew recognition on November 26, 2014. The Board determined whether the withdrawal of recognition violated Sec. 8(a)(5) by applying *Master Slack*.

In *Tritac Corp.*, 286 NLRB 522 (1987), the union was certified March 4, 1983, and the employer withdrew recognition March 21, 1984. During the certification year, the employer violated Sec. 8(a)(5) by refusing to furnish information and unilaterally increasing wages. The Board decided the 8(a)(5) withdrawal-of-recognition allegation by applying *Master Slack*.

Notably, in each of these cases—*Champion Home Builders*, *CoServ Electric*, and *Tritac*—the employer committed types of 8(a)(5) violations that repeatedly have been deemed to warrant a remedial extension of the certification year under *Mar-Jac Poultry*, 136 NLRB 785 (1962): unlawful failures to furnish information, unlawful unilateral changes in terms and conditions of employment, or both. See cases cited in fn. 23, *infra*. In *Whisper Soft*, the Board cited *Mar-Jac* as the sole basis for its decision to extend the calendar certification year. 267 NLRB at 816 & fn. 14. Thus, if *Whisper Soft* retained viability, the Board in these cases should have dealt with the withdrawals of recognition by extending the calendar certification year. It did not. It applied *Master Slack*.

22. See, in addition to *Master Slack*, *Guerdon Industries*, *supra* (applying a “totality of the circumstances” standard to resolve the causation-of-disaffection issue); *United Technologies*, 296 NLRB 571 (1989) (finding, without analysis, that bad-faith bargaining

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The majority's decision to apply the *Whisper Soft* precedent also directly conflicts with at least two other Board cases. First, it is at odds with *Garden Ridge Management*, 347 NLRB 131 (2006), where, as here, the employer unlawfully failed to meet at reasonable times for collective bargaining during the certification year. Also as here, the employer withdrew recognition after the certification year expired, although it did so a mere three days after that year ended, whereas here, the withdrawal of recognition occurred 54 days after the certification year ended. But in contrast to my colleagues' decision, the *Garden Ridge* Board did not extend the certification year to render the union's presumption of majority status irrebuttable on the date recognition was withdrawn. Applying *Master Slack*, it treated that presumption as rebuttable and found that the unlawful failure to meet at reasonable times did not cause the unit employees to withdraw their support from the union.

The majority does not distinguish this precedent, and with good reason: it is impossible to meaningfully distinguish it. The only difference between *Garden Ridge Management* and this case is the manner in which the employer failed to meet at reasonable times. In the instant case, the Respondent deprived the Union of the opportunity to bargain during the certification year in a single, continuous stretch. In *Garden Ridge Management*, the employer deprived the union of the

conclusively tainted evidence of unit employees' rejection of the union); *Lee Lumber II*, *supra* (holding that unlawful refusal to recognize and bargain raises rebuttable presumption that evidence of disaffection is tainted).

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opportunity to bargain during the certification year in multiple, discontinuous increments. In both cases, the result was the same: the union was deprived of its right to 12 full months of good-faith bargaining. Nevertheless, the Board in *Garden Ridge Management* treated the union's presumption of majority status as rebuttable 3 days after the certification year expired, whereas here, the majority holds that the Union's presumption of majority status remained irrebuttable 54 days after the certification year ended. My colleagues' decision cannot be reconciled with *Garden Ridge Management*.

The majority decision also conflicts with *Furr's Cafeterias, Inc.*, 251 NLRB 879 (1980). In that case, the union was certified April 7, 1975, and the employer withdrew recognition on June 1, 1976—55 days after the certification year expired, nearly the same as in the instant case—based on a disaffection petition signed by 98 out of 103 unit employees. The Board found that the employer had violated Section 8(a)(5) during the certification year by selecting employees for layoff, altering the seniority rights of employees recalled from layoff, and granting wage increases, all without giving the union notice and opportunity to bargain, and by bargaining in bad faith from the very beginning of negotiations for an initial collective-bargaining agreement.

In determining whether the withdrawal of recognition was unlawful, the *Furr's Cafeterias* Board applied a causation-of-disaffection standard—not *Master Slack*, which had not yet issued, but a causation standard nonetheless—and found that the employer's pre-

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withdrawal violations tainted the disaffection petition, rendering the withdrawal of recognition unlawful. *Id.* at 911. The Board also granted the union its so-called *Mar-Jac* extension remedy. Under *Mar-Jac Poultry*, *supra*, the Board awards a remedial extension of the certification year—i.e., an additional period of insulated majority status beginning on the date the parties resume good-faith bargaining following issuance of the Board’s decision²³—up to a maximum of 12 months, when the employer’s unfair labor practices have deprived the union of its full certification-year rights. As noted above, the *Whisper Soft* Board relied on *Mar-Jac* as the basis for extending the calendar certification year. 267 NLRB at 816 & fn. 14. Yet, three years earlier, in a case where the employer’s 8(a)(5) violations were deemed to warrant a full 12-month *Mar-Jac* extension, the Board decided the withdrawal allegation not by extending the calendar certification year, but by asking whether the violations caused employees to become disaffected with the union.

In *Whisper Soft*, the employer withdrew recognition 17 days after the certification year expired, considerably fewer than the 55 days in *Furr’s Cafeterias*. But the decisions cannot be reconciled on the basis that 55 days was too long a period of time to support an extension of the calendar certification year, whereas 17 days is not. That distinction is immaterial in light of the fact that the

23. *Mar-Jac Poultry*, 136 NLRB at 787 fn. 6 (“Since the [employer], in the instant case has already bargained for 6 months with the Union, its obligation to bargain continues for at least an additional 6 months *from the resumption of negotiations.*”) (emphasis added).

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Whisper Soft Board extended the calendar certification year for at least 4-1/2 half months, the length of time during which the employer unlawfully refused to make a counterproposal on wages and far more than 55 days. 267 NLRB at 816. Thus, like *Garden Ridge Management*, *Furr's Cafeterias* is irreconcilable with the majority's decision and *Whisper Soft*.

The majority acknowledges that these cases cannot be reconciled. They admit that *Whisper Soft* "has not always been invoked to evaluate the legality of employer withdrawals of recognition or refusals to bargain that occur more than 12 months after union certification." That is an understatement; until today, *Whisper Soft* has only been "invoked" once, in *New Madrid Nursing Center*. My colleagues deal with the cases discussed above by falling back on their "alternative modes of analysis" rationale, saying that the Board in those cases "applied a different (but not inconsistent) analysis"—not inconsistent, that is, with *Whisper Soft*. But the point isn't whether a "taint" analysis—under *Master Slack* or otherwise—is inconsistent with a *Whisper Soft* analysis. The point is that in cases materially indistinguishable from *Whisper Soft* and this case, the Board has applied *Master Slack* (or otherwise conducted a "taint" analysis pre-*Master Slack*), rendering my colleagues' decision to apply *Whisper Soft* instead arbitrary and capricious. This is precisely the "random use of inconsistent precedents" that the D.C. Circuit has said "surely is not reasoned decisionmaking." *Daily News of Los Angeles v. NLRB*, 979 F.2d at 1574. My colleagues further defend by saying there is no indication in these irreconcilable cases that

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the General Counsel presented a *Whisper Soft* analysis to the Board. Granted—but if *Whisper Soft* was the correct standard to apply in those cases, the Board was obligated to apply it, even if the General Counsel did not. See *MCPc Inc. v. NLRB*, 813 F.3d 475, 490 fn. 12 (3d Cir. 2016) (“[I]n assessing any claim properly before it, the Board must apply the correct legal standard to the relevant facts.”).

My colleagues’ defense of their decision to apply *Whisper Soft* tends to rotate. They take the position that *Whisper Soft* applies rather than *Master Slack* because this case “involve[s] extension of the certification year.” But this case involves extension of the certification year as a *result* of their decision to apply *Whisper Soft*.²⁴ They also rely on cases where a withdrawal of recognition was found unlawful as having occurred during an extended certification year. But in those cases, the certification

24. When the majority says that this case “involve[s] extension of the certification year,” I take it they mean it does so because they find that the Respondent’s unfair labor practices (other than the withdrawal of recognition) warrant a remedial extension of the certification year under *Mar-Jac Poultry*. But if *Master Slack* is applied, as it ought to be, the withdrawal of recognition may be lawful, in which case the Respondent would no longer have a duty to bargain at all, and the issue of whether to grant a *Mar-Jac* remedial extension would be moot. Whether a remedial extension of the certification year may be warranted must await determination of whether the disaffection petition established actual loss of majority status. The only reason is does not await that determination for my colleagues is their decision to apply *Whisper Soft*. Again, therefore, this case “involve[s] extension of the certification year” *because* the majority chooses to apply *Whisper Soft*.

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year had been remedially extended previously, putting the employers in those cases on notice that withdrawal of recognition within the remedial extension would be premature.²⁵ Here, the Respondent had no such notice. The certification year had expired, and no prior remedial extension of the certification year put the Respondent on notice that a withdrawal of recognition would be premature. Instead, my colleagues extend the certification year *in this case* and thereby *make* the withdrawal of recognition premature retroactively.

The conflict between the majority's decision and *Furr's Cafeterias* also underscores the larger dissonance between *Whisper Soft* and the Board's well-established *Mar-Jac* remedy. Although both seek to address the union's harm in being deprived of its full certification-year rights because of the employer's unfair labor practices, the *Mar-Jac* extension of insulated majority status is not added to the end of the calendar certification year. Instead, when the Board applies *Mar-Jac*, it grants an *additional* period of insulated majority status beginning

25. *Veritas Health Services, Inc. v. NLRB*, 895 F.3d 69, 437 U.S. App. D.C. 69 (D.C. Cir. 2018); *Bryant & Stratton Business Institute, Inc. v NLRB*, 140 F.3d 169 (2d Cir. 1998). In *Veritas*, the Board had previously granted a remedial extension of the certification year, and the employer withdrew recognition before that extension expired. In *Bryant & Stratton*, the employer withdrew recognition before the Board issued its decision extending the certification year, but after the administrative law judge issued his decision recommending that extension. Thus, when the employer in *Bryant & Stratton* withdrew recognition, it did so knowing that the judge had extended the certification year, and that the Board might adopt that remedy.

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on the date the parties resume good-faith bargaining following issuance of the Board's decision. This is obviously very different than *Whisper Soft*, where the Board simply extended the calendar certification year to make the withdrawal of recognition unlawful. Moreover, the Board has repeatedly awarded a *Mar-Jac* remedy for unlawful failures to furnish information, unlawful unilateral changes in terms and conditions of employment, or both.²⁶ But the Board has never extended the calendar certification year for these violations, and the Board *has* applied *Master Slack* where the employer committed these types of violations and then withdrew recognition soon

26. See, e.g., *Covanta Energy Corp.*, 356 NLRB 706 (2011) (awarding remedial extension of certification year for unilateral discontinuation of past practice of granting annual wage increase and semi-annual bonuses); *Metta Electric*, 349 NLRB 1088 (2007) (awarding remedial extension of certification year and basing the 12-month duration of the extension on employer's unlawful failure to furnish information); *Kankakee Valley Rural Electric Membership Corp.*, 338 NLRB 906 (2003) (awarding remedial extension of certification year for unilateral discontinuation of wage increases and 401(k) contributions (although the Board noted that no exceptions had been filed to the judge's recommended *Mar-Jac* remedy, the Board has discretion to address remedial matters in the absence of exceptions)); *Wells Fargo Armored Services Corp.*, 322 NLRB 616 (1996) (awarding remedial extension of certification year for unlawful failure to furnish information); *D. J. Electrical Contracting*, 303 NLRB 820 (1991) (same), enfd. 983 F.2d 1066 (6th Cir. 1993); *Tubari Ltd.*, 299 NLRB 1223 (1990) (same); *Valley Inventory Service*, 295 NLRB 1163 (1989) (same); *GMF Motors*, 293 NLRB 547 (1989) (same); *Winges Company, Inc.*, 263 NLRB 152 (1982) (awarding remedial extension of certification year for unlawful failure to furnish information and unilateral change in employees' wages).

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after the certification year expired.²⁷ The majority fails to come to grips with these contradictions.

In the end, what the majority has done here is precisely what the D.C. Circuit found unenforceable 30 years ago. They have adopted a rule that makes an unlawful refusal to bargain *per se* grounds to disregard an employee-disaffection petition. And they have done so without definitively announcing that a new rule has been adopted, “let alone justify[ng] and explain[ing]” it. *Sullivan Industries v. NLRB*, 957 F.2d 890, 902, 294 U.S. App. D.C. 141 (D.C. Cir. 1992) (remanding to “explain whether [the Board] has any such *per se* rule, and if so, its reasons therefor”); *Williams Enters., Div. of Williams Indus. v. NLRB*, 956 F.2d 1226, 1236, 294 U.S. App. D.C. 105 (D.C. Cir. 1992) (remanding because the Board’s decision “contained no [] explanation” for its failure to use the *Master Slack* analysis). By arbitrarily seizing on *Whisper Soft*, using this new *per se* approach to invalidate the employees’ petition without a causation analysis, and doing all this without confronting inconsistent precedent, defining the scope and limits of their new standard, or providing a coherent explanation for why a new standard is justified in the first place, my colleagues have authored a decision that cannot withstand judicial scrutiny.

I understand that applying *Whisper Soft* recognizes the Union’s certification-year right to 12 full months of good-faith bargaining. I also understand that because applying *Master Slack* here may result in finding the Respondent’s

27. See *supra* fn. 20 and accompanying text.

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withdrawal of recognition lawful (as I will show in the following section), the Union's loss of its full certification-year right will go unremedied if *Master Slack* is applied and the disaffection petition on which the Respondent relied is ultimately found to establish that the Union has lost majority status. But I also understand that by choosing *not* to apply *Master Slack*, the majority denies the unit employees their right to choose not to be represented by the Union. The certification-year right is based on a policy determination that a 1-year period of insulated majority status following certification promotes labor-relations stability at an acceptable cost to employee free choice. On the other hand, the right of employees to deselect a union is guaranteed by Section 7 of the Act—and the 1-year period of insulated majority status had expired when the Respondent withdrew recognition. Both rights cannot be honored here, and by choosing to apply *Whisper Soft*, my colleagues privilege a right based on a policy determination over a right guaranteed by the Act. Even apart from the many difficulties that choice faces as explained above, I believe they have made the wrong choice.

Absent reasoned decision-making clearly missing here,²⁸ the correct standard to apply in this case is *Master Slack*.

28. I can understand my colleagues' reluctance to apply *Master Slack* here. The *Master Slack* analysis may not be the best test for deciding the fate of a union-disaffection petition where the unfair labor practices center primarily on the employer's conduct in collective bargaining. Proof of causation under *Master Slack* requires that unit employees are aware of their employer's unfair labor practices, and employees typically may not know what is

*Appendix C**The Master Slack analysis*

Although I agree with the judge that *Master Slack* is the appropriate standard to be applied in this case, I strongly disagree with his determination that all four *Master Slack* factors support a finding of taint. As explained below, analysis under *Master Slack* shows that “the General Counsel has not established specific proof of a causal relationship between [the Respondent’s] unfair labor practices and the disaffection petition.”²⁹

going on in collective bargaining. As a result, the General Counsel may find it difficult to prove that the unfair labor practices caused employees to abandon the union, and the withdrawal of recognition will be lawful—assuming the petition was unassisted and establishes actual loss of majority status—even if the employer, by its unlawful bargaining conduct, has deprived the union of the 12 full months of good-faith bargaining to which the certification-year doctrine entitles it. But there may be other standards besides *Whisper Soft* that would protect the union’s certification-year right without prolonging the calendar certification year at the expense of employee rights. One would be to extend the *Lee Lumber* presumption-of-taint standard to unlawful extended failures to meet for bargaining. Another option where, as here, the employer unlawfully delays bargaining following the union’s certification may be to delay the start of the certification year until the date of the parties’ first bargaining session. See, e.g., *Dominguez Valley Hospital*, 287 NLRB 149 (1987), enfd. sub nom. *NLRB v. National Medical Hospital of Compton*, 907 F.2d 905 (9th Cir. 1990). But these alternatives are considerations for a future case. For the present, applying *Master Slack*, the Board’s controlling precedent, is the only option absent the announcement of a new standard through APA-required reasoned decision-making.

29. *Flying Foods*, 345 NLRB 101, 103 (2005), enfd. 471 F.3d 178, 374 U.S. App. D.C. 55 (D.C. Cir. 2006).

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(1) Length of time between unfair labor practice and withdrawal of recognition

In concluding that this factor supported a finding of taint, the judge relied primarily on the Respondent's refusal to provide requested cost information regarding employee benefits, reasoning that the refusal was "ongoing at the time of withdrawal." The judge also found that the Respondent's refusal to consider any proposal for union-administered benefits provided further support for his finding under this factor because it was linked to the refusal to furnish the cost information.

The Respondent refused to furnish the requested cost information in April 2019, and it failed to furnish that information in response to the Union's reiterated request in July 2019. The latter failure predated the November 2019 withdrawal of recognition by 4 months. The judge disregarded this substantial time gap, reasoning that the refusal was "ongoing at the time of withdrawal." But an unlawful failure to furnish information prior to a withdrawal of recognition is always, or nearly always, "ongoing at the time of withdrawal." If an employer fails to timely provide requested information but then subsequently provides it, the violation would be an unreasonable *delay* in furnishing the information, not a failure or refusal to furnish it. Thus, the judge's rationale would result in finding the first *Master Slack* factor invariably met, or nearly so, whenever an unlawful failure to provide requested information is followed by a withdrawal of recognition, regardless of how much time elapsed between the violation and the withdrawal.

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Such an analysis renders the first *Master Slack* factor meaningless.

The judge cited no authority for his rationale, and Board precedent is squarely to the contrary. In *Champion Home Builders*, *supra*, the Board found the first *Master Slack* factor did *not* support a finding of taint where the employer unlawfully refused to furnish information two months before it withdrew recognition, where there was no evidence that unit employees knew of that violation at the time they signed the disaffection petition. 350 NLRB at 792. So also here, there is no evidence that the unit employees were aware of the Respondent's refusal to furnish the requested cost information, or of its refusal to consider proposals for union-administered benefits, at the time they signed the petition.

Even if there were such evidence, the four- and seven-month gaps between, respectively, the failure-to-furnish and refusal-to-consider violations and the signing of the disaffection petition—not to mention the more-than-ten-month gap between the refusal-to-meet violation and the signing of that petition—are too lengthy to support a reasonable inference that those unfair labor practices caused the unit employees to become disaffected with the Union. Compare *Champion Home Builders*, 350 NLRB at 791-792 (finding unfair labor practices too remote in time to have caused disaffection where they were committed 5 to 6 months before the employees rejected union representation), *Garden Ridge Management*, 347 NLRB at 134 (5-month gap weighed against finding that unfair labor practices caused disaffection), and *Lexus of*

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Concord, Inc., 343 NLRB 851, 852 (2004) (3-month gap weighed against finding employer's unlawful conduct caused disaffection), with *Bunting Bearings Corp.*, 349 NLRB at 1072 (first *Master Slack* factor weighed in favor of finding taint where unfair labor practices preceded withdrawal of recognition by eight to fifteen days), and *Miller Waste Mills, Inc.*, 334 NLRB 466, 468 (2001) (2- to 6-week gap between violations and petition weighed in favor of finding that unfair labor practices caused disaffection); see *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640, 649, 405 U.S. App. D.C. 73 (D.C. Cir. 2013) (stating that *Master Slack*'s "temporal factor typically is counted as weighty only when it involves a matter of days or weeks"). Accordingly, the first *Master Slack* factor does not support finding a causal relationship between the Respondent's unfair labor practices and the unit employees' disaffection with the Union.

(2) The nature of the violation, including the possibility of a detrimental or lasting effect on employees

The judge found that the second *Master Slack* factor also supported a finding of taint, reasoning that the Respondent's unlawful refusal to meet with the Union for nearly three months at the outset of the certification year "deprived the employees' union of the ability to bargain during a significant portion of the period when a union is generally at its greatest strength," and therefore "the nature of this violation had a detrimental effect on employees who had voted to have the [Union] represent them." The judge further found that the Respondent's other two unfair labor practices "impeded the [Union]

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from seeking to improve employees' terms and conditions of employment in the important area of employee benefits."

I agree with the judge in one respect. The Respondent's lengthy failure to meet for collective bargaining delayed bargaining for 3 months during the certification year when the Union is entitled to 12 months of good-faith bargaining. The extent to which the Respondent's other two unfair labor practices impeded the Union from seeking to improve unit employees' benefits is less clear, given that the parties had reached tentative agreement on a 401(k) defined-contribution retirement plan and were negotiating over short-term disability benefits when the certification year ended. But even granting that point, the judge did not explain how impeding *the Union* from seeking to improve employee benefits detrimentally or lastingly affected the unit employees so as to support a causation-of-disaffection finding, absent evidence that those employees were aware of the failure-to-furnish and refusal-to-consider violations.

Unfair labor practices that have a detrimental or lasting effect on employees are those coercive violations that, by their very nature, employees will be aware of: suspending or discharging union adherents; unilaterally granting an unprecedented wage increase, withholding an expected increase, or otherwise unilaterally changing terms or conditions of employment; threatening job loss, plant closure, or other adverse consequences. See *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d at 650 (citing Board precedent). Unless their union tells them what the employer is doing—and not doing—in collective bargaining, employees typically will not be aware of

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violations committed in bargaining. Any possibility that the Respondent's refusal-to-consider and failure-to-furnish violations could have caused the unit employees to withdraw their support from the Union is destroyed by the lack of evidence that they knew of those violations. See *Champion Home Builders*, 350 NLRB at 792, discussed above under first *Master Slack* factor; *Renal Care of Buffalo, Inc.*, 347 NLRB 1284, 1297 (2006) (finding employer's failure to provide information relevant to formulating bargaining proposals did not cause employee disaffection where employees were not involved in drafting the information request nor were aware of any issues surrounding it); *Gulf States Mfrs.*, 287 NLRB 26, 26 (1987) (finding employer's refusal to provide information did not contribute to employee disaffection with the union where the record failed to indicate that the employer's position was disseminated to the employees).

The Respondent's months'-long failure to meet for bargaining stands on a different footing. A refusal-to-meet violation may detrimentally affect unit employees even if they are unaware of it, but presuming that it does so would be warranted only where the union's loss of support "arises during the course of" the unlawful refusal to meet. See *Lee Lumber III*, 334 NLRB at 399. There is no basis here to infer that the unit employees' disaffection with the Union arose during the Respondent's failure to meet for collective bargaining, since that violation ended 10 months before the employees signed the disaffection petition.

For all these reasons, the second *Master Slack* factor also does not support finding a causal relationship between

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the Respondent's unfair labor practices and the unit employees' disaffection from the Union.

(3) The tendency of the violation to cause employee disaffection

The judge found that the third *Master Slack* factor also tilts in favor of finding the petition tainted, reasoning that the Respondent's unfair labor practices "delayed and impeded progress" towards negotiated improvements in the unit employees' terms and conditions of employment, and that "[t]his lack of progress would have . . . the likely tendency[] to cause employees to lose faith with the [Union]." In support of his finding, the judge cited *Fruehauf Trailer Services*, 335 NLRB 393 (2001), and *Westgate Corp.*, 196 NLRB 306 (1972).

Preliminarily, the D.C. Circuit observed in *Tenneco* that the third *Master Slack* factor is related to the second factor "because unfair labor practices that have a lasting effect on employees are likely to be serious enough to cause disaffection with a union." 716 F.3d at 649. Thus, the kinds of unfair labor practices most likely to cause disaffection with a union are the same ones that have a lasting impact on employees: discriminatory discharges; threats of job loss or plant closure; unilateral changes in key terms of employment, such as wages. *Id.* at 650. The Respondent committed none of these.

From the judge's analysis of the second *Master Slack* factor, we know that by the violation that "delayed . . . progress," the judge meant the Respondent's failure to

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meet for bargaining, and by the violations that “impeded progress,” he meant the refusal to furnish benefits-cost information and, to a lesser extent, to consider union-administered benefits.

Regarding the latter, the General Counsel did not contend that the Respondent’s refusal to provide cost information regarding employee benefits frustrated the parties’ ability to reach agreement. Indeed, the record shows that the parties had tentatively agreed on a 401(k) plan and were negotiating short-term disability benefits. Moreover, by the time the Respondent withdrew recognition, the parties had reached tentative agreement on 35 items. Thus, the failure to provide the requested cost information or to consider proposals for union-administered benefits did not prevent the parties from making progress towards reaching an agreement.

Moreover, as stated above under the second (and related) *Master Slack* factor, the Board has repeatedly found that an unlawful failure or refusal to furnish information does not tend to cause disaffection where the evidence fails to show that unit employees knew of it. See *Champion Home Builders*, 350 NLRB at 792; *Renal Care of Buffalo*, 347 NLRB at 1297; *Gulf States Mfrs.*, 287 NLRB at 26. There is no evidence that the unit employees knew that the Respondent had refused to furnish the benefits-cost information. For the same reason—lack of knowledge by unit employees—the Respondent’s refusal-to-consider violation also would not tend to cause disaffection. Even if it could in theory, the seven-month time gap between that violation and the

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evidence of disaffection erases any possibility of a causal connection between the two.

Turning to the Respondent's failure to meet with the Union at the outset of the certification year, *Fruehauf Trailer Services*, cited by the judge, appears at first to provide some support for his finding that this violation tended to cause employees to "lose faith" in the Union. See *Fruehauf*, 335 NLRB at 394 ("The Board has long recognized that dilatory bargaining tactics . . . have a tendency to invite and prolong employee unrest and disaffection from a union."). However, the "dilatory bargaining tactics" in *Fruehauf* were completely different from the Respondent's—and even more importantly, they were ongoing at the time the employees in that case signed their disaffection petition. In *Fruehauf*, the employer recognized the union, and then met for collective bargaining just once before withdrawing recognition 7 months later. During that time, the employer neither responded to the union's proposals nor advanced proposals of its own. Those facts make *Fruehauf* strikingly different from this case, in which the failure-to-meet violation ended 10 months before the unit employees signed the disaffection petition and the parties went on to reach tentative agreement on 35 items, and where there is no evidence that the Respondent engaged in any other dilatory bargaining tactics.³⁰

30. Moreover, the Board in *Fruehauf* also found that the employer denied an employee his *Weingarten* rights and told him the facility was "nonunion," and the Board relied on "all of these reasons"—the *Weingarten* violation and the "nonunion" statement as well as the failure to meet for bargaining at reasonable times—to

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Accordingly, the third *Master Slack* factor also weighs against finding a causal connection between the Respondent's pre-withdrawal unfair labor practices and the unit employees' disaffection with the Union.

(4) The effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union

In concluding that the fourth and final *Master Slack* factor supported a causation-of-disaffection finding, the judge observed that there was "no evidence of disaffection during the period between certification and the start of any of the three unremedied unfair labor practices," and he relied on *United Site Services of California, Inc.*, 369 NLRB No. 137 (2020), and *Bunting Bearings Corp.*, 349 NLRB at 1070, for the proposition that "[t]he lack of prior disaffection is strong evidence of a causal connection between subsequent disaffection and the Respondent's unfair labor practices." *United Site Services*, *supra*, slip op. at 16.

There is no evidence that the Respondent's unfair labor practices had any effect on employee morale,

find the disaffection petition tainted under *Master Slack*. 335 NLRB at 394-395.

The other case the judge cited—*Westgate Corp.*, 196 NLRB 306 (1972)—is inapposite. In *Westgate*, the employees did not give their employer a disaffection petition, and the employer did not withdraw recognition. Thus, *Westgate* sheds no light whatsoever on the taint analysis.

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organizational activity, or membership in the Union. Further, the judge's reliance on *United Site Services* and *Bunting Bearings* is misplaced, as those cases are easily distinguished.

In *United Site Services*, the unit employees demonstrated overwhelming support of the union immediately before their employer embarked on a campaign of unfair labor practices, and then overwhelmingly rejected the union immediately after those violations. Specifically, 21 out of 24 unit employees struck on October 6, 2014. The strikers unconditionally offered to return to work on October 17, 369 NLRB No. 137, slip op. at 2, whereupon the employer proceeded to commit a series of Section 8(a)(3) violations against various strikers beginning that same day—October 17—and ending January 19, 2015. *Id.*, slip op. at 16. Twenty-one unit employees signed a disaffection petition between January 5 and February 11, 2015. *Id.* Thus, 21 of 24 unit employees demonstrated their union support by going on strike immediately before the 8(a)(3) violations began, and an equal number signed the disaffection petition immediately after those violations were committed. Under those circumstances, the Board easily concluded that the petition was tainted by those violations.

Bunting Bearings presents a similar scenario. In that case, the parties had not yet reached agreement on a successor contract as the expiration date of their current contract approached. All the employer's nonprobationary employees were union members; none of its probationary employees were. On April 21, 2001, the nonprobationary

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employees voted unanimously to authorize a strike if the employer's final offer was unsatisfactory. On April 26, the nonprobationary employees rejected the employer's final offer. On April 27, the employer locked out the nonprobationary employees. This partial lockout was ultimately found unlawful. On May 21, the employer implemented its final offer and invited "union members" to return to work. The union rejected the invitation, and the lockout was converted to a strike that same day. The following week, some nonprobationary employees crossed the picket line and returned to work. On May 29, the employer received a disaffection petition signed by a majority of the unit. 349 NLRB at 1070-1071. Thus, as in *United Site Services*, unit employees demonstrated overwhelming union support immediately before the employer violated the Act, and immediately after that violation, a majority signed a disaffection petition. As in *United Site Services*, the Board concluded that the unfair labor practice caused the disaffection.

Here, in contrast, unit employees' support of the Union was solid but not overwhelming shortly before the failure-to-meet violation began,³¹ and the disaffection petition was signed 10 months after that violation ended, and 7 and 4 months, respectively, after the refusal-to-consider and failure-to-furnish violations—not immediately thereafter, as in *United Site Services* and *Bunting Bearings*. As I have shown, 10-month, 7-month, and 4-month time gaps are too lengthy to be probative of taint under *Master*

31. I take administrative notice that the tally of ballots in Case 07-RC-226264, dated September 25, 2018, shows 107 votes for and 79 against representation by the Union.

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Slack. Moreover, the violations in *United Site Services* and *Bunting Bearings* were ones the unit employees would have been aware of: in the former case, failing to recall multiple strikers in violation of Section 8(a)(3); in the latter, instituting an unlawful partial lockout. As repeatedly noted, there is no evidence that the unit employees in the instant case were aware of any of the Respondent's unfair labor practices.³²

Like the previous factors, the fourth *Master Slack* factor also fails to support a finding that the Respondent's unfair labor practices tainted the unit employees' disaffection petition.

Conclusion of Master Slack analysis

None of the *Master Slack* factors supports a finding that the Respondent's three unremedied unfair labor practices caused the unit employees to become disaffected with the Union. Consequently, the disaffection petition is untainted, and I would reverse the judge's contrary finding. It remains to be determined, however, whether the signatures on the petition established actual loss of majority status. I would therefore sever the withdrawal-of-recognition allegation and remand it to the judge to determine whether the signatures on the disaffection petition established that the Union had actually lost majority status. Accordingly, from my colleagues' finding

32. Compare *Goya Foods of Florida*, 347 NLRB 1118, 1122 (2006) (finding the final *Master Slack* factor satisfied where employees had knowledge of the employer's unlawful actions), enfd. 525 F.3d 1117 (11th Cir. 2008).

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that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, I respectfully dissent.

Dated, Washington, D.C. April 20, 2022

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us
on your behalf

Act together with other employees for your
benefit and protection

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Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (“International Union”), the exclusive certified representative, and/or Local 228, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (“Local 228”), the International Union’s designated servicing representative, for employees in the bargaining unit by failing to meet at reasonable times for purposes of collective bargaining.

WE WILL NOT withdraw recognition from the International Union and/or Local 228 or fail and refuse to bargain with the International Union and/or Local 228 as the exclusive collective-bargaining representative and designated servicing representative of unit employees.

WE WILL NOT refuse to bargain collectively with the International Union and/or Local 228 by failing and refusing to furnish them with requested information that is relevant and necessary to the performance of their respective functions as the bargaining representative and designated servicing representative for our unit employees.

WE WILL NOT inform the International Union and/or Local 228 that there is no need to make a proposal on union-administered benefit plans because we will not agree to change our current benefit plans.

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, upon request, bargain with the International Union and/or Local 228 as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All of our full-time and regular part-time production and maintenance employees, including quality inspectors, shipping and receiving employees, material handler employees, leaders, environmental assistants, and tool room employees employed at our facility located at 44044 Merrill Road, Sterling Heights, Michigan; but excluding office clerical employees, professional employees, managers, temporary staffing agency employees, time study engineers, confidential employees, salaried employees, and guards and supervisors as defined by the Act.

WE WILL recognize that the certification year is extended for an additional 6 months from the date that good faith bargaining resumes.

WE WILL meet and bargain collectively and in good faith with the International Union and/or Local 228 in accordance with a bargaining schedule of at least 40

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hours per calendar month for at least 8 hours per session until the parties reach a complete collective-bargaining agreement or good-faith impasse in negotiations.

WE WILL furnish to the International Union and/or Local 228 in a timely manner the cost information requested in the union information requests of April 17, 2019, and July 9, 2019.

J.G. KERN ENTERPRISES, INC.

The Board's decision can be found at www.nlrb.gov/case/07-CA-231802 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Kelly Temple, Esq., for the General Counsel.

Christopher M. McHale, Esq., of Potomac Falls, Virginia, for the Respondent.

Stuart Shoup, Esq., of Detroit, Michigan, for the Charging Party.

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DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried on August 3, 2020.¹ Local 228, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, (the Charging Party or Local 228) filed the charges on November 27, 2018, July 29, 2019, and December 3, 2019. The Regional Director for Region 7 of the National Labor Relations Board (NLRB or Board) issued the initial complaint on February 21, 2019, the first consolidated complaint on October 8, 2019, the second consolidated complaint on May 8, 2020, and the second consolidated amended complaint (the Complaint) on June 22, 2020.

On October 3, 2018, the Board certified the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (Union or International Union) as the bargaining representative of a unit of the Respondent's production and maintenance employees. The Complaint alleges that, after certification, the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act or NLRA): from October 15, 2018, to January 9, 2019, by refusing to meet with the Charging Party and/

1. Due to the compelling circumstances created by the Coronavirus Disease pandemic, the hearing in this case was conducted remotely by videoconference using Zoom technology and under appropriate safeguards. See *William Beaumont Hospital*, 370 NLRB No. 9 (2020).

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or the International Union and by cancelling previously agreed upon bargaining on November 5-7, 26-28, and 30, 2019; on April 10, 2019, by telling the Charging Party that there was no need to make a proposal on benefit plans because the Respondent was keeping its current benefit plans; failing and refusing to provide information about employee benefits that the International Union and Charging Party sought in written requests on about April 17 and July 9, 2019; and on November 25, 2019, by withdrawing recognition from the Charging Party. The Respondent filed a timely Answer in which it denied committing any of the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT AND ANALYSIS**I. JURISDICTION**

The Respondent, a corporation, operates an office and place of business in Sterling Heights, Michigan, where it is engaged in the manufacture, machining, and non-retail sale of automotive parts. In conducting these business operations, the Respondent purchases and receives at its Sterling Heights facility goods valued in excess of \$ 50,000 directly from points outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2),

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(6), and (7) of the Act. I find that the Charging Party and the International Union are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

1. Respondent Agrees to Dates to Start Contract Negotiations, then Cancels

On October 3, 2018, after a representation election, the Board certified the International Union as the bargaining representative of a unit composed of production and maintenance employees at the Respondent's automotive parts manufacturing facility in Sterling Heights, Michigan.² At about the same time, the International Union designated its local union, Local 228, as the servicing representative for the bargaining unit employees. The Respondent did not have collective-bargaining relationships with any other unit of employees.

2. The bargaining unit is described as:

All full-time and regular part-time production and maintenance employees, including quality inspectors, shipping and receiving employees, material handler employees, leaders, environmental assistants, and tool room employees employed by Respondent at its facility located at 44044 Merrill Road, Sterling Heights, Michigan; but excluding office clerical employees, professional employees, managers, temporary staffing agency employees, time study engineers, confidential employees, salaried employees, and guards and supervisors as defined by the Act.

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In an email on October 15, Paul Torrente, the president of Local 228, contacted Jonathan Sutton, an attorney who the Respondent had retained to represent it in contract negotiations.³ Torrente offered to begin negotiations “anytime” at Sutton’s “earliest convenience.” Sutton responded by email on October 17 and stated that he was available to meet with Local 228 on November 5 to 7 or 26 to 28, although “things are subject to change rather quickly sometimes.” The next day, October 18, Torrente responded to schedule negotiations on November 5, 6 and 7—the earliest dates that the Respondent had offered. Torrente further stated that Local 228 was prepared to negotiate on the second set of dates referenced by Sutton—November 26 to 28. Torrente asked Sutton where he wanted the meeting to take place.

On November 2, Torrente followed-up with Sutton by email, stating that he had not heard from the Respondent since October 17 about the location where the Respondent wished to meet for the November negotiations. There is no written response to this in the record, and the Respondent has not claimed that Sutton responded to either this communication or Local 228’s earlier communication of October 18 regarding the specifics of where the previously scheduled bargaining would take place.

3. At trial, on August 3, 2020, Sutton was asked what his specialty was, and he testified that he had “been doing labor work” for the last 3 years. Transcript at Page(s) (Tr.) 64. That would mean that in October 2018 when Sutton began representing the Respondent regarding bargaining for a first contract, he had been “doing” labor work for approximately 14 to 15 months.

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On November 5—the first day of the scheduled negotiations—Sutton sent an email to Local 228’s financial secretary, stating that he was not available to meet that day as previously agreed. He stated that, in fact, he would not meet with the Union on any of the 6 dates in November when he had previously said he was available. Sutton explained that other matters—specifically, labor negotiations with another employer and involvement in the sale of a property—required his presence and attention in November. Sutton’s communication to the Union did not provide an explanation for: his decision to give the other matters priority over the negotiations with Local 228; why he had agreed to bargain in November if he could not do so; why he did not notify Local 228 that there was problem with the November bargaining dates prior to the day when that bargaining was scheduled to begin; or why he had not responded to the intervening communications from Local 228 about the negotiations. There is no record evidence, or even an assertion, that, prior to November 5 (the day when negotiations were scheduled to begin), the Respondent had communicated to Local 228 about any problem with the parties beginning negotiations on that date.

In his November 5 email cancelling the session, Sutton stated that he could “ask someone else to step in and fill my spot, in an effort to get things started.” That same day, Torrente emailed Sutton, and took him up on the offer to have someone else “step in.” Torrente’s stated that “it ma[de] no difference to” Local 228 whether it was Sutton “or someone else” who represented the Respondent in the negotiations. Torrente requested that someone

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representing the Respondent contact him by November 8 to set a new date to begin negotiations. At trial, Sutton claimed that Torrente had never asked to bargain with someone else despite this documentation of Torrente's request. General Counsel Exhibit Number (GC Exh.) 16.⁴ Later in November, Torrente had communications with James Teague, a labor law consultant for the Respondent. According to Torrente, Teague agreed to negotiate on November 26 and 27, but then texted to cancel those dates. Torrente testified that Teague then agreed to negotiate on November 30, but that Teague cancelled that date as well, citing, as had Sutton, scheduling conflicts. Teague testified that, to the contrary, he only had a single conversation with Torrente in November, and that this conversation did not involve scheduling of negotiations.⁵

4. Sutton's willingness to testify that the Union had not asked to bargain with someone else if Sutton was unavailable reflects poorly on Sutton's credibility as a witness. Based on Sutton's testimony, demeanor, and the record as a whole I find that he was an unusually biased and unreliable witness regarding disputed matters.

5. I do not find a basis in the record, or the demeanor of the witnesses, to resolve the factual dispute regarding whether Teague cancelled scheduled bargaining on November 26, 27 and 30. Torrente's testimony was that Teague had communicated that he was cancelling those dates, but Torrente was uncertain regarding the manner of some of the relevant communications and there is no documentation in the record of Teague's supposed agreement to, or cancellation of, negotiation on those dates. Teague's contrary testimony was also vague, in that he said he communicated with Torrente in November, but did not state what those communications were about, except to say that they were *not* about the ongoing attempts to schedule negotiations. Although I do not find that Teague did (or did not) cancel agreed-upon meetings in November, I do find, as discussed above, that Sutton did so.

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After the Respondent cancelled the November bargaining dates, the Union attempted to arrange bargaining in December. By certified letter dated November 27, 2018, Diane Virelli—an international representative for the Union who was assisting Torrente—proposed 15 bargaining dates between December 4 and 20. Sutton testified that he refused to meet at any time in December because he had sold a property in Houston “and so I was unable to be there.” Transcript at Page(s) (Tr). 66.

On January 10 and 11, 2019—after Local 228 filed an unfair labor practices charge accusing the Respondent of continually postponing negotiations—the Respondent came to the bargaining table for the first time. The record shows that Torrente was lead negotiator for Local 228, and that Virelli was present to assist him. Sutton was lead negotiator for the Respondent, and was assisted by the Respondent’s human resources director, Susan Allen. Teague testified that he attended “maybe two sessions” as “second chair,” but the record does not make clear which sessions those were.

2. Local 228 Requests Cost Information for Existing Employee Benefit Plan; Respondent States that it Will Not Consider Proposal for Union-Administered Benefits Plan and Refuses to Provide Cost Information on Existing Plan

At the time of the first bargaining session in January 2019, Local 228 orally requested information about the insurance and other benefits the Respondent was providing

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to unit employees in order to, in Torrente's words, "cost the agreement, to figure out . . . our proposals and put a whole contract together."⁶ Local 228 was considering proposing that the Respondent replace the health insurance it was currently providing with insurance through a union benefit plan. In response to the information request, the company provided Local 228 with a section of its 2018 employee welcome package in which the Respondent described the employee benefits the company provided.⁷ Later, the Respondent provided Local 228 with a copy of a health insurance option selection form that the company circulated in 2019 for employees to use in selecting from among the choices being offered. These documents showed the cost to employees of various plan options—including co-pays, deductibles, and employee share of premiums. Sutton conceded that Local 228 had asked for not just this information regarding employees' costs, but also for the Respondent's "specific cost structure and exactly what we were paying for benefits." Tr. 74. My review of the welcome package and options form show that those documents do not disclose the *Respondent's costs* for the health insurance or other benefits.

6. Virelli stated that, during negotiations, Local 228 was seeking information both about "what the Employer was actually paying in the benefits package, what their percentage would be" and about employees' costs so that Local 228 could make a proposal. Tr. 56 and 58-59.

7. Local 228 requested the 2019 welcome package describing benefits to employees, but the Respondent only provided the 2018 version. Susan Allen, the Respondent's human resources director, testified that the 2018 welcome package was still current in 2019 because the benefits had not changed.

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On April 2, Torrente followed up the earlier oral requests with an email to Sutton stating that the benefits information the Respondent had provided was insufficient and that other requested “information [was] needed to cost the package for negotiations and provide the company with an option.” On April 10, Sutton responded as follows:

Dear Mr. Torrente,

I have reviewed the requested information, but will not be providing same. I have stated previously there is a limit to the information we will be providing, and in this you ask for more than we will share.

In light of as much, there seems no need for you to put further effort into working up a proposal for union provided benefits. We will stick with the present plan.

Regards,
Jonathan M. Sutton

At the time of the above email, the Respondent had not provided any of the information that Local 228 had requested regarding the Respondent’s costs for the benefits package.

On April 17, 2019, Virelli sent an email to Sutton in which she requested that the Respondent provide, *inter alia*, the following information by May 1, 2019:

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A. General

1. Copies of the Summary Plan Descriptions for all benefit programs.
2. Plan documents for all benefit programs.
3. Eligibility criteria and duration of benefit continuation during period of leave, layoff and termination.
4. Cost information on each benefit program (to the employee)
5. A complete census of the entire bargaining unit showing the following for each employee:
 - a. Date of birth

* * *

B. Health Care

For each plan (medical, prescription drug, dental, vision and hearing):

1. By plan, the number of persons participating in each plan by family status (single, couple, family, or however else categorized) separately.
2. The full premium charge or premium equivalent by category.

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* * *

4. COBRA premium rates listed by family status for each health plan offered to the members.

5. Projected 2017, 2018, 2019 and 2020 cost increases, if any.

C. Life Insurance, Accidental Death & Dismemberment and Optional Dependent Insurance

* * *

2. List the cost/\$ 1000. List the total cost to the Employer.

* * *

On May 2, 2019, Sutton responded to Virelli's April 14 information request in an email to Torrente. In response to five of the specific requests—items A.4.(employees' costs under benefit programs), B.2.(full premiums for health plans), B.4.(COBRA premium rates for health plans), B.5.(projected health plan cost increases), and C.2. (employer cost for, *inter alia*, life insurance)—Sutton stated that "Cost information will not be shared." Sutton's email did not set forth any justification for the refusal to share this cost information. With respect to several of the other specific requests, the Respondent indicated that the information had already been provided in whole or in part—for example, items A.1., A.2., A.3., and A.5.

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On July 9, 2019, Torrente sent an email to Christopher McHale, another attorney representing the Respondent,⁸ requesting essentially the same information that Virelli requested on April 14. In addition to repeating the language from Virelli's request, Torrente's request stated that the copy of the employee handbook that the Union had been provided was "not up to date," and asked for "updated" complete census information for the unit. McHale responded to Torrente 3 days later, on July 12, stating that his understanding was that Sutton had already provided the information, but that he would respond once he heard back from Sutton. About an hour later, Torrente responded "[t]he information I have requested was never provided by Mr. Sutton," and that Sutton had "stated he was not going to provide it."

At first it seemed that Local 228 might have better luck obtaining the cost information from McHale than it had from Sutton. On July 17, McHale told Torrente by email that he would gather the information from the Respondent and provide it. However, McHale did not provide additional information and, instead, stated in a July 25 email that "[i]t is the company's position that all of the information that the union is entitled to has been disclosed." Torrente responded on July 25 by demanding that the Respondent provide the information by July 30 - the date of the next scheduled bargaining session. The Respondent never provided Local 228 with a number of the types of requested information, including information

8. McHale is trial counsel for the Respondent in the instant proceeding.

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showing the Respondent's costs for unit employees' healthcare insurance and other benefits.

Sutton provided the only testimony explaining the Respondent's refusal to provide Local 228 with cost information for the benefits. Specifically, Sutton stated that Local 228 wanted to know "our specific cost structure and exactly what we were paying for benefits," Tr. 74, but that he refused to provide that information because:

[T]hat's like going to a car dealership and saying, well, I'll pay you 80 grand for a car, and then where do you negotiate? They're going to sell you a car for \$ 79,999. You're not going to get a better deal than you otherwise might.

Tr. 75.

3. State of Bargaining at Time of Petition and
Withdrawal of Recognition

A. Course of Bargaining

As noted above, the Respondent cancelled the negotiations that the parties had agreed to conduct in November 2018 and then refused Local 228's request to bargain in December 2018. On November 27, 2018, Local 228 filed the first of the unfair labor practices charges in this case. The charge alleged that the Respondent was failing and refusing to bargain in good faith by, *inter alia*, the "[c]ontinued postponement of negotiations"

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After Local 228 filed the unfair labor practices charge, the Respondent met for contract negotiations in January and February. The Respondent did not bring a single proposal to the bargaining table during the sessions in January and February. Tr. 89-90. Local 228 made multiple proposals on individual contract issues during those sessions.⁹ As discussed, *supra*, at the start of the January session, Torrente asked the Respondent to provide information on the Respondent's costs for the existing employee benefits in order to guide Local 228 in developing a comprehensive contract proposal. During the January sessions the parties reached tentative agreements on some of Local 228's proposals, but Sutton told Torrente that the Respondent would refuse to "dive into anything of real consequence" until Local 228 submitted a comprehensive contract proposal. Prior to the January bargaining session, Sutton had not informed Local 228 that the Respondent was insisting that Local 228 submit a comprehensive contract proposal. While he eschewed negotiations over matters of consequence without a comprehensive proposal, Sutton did not make a comprehensive proposal of his own on behalf of the Respondent. The Respondent did not show, or even claim, that Local 228 indicated that it would not consider employer proposals—comprehensive or otherwise—or that Local 228 expressed that it would be unwilling to make a comprehensive proposal of its own once the Respondent provided the benefits information that Local 228 requested for use in crafting such a proposal.

9. During his testimony, Sutton repeatedly characterized this circumstance—in which the Respondent did not present a single proposal and Local 228 presented multiple proposals—as Local 228 being utterly unprepared for bargaining. Tr. 66, 76-77.

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Negotiations continued in March 2020 and during those sessions Local 228 provided the Respondent with what Sutton characterizes as “a bunch of” of additional proposals. The parties reached tentative agreement on some of those proposals. In April 2019, the parties reached additional tentative agreements. As discussed, *supra*, on April 10, Sutton told Torrente, in writing, that the Respondent “will stick with the present [employee benefits] plan” so there was “no need for [Local 228] to put further effort into working up a proposal for union provided benefits.”

In May, the parties had a 2-day bargaining session scheduled. On the first day Torrente and Sutton met privately about the negotiations. The following day Torrente and Virelli asked to meet privately with Sutton. Sutton testified that, during that meeting, the parties tried to “fine-tune some details on things that had already been reached.”¹⁰ The parties had a 2-day session in June as well. They met for 8 hours on the first day, but they ended negotiations early on the second day at Local 228’s request.

As is discussed below, the Respondent withdrew recognition from the International Union on November 25, 2019, after receiving a petition signed by employees.

10. Sutton confirmed that these meetings between the Respondent and Local 228 occurred during the time that the parties were scheduled to meet in May, and that the parties fine-tuned agreements at that time. However, the Respondent’s brief describes this as Local 228 “refus[ing] to bargain and cancel[ing] the May 2019 session on the spot.” This is a mischaracterization of the evidence.

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As of that time, the parties had reached 35 tentative agreements. They had not reached agreement on any of the economic issues—including insurance benefits, wages, and profit sharing. The International Union filed the final charge at-issue in this case on December 3, 2019. That charge alleges that the Respondent violated the Act when it withdrew recognition on November 25, 2019.

B. Petition and Withdrawal of Recognition

Employees at the Respondent circulated a petition in November 2019 which had the heading: “We the undersigned no longer wish to be represented by UAW local 228 for any purposes.”¹¹ The petition was signed approximately 205 times, and each signature is dated on either November 18, 19, or 20. There was no testimony showing how many of the persons who signed the petition were in the bargaining unit or what was the total number of employees in the bargaining unit at the time of the petition. Nor was there testimony that each of the signatures represented a discrete employee. To the contrary, my own cursory review showed that at least one individual (Oasiur J. Hegel) signed twice. There was also no testimony from a witness, or witnesses, who claimed to be able to authenticate the signatures. Allen testified that the petition was signed by “over 80 percent.” The parties entered into a stipulation that there was no allegation

11. The petition also has a heading written in a foreign language and alphabet that were not identified or translated on the record. The placement of this second heading suggests that it has the same meaning as the English language heading quoted above, but there was no testimony to that effect.

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that the “Respondent did . . . overtly solicit, assist, or otherwise interfere with the formulation, preparation, or promulgation,” of the petition.¹²

The parties were scheduled to negotiate on November 25, 2019. Before the negotiations could get underway that day, McHale and Teague presented Torrente and Virelli with a letter, signed by McHale, stating that the Respondent was withdrawing recognition from the Union based on an employee petition showing that a majority of employees no longer wished to be represented by the Union.¹³ Teague orally stated that the Respondent was

12. The Respondent presented the testimony of one employee, Damien Williams. He was the only bargaining unit employee called by any party in this case. Williams was not eligible to vote at the time the employees elected the Union as their bargaining representative, but by the time of the hearing in this matter he had become a bargaining unit employee. He stated that he circulated the petition, but he did not claim that he was instrumental in its creation or that he was a leader of the petition effort. Williams testified that he supported the petition for two reasons. First, he stated that when he worked for a previous employer there was a different union present and that the union at the previous employer always “tried to . . . get money.” He conceded, however, that to his knowledge the Respondent’s employees had not been required to pay dues to the Union. Second, Williams stated that he went to a picnic that the Union advertised, but that he had trouble finding the union representatives at the picnic site and felt “kind of disrespected as a result.” Williams did not claim to have any knowledge regarding why anyone else signed the petition.

13. The letter stated in relevant part:

On Friday, November 22, 2019, at approximately 10:00 am, J.G. Kern Enterprises, Inc. (J.G. Kern)

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“no longer going to bargain because the employees had decided to not continue to be part of the Union.” Torrente replied that the Respondent had an obligation to negotiate and Teague told him to “just file a ULP charge.”

When Torrente returned to his office on November 25, he sent an email to McHale in which he stated:

Putting aside the accuracy of your claim that an uncoerced majority of employees no longer wish to be represented by the Union—which we dispute—be advised that, as a matter of law, the various unfair labor practices committed by the Company prohibit it from withdrawing recognition. We demand that you rescind this decision immediately.

McHale responded by email on November 26, stating:

Unfortunately, J.G. Kern’s hands are tied and must respect the employees’ Section 7 rights. J.G. Kern can not unilaterally decide to ignore their decision. To do so would result in multiple ULPs from employees.

was presented with a Petition signed by a majority of employees stating unequivocally that they do not wish to be represented by the United Auto Workers (UAW) and Local 228. The National Labor Relations Act prohibits an employer from bargaining with a union where the employer has a good faith certainty that the union does not enjoy majority status. As a result, J.G. Kern has no choice but to withdraw recognition from the UAW and Local 288.

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After November 25, 2019, there were no further contract negotiations between Local 228 and/or the International Union and the Respondent.

III. ANALYSIS AND DISCUSSION

A. Respondent's Alleged Failure to Bargain from October 2018 Until January 9, 2019 by Refusing to Meet and Cancelling Meetings

The National Labor Relations Act (the Act) states that it is “the policy of the United States,” to “encourag[e] the practice and procedure of collective bargaining.” Section 1, 29 U.S.C. Section 151. To implement this policy, the Act imposes various obligations, including the obligation on unions and employers to “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” Section 8(d), 29 U.S.C. Section 158(d); see also *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348-349, 78 S. Ct. 718, 2 L. Ed. 2d 823 (1958) and *Burns Sec. Services*, 300 NLRB 1143, 1144 (1990). This obligation means that the parties are legally required to make “expeditious and prompt arrangements” to meet and confer, *Professional Transportation, Inc.*, 362 NLRB 534, 540 (2015), quoting *J.H. Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949), and to do so with the same “degree of diligence” as they “would display in . . . other business affairs of importance,” *Quality Motels of Colorado*. 189 NLRB 332, 336-337 (1971) (quoting *J. H. Rutter-Rex*, *supra*), enfd. 462 F.2d 1375 (10th Cir. 1972).

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In the instant case, the General Counsel alleges that the Respondent failed to meet these obligations, and violated Section 8(a)(5) and (1) of the Act, by failing and refusing to meet with Local 228 from October 15, 2018, until January 9, 2019. It is undisputed that as of October 3, 2018, when the Board certified the Union, the Respondent's bargaining obligations commenced. See *Beaird Industries, Inc.*, 313 NLRB 735, 736 (1994) (obligation to bargain commences, at the latest, upon certification of bargaining representative). On October 15, Local 228 contacted the Respondent and offered to meet "anytime" that was convenient for the Respondent. The Respondent delayed meeting with the Local 228 for over 3 months from the date of certification by declining to offer any dates prior to November, cancelling the November dates, and then refusing Local 228's request to schedule meetings during December. There is no evidence in the record, or any claim by the Respondent, that during this same 3-month period, Local 228 ever declined to meet on any date and, in fact, the undisputed facts show that Local 228 repeatedly sought to meet. The Board has long recognized that bargaining delays such as the one engaged in by the Respondent here, have the effect, and sometimes the purpose, of undermining the union's support among employees. *Fruehauf Trailer Services, Inc.*, 335 NLRB 393, 394-395 (2001); *Quality Motels of Colorado*, 189 NLRB at 336-337; *Sarasota Coca-Cola Bottling Co.*, 162 NLRB 38, 45-46 (1966), enfd. 402 F.2d 84 (5th Cir. 1968). "[A] delay in commencing collective bargaining entails more than mere postponement of an ordinary business transaction, for the passage of time itself, while employees grow disaffected and impatient with their designated

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collective bargaining agents' failure to report progress, weakens the unity and economic power of the group, and impairs the union's ability to secure a beneficial contact." *Northeastern Indiana Broadcasting Co.*, 88 NLRB 1381, 1390-1391 and fn.9 (1950), quoting *Burgie Vinegar Co.*, 71 NLRB 829, 830 (1946). "It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties." *Brooks v. NLRB*, 348 U.S. 96, 99-100, 75 S. Ct. 176, 99 L. Ed. 125 (1954)).

After reviewing the record and applicable law, I find that the General Counsel has established that the Respondent violated Section 8(a)(5) and (1) by unreasonably delaying bargaining during a period of almost 3 months from October 15, 2018, to January 9, 2019. It did this, most notably, by cancelling bargaining dates in November and then making a blanket refusal to bargain at all in December. The Board has found delays of similar lengths of time to be unreasonable in other cases. In *Northeastern Indiana Broadcasting Co., Inc.*, the Board held that an employer violated its obligation to bargain in good faith where it delayed meeting for 5 weeks from the date when the union asked the employer for negotiation dates. 88 NLRB at 1381-1382 and 1390-1391 (1950). In *Quality Motels of Colorado, Inc.*, the Board affirmed that the Respondent had violated its duty to meet at reasonable times when it delayed meeting for almost 2 months after the first negotiation meeting, 189 NLRB at 336-337. In *Fruehauf Trailer Services, Inc.*, the Board found that the employer had violated Section 8(a)(5) and

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(1) based on conduct that included the employer delaying bargaining for almost 3 months after the union's request for an initial bargaining session. 335 NLRB 393, 393 and fn. 5 (2001). The Board has been particularly inclined to rule that a party violated its duty to meet at reasonable times when that party cancels previously agreed upon bargaining dates, as the Respondent did here. See, e.g., *Professional Transportation, Inc.*, 362 NLRB at 534-535 (cancellation of bargaining sessions "clearly established an impermissible pattern of dilatory conduct by the [employer]"), *Lancaster Nissan*, 344 NLRB 225, 227-228 (2005) (employer violated its duty to bargain at reasonable times where it cancelled several meetings, often at the last minute), enfd. 233 Fed.Appx. 100 (3d Cir. 2007) *Calex Corp.*, 322 NLRB 977, 978 (1997) (employer engaged in a pattern of delay where it cancelled at least three scheduled meetings), enfd. 144 F.3d 904 (6th Cir. 1998); see also *Camelot Terrace* 357 NLRB 1934, 1935 and 1937 (2011) (employer required to pay union's bargaining expenses where it demonstrated overt bad-faith conduct by, inter alia, canceling meetings the day before they were scheduled to occur), enf. granted in relevant part 824 F.3d 1085, 423 U.S. App. D.C. 74 (D.C. Cir. 2016).

The Respondent attempts to escape liability by arguing that Sutton, it's negotiator, had other obligations that prevented him from meeting sooner. This defense fails as a matter of law and is also untenable as a factual matter given the record here. Regarding the law, the Board has repeatedly and consistently rejected the "busy negotiator" defense forwarded by the Respondent, without regard to whether the negotiator's scheduling conflicts are

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legitimate. See, e.g., *Kitsap Tenant Support Services*, 366 NLRB No. 98, slip op. at 6 fn. 14 (2018); *Fruehauf Trailer*, 335 NLRB at 393; *Barclay Caterers*, 308 NLRB 1025, 1035-1037 (1992); *O & F Machine Products Co.*, 239 NLRB 1013, 1018-1019 (1978); *Sarasota Coca-Cola Bottling Co.*, 162 NLRB 38, 45-46 (1966); *Radiator Specialty Company*, 143 NLRB 350, 369 (1963), enforcement of bargaining order denied on other grounds 336 F.2d 495 (4th Cir. 1964); *Northeastern Indiana Broadcasting Co., Inc.*, 88 NLRB at 1390-1391. “[T]o the extent that” Sutton “may have been busy, this is no answer to the Respondent’s obligation to furnish a representative to meet with [the union] at reasonable intervals. The Act does not permit a party to hide behind the crowded calendar of the negotiator whom it selects.” *Sarasota Coca-Cola*, 162 NLRB at 46; see also *Calex Corp.*, 322 NLRB at 978 (“[A]n employer’s chosen negotiator is its agent for purposes of collective bargaining, and . . . if the negotiator causes delays in the negotiating process, the employer must bear the consequences.”).

Given the Board’s rejection of the “busy negotiator” defense, the Respondent’s reliance on it would fail even if the facts showed that Sutton was diligently trying to meet at reasonable times and was not using delays in an effort to undermine the Union’s support among employees. Here, however, the Respondent has not only failed to show that Sutton was exhibiting the requisite diligence, but rather shows that he was not doing so. During the parties’ exchange on October 16 and 17, the Respondent stated it was available to bargain on six dates in November and Local 228 confirmed that it would bargain on the first

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three of those dates and would, if appropriate, bargain on the other three. The record indicates that between that October 16-17 exchange and the scheduled start of negotiations on November 5, the Respondent did not communicate to Local 228 that a problem of any kind had developed with respect to the November bargaining dates, did not suggest other dates, did not respond to Local 228's October 17 and November 2 queries about a specific location for the November 5 meeting, and did not contact Local 228 to clarify or modify anything else about any of the November dates. It was not until November 5—the very day when the negotiations were scheduled to begin—that the Respondent announced that it would not bargain either on that day or on any of the other dates it had previously stated it was available in November. Neither in its November 5 announcement, nor at trial, did anyone from the Respondent explain why the negotiator's other matters took priority over the previously offered and scheduled bargaining dates with Local 228 or why the negotiator waited until the day of the scheduled session to inform Local 228 of the purported scheduling conflicts. Moreover, when the Respondent stated that it could have a different negotiator commence bargaining, and Local 228 responded that it would bargain with any negotiator representing the Respondent, the Respondent—according to the testimony of the substitute negotiator himself (Teague)—did not schedule him to step in and meet with Local 228 on any of the previously offered and scheduled dates in November or, for that matter, on any date in November. Worse, rather than attempting to make up for this delay by moving forward diligently with new dates, the Respondent then refused to bargain at all for the entire month of December even after Local 228 offered

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15 bargaining dates that month. It was not until after the Union filed an unfair labor practices charge regarding the Respondent's postponement of bargaining that the Respondent came to the bargaining table for the first time. Cf. *Northeastern Indiana Broadcasting*, 88 NLRB at 1391 ("Further proof of the Respondent's lack of good faith is that it made no effort to schedule a meeting until the Union threatened to file unfair labor practice charges.").

It is clear under these facts that, during the 3 months following certification, the Respondent failed to meet its obligation to make "expeditious and prompt arrangements" to meet and confer, *Professional Transportation*, 362 NLRB at 540, with the degree of diligence it would accord to other business matters of importance, *Quality Motels*, 189 NLRB at 336-337. I make no finding as to whether the Respondent's delays were part of an intentional effort to undermine union support, but the Respondent's efforts to meet were so strangely feeble that the specter of intentional delay cannot be wholly discounted.

As discussed above, the Respondent unreasonably delayed meeting with Local 228 for a period of almost 3 months at the start of the certification year. The Respondent's "busy negotiator" defense fails as a matter of law and, even if that were not the case, that defense would fail under the facts here because the Respondent did not exert the requisite effort to meet at reasonable times as required by the Act. I find that the Respondent failed to bargain in good faith and violated Section 8(a)(5) and (1) of the Act during the period from October 15, 2018, to January 9, 2019.

*Appendix C**B. Respondent's Alleged Failure to Bargain by Stating
That There Was No Need for Local 228 to Make a
Proposal on Benefits, Because the Respondent was
Keeping its Current Plan*

The General Counsel alleges that the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act when, on April 10, 2019, Sutton told Torrente that there was “no need for you to put further effort into working up a proposal for union provided benefits” because the Respondent had decided to “stick with the present plan.” The Respondent announced its decision not to consider union proposals on a benefit plan, including health insurance, before engaging in any substantive negotiations on the subject. The General Counsel is correct that this is a clear violation of the Act. Health insurance and other employee benefit plans are terms and conditions of employment and a mandatory subject of bargaining. *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159-160, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971); *Larry Geweke Ford*, 344 NLRB 628, 628 fn.1 (2005); *Royal Motor Sales*, 329 NLRB 760, 770 (1999), enfd. 2 Fed.Appx. 1 (D.C. Cir. 2001); *Borden, Inc.*, 196 NLRB 1170, 1174-1175 (1972). An employer violates the Act where, as here, the employer states that during contract negotiations it will refuse to even consider union proposals on a mandatory subject of bargaining. *E.I. Dupont De Nemours & Co.*, 304 NLRB 792, 792 fn. 1 and 802 (1991).

The Respondent states that good faith bargaining does not require a party to yield and accept the other party's

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proposals. Brief of Respondent at Page 10. That point is not controversial, but entirely beside the point here. The Respondent violated the Act because it foreclosed negotiation on the subject before Local 228 even had an opportunity to make a proposal, not because it refused to yield and accept a proposal put forth by Local 228.

The Respondent violated Section 8(a)(5) and (1) of the Act since April 10, 2019, when it stated that it would not consider any proposal on union-administered benefits.

C. Respondent's Refusal to Provide Information

An employer's obligation to bargain in good faith under Section 8(a)(5) and (1) of the Act, includes the obligation to furnish the employees' bargaining representative, upon request, with relevant information that the union needs to perform its statutory duty as the employees' bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436, 87 S. Ct. 565, 17 L. Ed. 2d 495 (1967). Union requests for information regarding bargaining unit employees' terms and conditions of employment are "presumptively relevant" and such information must be provided upon request. *Richfield Hospitality, Inc.*, 368 NLRB No. 44, slip op. at 2 fn. 4 and 26 (2019); *Disneyland Park*, 350 NLRB 1256, 1257 (2007).

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) when it refused the April 17 and July 9, 2019, requests for cost information about the existing employee benefit plans. As noted in the previous section, health insurance and other employee

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benefit plans are a term and condition of employment for the unit employees and, therefore, Local 228's request for information was presumptively relevant. The record shows that the Respondent answered the Union's April information request by stating that it was refusing to provide cost information in response to the following specific requests: cost information on each benefit program (to the employee); the full premium charge or premium equivalent by category for each health care plan; COBRA premium rates listed by family status for each health plan offered to the members; the projected health care plan cost increases for 2017, 2018, 2019, 2020; total cost to the employer for the life insurance benefit, accidental death and dismemberment and optional dependent insurance. In response to the July 9 follow-up request for this information, the Respondent refused to provide any new information.

The evidence shows that the Respondent did withhold much of the presumptively relevant information at issue here.¹⁴ In particular the Respondent failed and refused to provide Local 228 with: the "full premium" for health care insurance, which would include the employer's share; COBRA rates; projected health care plan increases; and the employer's cost for the life insurance and related benefits. All of this information regarding unit employees' benefits was presumptively relevant.

14. The Respondent had actually provided some of the cost information that it stated it was refusing to provide. For example, the Respondent had already provided Local 228 with some employee cost information for the insurance plan—including the weekly cost to employees and the amounts of co-pays and deductibles.

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The Respondent did not offer the Union any substantive basis for withholding the information sought in the April and July requests. Even at trial the Respondent's witnesses provided no explanation at all for refusing to provide most of this presumptively relevant cost information. The only information that the Respondent's witnesses provided any rationale for withholding was the information relating to the Respondent's own costs for its health insurance plan. That rationale, testified to by Sutton, was that he was not required to provide the information because:

[T]hat's like going to a car dealership and saying, well, I'll pay you 80 grand for a car, and then where do you negotiate? They're going to sell you a car for \$ 79,999. You're not going to get a better deal than you otherwise might.

This explanation demonstrates either a fundamental ignorance of, or disregard for, the Respondent's duties and obligations during collective bargaining. An employer is required by the Act to engage in good faith bargaining with employees' bargaining representative. As the Supreme Court has long held, this includes the duty to provide the bargaining representative with requested information relevant to bargaining. See *NLRB v. Acme Industrial Co.*, *supra*. Neither a car buyer nor a dealership is subject to the strict requirements of federal labor law with respect to a car purchase negotiation. Indeed, I can think of few negotiating models less germane here (or more often bemoaned) than the one of car sales. I note that even that unacceptable explanation only goes to a small

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portion of the presumptively relevant information that the Respondent withheld here. For most of the withheld information the Respondent provided no explanation other than its own obstinacy.

The Respondent cites *Armstrong World Industries, Inc.*, for the proposition that the presumption of relevance is rebuttable. 254 NLRB 1239 (1981). That is true as far as it goes, however, in this case the Respondent did nothing to rebut the presumption of relevance. Indeed, as noted immediately above, the only rationale offered by the Respondent's negotiators was Sutton's entirely meritless suggestion that collective bargaining should follow the model of car sale negotiations and, in any case, that rationale only addresses one of the types of requested information that the Respondent refused to provide. In its brief, the Respondent cites no authority to support its bald assertion that the cost information was not relevant. This is not surprising since the Board has repeatedly affirmed that information regarding the costs of employee benefit plans, including the employer's costs, is relevant to bargaining. See, e.g., *B & B Trucking, Inc.*, 345 NLRB 1 at fn. 1 (2005); *Pontiac Nursing Home, LLC*, 344 NLRB No. 31 (2005), enfd. 173 Fed.Appx. 846 (D.C. Cir. 2006); *Republic Die & Tool Co.*, 343 NLRB 683, 686 (2004); *The Nestle Company*, 238 NLRB 92, 94 (1978); *Borden Inc.*, 235 NLRB 982, 983 (1978), affirmed following remand by 248 NLRB 387 (1980). Even if the cost information for unit employees' benefits was not presumptively relevant, and even if the Board had not repeatedly recognized the relevance of exactly this type of information, I would find that such information was clearly relevant in this case

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because I credit Torrente's testimony that Local 228 needed the information to "cost the agreement, to figure out . . . our proposals and put a whole contract together." Indeed, without such information it would be difficult for Local 228 to know if it could even make a benefits proposal that might be economically attractive to the Respondent.

The Respondent violated Section 8(a)(5) and (1) of the Act since April 17 and July 9, 2019, when it refused to provide the Union with multiple types of requested cost information regarding the existing benefit plans for bargaining unit employees.

D. Withdrawal of Recognition on November 25, 2019

A union certified by the Board enjoys a presumption of majority support for a period of 1 year. *Brooks v. NLRB*, 348 U.S. at 104; *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enfd. 156 Fed. Appx. 331 (D.C. Cir. 2005). The disaffection petition at-issue in this case was signed by employees approximately 6 to 7 weeks after that 1-year period. On November 25, 2019, the Respondent withdrew recognition from the Union citing the petition which it states was signed by a majority of the bargaining unit employees.¹⁵ The General Counsel

15. For purposes of this analysis I assume, without deciding, that the disaffection petition was signed by a majority of bargaining unit employees. "[W]here an employer relies on an employee petition for evidence of the union's loss of majority support, it is the Respondent's obligation to authenticate the petition signatures on which it relies." *Latino Express, Inc.*, 360 NLRB 911, 925 (2014). I note that the record does not include such authentication, nor

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alleges that the Respondent's withdrawal of recognition was unlawful because the Respondent committed unremedied violations of its bargaining obligations under the Act during the period between certification and the petition, and that this unlawful activity tended to cause the employee disaffection and poor morale that gave rise to the petition. For the reasons discussed below, I agree that the Respondent violated the Act by withdrawing recognition since the disaffection petition it relies on was tainted by the Respondent's unremedied violations of its bargaining obligations.

“The Board has held that an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the Union.” *United Site Services of California, Inc.*, 369 NLRB No. 137, at 15 (2020). Where, as here, the Respondent's unlawful activity did not directly advance the antiunion petition, the Board decides whether the petition is impermissibly tainted by consideration of four factors.

does it establish how many total bargaining unit members there were in November 2018, how many of the signatures on the petition were those of bargaining unit employees, or how many were repeat signatures. Allen, the Respondent's human resources director, testified that the signatures represented over “80 percent,” but she did not specify 80 percent of *what*. However, neither the General Counsel nor the Charging Party have argued that the petition was not signed by a majority of the unit employees. Since, for the reasons discussed in this decision, I find that the petition was tainted by the Respondent's unfair labor practices, and therefore could not in any case be relied upon as a basis for withdrawing recognition, I do not reach the question of whether the Respondent met its burden of authenticating the signatures of a majority of unit employees.

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- (1) The length of time between the unfair labor practices and the withdrawal of recognition;
- (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees;
- (3) any possible tendency to cause employee disaffection from the union; and
- (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Ibid.; *Master Slack*, 271 NLRB 78, 84 (1984).¹⁶

In this case, as found above, the Respondent committed multiple unfair labor practices during the period between certification and the withdrawal of recognition. Those unfair labor practices were unremedied when the

16. The Respondent makes no mention of *Master Slack*, *supra*, or the longstanding, and frequently affirmed, standard forth in that case, but rather cites *Johnson Controls Inc.*, 368 NLRB No. 20 (2019), which the Respondent says “updated [the Board’s] legal test for the withdrawal of recognition.” Brief of Respondent at Page 11. *Johnson Control* primarily addressed timing issues relating to anticipatory withdrawal near the time of contract expiration, and in no way addressed, or modified, the standards set forth in *Master Slack* for determining whether an antiunion petition was tainted by the employer’s unremedied unfair labor practices. Any doubt about this is eliminated by the Board’s application of *Master Slack* in a case, *United Site Services of California*, 369 NLRB No. 137 at 15, that it decided subsequent to *Johnson Control*.

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Respondent withdrew recognition and I find that, under the four-factor analysis, they would be expected to cause employee disaffection with the Union. Regarding the first factor, in this case the Respondent's unlawful refusal to provide requested cost information regarding benefits were ongoing at the time of withdrawal. Thus the "length of time" weighs in favor of finding the petition impermissibly tainted. This is true regardless of any of the Respondent's other unlawful activity, however, I note that the Respondent never reversed its unlawful refusal to negotiate over union-administered employee benefits. Because of this, and since the refusal to negotiate over benefits was linked to its ongoing refusal to provide cost information regarding benefits, this conduct provides additional support for finding that the length of time factor weighs in favor of finding the petition tainted.

The second factor—the nature of the illegal acts and the possibility of detrimental effects on employees—also favors finding that the petition was unlawfully tainted. The Respondent unlawfully delayed bargaining for approximately 3 months out of the 1-year period during which there was an irrebuttable presumption of majority status. This deprived the employees' union of the ability to bargain during a significant portion of the period when a union is generally at its greatest strength. See *Northwest Graphics, Inc.*, 342 NLRB at 1289 (refusal to bargain during part of the certification year has taken from the union the opportunity to bargain during the period when unions generally have the greatest strength). Therefore, the nature of this violation had a detrimental effect on employees who had voted to have the charging

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party represent them and who were entitled to a period of negotiation free from a potential, or actual, withdrawal of recognition by their employer. In addition, the Respondent's unlawful refusal to consider any proposal for union-administered benefits and to provide benefit cost information impeded the Charging Party from seeking to improve employees' terms and conditions of employment in the important area of employee benefits.

Regarding the third factor—any possible tendency to cause employee disaffection from the union—the record supports finding that that the Respondent's unlawful conduct tainted the petition. This factor does not require a showing that the Respondent's misconduct actually caused the disaffection, but only that the misconduct had a *possible tendency* to adversely affect the Charging Party's relationship with unit employees. It is fair to assume that employees who elect a union as their representative do so because they hope they will see improvements to their terms and conditions of employment. The Respondent's unlawful actions delayed and impeded progress towards such improvements during most of the certification year and would reasonably make the bargaining representative appear ineffectual and further bargaining appear futile. This lack of progress would have not just the *possible tendency*, but the *likely tendency*, to cause employees to lose faith with the Charging Party's ability to bring about positive changes in the workplace. In *Fruehauf Trailer Services*, the Board stated that it "has long recognized that dilatory bargaining tactics . . . have a tendency to invite and prolong employee unrest and disaffection from a union." 335 NLRB at 394. Similarly, in *Westgate Corp.*,

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the Board affirmed that when an employer unlawfully delays bargaining, as the Respondent did here, “unrest and suspicion are generated . . . and the status of the bargaining representative is disparaged.” 196 NLRB 306, 313 (1972).

The fourth and final factor—the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union—also supports finding that the Respondent’s unlawful conduct tainted the petition. There was no evidence of disaffection during the period between certification and the start of any of the three unremedied unfair labor practices found above. The signing of the anti-union petition did not occur until *after* the Respondent’s unfair labor practices. The Board recently stated that, under such circumstances, “[t]he lack of prior disaffection is strong evidence of a causal connection between subsequent disaffection and the Respondent’s unfair labor practices.” *United Site Services*, 369 NLRB slip op. at 16, citing *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007).

For the reasons discussed above, I find that the disaffection petition was tainted by the Respondent’s multiple, unremedied, unfair labor practices, and therefore that the Respondent could not lawfully rely on that petition to withdraw recognition, and violated Section 8(a)(5) and (1) by doing so.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment from October 15, 2018, to January 9, 2019.

4. The Respondent has violated Section 8(a)(5) and (1) of the Act since April 10, 2019, by stating that it would not consider any proposal for a union-administered benefits plan.

5. The Respondent has violated Section 8(a)(5) and (1) of the Act since April 17 and July 9, 2019, by refusing to provide the International Union and the Charging Party with requested cost information regarding the existing benefit plans for bargaining unit employees.

6. The Respondent has violated Section 8(a)(5) and (1) since November 25, 2019, by withdrawing recognition from the Charging Party as the exclusive collective-bargaining representative of the bargaining unit employees.

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

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to

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cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel asks that, as a remedy for the Respondent's violations of its bargaining obligation, I order a 6-month extension of the certification year under *Mar-Jac Poultry*, 136 NLRB 785 (1962). I find that the requested 6-month extension is appropriate here. "The Board has long held that where there is a finding that an employer, after a union's certification, has failed or refused to bargain in good faith with that union, the Board's remedy therefore ensures that the union has at least 1 year of good-faith bargaining during which its majority status cannot be questioned." *Mar-Jac Poultry*, *supra*. The extension of the certification year is not an extraordinary remedy, but rather "is a standard remedy where an employer's unlawful conduct precludes appropriate bargaining with the union." *Outboard Marine Corp.*, 307 NLRB 1333, 1348 (1992), *enfd.* 9 F.3d 113 (7th Cir. 1993); see also *Accurate Auditors*, 295 NLRB 1163, 1167 (1989) ("The law is settled that when an employer's unfair labor practices intervene and prevents the employees' certified bargaining agent from enjoying a free period of a year after certification to establish a bargaining relationship, it is entitled to resume its free period after the termination of the litigation involving the employer's unfair labor practices."). The Board's remedy usually takes the form of an extension of certification for one year, although it may be for a shorter period of time, or even for a "reasonable" time." *G.J. Aigner Co.*, 257 NLRB 669 fn. 4 (1981); *San Antonio Portland Cement Co.*, 277 NLRB 309 (1985); see also *Bemis Company*, 370 NLRB No. 7, slip op. at 4 (2020)

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(Board grants the full 12-month extension in accordance with *Mar-Jac*). Under the circumstances present here I find that the 6-month extension requested by the General Counsel is appropriate. Various factors are considered in determining what is a reasonable time period in which the parties can resume negotiations without unduly burdening employees with a bargaining representative from which they may have reasons for disaffection other than the Respondent's unfair labor practices. These factors include the nature of the violations found, the number, extent, and dates of the collective-bargaining sessions held, the impact of the unfair labor practices on the bargaining process, and the conduct of the Union during negotiations. *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 617 (1996). In this case, not only did the Respondent's unlawful refusal to meet at reasonable times mean that there was no bargaining for the first 3 months of the certification year, but even during the later period when the parties met for bargaining the Respondent's unlawful refusal to bargain over union-administered benefits and its unlawful refusal to provide relevant information¹⁷ about employee benefits seriously marred bargaining over those centrally important terms and conditions of employment. Indeed, while the parties were able to reach agreement on many of the noneconomic subjects—a fact that in this case weighs against granting the full 1-year *Mar-Jac* extension—the parties did not reach any agreements at all regarding employee benefits.

17. See *Accurate Auditors*, 295 NLRB at 1167 (failure to provide information relied on as a basis for extending the certification period).

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In addition, the General Counsel asks that the remedy include a requirement that the Respondent bargain with the Charging Party in accordance with a schedule of at least 40 hours per calendar month for at least 8 hours per session, until a complete collective-bargaining agreement or good-faith impasse in negotiations is reached. This is an extraordinary type of remedy, but one which the Board has found it necessary to impose in numerous cases. See, e.g., *Camelot Terrace*, 357 NLRB 1934, 1942 (2011) (Board order requires employer to meet with the union not less than 24 hours per month for at least 6 hours per session), *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn.2 (2011) (requiring employer to bargain with union for a minimum of 15 hours per week), enfd. 540 Fed. Appx. 484 (6th Cir. 2013), *Gimrock Construction, Inc.*, 356 NLRB 529 (2011) (Board orders the employer to bargain with the union for 16 hours a week), enf. of bargaining schedule denied on procedural grounds 695 F.3d 1188 (11th Cir. 2012). In *Camelot Terrace*, *supra*, the Board imposed a bargaining schedule where, *inter alia*, the employer had restricted the dates and length of bargaining sessions, repeatedly canceled bargaining sessions, and refused to bargain over economic subjects. In *All Seasons Climate Control*, *supra*, the Board agreed with the administrative law judge that ordering a bargaining schedule was appropriate given the employer's "egregious misconduct," which included withdrawing recognition from the union and refusing to supply necessary and relevant information. I conclude that under the circumstances present here it is appropriate to order the Respondents to adhere to the bargaining schedule that has been suggested by the General Counsel. The Respondent unacceptably delayed

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bargaining by, *inter alia*, refusing to bargain for a period of almost 3 months during the certification year and cancelling bargaining sessions. In addition, the bargaining sessions that subsequently occurred were seriously marred by the Respondent's completely unjustified refusal to bargain over union-administered benefits and to provide Local 228 with relevant information that it needed for negotiations over employee benefits. Under these circumstances, I believe it is necessary to have a bargaining schedule that provides some objective indication of whether the Respondent is complying with its bargaining obligations under the Act. The schedule sought by the General Counsel is not, on its face, unduly burdensome.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.¹⁸

18. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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ORDER

The Respondent, J.G. Kern Enterprises, Inc., Sterling Heights, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (International Union), the exclusive certified representative, and/or Local 228, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (Local 228), the International Union's designated servicing representative, for employees in the bargaining unit.

(b) Withdrawing recognition from the International Union and/or Local 228 and failing and refusing to bargain with the International Union and/or Local 228 as the exclusive collective bargaining representative of unit employees.

(c) Refusing to bargain collectively with the International Union and/or Local 228 by failing and refusing to furnish requested information that is relevant and necessary to the performance of their respective functions as bargaining representative and designated servicing representative for the Respondent's unit employees.

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(d) Informing the International Union and/or Local 228 that there is no need to make a proposal on union-administered benefit plans because the Respondent will not change its current benefit plans, or otherwise refusing to bargain with the employees' collective bargaining representative regarding unit employees' terms and conditions of employment.

(e) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(f) In any like or related matter fail and refuse to bargain collectively and in good faith with the International Union and/or Local 228.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain with the International Union and/or Local 228 as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production and maintenance employees, including quality inspectors, shipping and receiving employees, material handler employees, leaders, environmental assistants, and tool room employees employed by Respondent at its

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facility located at 44044 Merrill Road, Sterling Heights, Michigan; but excluding office clerical employees, professional employees, managers, temporary staffing agency employees, time study engineers, confidential employees, salaried employees, and guards and supervisors as defined by the Act.

The Respondent will recognize that the certification year is extended for an additional 6 months from the date that good faith bargaining resumes.

(b) Meet and bargain collectively and in good faith with the International Union and/or Local 228 in accordance with a bargaining schedule of at least 40 hours per calendar month for at least 8 hours per session until the parties reach a complete collective-bargaining agreement or good-faith impasse in negotiations.

(c) Upon request from the International Union and/or Local 228: rescind the Respondent's withdrawal of recognition of the International Union and Local 228 in writing, as well as any and all changes to terms and conditions of employment of unit employees that the Respondent made as a result of the withdrawal of recognition; restore the status quo ante for unit employees; make unit employees whole for any loss of wages and benefits, with interest and compensation for excess tax liability, in accordance with Board policy; and rescind any discipline issued to unit employees as a result of the Respondent's unlawful withdrawal of recognition and notify employees in writing that it has done so.

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(d) Furnish to the International Union and/or Local 228 in a timely manner all the information requested in the union information requests of April 17, 2019, and July 9, 2019.

(e) Within 14 days after service by the Region, post at its facility in Sterling Heights, Michigan, copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region Seven, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 15, 2018.

19. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us
on your behalf

Act together with other employees for your
benefit and protection

Choose not to engage in any of these
protected activities.

WE WILL NOT interfere with, restrain, or coerce you in
the exercise of the above rights.

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WE WILL NOT fail and refuse to recognize and bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (International Union), the exclusive certified representative, and/or Local 228, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (Local 228), the International Union's designated servicing representative, for employees in the bargaining unit.

WE WILL NOT withdraw recognition from the International Union and/or Local 228 or fail and refuse to bargain with the International Union and/or Local 228 as the exclusive collective bargaining representative and designated servicing representative of unit employees.

WE WILL NOT refuse to bargain collectively with the International Union and/or Local 228 by failing and refusing to furnish them with requested information that is relevant and necessary to the performance of their respective functions as bargaining representative and designated servicing representative for the Respondent's unit employees.

WE WILL NOT inform the International Union and/or Local 228 that there is no need to make a proposal on union-administered benefit plans because the Respondent will not agree to change its current benefit plans, or otherwise refuse to bargain regarding any of the unit employees' terms and conditions of employment.

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT in any like or related matter fail and/or refuse to bargain collectively and in good faith with the International Union and/or Local 228.

WE WILL, upon request, bargain with the International Union and/or Local 228 as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production and maintenance employees, including quality inspectors, shipping and receiving employees, material handler employees, leaders, environmental assistants, and tool room employees employed by Respondent at its facility located at 44044 Merrill Road, Sterling Heights, Michigan; but excluding office clerical employees, professional employees, managers, temporary staffing agency employees, time study engineers, confidential employees, salaried employees, and guards and supervisors as defined by the Act.

WE WILL recognize that the certification year is extended for an additional 6 months from the date that good faith bargaining resumes.

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WE WILL meet and bargain collectively and in good faith with the International Union and/or Local 228 in accordance with a bargaining schedule of at least 40 hours per calendar month for at least 8 hours per session until the parties reach a complete collective-bargaining agreement or good-faith impasse in negotiations.

WE WILL, upon request from the International Union and/or Local 228: rescind our withdrawal of recognition of the International Union and Local 228 in writing, as well as any and all changes to terms and conditions of employment of unit employees that we made as a result of our withdrawal of recognition; return to the status quo ante for unit employees; make unit employees whole for any loss of wages and benefits with interest and excess tax liability in accordance with National Labor Relations Board policy; and rescind any discipline issued to unit employees as a result of our unlawful withdrawal of recognition, and notify unit employees in writing that we have done so.

WE WILL furnish to the International Union and/or Local 228 in a timely manner with all the information requested in the union information requests of April 17, 2019, and July 9, 2019.

J.G. KERN ENTERPRISES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-231802 or by using the QR code below. Alternatively, you can obtain a copy of the

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decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

**APPENDIX D — DENIAL OF MOTION
OF THE NATIONAL LABOR RELATIONS BOARD,
DATED OCTOBER 21, 2022**

UNITED STATES OF AMERICA BEFORE
THE NATIONAL LABOR RELATIONS BOARD

Cases: 07-CA-231802
07-CA-245744
07-CA-252759

J.G. KERN ENTERPRISES, INC.,

and

LOCAL 228, INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA (UAW), AFL-CIO

**ORDER DENYNG MOTION
FOR RECONSIDERATION¹**

The Respondent's motion for reconsideration of the Board's Decision and Order reported at 371 NLRB No. 91 (2022) is denied.² The Respondent has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(c)(1) of the Board's Rules and Regulations.

1. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.
2. In response to the Respondent's motion for reconsideration, the General Counsel filed a brief in opposition.

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In the underlying decision, the Board found that the Respondent committed three bargaining-related violations in the 12-month period immediately following the Union's October 3, 2018 certification and unlawfully withdrew recognition less than 2 months after the 1-year anniversary of the Union's certification.³ In its motion for reconsideration, the Respondent largely expresses disagreement with each of the Board's unfair labor practice findings and the Board's remedy. The Respondent makes two arguments not expressly covered in the Board's underlying decision, which we address and reject below.

First, the Respondent argues that in support of the Board's withdrawal-of-recognition finding, the Board erroneously relied on *Whisper Soft Mills, Inc.*, 267 NLRB 813, 813-816 (1983), because the United States Court of Appeals for the Ninth Circuit assertedly vacated the decision.⁴ We reject this argument. Nothing in the Ninth Circuit's decision undermines the status of *Whisper Soft* as valid Board precedent with respect to the relevant rationale relied on by the Board here. The court did not

3. Member Ring dissented from the majority's finding that the Respondent violated Sec. 8(a)(5) by withdrawing recognition from the Union. While he adheres to the views stated in his dissenting opinion, he agrees with his colleagues that the Respondent has not demonstrated extraordinary circumstances warranting reconsideration.

4. In fact, the Ninth Circuit did not vacate the Board's decision; rather, it reversed the decision and vacated the *order*. See *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1388 (9th Cir. 1984) ("The decision of The National Labor Relations Board is reversed and its order is vacated.").

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reject the rationale of *Whisper Soft* followed by the Board in this case: that a withdrawal of recognition is *prima facie* unlawful if it occurs during an extension of the certification year made necessary by an unlawful delay in bargaining or other conduct that deprives the certified union of the 12 months of good faith bargaining to which the union is entitled as a result of its certification. Instead, the court merely found that the certification year should not have been extended (because the employer's delay in making a wage counterproposal was not unlawful) and thus the employer's withdrawal of recognition did not fall within a period when the union was irrebuttably presumed to have majority support. See 754 F.2d at 1383-1387.⁵

In any event, in finding an unlawful withdrawal of recognition here, the Board also relied on additional

5. But even if the Ninth Circuit had rejected the rationale of *Whisper Soft*, the decision would remain valid Board precedent, given the Board's long-established practice of non-acquiescence in adverse appellate court decisions. See, e.g., *Minnesota Timberwolves Basketball, LP*, 365 NLRB No. 124, slip op. at 3 fn. 13 (2017). See generally Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679, 706-709 (1989).

The Respondent's reliance on the decision of the United States Court of Appeals for the Third Circuit in *NLRB v. New Bista Nursing and Rehabilitation* is unavailing. The Third Circuit there denied enforcement of the Board's order not because the Board had devised its legal test from a case in which the Board's order had later been vacated (on other grounds) by another Circuit, but rather because the Third Circuit concluded that the Board's test was itself inconsistent with in-circuit law. 870 F.3d 113, 116, 130-134 (3d Cir. 2017).

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authority, including *New Madrid Nursing Center*, 325 NLRB 897, 900-902 & fn.31 (1998), enfd. 187 F.3d 769 (8th Cir. 1999), which expressly applied the *Whisper Soft Mills* rationale in extending the certification year and finding a withdrawal of recognition during that extension unlawful, and *Bryant & Stratton Business Institute, Inc. v NLRB*, where the Second Circuit concluded that the Board is not required to apply *Master Slack Corp.*, 271 NLRB 78 (1984) where, as here, extended certification year principles are applicable. See 140 F.3d 169, 185-187 (2d Cir. 1998).

In addition, we find no merit to the Respondent's claim that the Board's withdrawal-of-recognition finding violated the Respondent's due process rights. The Respondent's claim is premised on the argument—which the Board rejected in the underlying decision—that the Board deviated from the General Counsel's theory of the case in finding an unlawful withdrawal of recognition. Moreover, as the District of Columbia Circuit has explained:

The Board's Rules and Regulations require only that the complaint include “a clear and concise description of the acts which are claimed to constitute unfair labor practices,” not that it include the legal theory relied on. 29 C.F.R. § 102.15. Nor does “[t]he due process clause ... require a precise statement of the theory upon which the General Counsel intends to proceed under the Act, with the threat that failure of precision in pleading will require the General Counsel to re-try the case.

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Davis Supermarkets, Inc. v. NLRB, 2 F.3d 1162, 1169 (D.C. Cir. 1993) (citation omitted). Here, both the Second Consolidated Complaint and the Second Consolidated Amended Complaint explicitly alleged that the Respondent violated the Act by withdrawing recognition from the Union. Thus, the Respondent was on notice that its withdrawal of recognition was at issue. Those complaints likewise alleged the three pre-withdrawal-of-recognition bargaining violations the Board found here, including the Respondent's failure to bargain during the first three months following the Union's certification. Although the Respondent claims that it did not have the opportunity to litigate the issue, it fails to identify any evidence that it would have introduced, or cite any defense that it would have raised, if the complaints had expressly cited *Whisper Soft Mills, Inc.*, and *New Madrid Nursing Center*. Cf. *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d at 1169 (“When an employer is not prejudiced by the Board’s reliance on a theory not specifically addressed in the complaint or at the hearing, the employer’s due process rights are not violated.”)⁶

IT IS ORDERED, therefore, that the Respondent’s motion for reconsideration is denied.

6. The Respondent’s additional contention—that the Board here retroactively changed the standard for evaluating withdrawals of recognition resulting in a manifest injustice—is premised on the erroneous notion, rejected in the underlying Board decision, that *Whisper Soft Mills* and *New Madrid Nursing Center* have been sub silentio overruled.

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Dated, Washington, D.C., October 21, 2022.

/s/
Lauren McFerran, Chairman

/s/
John F. Ring, Member

/s/
Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD