No. 24-

IN THE

Supreme Court of the United States

RIETH-RILEY CONSTRUCTION CO., INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The National Labor Relations Board's interpretations of the National Labor Relations Act are entitled to deference if they are "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495–97 (1979). Congress made a "conscious decision" to "delegate[e] to the Board . . . the primary responsibility of marking out the scope of the statutory language. . . ." *Id.* at 496. In *Loper Bright Enterprises v. Raimondo*, this Court held that when a statute constitutionally delegates discretionary authority to an agency, "courts must respect the delegation, while ensuring that the agency acts within it." 144 S. Ct. 2244, 2273 (2024). The Sixth Circuit here, citing *Loper Bright*, stated that it "does not defer to the NLRB's interpretation of the NLRA. . . ."

The first question is: Does this Court's deferential standard of review for NLRB interpretations of the NLRA survive *Loper Bright*?

2. Congress may create multi-member agencies led by presidentially appointed officers removable only for cause. *E.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). The NLRB is an example of such an "independent" agency. Board orders, however, are not self-executing; the Board depends on its presidentially appointed General Counsel to seek their enforcement in court. On Inauguration Day 2021, the President fired the General Counsel without cause.

The second question is: May the President remove the NLRB General Counsel at will or only for cause?

PARTIES TO THE PROCEEDING

Petitioner is Rieth-Riley Construction Co., Inc., a large road and highway construction contractor that was in relevant part the respondent in the proceedings below.

Respondent is the National Labor Relations Board, the federal agency charged with administering and interpreting the National Labor Relations Act, and issuing decisions and promulgating regulations thereunder.

CORPORATE DISCLOSURE STATEMENT

Rieth-Riley is not a subsidiary or affiliate of a publicly owned corporation, and no publicly held company owns 10% or more of Rieth-Riley's stock. No other publicly owned corporation or its affiliate has a substantial financial interest in the outcome of this litigation.

STATEMENT OF RELATED PROCEEDINGS

Rieth-Riley Construction Co., Inc. v. Elizabeth Kerwin et al., No. 1:21-cv-407-PLM-SJB, United States District Court for the Western District of Michigan. Judgment was entered on June 21, 2024, and is currently on appeal to the Sixth Circuit Court of Appeals, No. 24-1690.

Rieth-Riley Construction Co., Inc. v. National Labor Relations Board, NLRB Case Nos. 07-CA-285321, 07-CA-300190, and 07-CA-300191. The opinion of the National Labor Relations Board is reported at 373 NLRB No. 149, and is currently on appeal to the Sixth Circuit Court of Appeals, No. 24-2105.

Rieth-Riley Construction Co., Inc. v. National Labor Relations Board, NLRB Case Nos. 07-CA-234085 and 07-CB-226531. The opinion of the National Labor Relations Board is reported at 374 NLRB No. 13, and is currently on appeal to the Sixth Circuit Court of Appeals, No. 24-2123.*

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* The latter two cases involve different unfair labor practice charges and arguments than are at issue here, but Petitioner nonetheless includes them in the interest of full disclosure.

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PETITION FOR WRIT OF CERTIORARI

This case presents the opportunity to decide two foundational issues of vital importance to the National Labor Relations Board and the parties that agency regulates.

1. Last Term, in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (June 28, 2024), this Court overruled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and its requirement that federal courts defer to permissible agency interpretations of statutes those agencies administer. Now, courts must approach questions of statutory interpretation *de novo*, consistent with the command of Section 706 of the Administrative Procedure Act that reviewing courts "decide all relevant questions of law." *Loper Bright*, 144 S. Ct. at 2261 & n.4. The Court added, however, that its opinion should not be read to suggest "that Congress cannot or does not confer discretionary authority on agencies." *Id.* at 2268. To the contrary, "Congress may do so, subject to constitutional limits, and it often has." *Id.* When that is so, "judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA." *Id.*

With the National Labor Relations Act, Congress did exactly what the Court in *Loper Bright* recognized it could do: it "assigned to the Board the primary task" of construing the Act and then, 12 years later, when amending the Act, it "made a conscious decision to continue

its delegation to the Board of the primary responsibility of marking out the scope of the statutory language. . . ." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495–96 (1979). This Court has repeatedly acknowledged this delegation of authority in cases decided before and after *Chevron*. Following the Court's lead, the circuit courts have also recognized that Congress delegated to the Board the principal authority to interpret the broad language of the Act. The Sixth Circuit has been no exception—no exception, that is, until now.

Without so much as acknowledging this Court's well-developed precedent in this area, let alone the Sixth Circuit's own caselaw on the subject, the panel below, citing only *Loper Bright*, stated that it "do[es] not defer to the NLRB's interpretation of the NLRA," and instead exercises "independent judgment in deciding whether an agency has acted within its statutory authority." App. 8a. This blanket rule of non-deference squarely conflicts with this Court's governing precedent, it conflicts with the precedent of other circuits decided before *Loper Bright*, and it conflicts with the decisions of those circuits that have addressed the issue since *Loper Bright*. Nothing in that decision undermines, explicitly or implicitly, the Court's prior caselaw recognizing Congress's "conscious" delegation of authority to the Board to interpret the NLRA. If anything, *Loper Bright* bolsters that precedent, confirming as it does no less than three times that, when determining the appropriate standard of review, "the statute's meaning may well be that the agency is authorized to exercise a degree of discretion." 144 S. Ct. at 2263; *see also id.* at 2268 (quoted above); *id.* at 2273 ("[W]hen a particular statute delegates authority to an agency consistent with constitutional limits, courts must

respect the delegation, while ensuring that the agency acts within it.").

Certiorari is warranted for this reason alone.

2. In *Seila Law LLC v. CFPB*, this Court recounted that, "up to now," it has recognized two exceptions to the President's plenary removal power—"one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority." 591 U.S. 197, 216–18 (2020) (referencing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), and *Wiener v. United States*, 357 U.S. 349 (1958), for the first exception and *United States v. Perkins*, 116 U.S. 483 (1886), and *Morrison v. Olson*, 487 U.S. 654 (1988), for the second). But the Court has yet to confront a third scenario: officers who are indispensable to the structure and functioning of an independent multimember agency, but who do not *themselves* exercise the quasi-judicial powers that supply the basis for that agency's independence. *See Humphrey's Ex'r*, 295 U.S. at 628; *accord Wiener*, 357 U.S. at 355–56. To put the matter more concretely in terms of the players here: Does the President have the authority to remove the NLRB General Counsel at will if to possess that authority would "threaten[ ] the independence" of the NLRB itself ? *See Humphreys Ex'r*, 295 U.S. at 630. That is, at its core, the second question presented here.

This Court has long recognized the Board is entitled to exercise its "quasi-judicial" authority over national labor policy independent of the President's direct oversight. Unlike all other federal agencies, however, the Board's orders are not self-executing; they are enforceable if and

only if: (1) the NLRB General Counsel, at the Board's direction, seeks their enforcement; and (2) a federal appellate court declares they are enforceable. The Board is thus entirely dependent in the first instance on the General Counsel's advocacy to give its decisions "teeth." *See NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992) (Posner, J.). This statutory structure, which has been in place for three-quarters of a century, requires the General Counsel to have the freedom to seek enforcement of Board decisions without fear or favor of the President.

Just as the President cannot fire Board members at will and thus deprive them of the statutory authority to make their independent quasi-judicial decisions, the President cannot fire the General Counsel at will and thus deprive the Board of its only statutory means of *effectuating* its independent quasi-judicial decisions. This appears to have been the prevailing view for nearly 75 years. Between 1947 (when Congress formally established the position of General Counsel) and Inauguration Day 2021 (when NLRB General Counsel Peter Robb was fired without cause), no President had ever removed a General Counsel in the middle of his or her term without cause. Thus, as a matter of statutory structure and historical practice, Section 3(d) of the Act, which grants the General Counsel "a term of four years" following appointment by the President and confirmation by the Senate, 29 U.S.C. §153(d), must be interpreted to preclude the at-will removal of the General Counsel if the Board's adjudicative independence is to have any meaning, consistent with the "unique need" compelled by this long-standing structure. *See Collins v. Yellen*, 594 U.S. 220, 250 n.18 (2021).

Simply put, the General Counsel should never be required to choose between performing her duty to

zealously represent the Board and bowing to the President's contrary wishes as a matter of self-preservation.

Certiorari is also warranted for this second reason.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 114 F.4th 519 and is reproduced in the Appendix at Appendix A. The opinion of the National Labor Relations Board is reported at 372 NLRB No. 142, and is reproduced at Appendix C.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its opinion and judgment on August 14, 2024, and denied Rieth-Riley's Petition for Rehearing *En Banc*, or, in the Alternative, for Panel Rehearing on October 23, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II, Section 2 of the United States Constitution states in relevant part:

> [H]e shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law[.]

Article II, Section 3 of the United States Constitution states in relevant part:

> [H]e shall take Care that the laws be faithfully executed[.]

Section 3(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §153(a), states in relevant part:

> [T]he Board shall consist of five . . . members, appointed by the President by and with the advice and consent of the Senate. . . . [Board members] shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. . . . Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

Section 3(d) of the NLRA,29 U.S.C. §153(d), states in relevant part:

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board,

> in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

Section 4(a) of the NLRA, 29 U.S.C. §154(a), states in relevant part:

> The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. . . . Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court.

Section 6 of the NLRA, 29 U.S.C. §156, states:

> The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

Section 9(c)(1) of the NLRA, 29 U.S.C. §159(c)(1), states in relevant part:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall

> investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

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

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise[.]

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

> The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . .

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

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. . . .

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

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of

> this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

STATEMENT OF THE CASE

In 2019, Operating Engineers Local 324 went on strike against Rieth-Riley, which later filed an unfair labor practice charge against the Union, alleging picket-line misconduct. R. 1593. In 2020, while the strike was ongoing, the Union sent two requests to Rieth-Riley, one for subcontracting information and one for wage information. R. 1811–12, 1820. Based on Rieth-Riley's responses, the Union filed two unfair labor practice charges against the company. R. 1699, 1721. On February 5, 2021, the NLRB General Counsel's office issued a consolidated complaint as to both charges. R. 1778–82. Two weeks earlier, Acting General Counsel Peter Sung Ohr had replaced former General Counsel Peter Robb after President Biden terminated Robb on Inauguration Day. *See* Press Release, NLRB, *Peter Sung Ohr Named*

Acting General Counsel (Jan. 25, 2021), https://go.usa.gov/xeZhQ (all websites last visited Jan. 8, 2025). At the time, Robb still had approximately 10 months left on his four-year term. *See* NLRB, *General Counsels Since 1935*, https://www.nlrb.gov/about-nlrb/who-we-are/general-counsel/general-counsels-since-1935.

All three charges were consolidated for hearing, and on July 18, 2022, Administrative Law Judge Muhl issued his decision. R. 2137–76. As to Rieth-Riley, he determined (1) the Union's request for subcontractor information was relevant to bargaining, despite the Union's prior representations otherwise; and (2) the Union's request for wage information was sufficiently clear to require some production of information, even though the request remained partially unclear. R. 2164, 2168–69. Judge Muhl further rejected Rieth-Riley's defense asserting the complaint against it was void because General Counsel Robb had been illegally discharged. R. 2172. As to the Union, Judge Muhl found a picketer violated the NLRA when he assaulted a picket-line crosser with a picket sign and spat on him. R. 2162. The Board affirmed. App. C.

In a published opinion, Judge Cole (joined by Judges Moore and Mathis) denied Rieth-Riley's petition for review and granted the Board's cross-petition for enforcement. App. A. The panel agreed that the Union had requested information relevant to bargaining with sufficient clarity to permit a response. App. 16a–19a. The panel further held that the General Counsel enjoys no removal protections under the Act, and additionally, any such protections would violate the President's authority to enforce the law under Article II. App. 8a–14a. Finally, the panel held *sua sponte* that *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (June 28, 2024), imposed a *de novo* review standard

for the NLRB's interpretations of the Act. App. 8a. Rieth-Riley filed a timely petition for rehearing *en banc*, or, in the alternative, for panel rehearing, which was denied on October 23, 2024. App. D. Rieth-Riley then moved for a stay of the Sixth Circuit's mandate pending filing and disposition of this certiorari petition, which the court granted on December 20, 2024, App. E, thus suggesting that even the appellate court believes this Court could find that the panel below erred, *see Luxshare, Ltd. v. ZF Auto. US, Inc.*, 15 F.4th 780, 783 (6th Cir. 2021) ("[W]hen a party seeks a stay pending certiorari, the applicant must show not only a reasonable probability that certiorari will be granted but also a significant possibility that the judgment below will be reversed" (cleaned up; citations omitted)); *accord Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

REASONS FOR GRANTING THE WRIT

This case presents two issues of exceptional importance: (1) whether *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (June 28, 2024), altered the Court's standard of review for Board decisions interpreting the NLRA; and (2) whether the at-will termination of NLRB General Counsel Peter Robb was lawful under the NLRA. Both issues merit certiorari.

1. The Sixth Circuit's determination that *Loper Bright* altered the standard of review for NLRB interpretations of the NLRA conflicts with a flood of Supreme Court and circuit precedent, and has created a circuit conflict.

Loper Bright did not alter the standard of review governing Board interpretations of the NLRA. These

interpretations are entitled to deference under Supreme Court precedent tracing back to before America's entry into World War II—precedent this Court has explicitly and repeatedly reaffirmed for decades. So long as the Board's interpretation is reasonable, a circuit court must defer to it, even if the reviewing court thinks it is not the "best" interpretation of the Act. The Sixth Circuit's decision stands alone, directly conflicting with this precedent, as well as a raft of circuit decisions decided both before and after *Loper Bright*.

1.1. The Sixth Circuit's decision conflicts with decades of Supreme Court precedent and the circuit decisions following that precedent.

Just six years after it was enacted, this Court recognized the deference Congress conferred on the Board to interpret the NLRA. In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), the Court stated: "A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application," *id.* at 194. While "[t]here is an area plainly covered by the language of the Act and an area no less plainly without it," Congress left the rest "to the empiric process of administration"—a process "committed to the Board, *subject to limited judicial review*." *Id.* (emphasis added).

Since *Phelps Dodge*, the Court has made plain, again and again, that Congress, through the broad language of the NLRA, delegated to the Board the power to interpret the Act, thus entitling its interpretations to deference. In *NLRB v. Local Union No. 103, International Association*

of Bridge, Structural, & Ornamental Iron Workers, AFL-CIO, 434 U.S. 335 (1978) ("*Iron Workers*"), for instance, the Board construed a particular provision of Section 8 of the NLRA one way and the reviewing appellate court another. This Court reversed: "The Board's resolution of the conflicting claims in this case represents a defensible construction of the statute and is entitled to considerable deference. Courts may prefer a different application of the relevant sections, but the function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Id.* at 350 (cleaned up; citations omitted). And if there remained any uncertainty about what the Court meant to convey, it added that when the Board has construed the Act, the courts "should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *Id.* at 351. The court should instead defer to that understanding so long as it is not "fundamentally inconsistent with the structure of the Act and the function of the sections relied upon." *Id.* at 350 (citation omitted).

Similarly, in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), the Board had to decide whether certain matters were "terms and conditions of employment" subject to mandatory collective bargaining within the meaning of Section 8 of the NLRA. The Board decided they were and the appellate court enforced the Board's order. *Id.* at 493–94. This Court affirmed, noting "Congress assigned to the Board the primary task of construing [the Act]" and then, over a decade later, made a "conscious decision" to reaffirm that delegation when amending the Act. *Id.* at 495–96. So long as the Board's construction of the statute

is "reasonably defensible," the Court said, "it should not be rejected merely because the courts might prefer another view of the statute." *Id.* at 497. For "[c]onstruing and applying the duty to bargain and the language of § 8[ ] . . . are tasks lying at the heart of the Board's function." *Id.*

Since *Ford Motor Co.*, the Court has time and again reaffirmed this understanding of the NLRA, separate and apart from any reliance on *Chevron*-specific deference. A few examples will make the point:

- *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) ("Since the task of defining the term 'employee' [within the meaning of the Act] is one that has been assigned primarily to the agency created by Congress to administer the Act, the Board's construction of that term is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible." (cleaned up; collecting cases)).

- *NLRB v. Fin. Inst. Emps. of Am., Loc. 1182, Chartered by United Food & Com. Workers Int'l Union, AFL-CIO*, 475 U.S. 192, 202 (1986) ("Our cases have previously recognized the Board's broad authority to construe provisions of the Act, and have deferred to Board decisions that are not irrational or inconsistent with the Act." (collecting cases)).

- *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("The Board,

> of course, is given considerable authority to interpret the provisions of the NLRA. If the Board adopts a rule that is rational and consistent with the Act, then the rule is entitled to deference from the courts." (citation omitted)).
>
> • *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 201 (1991) ("[W]e will uphold the Board's interpretation of the NLRA so long as it is rational and consistent with the Act." (cleaned up; citations omitted)).

As one would expect, the circuit courts have fallen in line with this precedent, including the Sixth Circuit (at least until this Court decided *Loper Bright*). Citing this Court's pre-*Chevron* caselaw, the Sixth Circuit recognized that it had a duty—that it "must"—"uphold the Board's interpretation of the Act if it is 'reasonably defensible'" and "may not reject the Board's interpretation 'merely because the courts might prefer another view of the statute.'" *Kindred Nursing Centers E., LLC v. NLRB*, 727 F.3d 552, 559 (6th Cir. 2013) (cleaned up) (quoting *Ford Motor Co.* and citing *Iron Workers*, both *supra*). Many other Sixth Circuit decisions are to the same effect. *See*, *e.g.*, *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1212 (6th Cir. 1997) ("The Board's construction of the Act should be upheld if it is reasonably defensible.'" (quoting *Ford Motor Co.*); *NLRB v. Prod. Molded Plastics, Inc.*, 604 F.2d 451, 454 (6th Cir. 1979) ("Of course, the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." (quoting *Ford Motor Co.* and citing *Iron Workers*)).

So too are decisions from other circuits. Again, just a few examples will suffice to make the point, none of which rely on *Chevron* either:

- *NLRB v. Maine Coast Reg'l Health Facilities*, 999 F.3d 1, 8 (1st Cir. 2021) ("Because Congress has delegated to the Board the authority to implement national labor policy, we give considerable deference to the Board's interpretation of the Act so long as it is rational and consistent with the Act." (cleaned up; citing Supreme Court precedent)).

- *Sam's Club, a Div. of Wal-Mart Stores, Inc. v. NLRB*, 173 F.3d 233, 239 (4th Cir. 1999) ("The Board's legal interpretations of the NLRA are entitled to deference. If the Board's interpretations are rational and consistent with the Act, they will be upheld by reviewing courts." (same)).

- *St. John's Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 (8th Cir. 2006) ("The Board's construction of the Act is entitled to considerable deference, and must be upheld if it is reasonable and consistent with the policies of the Act." (same)).

- *Four B Corp. v. NLRB*, 163 F.3d 1177, 1182 (10th Cir. 1998) ("[F]or the Board to prevail, it need not show that its construction is the *best* way to read the statute; rather, courts must respect the Board's judgment so long

as its reading is a reasonable one." (same; emphasis original)).

- *Shore Club Condo. Ass'n, Inc. v. NLRB*, 400 F.3d 1336, 1338 (11th Cir. 2005) ("Because of the Board's special competence in the field of labor relations, its interpretation of the Act is accorded substantial deference." (same)).

So until June 28, 2024, when this Court issued its opinion in *Loper Bright*, it was settled law that Board interpretations of the NLRA were entitled to deference. And critically, this was so *not* because, as happened in *Chevron*, the *Court* issued a "directive" requiring such deference. *Loper Bright*, 144 S. Ct. at 2264. It was instead because *Congress* made a "conscious decision" to "delegate[e]" the "primary responsibility" for interpreting the Act to the Board. *Ford Motor Co.*, 441 U.S. at 496. *Loper Bright* reaffirms that this sort of delegation is proper—even commonplace. 144 S. Ct. at 2268. More, nothing in *Loper Bright* purports to call into question any of the Court's prior decisions recognizing such delegations; indeed, *Loper Bright* does not even call into question prior decisions relying on the *Chevron* framework. 144 S. Ct. at 2273.

The Sixth Circuit's decision here obviously and plainly conflicts with this decades-long run of caselaw. It is simply incorrect that a reviewing court "do[es] not defer to the NLRB's interpretation of the NLRA." App. 8a. That is *exactly* what a reviewing court is to do. This Court has long held that, "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of

Appeals should follow the case which directly controls. . . ." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). This case involves a textbook violation of that rule. There are innumerable cases that "directly control" here. And while those cases might "appear" to rest on reasons rejected in *Loper Bright*, that is true only on the most superficial understanding of that case.

Because the Sixth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court," certiorari is warranted for this reason alone. S. Ct. R. 10(c). But certiorari is also warranted on this issue because the Sixth Circuit's decision conflicts with cases from other circuits decided after *Loper Bright*.

1.2. The Sixth Circuit's decision conflicts with decisions of other circuits issued since *Loper Bright*.

The Sixth Circuit stands on an island in holding that *Loper Bright* eliminated the deference due to the Board's NLRA interpretations. Since this Court decided *Loper Bright*, several circuits have addressed the appropriate standard of review in this context, and the Sixth Circuit's decision here conflicts with all of them.

To start, in *Hudson Institute of Process Research Inc. v. NLRB*, 117 F.4th 692 (5th Cir. Sept. 18, 2024), the Fifth Circuit addressed the standard of review head on, stating it would affirm the NLRB's legal conclusions "if they have a reasonable basis in the law and are not inconsistent with the [NLRA]." *Id.* at 700 (citation omitted). And while the court cited *Loper Bright* for the proposition that courts

"do not simply defer to an agency's interpretation of 'ambiguous' provisions of their enabling acts," it also recognized that *Loper Bright* "d[id] not call into question prior cases that relied on the *Chevron* framework." *Id.* (quoting *Loper Bright*, 144 S. Ct. at 2273). Even more importantly, the court recognized *Loper Bright*'s admonition that, "where a statute delegates discretionary authority to an agency, 'the role of the reviewing court . . . is, as always, to independently interpret the statute and effectuate *the will of Congress* subject to constitutional limits.'" *Id.* (quoting *Loper Bright*, 144 S. Ct. at 2263 (emphasis added)).

The Second, Seventh, and D.C. Circuits, likewise, have reaffirmed their deferential standard of review for Board decisions, all without even referencing *Loper Bright*. *See NLRB v. Blue Sch.*, No. 23-6305-AG, 2024 WL 4746378, at *2 (2d Cir. Nov. 12, 2024) (summary order) (stating as to "legal conclusions" the court "must give the Board considerable deference and afford the Board a degree of legal leeway" (citation omitted)); *International Union of Operating Eng'rs, Loc. 150, AFL-CIO v. NLRB*, 109 F.4th 905, 915 (7th Cir. July 23, 2024) ("For legal conclusions, our scrutiny of the Board's decision is deferential out of respect for Congress's broad delegation of responsibility for developing national labor policy to the Board. Therefore, we accept the Board's legal conclusions unless they are irrational or inconsistent with the Act." (cleaned up)); *Acumen Cap. Partners, LLC v. NLRB*, 122 F.4th 998, 1003 (D.C. Cir. Dec. 13, 2024) ("[E]ffectuat[ing] national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." (citation omitted)).

And finally, in *Alaris Health at Boulevard East v. NLRB*, 123 F.4th 107 (3d Cir. Dec. 9, 2024), the Third Circuit questioned whether *Loper Bright* had any effect at all in this context. There the court explained it had "traditionally deferred to the Board's interpretations of the Act so long as they are 'reasonable.'" *Id.* at 120 (citation omitted). While stating that "[w]hether this deference survives" *Loper Bright* "is somewhat of an open question," the court recognized that "judicial deference to the Board's classifications of the 'terms and conditions of employment' under the Act" is apparently "distinct from *Chevron* deference, as the Supreme Court's decisions developing that deference to the Board predate *Chevron*. . . ." *Id.* at 121. In support of this proposition, the panel cited this Court's decision in *Ford Motor Co.* *Id.* "In fact," the Third Circuit went on, "the Court in *Loper Bright* distinguished *Chevron* deference from prior cases where it deferred to the Board's interpretation of the Act, reasoning 'the Act had, in the Court's judgment, assigned primarily to the Board the task of marking a definitive limitation around the relevant statutory term' and so 'application of the statutory term was sufficiently intertwined with the agency's factfinding' that deference to the Board's interpretation was warranted." *Id.* (cleaned up) (quoting *Loper Bright*, 144 S. Ct. at 2259–60, and again citing *Ford Motor Co.*). Although on the right track, however, the court ultimately concluded it did not need to decide the issue. *Id.* at *8.

That "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" provides a strong, independent reason to grant certiorari. S. Ct. R. 10(a).

1.3. This case provides an ideal vehicle for confirming that *Loper Bright* did not disturb the Court's decisions mandating that courts defer to the Board's interpretations of the NLRA.

The Sixth Circuit's rejection of the traditional standard for reviewing Board interpretations of the Act is direct, clear, and unmistakable. The court stated point blank that it would "not defer to the NLRB's interpretation of the NLRA," and instead would "exercise independent judgment" when deciding such questions. App. 8a. What's more, the petitioner here sought rehearing on this issue, and the court rejected the invitation to correct its mistake. App. D. Nor can there be any doubt as to the basis for the court's pivot away from the traditional standard of review. The only case the court cited for its novel rule of non-deference was *Loper Bright*. *See* App. 8a. And as if there was any question remaining about what the court was doing, in a subsequent decision citing its opinion at issue here, the Sixth Circuit confirmed it now "appl[ies] de novo review to the NLRB's interpretation of the NLRA. . . ." *NLRB v. Macomb*, No. 23-1335, 2024 WL 4240545, at *3 (6th Cir. Sept. 19, 2024) (per curiam). This makes for a perfect vehicle to confirm that *Ford Motor Co.* and related precedent survive *Loper Bright*.

The Court should not wait to grant certiorari on this issue and risk allowing the circuit split to widen. In the twelve-month period ending on September 30, 2023, petitions for review were filed from NLRB orders in 188 cases. Table B-3, U.S. Courts of Appeals Judicial Business (Sept. 30, 2023), https://www.uscourts.gov/statistics/table/b-3/judicial-business/2023/09/30. Setting

aside cases from the Bureau of Immigration Appeals, which run into the thousands annually, only EPA decisions spawned more agency-based federal appellate litigation (and not by much—just eight more cases). *Id.* These numbers are representative of the circuit courts' annual administrative caseload. *See id.* (documenting sources of appeals back to Sept. 30, 2019). It is beyond question, then, that courts in many other circuits will soon confront the very issue addressed by the Sixth Circuit here and so would immediately benefit from the Court's guidance.

It goes without citation that getting the standard of review right is vitally important. The difference between deferential review and *de novo* review can be outcome determinative. Even more, as *Loper Bright* indicated, it can often spell the difference between respecting a conscious delegation of congressional authority and not. The Court thus has often granted certiorari for the express purpose of determining the applicable standard of appellate review. *Loper Bright* is a prime example, but there are many others in recent history. *See*, *e.g.*, *Monasky v. Taglieri*, 589 U.S. 68, 83–84 (2020); *U.S. Bank Nat'l Ass'n ex rel. CW Cap. Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 392–94 (2018); *McLane Co. v. EEOC*, 581 U.S. 72, 79–85 (2017).

* * *

The Court should grant certiorari. And because the Sixth Circuit's statement of the governing standard of review is patently incorrect, the Court may wish to consider summarily reversing and remanding. *See* S. Ct. R. 16.1. This not only would allow the Sixth Circuit to apply the correct standard, but it would also make clear

to the other circuits that, consistent with the Court's decades-long line of caselaw in this area, reviewing courts must continue to defer to the Board's interpretations of the NLRA.

2. The Sixth Circuit's decision that the NLRB General Counsel may be removed at will by the President threatens the long-recognized independence of one of the oldest independent federal agencies.

Certiorari is also warranted to address "an important question of federal law that has not been, but should be, settled by this Court": does the NLRB General Counsel enjoy protection from at-will removal by the President? *See* S. Ct. R. 10(c). The Court should take this case to decide that she does, both because of the importance of the issue to the agency it affects and those it regulates, but also because this case is an ideal vehicle for doing so.

2.1. Whether the President may remove the NLRB General Counsel at will is a question of fundamental importance to the Board's independence.

The Board's quasi-judicial function is, to borrow a phrase from another removal case, "operationally incompatible" with at-will presidential removal of its General Counsel. *Severino v. Biden*, 71 F.4th 1038, 1047–48 (D.C. Cir. 2023) (recognizing the President's removal authority may be limited if it would be operationally incompatible with the functions of the relevant agency, and citing, among other authorities, *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), and *Wiener v. United States*, 357 U.S. 349 (1958)). Without removal protections,

the Board cannot count on the General Counsel to seek enforcement of its decisions. This not only undermines the independence of the Board itself, but it also threatens to put the General Counsel in an impossible position, having to choose between honoring her statutory duty to faithfully seek enforcement of the Board's decisions and kowtowing to the wishes of the President who may not want those Board decisions enforced.

2.1.1. The Board's independence is inextricably linked with the General Counsel's independence.

Before addressing the discrete removal question at issue, it is necessary to fully appreciate the General Counsel's role within the NLRB, as a matter of both statute and Board policy.

It is well-established that Congress created the NLRB as an independent agency, whose members are protected from at-will removal under Section 3(a) of the Act. Since the NLRA became law in 1935 with the Wagner Act, and thereafter when in 1947 it was amended by the Taft-Harley Act (also called the Labor Management Relations Act), the Court has repeatedly upheld Congress's ability to create "quasi-judicial" agencies with multi-member leadership beyond the immediate oversight of the President—and the Court has pointed to the NLRB as just such an agency. *See Collins v. Yellen*, 594 U.S. 220, 249 (2021) (noting "Congress has restricted the President's removal power" over the NLRB); *Seila Law LLC v. CFPB*, 591 U.S. 197, 261 (2020) (Kagan, J., concurring in part and dissenting in part) (citing the statute establishing the NLRB as a model for restricting the President's removal authority "repeatedly approved" by the Court).

But this power to adjudicate independent of presidential oversight does not mean the Board's orders automatically carry the force of law. They don't: "The NLRB may be the only agency that needs a court's imprimatur to render its orders enforceable." *Dish Network Corp. v. NLRB*, 953 F.3d 370, 375 n.2 (5th Cir. 2020), *as revised* (collecting cases). As Judge Posner observed: "To put teeth into one of its orders the Board must persuade a court of appeals to enforce the order. . . ." *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992).

This is where the General Counsel comes in. Section 3(d) of the Act grants the General Counsel supervisory authority over "all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members). . . ." 29 U.S.C. §153(d). ALJs are to be neutral arbiters and the Board's legal assistants do not advocate on behalf of the Board in enforcement proceedings. And hiring attorneys who do *not* answer to the General Counsel for the purpose of seeking enforcement of Board orders isn't an option. The Board thus must rely on the General Counsel and those attorneys under her supervision to seek enforcement of the Board's decisions.

The General Counsel in turn takes her enforcement cues from the Board. Under the Act, "[a]ttorneys appointed under this section"—that is, the attorneys under the supervision of the General Counsel—"may, at the direction of the Board, appear for and represent the Board in any case in court. . . ." 29 U.S.C. §154(a). Using that authority, the Board has affirmed for 75 years running that the General Counsel "will" petition for enforcement of Board orders "in full accordance with

the directions of the Board." *See Notice, NLRB, General Counsel, Description of Authority & Assignment of Responsibilities*, 15 Fed. Reg. 6924 (Oct. 13, 1950); *accord Notices, Authority & Assigned Responsibilities of General Counsel of NLRB*, 20 Fed. Reg. 2175 (Apr. 1, 1955), *most recently reaffirmed in relevant part*, 77 Fed. Reg. 45696 (Aug. 1, 2012). This places no small obligation on the General Counsel, because the NLRB, "uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). So by congressional design, the Board must depend in the first instance on the General Counsel's faithful advocacy to give its quasi-judicial rulings the force of law.

In keeping with this statutory division of powers—with the Board as adjudicator and the General Counsel as the Board's advocate—the Court has consistently held that in enforcement proceedings, the General Counsel *must* advocate for the Board's decisions using the Board's own reasoning. For "[t]he integrity of the administrative process demands no less than that the Board, not its legal representative, exercise the discretionary judgment which Congress has entrusted to it." *NLRB v. Food Store Emps. Union, Loc. 347*, 417 U.S. 1, 9 (1974); *see also NLRB v. Yeshiva Univ.*, 444 U.S. 672, 685 n.22 (1980) (refusing to "substitute counsel's *post hoc* rationale for the reasoning supplied by the Board itself"); *Beth Israel Hosp., v. NLRB*, 437 U.S. 483, 500–01 (1978) ("[I]t is to the Board that Congress entrusted the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. . . .'" (citation omitted)). Put more directly,

the General Counsel must "defend the decisions of the Board on review, regardless whether the Board adopted the view [that the General Counsel] expressed as a party before it." *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002).

Considered together, these statutory provisions and settled principles of law establish that the independence of the Board is inextricably bound up with, and dependent upon, the independence of the General Counsel. If the Board wants its orders enforced, it must rely on the General Counsel to seek their enforcement. And if the General Counsel does not seek enforcement of the Board's orders, those orders cannot be given "teeth."

2.1.2. The Sixth Circuit's holding that the General Counsel is subject to at-will removal by the President is operationally incompatible with the structure of the Act and historical practice.

Despite all this, under the Sixth Circuit's decision, the President may remove the General Counsel at will. This threatens the independence of the Board itself in a very practical way.

Now, if the Sixth Circuit decision stands, in the event the General Counsel seeks enforcement of Board decisions with which the President disagrees, the General Counsel is placed in the position of either honoring her duty to represent the Board's position in court in accord with the Act or deferring to the President *in violation* of the Act. If, at the direction of the Board, the General Counsel chooses to honor her duty to the Board, she risks

being fired by the President. But if, at the direction of the President, the General Counsel chooses *not* to honor her duty to the Board, the Board's decisions won't be worth the paper they're written on; for the respondent can violate them "with impunity." *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 890 (7th Cir. 1990) (Posner, J.). There is no reason to presume Congress intended to put the General Counsel in such an impossible position. An individual can serve two masters only "if the service to one does not involve abandonment of the service to the other." *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94–95 (1995) (citation and emphasis omitted)). But that is precisely what the Sixth Circuit's decision requires.

It is a cardinal principle of statutory construction that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Here, an alternative interpretation *is* available. Reading Section 3(d) to impose a for-cause limitation on the President's removal authority over the General Counsel gives force to all of the provisions of the Act, including those providing for (1) the General Counsel's four-year term; (2) the Board's protections against at-will presidential removal; (3) the General Counsel's supervisory authority over NLRB attorneys; (4) the Board's authority to direct NLRB attorneys in enforcement proceedings; and (5) the General Counsel's authority over prosecutorial decisions made before the Board issues a decision (more on this last provision shortly). This is the only construction that reads "the statute as a symmetrical and coherent regulatory scheme," and fits "all parts into an harmonious whole." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (cleaned up).

This understanding of Section 3(d) also marks out the extent to which the President *does* have authority to remove the General Counsel: namely if she violates her duty to faithfully pursue enforcement of the Board's decisions in federal court. For "[t]he legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough." *NLRB v. Local Union No. 1229, Int'l Bhd. Of Elec. Workers*, 346 U.S. 464, 475 (1953); *accord Collins*, 594 U.S. at 256.

Indeed, that is precisely how previous presidents have apparently viewed their removal authority over the General Counsel for 75 years. President Truman, for example, asked the first NLRB General Counsel, Robert Denham, to resign in 1950 (and he did so voluntarily) due to Denham's express refusal to adhere to Board mandates during enforcement proceedings. As Denham admitted: "The Board ordered me flatly not to file a brief prepared under my direction, but to use an earlier draft prepared by one of my law clerks, which I had seen. It was bad law, and I refused[.]" *See* 96 Cong. Rec. App'x A7989-91 (1951), https://www.govinfo.gov/content/pkg/GPO-CRECB-1950-pt18/pdf/GPO-CRECB-1950-pt18-1.pdf (extension of remarks by Rep. Paul Shafer, with excerpt of Robert N. Denham, *And So I Was Purged*, The Saturday Evening Post (Dec. 30, 1950)).

So even if prior practice indicates the President has authority to fire the General Counsel, that authority has only ever been entertained under circumstances demonstrating "cause" for termination, defined as disloyalty to the *Board's* mandates—not the President's.

2.1.3. Other interpretive canons do not trump statutory structure and historical practice.

The courts of appeal have thus far found that the General Counsel enjoys no protection against at-will removal by the President by relying on various other canons of statutory interpretation—beyond structure and history—applying them in rote fashion. In addition to the Sixth Circuit's decision here, see *NLRB v. Aakash, Inc.*, 58 F.4th 1099 (9th Cir. 2023); *Exela Enter. Sols., Inc. v. NLRB*, 32 F.4th 436 (5th Cir. 2022). But rote application of interpretive canons fails to account for the unique position the General Counsel occupies within the NLRA, as the exclusive advocate of the Board. In none of the three cases that have addressed this issue—including in the Sixth Circuit decision in this case—did the courts grapple with the structural and historical arguments that petitioner consistently has pressed in this case.

2.1.3.1. The fact that the Board enjoys express statutory removal protection does not imply the General Counsel may be fired at will given the relevant statutes were enacted separately.

The most common objection to interpreting Section 3(d) of the Act as implying removal protections for the General Counsel is that, because Section 3(a) of the Act contains an express limitation on removing members of the Board, Section 3(d) should be read as intentionally omitting such protections for the General Counsel. *See* App. 11a–12a. But as this Court has cautioned, this

"negative pregnant argument should not be elevated to the level of interpretive trump card." *Field v. Mans*, 516 U.S. 59, 67 (1995).

What these decisions omit is that the relevant removal language in Section 3(a) was enacted as part of the Wagner Act in 1935, while Section 3(d) was enacted as part of the Taft-Hartley Act in 1947. *Compare* Pub. L. No. 74-198, §3(a), 49 Stat. 449, 451 (1935), *with* Pub. L. No. 80-101, §3(a), 61 Stat. 136, 139 (1947). Given this twelve-year gap, there is no reason to infer anything from the fact that Congress did not explicitly extend Section 3(a)'s removal restrictions as to Board members to the General Counsel under Section 3(d). *Compare Gomez-Perez v. Potter*, 553 U.S. 474, 486–87 (2008) (holding the Age Discrimination in Employment Act's federal-sector provision did not impliedly prohibit retaliatory conduct even though the ADEA's private-sector provision expressly prohibited retaliation, where "the two relevant provisions were not considered or enacted together"), *with Collins*, 594 U.S. at 247–48 (holding it could be inferred that the "Acting" FHFA Director did not have implied removal protections based on the fact that the FHFA Director was granted express removal protections, where the relevant statutory provisions were enacted simultaneously).

More, notably absent from the Taft-Hartley Act's legislative history is any indication Section 3(a)'s for-cause protections were ever reconsidered before the Act becoming law. *See* 1 & 2 N.L.R.B., Legislative History of the Labor Management Relations Act, 1947 (Gov. Print Off., 1948) ("LMRA History"), https://catalog.hathitrust.org/Record/000955829. Rather, it appears Congress simply presumed the General Counsel would

have a protected right to a full four-year term under Section 3(d), a presumption detractors relied on to drum up opposition to the bill. *See* 2 LMRA History at 1559 (6th Cir. Dkt. No. 22 at ADD003) (statement of Sen. Morse) (the General Counsel "is to be appointed by the President for a *fixed* term of years" (emphasis added))); *id.* at 1567 (ADD004) (statement of Sen. Murray) ("Any discipline of this individual is precluded by making him a Presidential appointee, subject to Senate confirmation, removable only for clear malfeasance in office.")). This sentiment was further echoed in President Truman's veto of the Taft-Hartley Act (which Congress overrode), stating "[t]he bill would establish, in effect, an independent General Counsel and an independent Board." *See* Harry Truman, *Veto of the Taft-Hartley Labor Bill* (June 20, 1947) https://www.trumanlibrary.gov/library/public-papers/120/veto-taft-hartley-labor-bill.

2.1.3.2. A statutory term of years may be read to limit the removal of agency officials when considering the structure of the agency as a whole.

The circuit courts have also relied on the general presumption that a statutory term of years, without more, does not constitute a removal restriction. *See*, *e.g.*, *Aakash*, 58 F.4th at 1103 (citing *Parsons v. United States*, 167 U.S. 324 (1897)). But this too ignores that a term limit can, *with more*, restrict removal of certain officers of an otherwise independent agency. *See Wiener*, 357 U.S. at 353–56. Indeed, federal courts, in reliance on this Court's precedents, have recognized that "Congress may clearly indicate its intent to restrict removals through the statutory structure and function of an office."

Severino, 71 F.4th at 1044; *see also FEC v. NRA Pol. Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (discussing commissioners of the Federal Election Commission); *S.E.C. v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) (discussing commissioners of the Securities and Exchange Commission); *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 487 (2010) (accepting the parties' agreement that SEC commissioners could not be removed except for cause).

2.1.3.3. Interpreting the NLRA to prohibit at-will removal of the General Counsel does not impede the President's Article II responsibility to faithfully execute the law.

Finally, the Sixth Circuit determined that petitioner's proposed interpretation of the Act is unconstitutional because Section 3(d) vests "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [of the Act], and in respect of the prosecution of such complaints before the Board. . . ." *See* App. 11a. But that view ignores that the analogy between the General Counsel and a traditional prosecutor is, as this Court has recognized, "far from perfect." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 156 n.22 (1975); *accord NLRB v. United Food & Com. Workers Union, Loc. 23, AFL-CIO*, 484 U.S. 112, 126 n.21 (1987) (calling the analogy "of little aid").

First, the General Counsel does not have authority to "bring" charges, as the panel below thought. App. 13a. Rather, "[t]he General Counsel, unlike most prosecutors, may authorize the filing of a complaint with the Board

only if a private citizen files a 'charge.'" *Sears*, 421 U.S. at 156 n.22.

Second, the General Counsel's executive authority is limited to those discrete matters of labor law relevant to the charges private citizens choose to file. *Cf. Seila Law*, 591 U.S. at 219 (distinguishing the CFPB Director from the independent counsel at issue in *Morrison v. Olson*, 487 U.S. 654 (1988), whose independent executive power "was trained inward to high-ranking Governmental actors identified by others").

Third, the General Counsel is not vested with statutory discretion to bring matters directly to court; prosecutions ultimately proceed "before the Board." 29 U.S.C. §153(d). So, since the Board possesses exclusive statutory authority over *which* cases proceed to an Article III court, the General Counsel's prosecutorial authority never truly extends beyond the Board itself.†

On this issue, *Seila Law* is particularly instructive. The Court there cited *Humphrey's Executor*, 295 U.S. at 632, for the proposition "that between purely executive officers on the one hand, and officers that closely resembled the

† The General Counsel seeks judicial relief without Board approval under Section 10(l) of the Act (*see* 29 U.S.C. §160(l)), but doing so is *mandatory* once the General Counsel finds merit to certain limited unfair labor practice allegations. Section 10(l) thus also does not grant the General Counsel true prosecutorial discretion. *See Overstreet v. United Bhd. of Carpenters & Joiners of Am., Loc. Union No. 1506*, 409 F.3d 1199, 1205 (9th Cir. 2005) ("Board officials must petition for a § 10(l) injunction whenever it has reasonable cause to believe that specific violations of the NLRA . . . have occurred." (cleaned up)).

FTC Commissioners on the other, there existed 'a field of doubt' that the Court left 'for future consideration.'" *Seila Law*, 591 U.S. at 216. In determining where the CFPB Director fell on that spectrum, *Seila Law* found, in three respects, that the Director's authority was incompatible with removal protections for a single individual—authority that, here, is held by the Board, not the General Counsel:

- to "promulgate binding rules fleshing out [ ] federal statutes," 591 U.S. at 218; *compare* 29 U.S.C. §156 ("The Board shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter.");

- to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications," 591 U.S. at 218–19; *compare* 29 U.S.C. §159 (granting the Board authority to determine bargaining units and conduct union elections) *and* 29 U.S.C. §160(c) (granting the Board authority to issue orders remedying unfair labor practices); and

- to "seek daunting monetary penalties against private parties on behalf of the United States in federal court," 591 U.S. at 219; *see* 29 U.S.C. § 160(e) ("The Board shall have power to petition any court of appeals of the United States" for enforcement of its orders); *id.* § 160(j) ("The Board shall have power . . . to petition any United States district court" for injunctive relief).

Seila Law thus supports the constitutionality of recognizing the General Counsel cannot be removed at will. The General Counsel's responsibility to advocate on behalf of the Board renders the General Counsel something other than a "purely executive officer," placing the position within the "field of doubt" left by *Humphrey's Executor* for future adjudication. And in weighing the General Counsel's overall responsibilities, the scale must tip in favor of recognizing removal protections, because final decision-making and policy-making authority at the NLRB is vested exclusively in the Board. The General Counsel merely makes policy *recommendations* through her prosecutions, which the Board is free to accept or reject. But once the Board renders a decision, the General Counsel is bound to adhere to it, even if she thinks it is, in former General Counsel Denham's words, "bad law." Even the *Board*'s adjudicatory authority is ultimately limited to "submitting recommended dispositions to an Article III court," which *Seila Law* cited as supporting a constitutional removal restriction. *See* 591 U.S. at 218–19.

Accordingly, recognizing implied removal protections for the General Counsel does not impede the President's Article II powers any more than the Board's express removal protections do. As such, the fixed four-year term for the General Counsel in Section 3(d) of the Act can and should be interpreted to prevent at-will removal by the President, so as to effectuate Congress's intent that the Board operate as an independent agency.

2.2. This case presents an ideal vehicle for deciding whether the President may remove the General Counsel at will.

This case presents the removal question cleanly and squarely, as the Board has never disputed that its

complaint against Rieth-Riley would be invalid if General Counsel Robb were improperly removed from office. *See SW Gen., Inc. v. NLRB*, 796 F.3d 67, 79–81 (D.C. Cir. 2015), *aff'd*, 580 U.S. 288 (2017) (recognizing private parties are entitled to challenge actions by individuals purporting to wield the General Counsel's power on the grounds they lack such authority). The issue was pressed below, fully briefed by the parties, and discussed extensively by the court of appeals with the additional benefit of on-point decisions from the Fifth and Ninth Circuits.

And although there is no circuit conflict on this issue, the Court has consistently recognized the importance of addressing separation-of-powers issues even in the absence of a circuit conflict—particularly where, as here, the President's removal authority is at issue. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), for example, the D.C. Circuit addressed the removal protections for the PCAOB as a matter first impression, and still the Court granted certiorari. Similarly, in *Collins v. Yellen*, 594 U.S. 220 (2021), the Fifth Circuit concluded that removal restrictions for the director of the Federal Housing Finance Agency were unconstitutional, also as a matter of first impression, and the Court granted certiorari. And in *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020), both the D.C. and Ninth Circuits upheld removal protections for the CFPB Director and no circuit had ruled otherwise—and still, once more, the Court granted certiorari.

In sum, this case neatly presents an issue regarding the scope of presidential removal powers of foundational importance to the independence of the NLRB, and it does so directly, after consideration by three different appellate courts.

CONCLUSION

The Court should grant certiorari on both the standard-of-review issue and the removal issue, and set the case for merits briefing and argument. At minimum, the Court should grant certiorari and summarily reverse on the standard-of-review issue.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 14, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 23-1899/1946

RIETH-RILEY CONSTRUCTION CO., INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

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

Nos. 07-CA-261954; 07-CA-269365; 07-CB-247398.

Argued: July 25, 2024

Decided and Filed: August 14, 2024

Before: MOORE, COLE, and MATHIS, Circuit Judges.

OPINION

COLE, Circuit Judge. This action concerns an unfair labor practice dispute between Rieth-Riley Construction Co., a highway construction contractor in Michigan, and

Appendix A

Local 324, International Union of Operating Engineers, AFL-CIO (the Union), which represents employees at road construction contractors, regarding subcontracting and employee wages. This matter comes before us on Rieth-Riley's Petition for Review and the Board's Cross-Application for Enforcement of a Final Order of the Board. We enforce the NLRB's decision and order, hold that the President can remove the NLRB General Counsel at will, and hold that the General Counsel had unreviewable prosecutorial discretion to fashion complaints on behalf of the parties.

I.

A.

Rieth-Riley is an asphalt paving and heavy road construction contractor in Michigan. The Union represents more than 14,000 employees of road construction contractors in Michigan, including Rieth-Riley. The last collective-bargaining agreement between Rieth-Riley and the Union expired on May 31, 2018 (the Road Agreement). Negotiations began in November 2018, but despite participating in 10 bargaining sessions between then and September 2019, the parties have not yet reached a successor agreement.

The two main issues remaining after the parties' negotiations are subcontracting and wages. On July 8, 2019, the Union proposed requiring Rieth-Riley to subcontract only with subcontractors who comply with the terms of the prior Road Agreement. Rieth-Riley counter-

proposed on July 29, stating that it would agree to the Union's restrictions if they were limited to seven counties. The Union rejected the counter-proposal because it had a successor contract with the Michigan Union Contractors Group (MUCG) that contained a "most-favored-nations" clause, under which any agreement with Rieth-Riley to limit the subcontracting restriction to certain counties would impact the Union's other subcontracting agreements throughout the state.

During one of the negotiating sessions, Doug Stockwell, the Union's business manager, told Keith Rose, Rieth-Riley's President and CEO, that the Union "might as well die on the vine" if it did not get "its desired subcontracting language" and that he was "willing to burn the house down over subcontracting." (ALJ Op., PageID 2143.) On July 31, 2019, while contract negotiations were ongoing, the Union went on strike against Rieth-Riley. The Union then set up picket lines at 13 Rieth-Riley facilities in Michigan.

Relevant here, on August 13, 2019, at the Rieth-Riley Lansing facility, truckdrivers Karl Grinstern and Chad Feibig were driving out of the facility at three to four miles per hour when the truck hit the left side of the body of Michael Feighner, a striking union member picketing on the driveway. Feighner then yelled at Grinstern, jabbed Grinstern's arm with a picket sign several times, opened the truck door, took the keys out of the ignition, and spit in Grinstern's face. Union representative Robert Heurtebise stepped between the men and suggested Feighner leave for the day. Feighner was not disciplined and was paid by

the Union for picketing. On August 29, 2019, Rieth-Riley filed an unfair labor practice charge against the Union regarding the Feighner and Grinstern incident as well as other alleged picket line misconduct.

On June 1, 2020, the Union requested the following subcontractor-related information:

> For the last four years, provide any and all documents that indicate the percentage of work covered by the expired 2013-2018 MITA/ IUOE 324 Road Agreement that has been subcontracted.

(*Id.* at PageID 2143.) The Union explained that the information was relevant to its bargaining responsibility and that whether "Rieth-Riley sub-contracts one to ten percent of its work versus . . . 50 percent or more would have a large impact" on its counter-proposals. (*Id.* at 2144.)

On June 16, 2020, Rieth-Riley responded, stating: (1) this was the third iteration of the same request; (2) the information requested was not relevant to negotiations, was confidential, and akin to a trade secret; (3) the request was just pretense for the Union to bring an unfair labor practice charge; and (4) the Union would use the information to harass the subcontractors. On June 18, 2020, the Union filed an unfair labor practice charge against Rieth-Riley for its refusal to provide the requested subcontracting information.

On November 3, 2020, the Union sent a second request, about bargaining unit employees:

> From June 1, 2020, to the present, provide the compensation, both wages and fringe benefits, for all employees (including their names and classifications) doing work covered by the work jurisdiction provisions of the expired 2013-2018 MITA/IUOE 324 Road Agreement. This information demand includes, but is not limited to, all employees on whose behalf Rieth-Riley has ever previously paid employee benefit contributions to the Operating Engineers Local 324 Fringe Benefit Funds.

(*Id.* at PageID 2146.) On November 12, 2020, Rieth-Riley responded, stating that: (1) the term "work jurisdiction provisions" was vague; (2) the Union requested this information to harass Rieth-Riley employees; and (3) no bargaining sessions had occurred for a year. (*Id.* at PageID 2147.) Rieth-Riley proposed a definition for "work jurisdiction provisions" based on Article I of the preexisting Road Agreement and requested confirmation from the Union.

On November 16, 2020, the Union confirmed that the Road Agreement provision cited by Rieth-Riley defined "work jurisdiction provisions" but "not by limitation." (*Id.*) Rieth-Riley responded on November 20, stating it understood the Union's response to reject the proposed definition of "work jurisdiction provisions" without offering an alternative definition, and requested the term be defined with specificity. On November 23, 2020, the Union filed an unfair labor practice charge against Rieth-Riley for failure to provide the bargaining unit employee information.

Appendix A

B.

On July 30, 2020, the General Counsel of the NLRB issued a complaint on behalf of Rieth-Riley containing 10 allegations against the Union for alleged picketing misconduct in violation of Section 8(b)(1)(A) of the NLRA. On September 24, 2020, the General Counsel issued a complaint on behalf of the Union against Rieth-Riley for failure to produce the requested subcontracting percentage information. On February 5, 2021, the General Counsel issued a second complaint on behalf of the Union against Rieth-Riley for failure to produce the November 2020 requested bargaining unit employee information. All three cases were consolidated for hearing. On March 3, 2021, the General Counsel withdrew nine of the picketing misconduct allegations against the Union, leaving only the incident between Feighner and Grinstern.

At the hearing, in addition to testimony about the incident between Grinstern and Feighner, Rieth-Riley presented evidence of other picket line misconduct, which the ALJ allowed for the limited purpose of arguing as a defense that Rieth-Riley had reasonable fear that the Union would use the information requested improperly. Rieth-Riley alleged that the picketers engaged in misconduct at 10 facilities, including picketers: blocking the vision of drivers with their picket signs and stopping vehicles attempting to exit the facilities, throwing "fart bombs" into the vehicles of non-picketing employees, breaking the windshields of Rieth-Riley vehicles and machinery, making contact with trucks trying to leave the facility, shouting at non-striking employee drivers,

and using their own vehicles to block the entrances and exits to certain facilities.

On July 18, 2022, the ALJ issued a decision concluding that Rieth-Riley's refusals to provide information were not justified and violated NLRA Section 8(a)(1) and (5), and that the Union violated Section 8(b)(1)(A) when Feighner struck Grinstern with a picket sign and spit in his face. Because it was not alleged in the complaint, the ALJ declined to make a finding as to whether Feighner's spitting on Feibig, the other truckdriver in the vehicle with Grinstern, was a violation of Section 8(b)(1)(A). The ALJ ordered: (1) Rieth-Riley to provide the subcontracting and employee information to the Union; and (2) the Union to cease and desist from physically assaulting individuals by hitting or spitting on them, and from restraining or coercing employees in their exercise of their NLRA rights.

On September 28, 2023, the Board affirmed the ALJ's Decision and adopted the ALJ's Order with a slight modification requiring the subcontracting information be limited to documents indicating the overall percentage of subcontracting. Rieth-Riley now petitions this court, requesting review of the Board's Order and that we remand the matter for further proceedings. The NLRB cross petitions for enforcement of its order.

II.

This court defers to the "Board's findings of fact, reasonable inferences from the facts, and applications of law to the facts if they are supported by substantial

evidence on the record considered as a whole." *Hendrickson USA, LLC. v. NLRB*, 932 F.3d 465, 469 (6th Cir. 2019). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 587 U.S. 97, 103, 139 S. Ct. 1148, 203 L. Ed. 2d 504 (2019) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938)).

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. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262, 219 L. Ed. 2d 832 (2024). We pay "careful attention" to the judgment of the agency to inform that inquiry, *id.* at 2273, and we also review de novo the NLRB's interpretation of non-NLRA legal conclusions, *Painting Co. v. NLRB*, 298 F.3d 492, 499 (6th Cir. 2002). Finally, the Board has "broad discretion in fashioning remedies for [NLRA] violations." *NLRB v. ADT Sec. Servs., Inc.*, 689 F.3d 628, 635 (6th Cir. 2012). We review remedial orders for abuse of discretion. *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1291 (6th Cir. 1998).

III.

A.

In January 2021, President Joseph R. Biden removed the NLRB's then General Counsel, Peter Robb, who had 10 months remaining on his four-year term. President Biden named Peter Ohr as the Acting General Counsel, after

which Ohr issued the unfair-labor practice complaints against Rieth-Riley. Rieth-Riley argued that President Biden's removal of then-General Counsel Robb was invalid, rendering the unfair labor practice complaints against it invalid. The Board concluded there was no legal basis for a challenge to the President's removal authority over the General Counsel. (Board Decision & Ord. at PageID 2476 n.1 (citing *Aakash Inc. d/b/a Park Cent. Care & Rehab. Ctr.*, 371 NLRB No. 46, slip op. at 1 (2021) *enfd. NLRB v. Aakash, Inc.*, 58 F.4th 1099, 1103-05 (9th Cir 2023)).

The Constitution gives the President authority "to remove those who assist him in carrying out his duties." *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 513-14, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010). The President's removal power of an executive officer is generally plenary. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 214-15, 140 S. Ct. 2183, 207 L. Ed. 2d 494 (2020). The Supreme Court recognizes two exceptions to the President's plenary removal power, neither of which are applicable here.

First, Congress can impose removal restrictions on a multi-member body of experts with staggered terms that is politically balanced, does not exercise executive power, and performs quasi-legislative and quasi-judicial functions. *Id.* at 216-17; *Humphrey's Executor v. United States*, 295 U.S. 602, 624, 628, 55 S. Ct. 869, 79 L. Ed. 1611 (1935) (upholding removal protections for commissioners of the Federal Trade Commission because they had no executive power and it was an administrative body that performed specified legislative or judicial duties); *Wiener*

v. United States, 357 U.S. 349, 356, 78 S. Ct. 1275, 2 L. Ed. 2d 1377, 142 Ct. Cl. 932 (1958) (upholding removal protections for members of the War Claims Commission—an independent, three-member body that adjudicated WWII injury claims).

Second, Congress can compel for-cause removal protections for inferior officers who have limited duties and no policymaking or administrative authority that could "impede the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988) (upholding removal protections for an independent counsel appointed to investigate and prosecute crimes by high-ranking Government officials); *see also United States v. Perkins*, 116 U.S. 483, 485, 6 S. Ct. 449, 29 L. Ed. 700, 21 Ct. Cl. 499 (1886) (upholding tenure protections for a naval cadet-engineer).

Neither exception applies because the General Counsel is a singular officer that exercises extensive executive functions. The General Counsel has final authority to: (1) supervise all NLRB attorneys (other than ALJs and legal assistants to Board members); and (2) investigate charges, issue complaints, and prosecute unfair labor practices. 29 U.S.C. § 153(d); *see also Seila L. LLC*, 591 U.S. at 218-19 (declining to extend removal protections to CFPB director because the director was not merely a legislative or judicial aid, but administered 19 consumer-protection statutes, promulgated rules, issued "final decisions awarding legal and equitable relief in administrative adjudications," and was empowered to

"seek daunting monetary penalties against private parties on behalf of the [U.S.] in federal court"); *and Collins v. Yellen*, 594 U.S. 220, 250-51, 141 S. Ct. 1761, 210 L. Ed. 2d 432 (2021) (holding as unconstitutional statutory restrictions on President's removal authority of director of FHFA).

Further, the "words, structure, and history of the . . . NLRA clearly reveal that Congress intended to differentiate between the General Counsel's and the Board's 'final authority' along a prosecutorial versus adjudicatory line." *NLRB v. United Food & Commercial Workers Union, Local 23* (*UFCW*), 484 U.S. 112, 124, 108 S. Ct. 413, 98 L. Ed. 2d 429 (1987) (quoting 29 U.S.C. § 153(d)). In response to complaints of bias and lack of uniformity in enforcement, the 1947 Taft-Hartley Act amendment to the NLRA created the General Counsel's office to separate the Board from the prosecutorial functions of the office. *Jackman v. NLRB*, 784 F.2d 759, 763 (6th Cir. 1986); *see also UFCW*, 484 U.S. at 129 (explaining that the "on behalf of the Board" language in 29 U.S.C. § 153(d) was added "to make it clear that the General Counsel acted within the agency, not to imply that the acts of the General Counsel would be considered acts of the Board"). The decision to initiate or dismiss charges is an executive, not judicial, constitutional duty. *United States v. Bell*, 37 F.4th 1190, 1195-96 (6th Cir. 2022).

The text of the NLRA also supports this conclusion. "When a statute does not limit the President's power to remove an agency head, [courts] generally presume that the officer serves at the President's pleasure." *Collins*,

594 U.S. at 248. Section 3(d) provides that the Board's General Counsel "shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years." 29 U.S.C. § 153(d). It contains no provision restricting the President's removal power, unlike Section 3(a), which expressly states: "[a]ny member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for *no other cause*." 29 U.S.C. § 153(a) (emphasis added). "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Collins*, 594 U.S. at 248 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002)). Further, the General Counsel's fixed, four-year term does not implicitly provide removal protections. The Supreme Court has long held that a fixed term of office, without any additional limitation, does not impact the President's discretionary removal power. *Parsons v. United States*, 167 U.S. 324, 338-39, 17 S. Ct. 880, 42 L. Ed. 185, 32 Ct. Cl. 626 (1897).

Rieth-Riley differentiates between the General Counsel's prosecutorial function in front of the Board and his responsibility to the Board to petition courts of appeals for enforcement of Board decisions through litigation. *See* 29 U.S.C. § 160(e) ("The Board shall have power to petition any court of appeals of the United States . . . for the enforcement" of its decisions and orders). Rieth-Riley argues that the NLRB must rely on the General Counsel to effectuate its decisions by seeking enforcement,

because the Board's independence is tied to the that of the General Counsel. Without removal protections, Rieth-Riley maintains that the General Counsel can undermine the Board's actions and be put in the impossible position of serving "two masters" with "conflicting agendas," i.e., the President and the Board. (Pet'r's Br. 59.)

First, it is the General Counsel's prosecutorial function in front of the Board—an authority built into the statutory framework to which no party objects—that provides the General Counsel with influence over the issues that the Board may ultimately petition federal courts to review. The General Counsel has final authority to issue, and withdraw, complaints. 29 U.S.C. § 153(d). Thanks to that prosecutorial authority, the General Counsel determines what charges the Board will hear and thus what issues the Board will have an opportunity to decide and seek enforcement of. The authority to initiate or dismiss complaints is a purely executive, not judicial, function, *Bell*, 37 F.4th at 1195-96; it is squarely on the prosecutorial side of the "prosecutorial versus adjudicatory line," *UFCW*, 484 U.S. at 124. Stated otherwise, it is prosecutorial, i.e., executive authority to bring and drop charges that empowers the General Counsel; the President properly has removal authority over officers with such executive function. *See Collins*, 594 U.S. at 250-52. The General Counsel's purely executive function, moreover, is detached from the Board's adjudicatory function and thus untethered from the Board's independence.

Second, removal protections would serve only to insulate the General Counsel's office from accountability

by removing the President's at-will removal power, which is currently the main check on the General Counsel's actions. *See id.* at 252. As explained above, the General Counsel's and the Board's authority are separated "along a prosecutorial versus adjudicatory line." *UFCW*, 484 U.S. at 124. Removal protections for the General Counsel thus would not provide the Board with more control over the office than it already has.

In sum, President Biden lawfully removed former General Counsel Robb, and the prosecution brought by then-Acting General Counsel Ohr against Rieth-Riley was proper. *See Aakash, Inc.*, 58 F.4th at 1104-06 (holding the President has at-will removal power over NLRB General Counsel); *Exela Enter. Sols., Inc. v. NLRB*, 32 F.4th 436, 443-45 (5th Cir. 2022) (same).

B.

"Section 7 of the NLRA guarantees employees the right 'to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing,' and the right to refrain from those activities." *Hendrickson USA, LLC.*, 932 F.3d at 470 (quoting 29 U.S.C. § 157). Section 8 makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]," including refusing to bargain collectively in good faith with the representatives of an employer's employees. 29 U.S.C. § 158(a)(1), (a)(5). An employer's duty to bargain collectively includes providing, on request, "relevant information needed by a labor union for the proper performance of its duties

as the employees' bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303, 99 S. Ct. 1123, 59 L. Ed. 2d 333 (1979). "Good faith bargaining requires full disclosure by the parties of relevant information in order to produce informed, effective negotiations." *NLRB v. Goodyear Aerospace Corp.*, 497 F.2d 747, 751 (6th Cir. 1974) (quotations and citation omitted). "The duty to supply information under § 8(a)(5) turns upon 'the circumstances of the particular case.'" *Detroit Edison Co.*, 440 U.S. at 314 (quoting *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153, 76 S. Ct. 753, 100 L. Ed. 1027 (1956)).

We apply a liberal "discovery type standard," which requires only that the requested information be relevant to the union in its negotiations and helpful in carrying out its responsibilities. *Gen. Motors Corp. v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983). "Relevance is broadly construed, and in the absence of a countervailing interest, any requested information that has a bearing on the bargaining process must be disclosed." *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19, 333 U.S. App. D.C. 84 (D.C. Cir. 1998) (citation omitted).

Bargaining Unit Employee Information. The NLRA "creates a duty to bargain collectively 'with respect to wages, hours, and other terms and *conditions of employment*.'" *Gen. Motors Corp.*, 700 F.2d at 1088 (quoting 29 U.S.C. § 158(d)). Bargaining unit employees' wages, hours, and conditions of employment are "presumptively relevant to bargaining issues" and an "employer has a duty to provide such information on request." *Goodyear Aerospace Corp.*, 497 F.2d at 751 (citation omitted).

The bargaining unit employee information that the Union requested is relevant in two ways. First, it is presumptively relevant on its face as wage-related information. Second, it is specifically relevant to the parties' negotiations, because wages are an outstanding issue. Substantial evidence supports the finding that Rieth-Riley should have understood why the Union requested this information and that it was obligated to provide the Union with this "readily available relevant information." *ASARCO, Inc., Tenn. Mines Div. v. NLRB*, 805 F.2d 194, 198 (6th Cir. 1986).

Rieth-Riley's allegations of bad faith do not alleviate its burden, as the "good faith" disclosure requirement is met if "at least one reason for the demand can be justified." *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1192, 343 U.S. App. D.C. 336 (D.C. Cir. 2000) (citing *Island Creek Coal Co.*, 292 NLRB 480, 489 (1989)). The Union's demand was justified by its role as the employee's bargaining representative. The requested names, compensation, and classification information was presumptively relevant, and the Union was not required to provide further justification.

Rieth-Riley argues, however, that it was unable to comply because the Union's information request was ambiguous. This argument is without merit. In *Keauhou Beach Hotel*, the Board established the standard that "an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification *and/or* comply with the request to the extent it encompasses necessary and relevant information." 298 NLRB 702, 702 (1990) (emphasis added).

Rieth-Riley contends that the Board modified this same standard four years later by eliminating the conjunctive "and/or," and instead adopting the disjunctive "or"; specifically, in *Pacific Physicians Servs., Inc.*, the Board explained that "[i]t is well established that an employer may not simply refuse to comply with an ambiguous or overbroad information request, but must request clarification *or* comply with the request to the extent it encompasses necessary and relevant information." 315 NLRB 108, 108 (1994) (emphasis added). Given this language, in Rieth-Riley's view, it met its obligation by requesting clarification, and it was not required to act further when the Union allegedly failed to clarify the definition of part of its request.

It is true that the Board has inconsistently applied this standard. Indeed, more recent decisions addressing information request disputes apply both the "and/or" standard established in *Keauhou Beach Hotel* and the "or" disjunctive standard. *See e.g., Starbucks Corp. & Workers United, a/w Serv. Emps. Int'l Union*, 373 NLRB No. 48, 2024 WL 1961075, *2 (May 2, 2024) (applying "and/or" standard); *Superior Protection Inc.*, 341 NLRB 267, 269 (2004) (applying "or" standard). Which standard is applicable, however, is irrelevant because negotiations did not end after Rieth-Riley sought clarification.

There is substantial evidence that the Union appropriately clarified that "work jurisdiction provisions" was defined, at a minimum, by Article I of the Road Agreement. At that point, Rieth-Riley was obligated to move onto step two and provide the presumptively relevant

employee information the Union indicated it needed to make wage proposals.[1] *See Hilton Hotel Employer LLC*, 372 NLRB No. 61, at *5 (Feb. 28, 2023) (concluding the hotel employer had conducted "semantic gamesmanship" when it refused to provide the union with the requested information, even after the union clarified because the totality of the circumstances showed that the union sought guest feedback information). Further, Rieth-Riley's position acts against the purpose of Section 8(a)(5), which encourages good faith bargaining and sharing of information. *Goodyear Aerospace Corp.*, 497 F.2d at 751.

In conclusion, there is substantial evidence that the bargaining unit employee information was presumptively relevant and was going to be used by the Union to draft a wage proposal. Once the Union clarified that Article I of the Road Agreement provided the basic definition for "work jurisdiction provisions," Rieth-Riley was, at

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1. While the strike was ongoing, there were two petitions filed for an election to decertify the Union as the bargaining representative of Rieth-Riley's operating engineers in Michigan. Both were dismissed by the General Counsel. In response to the second petition, Rieth-Riley provided the Union with a voter list containing the full names, work locations, shifts, job classifications, contact information, and job category of all eligible voters (i.e., whether the employee had returned to work from striking, was a striker, or was a replacement worker). That the Union already had access to most of the bargaining unit employee information from a prior decertification petition does not discharge Rieth-Riley's obligation. *ASARCO, Inc.*, 805 F.2d at 198 (explaining that "the availability of the requested information from another source does not alter the employer's duty to provide readily available relevant information" to the union).

minimum, obligated to provide the presumptively relevant information to the Union within the boundaries of that definition.

Subcontracting Percentage Information. Where the information requested concerns non-unit employees, like requests for subcontracting information, the Union must establish relevancy. *E.I. DuPont de Nemours & Co. v. NLRB*, 744 F.2d 536, 538 (6th Cir. 1984) (per curiam). Because subcontracting was at issue in the negotiations, information about subcontracting is relevant to the Union's ability to fulfill its duties as the collective-bargaining representative for union employees. *Cf. Elec. Workers Loc. 58 Pension Tr. Fund v. Gary's Elec. Serv. Co.*, 227 F.3d 646, 654 (6th Cir. 2000) (explaining that a union's request for information about enforcement of an existing agreement with an employer was relevant to the union's ability to fulfill its duties); *Crozer-Chester Med. Ctr v. NLRB*, 976 F.3d 276, 285-86 (3d Cir. 2020) (finding that information in an employer's asset purchase agreement for sale of employer's health care network contained relevant information regarding availability of work, potential for layoffs and hiring, and whether non-unit employees were receiving pay and benefits the union may want to negotiate for union employees). Not only was the information directly relevant to the Union's potential subcontracting counterproposals, but the Union explained that a smaller percentage of subcontracting would have less impact on its subcontracting proposal than a larger percentage.

Rieth-Riley argues that negotiations were at an impasse because the parties had rejected each other's

proposals and had not held a negotiating session since September 2019. But "a true impasse" exists "after good-faith negotiations have exhausted the prospects of concluding an agreement." *Taylor v. ADT, LLC*, No. 22-6116, 2023 U.S. App. LEXIS 27043, 2023 WL 6601885, at *4 (6th Cir. Oct. 10, 2023) (quoting *United Paperworkers Int'l Union v. NLRB*, 981 F.2d 861, 866 (6th Cir. 1992) (per curiam)). And here, the record evidence does not "*conclusively* point[] to an exhaustion of good faith negotiations." 2023 U.S. App. LEXIS 27043, [WL] at *5. That there had been 10 negotiating sessions without an agreement is not conclusive as to whether negotiations had stalled. *NLRB v. Newcor Bay City Div. of Newcor, Inc.*, 219 F. App'x 390, 396 (6th Cir. 2007) (finding no impasse where seven bargaining sessions had occurred, and the union was developing a proposal to meet employer concerns).

In fact, the Union's request for information demonstrated its continuing efforts to develop a subcontracting proposal. *See Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 142 (2d Cir. 2013) (finding no impasse where "the Union was signaling a willingness to make concessions" or "compromise"). Further, the Union indicated in its letter that subcontracting would be much less of an issue if it comprised only 10% of Rieth-Riley's work. This demonstrates that the Union thought an agreement was potentially reachable—not that the parties were deadlocked. This is also evidence that the Union had potentially departed from its position that the Union would "die on the vine" when it came to subcontracting. Finally, even if we assumed the parties were at a negotiation

impasse, Rieth-Riley's failure to provide the information would not help to break the impasse; in fact, it would prolong it. That behavior should not be rewarded. Given the above, substantial evidence supported the ALJ's conclusion that the negotiations were on hiatus, not at an impasse.

Rieth-Riley also argues that the subcontracting information is confidential. A union's interest in relevant information must accommodate privacy concerns. *Detroit Edison Co.*, 440 U.S. at 318-20 (holding that a union's request for employee aptitude tests was relevant to its claim, but employer's interest in preserving confidentiality was also legitimate, and disclosing the information only upon the employee's written consent was a reasonable accommodation). Employers, however, must propose a way to release the information that accommodates its concerns, such as placing restrictions on the use of the information while still meeting its bargaining obligations. *See, e.g., E. Tenn. Baptist Hosp. v. NLRB*, 6 F.3d 1139, 1144 (6th Cir. 1993) (reversing Board decision where hospital employer offered reasonable alternatives to union request for wage and attendance information that protected the confidentiality of non-union employees). The onus is placed on the employer because it can propose "how best [to] respond to a union['s] [information] request." *U.S. Testing Co.*, 160 F.3d at 21.

As the ALJ explained, redacting the subcontractors' names and addresses was one way to address Rieth-Riley's concerns, but Rieth-Riley never proposed that as a reasonable accommodation. Nor did it ask the Union to

keep the information confidential. Therefore, substantial evidence supports the conclusion the Rieth-Riley failed to meet its burden in asserting this defense and that the NLRA compelled disclosure of this information.

C.

The original complaint issued on behalf of Rieth-Riley against the Union by the General Counsel on July 30, 2020, alleged 10 instances of picket line misconduct, pursuant to Section 8(b)(1)(A) of the NLRA. On March 3, 2021, the General Counsel withdrew nine of the allegations, leaving only the allegations concerning the incident between Feighner and Grinstern. Then-Acting General Counsel Ohr denied Rieth-Riley's appeal of the withdrawal of the misconduct allegations.[2]

The Board affirmed the ALJ's conclusion that Feighner's assault on Grinstern was an unfair labor practice because a union may not restrain or coerce

2. On May 14, 2021, Rieth-Riley filed a complaint for declaratory judgment in the United States District Court for the Western District of Michigan, alleging the withdrawal of the nine allegations was invalid because: (1) it violated the Board's rules on appeals to the General Counsel; and (2) Ohr was not a valid Acting General Counsel because General Counsel Robb's firing was unlawful. On June 21, 2024, the district court granted the General Counsel's motion to dismiss the complaint, finding it lacked subject-matter jurisdiction because the General Counsel's decision to withdraw portions of the complaint "unquestionably constitute[d] an exercise of prosecutorial discretion that Congress shielded from judicial review." *Rieth-Riley Construction Co. v. Kerwin et al.*, R. 26, No. 1:21-cv-407, 2024 U.S. Dist. LEXIS 109663, *15 (W.D. Mich. June 21, 2024).

employees in the exercise of their rights. *See* 29 U.S.C. § 158(b)(1)(A). The Board also concluded that the ALJ need not find a separate violation occurred when Feighner spit on another driver because the remedial notice to the Union already banned spitting. Finally, the Board concluded that the ALJ did not err by not ruling on allegations of picket line misconduct that were not included in the complaint.

On appeal, Rieth-Riley challenges the Board's decision not to reach 42 of the 44 picket misconduct allegations raised at the hearing. Rieth-Riley also argues the Board erred when it concluded that it need not find additional violations because the remedial notice regarding the assault violation was sufficient to apprise picketers of their other unlawful conduct based on the limited allegations in the complaint.

The General Counsel has "final authority" regarding the filing, investigation, and prosecution of unfair labor practice complaints. 29 U.S.C. § 153(d). Therefore, "Congress has delegated to the Office of the General Counsel 'on behalf of the Board' the unreviewable authority to determine whether a complaint shall be filed." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975); *McGlone v. Cintas Corp.*, 35 F.3d 566, *4 [published in full-text format at 1994 U.S. App. LEXIS 24588] (6th Cir. 1994) (table) (citation omitted) (explaining a "General Counsel's refusal to issue a complaint is within his prosecutorial discretion and the courts are without jurisdiction to review that discretionary act"). The General Counsel also has the discretion to withdraw a complaint. *UFCW*, 484 U.S. at 126. While

final orders of the Board are judicially reviewable under Section 10(f) of the NLRA, the statute provides for no such review of General Counsel decisions. 29 U.S.C. § 160(f); *cf. UFCW*, 484 U.S. at 130 (explaining that "since respondent concedes that the General Counsel's decision not to file a complaint is not reviewable under § 10(f), we perceive no merit or logic in the argument that a settlement decision of the General Counsel may be"). Because the decision not to prosecute certain allegations was within the General Counsel's prosecutorial discretion, it cannot be reviewed by this court under the NLRA.

Rieth-Riley's other picket line misconduct allegations were not fully litigated before the ALJ, and those claims are therefore not reviewable by the Board and this court. Whether an issue has been fully litigated is best illustrated in the preclusion context. "An administrative board acts in a judicial capacity when it hears evidence, gives the parties an opportunity to brief and argue their versions of the facts, and the parties are given an opportunity to seek court review of any adverse findings." *Herrera v. Churchill McGee, LLC*, 680 F.3d 539, 547 (6th Cir. 2012) (quoting *Nelson v. Jefferson County*, 863 F.2d 18, 19 (6th Cir. 1988)). In *Herrera*, we gave preclusive effect to a county administrative decision in the later federal court proceedings because the plaintiff was given a full and fair opportunity to litigate his claim through prior administrative proceedings by presenting evidence and seeking judicial review of the administrative decision. *Id.* at 547-50.

While Rieth-Riley presented evidence of other misconduct violations, the ALJ concluded most of that

evidence was hearsay, and allowed it only as evidence of state-of-mind under Federal Rule of Evidence 803(3). Further, the ALJ unequivocally stated that those other incidents of misconduct were not alleged in the complaint, and the evidence was not presented for the truth of the matter asserted, but instead to support Rieth-Riley's affirmative defense that the Union would use the requested employee and subcontracting information improperly. Also, the Union and General Counsel did not present rebuttal evidence.

"Evidence without a supporting allegation cannot serve as the basis of a determination of an unfair labor practice." *Montgomery Ward & Co. v. NLRB*, 385 F.2d 760, 763 (8th Cir. 1967). Typically, "[t]he Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing" and "[e]ven where the record contains evidence supporting a remedial order, the court will not grant enforcement in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue in the hearing itself." *NLRB v. Blake Constr. Co.*, 663 F.2d 272, 279, 214 U.S. App. D.C. 95 (D.C. Cir. 1981). This approach is in line with due process expectations and avoids forcing this court to make decisions on an incomplete record. *Contra Action Auto Stores Inc.*, 298 NLRB 875, 876 n.2 (1990), *enfd*. 951 F.2d 349 (6th Cir. 1991) (table) (per curiam) ("It is well established that the Board may find a violation not alleged in the complaint if the matter is related to other violations alleged in the complaint, is *fully and fairly litigated* , and no prejudice to the respondent has been alleged or established.") (emphasis added). Given the

limited purpose of the evidence presented and that the misconduct was not alleged in the complaint, we cannot fairly conclude that both parties were provided with "an opportunity to brief and argue their versions of the facts." *Herrera*, 680 F.3d at 547.

Finally, the ALJ's notice remedy, as affirmed by the Board, was sufficient to apprise the Union of the unlawful conduct alleged in the complaint. At the time of the hearing, the only remaining allegation in the complaint was that Feighner "inflicted injury upon [Grinstern] by striking [him] with a picket sign." (Misconduct Compl., Admin R., PageID 1756.) Again, this court must defer to the General Counsel's prosecutorial discretion to pursue only one incident of misconduct. *See Sears, Roebuck & Co.*, 421 U.S. at 138. Although Rieth-Riley presented testimony that Feighner also blocked the facility driveway, damaged vehicles, and seized Grinstern's personal property, the ALJ was not tasked with making a finding as to those actions. The complaint was limited to Feighner striking Grinstern with a picket sign. Therefore, the notice sufficiently warned striking members that they could not "[p]hysically assault[] individuals, by hitting them with picket signs or spitting in their face" because it violated Section 8(b)(1)(A) of the NLRA. (Board Decision & Ord., PageID 2477.)

IV.

For the foregoing reasons, we **DENY** Rieth-Riley's petition for review and **GRANT** the NLRB's cross-application for enforcement of its order in full.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 14, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 23-1899/1946

RIETH-RILEY CONSTRUCTION CO., INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

Before: MOORE, COLE, and MATHIS, Circuit Judges.

JUDGMENT

THIS MATTER came before the court upon Rieth-Riley Construction Co., Inc.'s petition for review of an order of the National Labor Relations Board and the Board's cross-application for enforcement.

UPON FULL REVIEW of the record and the briefs and arguments of counsel,

IT IS ORDERED that the petition for review is DENIED and the cross-application for enforcement is GRANTED.

Appendix B

ENTERED BY ORDER OF THE COURT
/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX C — DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD, FILED DECEMBER 15, 2023

Rieth-Riley Construction Co., Inc. *and.* Local 324, International Union of Operating Engineers (IUOE), AFL–CIO. Cases 07–CA–261954; 07–CA–269365; and 07–CB–247398

September 28, 2023

DECISION AND ORDER

By Chairman Mcferran and Members Kaplan And Prouty

On July 18, 2022, Administrative Law Judge Charles J. Muhl issued the attached decision. The General Counsel, Respondent Rieth-Riley, and the Respondent Union filed exceptions and supporting briefs. The General Counsel, Respondent Rieth-Riley, and the Respondent Union each filed answering briefs and reply briefs.

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

Appendix C

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the

1. On exception, Respondent Rieth-Riley argues that the removal from office of then-General Counsel Peter Robb by President Biden renders the complaint in this case invalid. We have determined that such challenges to the authority of the Board's General Counsel based upon the President's removal of former General Counsel Robb have no legal basis. See *Aakash, Inc. d/b/a Park Cent. Care & Rehab. Ctr.*, 371 NLRB No. 46, slip op. at 1 (2021) (finding that superseding Supreme Court decision resolved claim that President's removal of General Counsel violated Sec. 3(d)), enfd. 58 F.4th 1099, 1103-1105 (9th Cir. 2023); see also *Exela Enterprise Solutions v. NLRB,* 32 F. 4th 436 (5th Cir. 2022) (holding that the Act "does not provide tenure protections to the General Counsel of the Board" and that President Biden therefore lawfully removed former General Counsel Robb without cause).

Member Kaplan acknowledges and applies *Aakash* as Board precedent, although he expressed disagreement there with the Board's approach and would have adhered to the position the Board adopted in *National Assoc. of Broadcast Employees and Technicians--The Broadcasting and Cable Television Workers Sector of the CWA, AFL–CIO, Local 51*, 370 NLRB No. 114, slip op. at 2 (2021). See *Aakash*, 371 NLRB No. 46, slip op. at 4–5 (Members Kaplan and Ring, concurring).

2. The Respondent Union and Respondent Rieth-Riley have 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.

3. We agree with the judge, for the reasons he states, that Respondent Rieth-Riley violated Sec. 8(a)(5) by failing and refusing

to provide the Union with relevant information requested by the Union on June 1, 2020, related to "the percentage of work covered by the expired 2013- 2018 MITA/IUOE 324 Road Agreement that has been subcontracted" by the Respondent, and by failing and refusing to provide the Union with relevant information requested by the Union on November 3, 2020, related to employees' terms and conditions of employment. Member Kaplan emphasizes that, based on its wording, the June 1, 2020 request requires the Respondent to provide documents indicating the *overall* percentage of work subcontracted under the Road Agreement; should the Union seek any information beyond documents indicating that overall percentage, it would need to make a separate request.

In addition, we affirm the judge's finding that the Respondent Union violated Sec. 8(b)(1)(A) by striking employee Michael Feighner's assault on third-party driver Karl Grinstern. In affirming this finding, Member Kaplan would not rely on the portion of the judge's analysis applying *Clear Pine Mouldings*, 268 NLRB 1044 (1984).

The judge also found that Feighner spit on another driver but declined to find a violation because the allegation was not included in the General Counsel's complaint. Even if an allegation related to this incident was closely related to the complaint allegation and fully litigated, see, e.g., *Pergament United Sales*, 296 NLRB 333, 334 (1989), we would find it unnecessary to pass on the allegation as any finding of a violation would not affect the remedy. See, e.g., *Raymond F. Kravis Center for Performing Arts*, 351 NLRB 143, 145 (2007), enfd. 550 F.3d 1183 (D.C. Cir. 2008).

We also find no merit to Respondent Rieth-Riley's arguments that the judge erred in failing to find that numerous additional acts of picket line misconduct not alleged in the complaint violated the Act. It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case. See *Hobby Lobby Stores, Inc.*, 367 NLRB No. 78, slip op. at 1, fn. 3 (2019).

recommended Order as modified and set forth in full below.[4]

Amended Conclusions of Law

1. Substitute the following for paragraph 4. "4. Rieth-Riley violated Section 8(a)(5) and (1) by refusing to provide the Union with documents indicating the percentage of work covered by the expired Road Agreement that had been subcontracted as requested by the Union on June 1, 2020, and information about employees' terms and conditions of employment requested on November 3, 2020, that are relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of employees in the above-described, appropriate unit."

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4. We have amended the judge's conclusions of law to conform with his unfair labor practice findings, specifically limiting the violation concerning the June 1, 2020 information request to documents indicating the percentage of work that had been subcontracted. We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Paragon Systems Inc.*, 371 NLRB No. 104, slip op. at 3 (2022), and we shall substitute new notices to conform to the Order as modified. Member Kaplan acknowledges and applies *Paragon Systems* as Board precedent, although he expressed disagreement there with the Board's approach and would have adhered to the position the Board adopted in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020).

We also decline to order an affirmative bargaining order, as requested by the General Counsel and the Union, because we find the traditional remedies are sufficient to remedy the unfair labor practices committed by Respondent Rieth-Riley in this case, i.e., unlawfully refusing to provide requested relevant information.

Appendix C

ORDER

A. The National Labor Relations Board orders that the Respondent, Rieth-Riley Construction Co., Inc., Goshen, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Local 324, International Union of Operating Engineers, AFL–CIO (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective bargaining representative of the Respondent's unit employees.

(b) 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) Furnish to the Union in a timely manner the information requested by the Union on June 1, 2020, concerning documents indicating the percentage of work covered by the expired 2013–2018 Road Agreement that was subcontracted from June 1, 2016, to June 1, 2020.

(b) Furnish to the Union in a timely manner the information requested by the Union on November 3, 2020.

(c) Post at its Goshen, Indiana facility and all of its facilities in the State of Michigan copies of the attached notice marked "Appendix A."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on

5. If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. If 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 June 1, 2020.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 7 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.

B. The National Labor Relations Board orders that the Respondent, Local 324, International Union of Operating Engineers (IUOE), AFL-CIO, Broomfield Township, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Physically assaulting individuals, by hitting them with picket signs or spitting in their face, in the presence of employees on a picket line.

(b) In any like or related manner 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.

Appendix C

(a) Post at its Broomfield Township, Michigan union office copies of the attached notice marked "Appendix B."[6] Copies of the notice, on forms provided by the Regional Director for Region 7, 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 and members are customarily posted. In addition to physical posting of paper notices, 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

6. If the Respondent's office and meeting places are open and accessible to a substantial complement of employees and members, the notice must be posted within 14 days after service by the Region. If the office and meeting places involved in these proceedings are closed or not accessible by a substantial complement of employees and members due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the office and meeting places reopen and are accessible by a substantial complement of employees and members. If, while closed or not accessible by a substantial complement of employees and members due to the pandemic, the Respondent is communicating with employees and members by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

its members 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.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 7 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. September 28, 2023

Lauren McFerran,	Chairman
Marvin E. Kaplan,	Member
David M. Prouty,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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.

Appendix C

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 refuse to bargain collectively with Local 324, International Union of Operating Engineers, AFL–CIO (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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 furnish to the Union in a timely manner the information requested by the Union on June 1, 2020, concerning documents indicating the percentage of work covered by the expired 2013–2018 Road Agreement that was subcontracted from June 1, 2016, to June 1, 2020.

WE WILL furnish to the Union in a timely manner the information requested by the Union on November 3, 2020.

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Rieth-Riley Construction Co., Inc.

The Board's decision can be found at https://www.nlrb.gov/case/07-CA-261954 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.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
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

Appendix C

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT physically assault individuals, by hitting them with picket signs or spitting in their face, in the presence of employees on a picket line.

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

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

The Board's decision can be found at https://www.nlrb.gov/case/07-CA-261954 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.

Appendix C

DECISION

CHARLES J. MUHL, Administrative Law Judge. This is the second unfair labor practice case arising out of a collective bargaining relationship gone bad between Rieth-Riley Construction Co., Inc. and Local 324 of the International Union of Operating Engineers. The General Counsel's complaint in Cases 07–CA–261954 and 07–CA–269365 alleges that Rieth-Riley refused on two occasions to provide the Union with requested, relevant information. The first request sought the percentage of work that Rieth-Riley subcontracted over a 4-year period. The second request sought the names, job classifications, and compensation, both wages and benefits, of bargaining unit employees. The General Counsel's complaint in Case 07–CB–247398 alleges that, during the Union's ongoing strike against Rieth-Riley, one of its picketers inflicted injury upon a non-striking employee at Rieth-Riley's asphalt plant in Lansing, Michigan by hitting that employee with a picket sign. Why this odd pairing of cases? To defend against the refusal to-provide-information allegations, Rieth-Riley principally claims that it was justified in not providing the information based on a clear and present danger that the Union would misuse it to harass non-striking employees and subcontractors. I conclude that Rieth-Riley's refusals to provide information were not justified and violated Section 8(a)(5) and (1). I also find that the picketer's hitting of the non-striking employee with a picket sign, for which the Union is culpable, violated Section 8(b)(1)(A).[1]

1. On July 30, 2020, the General Counsel, through the Regional Director for Region 7 of the National Labor Relations

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For 9 days during June, September, and October 2021, by videoconference, I conducted a trial on the General Counsel's complaints. On December 21, 2021, the General Counsel, the Union, and Rieth-Riley filed posthearing briefs. On the entire record and after carefully considering those briefs, I make the following findings of fact and conclusions of law.[2]

Board (the Board), issued a complaint in Case 07–CB–247398 against the Union. The complaint was premised upon an unfair labor practice charge filed by Rieth-Riley on August 29, 2019. On August 13, 2020, the Union filed an answer to the complaint denying the substantive allegations. On September 24, 2020, the General Counsel issued a complaint in Case 07–CA–261954 against Rieth-Riley. The complaint was premised on a charge filed by the Union on June 18, 2020. On October 7, 2020, Rieth-Riley filed an answer to the complaint denying the substantive allegations and asserting numerous affirmative defenses. On December 14, 2020, Rieth-Riley filed a motion to consolidate Cases 07–CB–247398 and 07–CA–261954 for hearing, which the General Counsel and the Union opposed. On February 5, 2021, the General Counsel issued a complaint in Case 07–CA–269365 against Rieth-Riley. The complaint was premised on a charge filed by the Union on November 23, 2020. Contemporaneously with issuing the complaint, the Regional Director also ordered Cases 07–CA–261954 and 07–CA–269365 consolidated for hearing. Via order dated February 8, 2021, I granted Rieth-Riley's motion to consolidate Cases 07–CB–247398 and 07–CA–261954, which effectively resulted in all three cases being consolidated for hearing. On February 19, 2021, Rieth-Riley filed an answer to the consolidated complaint in Cases 07–CA–261954 and 07–CA–269365, denying the substantive allegations and asserting numerous affirmative defenses.

2. In order to aid review, I have included citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive. My findings and conclusions are based on my review and consideration of the entire record. In assessing

Appendix C

Findings of Fact[3]

I. Background

Rieth-Riley Construction Co., Inc. (Rieth-Riley or the Company) is a heavy highway construction contractor which performs asphalt paving and other road construction work throughout Michigan. The company's headquarters is in Goshen, Indiana. Since 2009, Keith Rose has been Rieth-Riley's president and, in 2011, he also became its chief executive officer. Local 324, International Union of Operating Engineers, AFL–CIO (IUOE Local 324 or the Union) represents over 14,000 employees/union members at road construction contractors throughout the State of Michigan. Since May 2016, Ken Dombrow has been

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witnesses' credibility, I have considered their demeanors, the context of the testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom. 56 Fed.Appx. 516 (D.C. Cir. 2003). Where needed, I discuss specific credibility resolutions in my findings of fact

3. At the hearing, I granted the General Counsel's unopposed motion to admit the transcripts and exhibits from the first unfair labor practice case involving Rieth-Riley and the Union (*Rieth-Riley 1*) in this case for the purpose of efficiency. (Tr. 15.) The lead case number in *Rieth-Riley 1* is 07–CA–234085. Any citations to the *Rieth-Riley 1* transcript or exhibits in this decision will contain a "RR1" designation. Other transcript and exhibit citations are to those in this case.

the Union's president. Since September 2012, Douglas Stockwell has been the Union's business manager. The last collective-bargaining agreement between Rieth-Riley and the Union covering highway and road construction in Michigan ran from March 19, 2013, to May 31, 2018 (the road agreement). Rieth-Riley and the Union have been negotiating a successor contract since November 2018, but have not reached an agreement.[4]

II. The August 13, 2019 Picket Line Altercation

On July 31, 2019, as contract negotiations were ongoing, the Union went on strike against Rieth-Riley.[5] Thereafter, the Union set up picket lines at 10 or more Rieth-Riley facilities throughout the State of Michigan. Picketing continued until mid-November, when the construction season ended in Michigan.

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4. The expired road agreement was between the Union and the Michigan Infrastructure and Transportation Association, Inc. (MITA), a multiemployer bargaining association. Rieth-Riley designated MITA as its bargaining representative for the negotiations resulting in that contract. Current negotiations between Rieth-Riley and the Union are being done on an individual, not multiemployer, basis.

In its answer to the consolidated complaint in Cases 07–CA–261954 and 07–CA–269365, Rieth-Riley admitted, and I so find, that the Board has jurisdiction in these cases and it is a Sec. 2(2), (6), and 7 employer. It also admitted, and I so find, that the Union is a Sec. 2(5) labor organization. In its answer to the complaint in Case 07–CB–247398, the Union admitted the same things.

5. All dates hereinafter are in 2019, unless otherwise indicated.

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One of the Rieth-Riley facilities where the Union picketed was an asphalt plant in Lansing (the Lansing facility), where asphalt is loaded onto trucks for transport to road construction jobs. The Lansing facility has a driveway entrance to the south of the facility and a driveway exit to the north. The exit is approximately 20 feet wide. The posted speed limit inside the facility is 5 miles per hour. Both driveways can be accessed via Creyts Road, an adjacent four-lane road which also has a turn lane and a 55 mile-per-hour speed limit. At the Lansing facility, about 25 to 30 Rieth-Riley employees went on strike. The Union told striking employees to report to their work facility on the first day of the strike and picket there. The picketing occurred daily from 7 a.m. to 5 p.m. At the beginning of the strike, Union Representatives Ryan Doom and Zane Hubbard spoke to Michael Feighner, a striking Rieth-Riley employee, about picketing. Doom said the picketers needed to conduct themselves in a professional way and to let vehicles in and out. Doom also stated that the Union did not want any problems that would end up in court. Hubbard similarly told Feighner just to let vehicles in and out and not hold them up, as well as not to touch the trucks.[6]

On August 13, the Union assigned picketers to both driveways of the Lansing facility. At the north driveway, the picketers were Feighner; Robert Nevins, another Rieth-Riley employee who was on strike at the time; and a third unidentified individual.[7] Union Representative

6. GC Exh. 2; Tr. 29, 32, 36–37, 144, 249–251, 681.

7. It appears that a third picketer was present at the north driveway on that date. (Tr. 178.) However, the record does not

Ronald Heurtebise was stationed at the south driveway that day with two to four other picketers. At approximately 1 p.m., truckdrivers Karl Grinstern and Chad Feibig arrived at the facility to pick up loads of asphalt. At the time, Grinstern and Feibig were employees of McKerney Asphalt and Sealing. Grinstern arrived through the south entrance, had his truck loaded with asphalt, and proceeded to the north driveway to exit the facility. Grinstern's loaded truck weighed anywhere from 80,000 to 160,000 pounds.

As Feighner and Nevins walked the picket line back and forth across the driveway, Feighner observed Grinstern's truck approaching the exit at approximately 3 to 4 miles per hour. That was a faster-than-normal speed compared with other vehicles leaving the facility that day. Feighner attempted to finish crossing the driveway to a clear location but, before he could do so, the truck hit the left side of Feighner's body with the headlight area of the driver's side of the truck. The impact spun Feighner around and caused his footing to slip. Feighner walked to the driver's side door, during which he jabbed the truck with his picket sign. When he got to the door, he held his picket sign up to Grinstern's window right near Grinstern's face. Feighner said to Grinstern, "Hey, stupid, you just hit me with your fucking truck." Grinstern, who had his window down, giggled at Feighner. That prompted Feigner to yell, "You find that funny? I don't find that funny. You could have fucking run me over." Feigner then jabbed Grinstern

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establish who the picketer was or any involvement of the picketer in the material events in this case.

in the arm with the picket sign stick approximately 6 to 8 times, causing visible injuries. At some point while being jabbed, Grinstern pulled the paper off the picket sign and into his truck. He ultimately grabbed the picket sign stick and took that inside his truck as well. Feighner then opened the driver's side door. The two went back and forth a couple of times opening and closing the door. Then Feighner took the keys out of the ignition and Grinstern got out of the truck. The two were standing face-to-face. Feighner yelled at Grinstern that he could have Grinstern arrested for attempting to murder him with a vehicle. He also told him to "slow the fuck down." Feighner spit in Grinstern's face as he yelled. Grinstern told Feighner to give him his keys back or they were "going to have some serious problems." Grinstern then took his keys back from Feighner. Union Representative Heurtebise walked over to the north driveway upon hearing the yelling and got between Grinstern and Feighner. Grinstern returned to his truck, started it, and exited the facility. After Grinstern left, Heurtebise suggested to Feighner that he go home for the day. The Union paid Feighner for picketing and did not discipline him for his conduct that day.

At the hearing, both Feighner (Tr. 138–140, 142, 145, 150–151, 155–156, 158–159, 165–166, 262–263; GC Exh. 5) and Grinstern (Tr. 36–41, 69, 72–74, 97) testified concerning their altercation. Nevins (Tr. 227–231, 254–255) and Feibig (Tr. 108–109, 113–114) testified concerning what they observed of the altercation. Heurtebise testified about his intervention at the scene at the end of the altercation. (Tr. 172–173, 176–179.) Feighner's and Grinstern's testimony largely was consistent. Despite the

consistency, three critical conflicts required credibility determinations to reach the above findings of fact.

The most imperative conflict was whether Feighner repeatedly jabbed Grinstern's arm with his picket sign, as Grinstern and Feibig testified, or just held it at Grinstern's face, as Feighner and Nevins testified. I credit the testimony of Grinstern and Feibig on this question and find that Feighner did repeatedly jab Grinstern. Feigner testified that he sustained injuries from the altercation, including to his left arm from being jabbed and to one of his fingers which he pressed into a staple when grabbing the picket sign stick. Both the General Counsel and Rieth-Riley also entered into evidence contemporaneous pictures of Grinstern's arm, which was bruised and had blood spots. (GC Exhs. 3, 4; RR Exhs. 2–3, 25.) That evidence corroborates Grinstern's testimony. In contrast, Feigner testified that he did not strike Grinstern with the sign and that Grinstern grabbed the picket sign from him without any struggle. The Union has no answer, because none exists, for how Grinstern's arm could be bloodied if that was all that happened. The Union's suggestion that Grinstern injured himself when he and Feighner struggled over the sign misses the mark, because Feighner himself did not testify that any such struggle occurred.

The next conflict in testimony between Feighner and Grinstern was where Grinstern's truck hit Feighner. On that question, I credit Feighner's testimony that Grinstern hit Feighner with the headlight area on the driver's side of the truck. (Tr. 138–139.) Grinstern contended that Feighner intentionally walked into the side of his

truck without any instigation. However, Feibig saw the altercation between Feighner and Grinstern at the driver's side door, but testified that he did not see any contact between Grinstern's truck and Feighner. (Tr. 117.) Feibig would have seen it if the contact occurred as Grinstern claimed. Moreover, when Grinstern was pressed during cross-examination concerning whether the contact was at the front, not the side of his truck, Grinstern ultimately agreed to the former. Before doing so, his responses to an uncomplicated question (where Feighner came into contact with the truck) repeatedly were unclear and his demeanor when so testifying appeared untrustworthy.

The final conflict is how fast Grinstern was driving when he struck Feighner. I credit Feighner's testimony that Grinstern's truck was going 3 to 4 miles per hour when it struck him, not moving at a crawl or slower than walking as Grinstern claimed. (Tr. 38, 139.) Feighner's angry reaction to Grinstern's truck hitting him is indicative of Grinstern driving too fast under the circumstances. Feighner stated that he got in the altercation with Grinstern because he got "run . . . over" with a "loaded dump truck," and that he was "outraged" at what happened. (Tr. 144–145, 148–149.) Feighner's conduct would be an overreaction if he merely was tapped by a truck that was proceeding at a speed of crawling or less than walking.

Accordingly, as detailed above, I find that Grinstern hit Feighner with the front of his truck going at a rate of speed between 3 and 4 miles per hour. I also find that, in response to being struck by the truck, Feighner jabbed

Grinstern with his picket sign a total of 6 to 8 times, thereby injuring him, and also spit in Grinstern's face.[8]

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8. Later on the same day of the altercation, Grinstern reported it to the Eagle County Sheriff's Department and he and Feibig met with two police officers at the Rieth-Riley Lansing facility. (Tr. 69, 120.) The officers interviewed Grinstern and Feibig, writing up reports of what the two told them. Body cam video footage of an officer's conversation with Grinstern also was taken. The reports and video footage were entered into evidence. (RR Exhs. 23, 24; U. Exh. 66; RR1 GC Exh. 130). I give little weight to the hearsay statements contained therein. I further note that the two officers testified at the hearing but had essentially no recall of their interactions with Grinstern and Feibig that day. (Tr. 737–758, 1251–1264.) The officers also never followed up with Feighner to obtain his side of the story and did not take any further action on Grinstern's allegations. (Tr. 145.) However, I do rely upon additional photos of Grinstern's injuries taken on August 13, 2019, by one of the deputies and of the picket sign stick that Grinstern gave the deputies as evidence. (RR Exhs. 25, 26.)

Feighner and Feibig also testified concerning their interaction at the Lansing asphalt plant after Grinstern exited the facility. Feibig claimed that Feighner opened his truck door and tried to get in, then spit on him. (Tr. 116–117.) In contrast, Feighner testified that Feibig stated to him: "You fucking spic, I'll fucking whip your ass. You want me to come on you and whip your ass." Feighner responded: "You fucking brat, get out of there, come on out here." He then opened Feibig's door and Feibig shut it. (Tr. 140–141.) I credit Feibig's testimony regarding Feighner spitting on him during their conversation, as Feighner was not asked and therefore did not deny that he did so. I do not credit Feighner's testimony concerning what Feibig allegedly said to him, as it was not corroborated by anyone even though multiple other picketers were present at the time. Feighner's demeanor when providing this testimony also appeared unreliable. However, the General

Appendix C

III. The Union's Information Requests

A. Contract Negotiations Between Rieth-Riley and the Union on Subcontracting

As previously noted, negotiations for a successor road agreement between Rieth-Riley and the Union began in November 2018. The parties had 10 bargaining sessions from November 2018 through September 2019, but have not reached an overall agreement. Subcontracting and wages were two outstanding issues. On July 8, the Union proposed subcontracting language which would have required Rieth-Riley to subcontract work only to subcontractors who would comply with the rates, terms, and conditions of the road agreement. The Union had obtained that language in successor contracts with other road agreement contractors. Rieth-Riley opposed this provision. On July 29, Rieth-Riley provided the Union with a subcontracting counterproposal in which it would agree to the Union's language with respect to seven counties within the State of Michigan, but not for the remaining counties. The Union rejected the proposal, because the Union's successor contracts with other contractors also contained a most-favored-nations-clause. It meant that any agreement with Rieth-Riley to limit the Union's subcontracting language to certain Michigan counties would apply to other road agreement contractors.[9]

Counsel's complaint does not allege that Feighner's spitting on Feibig violated Sec. 8(b)(1)(A) and no legal argument is made in the General Counsel's brief that I should so find. Accordingly, I decline to address whether this conduct was unlawful.

9. Tr. 214, 222–223; RR 1 C. Exhs. 217, 219, 223, 224; RR1 Tr. 1512, 1576–1578, 2554–2662. The evidence in *Rieth-Riley 1*

At one of the negotiation sessions, on an unspecified date, Stockwell and Rose spoke about subcontracting in a side bar. Stockwell told Rose he "might as well die on the vine" if the Union did not get its desired subcontracting language, because contractors could decide at any time to use nonunionized subcontractors. Rose told Stockwell that the Union's proposal would put Rieth-Riley out of business. He added that the west side of the State of Michigan was a "different animal than anywhere else" and the Company could not have the Union's subcontracting language there. Rose asked Stockwell if he was willing to burn the house down over subcontracting and Stockwell told him yes.[10]

B. The First Decertification Petition

On March 11, 2020, a petition was filed seeking an election to decertify the Union as the bargaining representative of the Rieth-Riley operating engineers bargaining unit in Michigan. On March 20, 2020, the Acting Regional Director for Region 7 issued a decision to block the processing of the petition, in part due to the litigation of the alleged unfair labor practices in *Rieth-Riley 1*. On March 23, 2020, Rieth-Riley filed with the Board a request for review of the Acting Regional Director's decision.[11]

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established that subcontracting was an issue between the Union and Rieth-Riley going all the way back to 2014.

10. Tr. 214–216.

11. I take administrative notice of the Board's proceedings for this decertification petition (Case 07–RD–257830). See *Metro Demolition Co.*, 348 NLRB 272, 272 fn. 3 (2005).

C. The Union's Request for the Percentage of Work that Rieth-Riley Had Subcontracted

On June 1, 2020, David Selwocki, counsel for the Union, sent an information request to Stuart Buttrick, counsel for Rieth-Riley. One of the items requested by the Union was:

> For the last four years, provide any and all documents that indicate the percentage of work covered by the expired 2013-2018 MITA/IUOE 324 Road Agreement that has been subcontracted.

As to the relevance of the information, Selwocki stated generally that the information was "necessary for [the Union's] purposes and functions as an exclusive bargaining representative to monitor, enforce, and continue to negotiate over the terms and conditions of employment of its bargaining unit members." He also specifically stated:

> [O]ne of the remaining issues in the contract negotiations between your client, Rieth-Riley Construction Co., and the Union is regarding sub-contracting. The above requested information pertains directly to the various sub-contract proposals going back and forth and will permit the Union to evaluate the offers made by Rieth-Riley and, in turn, to potentially permit the Union to generate alternative proposals.

Regarding the specific request for the percentage of work being subcontracted by Rieth-Riley, Selwocki also stated:

> [I]t is extremely important to understand the amount of work that is actually at issue in negotiating these sub-contract provisions. For example, if Rieth-Riley sub-contracts one to ten percent of its work versus whether it sub-contracts 50 percent or more would have a large impact on the parties' proposals and how important same are.[12]

On June 16, 2020, Buttrick responded to Selwocki's letter. First, Buttrick noted that the Union's information request was the third iteration of such a request in the past 18 months. Second, Buttrick stated that, under the Board's decision in *Disneyland Park*, 350 NLRB 1256, 1258 (2007), the amount of work being subcontracted was not relevant to the Union's responsibilities as the collective-bargaining representative. Third, Buttrick asserted a confidentiality objection, claiming that the requested subcontractor information was effectively a trade secret akin to a

12. GC Exh. 201(a). The Union had three additional information requests in the same correspondence that are not at issue in this case. Those requests were for a list of subcontractors utilized by Rieth-Riley to perform road agreement work; the Company's bidding procedures for obtaining new projects; and any attempts by the Company to subcontract to union subcontractors or subcontractors who would abide by the terms and conditions of the road agreement. None of those requests were included in the General Counsel's complaint.

client list. He further stated that publicly revealing the information could potentially cause serious harm to Rieth-Riley's ability to effectively negotiate for subcontractor services going forward. He said Rieth-Riley was unable to conceive of a way confidential information could be withheld and nonconfidential information produced in a manner which would provide responsive information to the request. Buttrick asked Selwocki to let him know if he wished to discuss the confidentiality objections further. Fourth, Buttrick asserted that the Union had impermissible purposes for requesting the information. He stated that the Union's conduct during its strike against Rieth-Riley was "appalling" and noted that the Regional Director for Region 7 had sustained allegations of strike misconduct against the Union. He specifically referenced the August 13, 2019 incident between Grinstern and Feighner described above. Buttrick stated that providing the names of subcontractors and relative amounts of work would put the subcontractors at risk of harassment and injury by the Union. He also said Rieth-Riley believed the Union would punish the subcontractors for their ongoing affiliation with Rieth-Riley, in order to exert unlawful secondary pressure on Rieth-Riley at the bargaining table. Buttrick then asserted that the Union's response to Rieth-Riley's objections to prior information requests was to file an unfair labor practice charge, without discussing the objections. He noted that the Union had relied on one of those charges as a basis to argue that the decertification petition should be blocked. Buttrick said that Rieth-Riley could only conclude that, in making the information request, the Union had the ulterior motive of again filing an unfair labor practice charge against the Company.[13]

13. GC Exh. 201(b).

On June 8, 2020, the Board denied Rieth-Riley's request for review of the Regional Director's decision to block the processing of the first decertification petition.

On June 18, 2020, the Union filed the unfair labor practice charge alleging Rieth-Riley had unlawfully refused to provide it with requested, relevant (subcontracting) information.

D. The Second Decertification Petition

On August 10, 2020, a second petition was filed for an election to decertify the Union as the bargaining representative of Rieth-Riley's operating engineers in Michigan.[14]

On September 24, 2020, the General Counsel issued the complaint alleging that Rieth-Riley violated Section 8(a)(5) and (1) by refusing to provide the Union with the subcontracting percentage information.[15]

On September 25, 2020, the Regional Director for Region 7 issued a decision and direction of a mail-ballot election pursuant to the second decertification petition.

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14. I again take administrative notice of the Board's proceedings for the second decertification petition (Case 07–RD–264330). The second petition was filed after the Board implemented changes in April 2020 to its blocking charge policy.

15. GC Exh. 1(a). At the hearing, Stockwell testified the Union never received the requested subcontractor information from Rieth-Riley. (Tr. 217.)

Ballots were to be mailed to unit employees on October 13, 2020. The deadline for returning the ballots was November 2, 2020, and the counting of the ballots was scheduled for November 9, 2020.

On October 9, 2020, Rieth-Riley provided the Union and the decertification petitioner with a voter list for the election. That list contained the full names, work locations, shifts, job classifications, contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) and the job category of all eligible voters. The categories indicated the current work status of each employee as a striker, an employee who had returned to work from striking, or a replacement worker.[16]

At the hearing, Stockwell testified that the Union requested the subcontracting information based upon Rose's assertion that the Union's proposed subcontracting language would not work for Rieth-Riley on the western side of Michigan. He stated that the information would give the Union a picture of how much work Rieth-Riley actually was subcontracting in that geographic area compared to what the Company itself was doing; what kind of contractors they were subbing work out to; and whether the union contractor density on that side of the state could handle the workload. He further noted that any agreement between Rieth-Riley and the Union to limit the geographic scope of the Union's subcontracting language

16. GC Exh. 200. Sec. 102.62(d) of the Board's Rules and Regulations requires an employer, within 5 days of an election agreement, to provide such a voter list.

would apply to other collective- bargaining agreements the Union had with construction contractors because of the most-favored-nations clause. Stockwell stated that this information would allow the Union to determine if it could move on its bargaining position over the subcontracting language.[17]

E. The Union's Request for Bargaining Unit Employee Information

On November 3, 2020, Selwocki sent a second information request on behalf of the Union to Buttrick. In it, the Union requested:

> From June 1, 2020, to the present, provide the compensation, both wages and fringe benefits, for all employees (including their names and classifications) doing work covered by the work jurisdiction provisions of the expired 2013-2018 MITA/IUOE 324 Road Agreement.
>
> This information demand includes, but is not limited to, all employees on whose behalf Rieth-Riley has ever previously paid employee benefit contributions to the Operating Engineers Local 324 Fringe Benefit Funds.

Selwocki again stated that the information was "necessary for [the Union's] purposes and functions as an exclusive bargaining representative to monitor, enforce, and continue to negotiate over the terms and conditions of

17. Tr. 217–218, 1347, 1349.

employment of its bargaining unit members."[18]

On November 9, 2020, the day the mail ballots had been scheduled to be counted in the decertification election, the Regional Director for Region 7 issued a decision dismissing both the first and the second decertification petitions involving Rieth-Riley. The Regional Director found that the unfair labor practices in *Rieth-Riley 1* materially affected the filing of the decertification petitions and interfered with employee free choice in an election.[19]

On November 12, 2020, Buttrick responded to the Union's information request. First, he claimed that the term "work jurisdiction provisions" was undefined and thus "somewhat vague." He identified provisions in the collective-bargaining agreement to which he presumed Selwocki was referring but asked for confirmation. Those provisions all were in Article I of the agreement entitled "Definitions" and they all defined work that was or was not under the jurisdiction of the operating engineers working under the road agreement. Second, Buttrick again accused the Union of making the request for an improper purpose. This time, Buttrick stated that the request was sent while a decertification petition for Rieth-Riley operating engineers was pending. Noting that the requested response date was after ballots were due to be counted in the decertification election, Buttrick

18. GC Exh. 202(a).

19. The Board recently affirmed the Regional Director's decision to dismiss the petitions. *Rieth-Riley Construction Co., Inc.*, 371 NLRB No. 109 (2022).

questioned how the information was relevant to the Union's bargaining representative rights. He further commented that the Union had not scheduled any bargaining sessions with Rieth-Riley for over a year. He concluded by saying that the Company was concerned that the Union would not use the information for a legitimate bargaining purpose, but as a substitute for the NLRB's subpoena processes in a postelection representation hearing. Finally, Buttrick again asserted that Rieth-Riley was concerned the Union would use the requested information for the improper purpose of harassing and intimidating the Company, its employees, and affiliated third parties, based upon the Union's picket line misconduct. In particular, he stated that the Union could link wage information to specific non-striking and replacement operators, then subject them to improper conduct. He further noted the Union had never acknowledged or addressed this concern that the information requested would be misused. He asked that the Union provide assurances regarding its intended use of the information.[20]

On November 16, 2020, Selwocki responded. Regarding vagueness of the request, he confirmed that the provisions cited by Buttrick addressed work jurisdiction but "not by limitation." He further stated that the Union presumed Rieth-Riley was well aware of the work jurisdiction provisions as it had been working under the contract for many years. As to relevance, he stated the Union still was the exclusive collective-bargaining representative of the Rieth-Riley operators and the information requested

20. GC Exh. 202(b).

was "presumptively relevant" to its duties as that representative. Finally, regarding alleged improper use of the information, Selwocki stated "[p]lease see above" and that the Union was "requesting information for proper purposes and will use same for such."[21]

On November 20, 2020, Buttrick responded. As to vagueness, Buttrick stated that the Union rejected Rieth-Riley's proposed definition of work jurisdiction when Selwocki stated "not by limitation" in his response and the Union did not offer an alternative definition. He noted that Rieth-Riley was not "well aware" of what Selwocki meant, as well as that work jurisdiction could refer to job classification, geography, or a combination of the two. He asked Selwocki to define with specificity what he meant by "work jurisdiction provisions" and to identify all applicable provisions in the collective-bargaining agreement. Regarding improper purpose, Buttrick asserted that no additional facts or explanation had been provided for why the Union needed the requested information now and that the assurance sentence given by Selwocki was "perfunctory" and inadequate to address Rieth-Riley's stated concern.[22]

On November 23, 2020, the Union filed an unfair labor practice charge alleging Rieth-Riley had unlawfully refused to provide it with requested, relevant (bargaining unit employee) information. Rieth-Riley never provided that information to the Union.

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21. GC Exh. 202(c).

22. GC Exh. 202(d).

At the hearing, Stockwell testified that the Union requested the wage information because it needed to know what employees were currently earning in order to effectively negotiate with Rieth-Riley over wages in the successor contract. He also stated that, given the 9(a) bargaining relationship between the two entities, the Union needed to determine if Rieth-Riley was paying operators "over scale," presumably meaning above the existing status quo. Loney testified that he was solely responsible for Rieth-Riley's responses to the Union's information request. He stated he feared that, if the Union obtained the names of employees who had crossed the picket line, it would use that information to harass those employees. But he also conceded that the Union already had that information as a result of the processing of the second decertification petition. And he acknowledged that any harassment which was occurring would not increase if the Union had the wage rates. Loney also admitted that Rieth-Riley never offered the Union an accommodation, such as only providing the name and wage rate of each employee. Finally, Loney previously testified that wages were an open issue in Rieth-Riley's contract negotiations with the Union.[23]

23. Tr. 222, 1314–1315, 1323–1329, 1337–1342; RR 1 Tr. 2399.

IV. The Union's August to Mid-November 2019 Picketing at Rieth-Riley Facilities in Michigan

In its answer to the General Counsel's complaint alleging Rieth-Riley unlawfully refused to provide information to the Union, the Company pled as an affirmative defense that it had a reasonable fear the Union would use the information to harass employees, subcontractors, and/or replacement workers and, after communicating that concern to the Union, the Union did not respond with reasonable assurances to the contrary. At the hearing, I allowed Rieth-Riley to present extensive evidence in support of this defense. The findings of fact contained in this section reflect the credited evidence.[24]

A. Background

At the start of its strike on July 31, the Union set up picket lines at 13 different Rieth-Riley asphalt plants in Michigan. The facilities were located in Benton Harbor, Big Rapids, Grand Rapids/Wyoming, Houghton Lake,

24. In reaching the findings of fact in Sec. IV of this decision, I have relied upon the testimony of witnesses who directly observed the events in question, as well as video evidence of the events and any non-hearsay statements in supporting documents. Rieth-Riley presented a substantial amount of hearsay testimony regarding reports that its managers received of alleged union misconduct. Although I permitted the testimony under the state-of-mind exception in Federal Rule of Evidence 803(3), I stated then and reiterate now that the testimony is not allowed to prove the truth of the underlying facts asserted therein, i.e., that the Union engaged in the reported misconduct.

Kalamazoo, Lansing, Ludington, Levering, Manton, Mason, Hudson Boyne Falls, Traverse City, and Zeeland. Each location was assigned a union agent at all times to police the picketing and ensure that things did not get out of hand. The Union paid picketers as well. Rieth-Riley contends that picketers engaged in misconduct at 10 of the 13 facilities, as well as at the facility of one of its service providers in Cadillac, Michigan.[25]

B. Traverse City

Rieth-Riley operates an asphalt plant in Traverse City. The Union picketed that facility from August to the end of the construction season sometime in November. Organizer Jim Trumbull was one of the union officials who participated. At the start, the picketers were located at the lone entrance/exit driveway to the facility. The road to access the driveway is four lanes wide, with three travel lanes, and one turn lane. A stop sign is at the driveway exit. The picketers walked back and forth at the driveway entrance, immediately adjacent to the road. They also set up a canopy for shade. A banner was attached to the canopy and positioned so that vehicles could view it while approaching the entrance on one side of the roadway.[26]

Video of the picketing on August 5 showed six picketers walking back and forth of the driveway entrance with the

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25. RR 1 Tr. 2539–2540; RR 1 GC Exh. 110; Tr. 341–342, 895; GC Exh. 5.

26. RR Exh. 35; Tr. 396, 443–446, 1113–1118, 1130–1131, 1449– 1450.

shade tent in the same location. Several cars were parked on the sides of the driveway entrance. The picketers placed orange cones on the roadway, one at about the middle of the driveway and the others to the sides of the driveway. The cones did not impede entrance or exit to the driveway. The picketers placed the cones there because a child also was on the picket line that day. The video does not show any vehicles attempting to enter or exit the facility.[27]

On August 9, Sean Sebela, a project manager and estimator for Rieth-Riley, took three videos of the picketing at Traverse City. Their combined length is approximately 1 minute and 28 seconds. The first video is 28 seconds long and shows a truck waiting in the turn lane to turn left into the facility. Three picketers walk back and forth at the driveway entrance, at times leaving more than enough room for the truck to turn in. However, oncoming traffic prevented the truck from doing so for those 28 seconds. A second video, 38 seconds long, shows a truck arriving at the stop sign and waiting to exit the facility. Four picketers are present. Two of the picketers cross the driveway once. At the same time, numerous cars go by on the roadway. At the point the picketers clear the truck, Sebela walks over while filming and repeatedly requests that the picketers move. However, none of the picketers were walking in front of the truck when Sebela got there. The truck then turned right out of the driveway. The final video that day shows Trumbull standing at the driver's side window of a vehicle being driven by Sebela that was stopped at the stop sign. No other picketers were

27. RR Exhs. 36–37; Tr. 1120–1122, 1443.

in the driveway or in front of Sebela's car. Trumbull was holding a picket sign and Sebela could not see the roadway. Trumbull stood at the window for approximately 17 to 22 seconds, then proceeded to the back of the vehicle.[28]

In addition to the videos and the testimony of Sebela and Trumbull, two Rieth-Riley managers testified about the Union's Traverse City picketing. Stuart Wright, an asphalt plant and paving superintendent, stated that he crossed the Traverse City picket line about 10 times in the first 2 weeks of August. Picketers walked close to one another in a semi-circular motion. The first time he attempted to leave the facility and turn right out of the exit, he had to nudge his truck to get through the picketers. Once he got clear, the picketers' signs blocked his view of oncoming traffic. Wright did not testify concerning the length of any delay in exiting. Trevor Green is an area quality control manager for Rieth-Riley. Green stated that he saw one incident where a truck trying to leave the facility had a clear path to do so, but picketers turned around halfway across the driveway and prevented the driver from exiting. The picketers did the same thing during a second incident he observed. A truck was trying to turn left into the driveway but had to stop in the roadway for 30 to 60 seconds when the picketers changed direction.[29]

Green also testified that, at times during the Union's picketing, the picketers would wave their picket signs as

28. RR Exhs. 39–41; See also Tr. 1111, 1131–1134, 1145, 1449.

29. Tr. 387, 397–398, 437, 450–451.

they were walking. That waving, as well as the position of the canopy, made it difficult for him to look for traffic on the roadway before exiting and, at an unspecified number of occasions, obstructed his view. Sebela likewise had his line of sight impeded at times due to the positioning of the canopy. He went in and out of the facility four times during the first 2 weeks of August. However, it appears the canopy positioning was changed to not block the line of sight shortly after picketing began. The August 5 video shows that the canopy was set up just inside the curb line in a right of way. However, the canopy is not in that position in the August 9 videos and the view of the roadway appears clear. Green also testified that the canopy was stationed 10 to 15 feet from the edge of the roadway, which would not block the sight line.[30]

C. Roscommon

On September 11, a picketer at Rieth-Riley's Roscommon facility called the Michigan Department of State Police and reported being struck by a truck. A trooper visited the scene and later reviewed video of the incident. The video showed an unmarked road with two lanes. Three pickup trucks are parked either on the side of the street off the roadway or on the roadway's edge. One semitruck approaches two picketers in the roadway. Another picketer is walking back and forth further up the roadway at the facility entrance. The truck slowly approaches at a continuous speed as the two picketers walk back and forth. Ultimately, the truck hits one of the

30. Tr. 445–448. I credit the testimony of Wright and Green concerning the picketing at Traverse City, as it was based on their direct, personal observations.

picketers on the left edge of the driver's side bumper. The entire length of the video is 43 seconds. The police determined that the picketers impeded traffic and a picketer had been hit by the truck. Prosecutors declined to prosecute either offense.[31]

Also in mid-September, Union Representative Aaron Robbins took video of three picketers at the entrance/exit of the Roscommon facility. The first video shows the picketers at three different spots in the roadway, rather than walking in the same line. Two semitrucks approach the exit of the facility with a sizeable gap between them. One of the picketers was walking back and forth in the road at the time. The first truck exited without any slowdown as the walking picketer was on the side of the road. The picketer then turned around and walked back into the roadway as the second truck approached. The truck appeared to slow down but exits without incident. As the second truck exited, Robbins stated "Funny how he is going to slow down this time, huh?[32]

In the second video, three trucks approach the facility's entrance. Two picketers are visible, one further up the roadway and Robbins at the driveway entrance. The first picketer stands at the side of the road as the three trucks pass by. When the first truck arrives at the entrance, Robbins is walking in the roadway. When Robbins clears, two trucks enter without incident. As the third truck approaches the entrance, Robbins is walking

31. RR Exhs. 42, 43; Tr. 1184–1188.

32. RR Exh. 66; Tr. 1391–1394.

back in the opposite direction in the roadway in front of the truck. Once he turns around and clears, the third truck enters. The entire sequence from the point at which the first truck arrives at the entrance and the third truck enters is less than 1 minute.[33]

A third video, lasting 45 seconds, shows a truck approaching the exit and Robbins walking back and forth in the roadway. As the truck approaches Robbins, it does not slow down and almost clips him as it goes by. Robbins responded: "Fuck you asshole."[34]

A fourth video shows two trucks approaching the entrance and Robbins again walking back and forth in the roadway. The first truck is delayed about 15 seconds from entering until Robbins clears. The second truck is delayed roughly 20 seconds by Robbins and a second picketer that was further up on the entrance driveway.[35]

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33. RR Exh. 67; Tr. 1395.

34. RR. Exh. 68.

35. RR. Exh. 69. Rieth-Riley Area Manager Larry Bushong also testified concerning the Union's picketing in the first 2 to 3 weeks of August at Roscommon. When asked what he observed, he responded: "[M]ainly they would wait until you approached the plant and then they would start to cross the road in front of you, kind of one by one in a line, walk slowly and then to the point where you pretty well had to come to a stop, and then they would clear—once everyone got to the other side of the road, we had a security guard there that kind of basically stopped them once they—once they crossed the road once, then you would go through." (Tr. 353–354.) I credit this testimony, which is based upon direct, personal observation.

Also in August, David Huff, a safety superintendent for Rieth-Riley, visited the Roscommon facility to conduct an inspection. As he left the facility, picketers were stationed at the exit and Huff observed Gary Barnes, a striking Rieth-Riley employee, on the passenger side of his vehicle. When Huff stopped to allow the picketers to clear, an object flew into his vehicle from the open passenger side window and bounced off his shoulder into a cup holder. Huff saw a small square plastic package, about the size of a credit card, that appeared to be expanding. He grabbed the packet and threw it back out the window. The package hit Barnes in the face and then exploded next to his face. It turned out the package was a "fart bomb."[36]

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36. Tr. 590, 593–596; RR Exhs. 12, 57. Huff did not explain what a "fart bomb" is and a dictionary definition is unavailable. However, the dictionary does contain the following definition of a "stink bomb": a small bomb charged usually with chemicals that gives off a foul odor on bursting. "Stink bomb," MERRIAM-WEBSTER DICTIONARY (https://www.merriam-webster.com/dictionary/stink%20bomb, last visited June 9, 2022).

Also at Roscommon in August, Bushong was leaving the facility one day, looked in his rear view mirror at another exiting vehicle behind him, and observed picketers with their cell phones out. Bushong theorized that it looked as though they were taking pictures of the license plate of the vehicle behind him, but no such pictures were entered into evidence. Thus, I do not find that the picketers were taking pictures with their cell phones. In addition, Bushong observed a picture posted by the Union on Facebook of the side of a door of a truck utilized by Crawford County, Michigan to haul asphalt the county purchased from Rieth-Riley. The posting stated "Here's your county crossing a picket line." (Tr. 367–369.)

Appendix C

D. Wyoming (Grand Rapids)

From the beginning of August to the end of the construction season in October/ November, the Union also picketed at the separate entrance and exit to Rieth-Riley's Wyoming asphalt plant. That facility is located in the Grand Rapids area of Michigan. The road to access the entrance is four lanes with a speed limit of 45 miles per hour. Union Officials Joe Shippa and Brandon Popps participated in the picketing. During the first 2 days, the picketers walked slowly back and forth in a line in front of the entrance and exit while waving their picket signs.[37]

A video from August 27, shows six picketers walking at the exit and one truck being stopped there for 15 seconds before turning. A second August 27 video shows seven picketers and three trucks waiting to turn right into the driveway. The trucks waited 40 seconds until a large enough opening in the picket line allowed them to turn in. A third August 27 video, somewhat difficult to see, shows two trucks being only momentarily stopped as they turned left out of the exit in succession. A fourth August 27 video shows six picketers and a truck waiting to turn left out of

37. Tr. 897–898, 901–902, 905–907, 1200–1206; RR Exh. 28. Police were called to the facility on August 2. The police report filed following the visit stated: "No driveway is being blocked. Workers that are on strike are on public right of way and walk across the entrance (off property) with picket signs. Nothing we can do at this point. [Entrance] is not totally blocked. All advised. Nothing the police [can] do about free speech swearing anymore." (RR Exh. 29.) James Boven, a Rieth-Riley superintendent, confirmed that the police told him the Union had a right to picket. (Tr. 923–929.)

the exit with the picketers in front of the truck for about 15 seconds. The truck waited longer to make the turn due to traffic on the roadway. During that time, the picketers were at the driver's side of the truck. A fifth undated video shows one truck being stopped from exiting for about 25 seconds. It appears that picketers were walking in front of the truck for that duration. At least two cars also passed on the roadway during that time.[38]

A video taken on August 28 showed a very large semitruck waiting for traffic to pass to turn left into the entrance driveway. When traffic cleared, the truck immediately turned in. Several picketers were in the vicinity at the time and, given the size of the truck, the driver came close to making contact with the picketers. It appeared one of the picketers struck the truck with his picket sign in response. A second video showed a different very large truck turning quickly into the entrance while picketers still were in the vicinity. Again, the truck came very close to making contact with the picketers and, in response, one of the picketers hit the truck with his picket sign.[39]

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38. RR Exhs. 45–48, 52, 53. (See also Tr. 1206.) Kirk Breukink, an area manager for Rieth-Riley at Wyoming, testified that, on August 25, 2019, he learned that one of Rieth-Riley's excavators had a broken windshield. I credit this testimony. However, Breukink did not provide any further details. (Tr. 1223–1226; RR Exh. 54.)

39. RR Exhs. 50, 51. Deb Devore, a quality control technician for Rieth-Riley, testified that, during the second week of picketing, she went out into the Wyoming facility driveway and found two brand new galvanized roofing nails. No picketers were present when she found the nails. (Tr. 512–517.) I credit this testimony.

E. Levering

The Union picketed at Rieth-Riley's Levering facility from August 1 to mid-November. The Company hired security personnel who were onsite from 6 a.m. to 6 p.m. every day, 7 days a week. The personnel took laps around the facility every one half hour, had two guards at the front entrance, and had a camera for recording. About 5 to 15 trucks entered and exited each day.[40]

On August 19, about 6 to 8 picketers and security were onsite at the driveway entrance. Video taken by a security

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In addition, at some point between August 1 and August 6, Delbert Willison, a Rieth-Riley operator at Wyoming, while on strike, was driving to his house and passed an individual looking through binoculars in the direction of his house. When Willison turned around in his neighbor's driveway, the individual got into a gray truck and drove off. Willison could not identify the individual. Although Willison speculated during his testimony that it was a union representative, that allegation is illogical given that he was a striking employee when the observation occurred. A union representative would have no reason to surveil a striking Rieth-Riley employee. Although Willison resigned his union membership on August 7, he was adamant during his testimony that he observed the individual prior to that resignation. (Tr. 1078–1083.) Therefore, I do not find that a union representative surveilled Willison.

Finally, on August 22, a truckdriver who was performing work for Rieth-Riley and visited the Wyoming facility had his truck struck with a picket sign by a picketer. The same driver went in and out of that facility about 18 times a day for 12 days without incident while the picketing was ongoing. (Tr. 1264–1271.)

40. Tr. 1034, 1038–1040.

guard at one point that day showed one truck taking about 35 seconds to leave the facility while picketing was ongoing. A video of the same events taken by Union Organizer Robbins showed the truck coming to a stop at the stop sign to exit the driveway. Robbins stated: "Keep walking." As the driver inched the truck forward to exit, he gently grazed a different picketer with the driver's side front bumper. Thereafter, the driver may have grazed Robbins as well. Robbins responded: "Just like that, huh?", then turned his cell phone to the driver's side window and stated: "You're on camera fucker." It is unclear from the video if any traffic was on the roadway as the truck attempted to exit.[41]

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41. Tr. 1036–1042, 1047–1048, 1388, 1401–1403; RR Exhs. 33, 70. A second video from that same date showed an argument between the picketers and a truck driver who entered the facility through the picket line. The picketers yelled at the driver as he entered, leading to the driver stopping and then exiting the vehicle to confront the picketers. (RR Exh. 71; Tr. 1404–1405.) Rieth-Riley employee Timothy Czerkies testified that, on the first day of the Union's picketing at Levering on August 1, he attempted to exit the facility and a number of picketers slow walked in front of his vehicle. This caused him to have to repeatedly inch out of the driveway to exit. The testimony was abbreviated and lacked context. Although I do find that Czerkies was delayed from exiting that day, I do not credit his implausible testimony that the delay was for 7 to 10 minutes. (Tr. 1544–1548.) On August 8 at Levering, a security guard heard what sounded like a gunshot. He ran to the entrance of the facility and told another guard to begin videotaping when he got there. Another three gunshots could be heard on the subsequent 24-second video. Rieth-Riley manager Green, who was at the plant at the time, heard a total of a dozen or so gunshots, the sounds coming from the same direction as the picket line. (Tr. 454–458, 1043–1045; RR Exhs. 20, 32.) The police were called to

F. Lansing

During the first 2 weeks of August, the Union picketed at Rieth-Riley's Lansing facility (the same location where the earlier discussed battery of a truck driver occurred). As a reminder, the roadway to the Lansing entrance is four lanes wide with a center turn lane and a speed limit of 55 miles per hour. Prior to the picketing, a union business agent informed striking employee Jimmie Ranger that he should walk back and forth, hold his sign up, and slow down the vehicles coming in and out. Picketers walked slowly back and forth across the driveway entrance. On the first day of picketing there, Dan Larson, Rieth-Riley's area manager at Lansing, observed vehicles being

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the scene, but did not file a report. This evidence is insufficient to find that picketers were responsible for the gunshots.

In September 2019, Tony Bolinowski, a union representative, called striking Rieth-Riley employee Tyler Socolovitch, who had gone to work for a nonunionized employer during the strike. Bolinowski stated that, if Socolovitch did not go back to striking or go to a unionized job, he was going to lose his insurance and possibly have to pay fines. Bolinowski made that comment because, at the time, Socolovitch still was a union member. (Tr. 1521–1526, 1539–1540.) On direct, neither a foundation for the conversation nor any additional details about it were introduced. In addition, I do not credit Socolovitch's testimony that, during the first week of February 2020 after Socolovitch had resigned his union membership and returned to work for Rieth-Riley, Bolinowski stayed at the facility after picketing had ceased and left only when Socolovitch did. Socolovitch initially testified that he did not see Bolinowski's vehicle when picketers were not present but, after a leading question that provided him with a specific, contrary answer, Socolovitch changed his tune. (Tr. 1527, 1529, 1531–1532.)

delayed entering and exiting the facility as the picketing occurred.[42] However, it is unclear whether the entirety of those delays was due to the picketing. The road to access the driveway is admittedly "very busy."[43]

On 2 days that first week of August, picketers parked their vehicles along the edge of the roadway in the right-of-way. Concerned that this was blocking the sight lines of drivers seeking to exit the plant, Larson called the police and they visited the facility. After observing where the vehicles were parked, an officer concluded that, while semitrucks could see over the parked cars, the line of sight for regular automobiles was blocked. Thus, the officer suggested to the picketers that they move the vehicles further in and park them along a fence that bordered the facility, not in the right-of-way. The officer had cleared this vehicle repositioning with Rieth-Riley. The picketers agreed to do so. On August 13, the same officer returned to the facility and observed one truck being delayed from turning in for 30 to 60 seconds due to "slow walking" by the picketers.[44]

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42. Larson estimated the delays at anywhere between three and 10 minutes, but provided no explanation for how a delay in that time range came about or any specific observations that he had. Therefore, I do not credit the testimony.

43. Tr. 657, 673–686, 1010–1011; RR Exh. 18. Larson described the picketers conduct as "slow walking" and further noted that employees were being "harassed" by the picketers, i.e. they were shouting at drivers crossing the picket line. (Tr. 678–679.)

44. Tr. 687–689, 947–957, 960, 972–973, 988; RR Exh. 19. On August 13, the deputy visited the facility again and, upon his

Also at the beginning of August, Rieth-Riley had contracted with a general contractor to perform asphalt paving as part of a hospital construction project. The work was being performed under a project labor agreement which contained a no-strike-clause. The work was scheduled to start on August 3, after the Union initiated its strike against Rieth-Riley. The Union would not provide operators to perform the work, so Rieth-Riley completed it using managers and other trades. Prior to doing so, Larson asked Ranger, a striking employee, to work on the project and Ranger agreed to do so. However, Ranger later talked to Union Representative Hubbard, who told him he would be fined if he worked on the project.[45]

Finally, on September 3, Rieth-Riley employee Shaundel Elowski was exiting the Lansing facility. As he approached the driveway exit, two pickup trucks were parked diagonally in front of him. One of the trucks was

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arrival, observed a truck waiting to turn left into the facility from the center turn lane while picketing was ongoing. The vehicle was delayed from entering for 30 to 45 seconds. (Tr. 960–961.)

45. Tr. 658, 664–670, 1008, 1010, 1013, 1016; RR Exhs. 13–16. I credit Larson's testimony that, when Ranger advised him he could not work on the project, Ranger said it was because the Union told him he would be fined for doing so. Ranger testified that Hubbard told him it would not be a good idea to work on the project because he could lose his insurance, retirement, and death benefits. However, Ranger qualified his testimony by saying it was "basically" what Hubbard said, Hubbard said, "other stuff like that," and Hubbard said it would jeopardize the "stuff" he had built up with the Union. I find those alleged statements illogical and do not credit that testimony.

at the stop sign and the other was immediately behind. Elowski was unaware who was in the two trucks. A video shows a security guard approaching the two trucks on foot, then a vehicle driving by on the roadway, and the two trucks exiting immediately thereafter to the right. The entire video lasted 20 seconds.[46]

G. Ludington

Rieth-Riley operates another asphalt plant in Ludington. Chad Waldo is an area manager for the Company who oversees Ludington and other facilities. Eric Nelson is a highway engineer and Joe Fiers is a road foreman for the Mason County Road Commission in Scottville, Michigan. The Ludington facility is in that county. The commission is responsible for maintaining certain county roads. The facility has multiple driveways. The Union began picketing at Ludington once the strike began. Union Official Popps also picketed at this facility. During the first 2 weeks of August, the picketers were located in a right of way across the street from the entrance to the facility and parked their cars there as well. Some of the parked vehicles belonged to Rieth-Riley employees. In mid-August, the picketers moved to the other side of the street where the driveways are located and blocked one of the driveways by parking five or six

46. RR Exh. 11; Tr. 560, 564–567. Although Elowski testified that he heard someone in the truck parked behind the first one say "get moving" and then nudge the first vehicle with the truck, the video does not reflect either thing. Thus, I do not credit that testimony. Elowski also testified he was delayed "a couple minutes" but, again, the video does not corroborate that testimony and I do not credit it.

cars in it. When Popps saw one of the picketers parking at the previous location, he spoke through a bullhorn and told the individual to move his vehicle to where the other vehicles now were located to block the exit. However, Waldo did not testify that the parked trucks actually blocked any vehicles from entering or exiting the facility. That same day, the Union picketed at the main entrance of the facility, causing vehicles to be delayed by 30 to 60 seconds when entering and exiting. On August 19, Nelson went to the facility after getting reports from his employees that the site was being picketed. He observed 8 to 15 picketers either pacing or standing. This resulted in one truck being delayed in turning into the entrance by 1 to 2-1/2 minutes. Fiers also was at the facility one day and observed six to eight picketers walking at the front of the driveway. On and off, trucks were able to go in and out.[47]

H. Additional Facilities

The Union also picketed at the main entrance of Rieth-Riley's Hudson facility from August to November.[48]

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47. Tr. 269–271, 275, 279–282, 788, 790, 794–797, 806, 818, 821, 829, 994–998.

48. Tr. 389–396, 437–442. I credit the testimony of Rieth-Riley managers Green and Wright that the picketers engaged in "slow" walking. However, I do not credit the generalized and conclusory testimony of Wright that he was stopped for two to three minutes every time he entered or exited the facility during the first 2 weeks of August. (Tr. 395.) The testimony appeared exaggerated and Green testified that, on the first day of picketing, it only took him 30 to 60 second to cross the picket line. (Tr. 442.) Czerkies, a Rieth-Riley employee, also testified that, on August

Shortly after the strike started, a picketer at the Hudson facility swung a picket sign inside a third-party's asphalt hauling truck, coming within 2 to 3 inches of the driver's head but without hitting him.[49]

The Union likewise picketed at Rieth-Riley's Kalamazoo facility during the first 2 months of the strike.[50] There, Union Representative Salisbury told asphalt paving foreman Mark Gardner that he would probably lose his insurance if he crossed the picket line.[51]

At Rieth-Riley's Petoskey facility 3 to 4 weeks into the strike, Timothy Czerkies, a shop foreman, found a box of exterior screws scattered along 100 to 120 feet of the facility including the main entrance.[52]

3, he observed a picketer close a gate in front of a truck trying to leave the facility. However, he did not testify as to the delay, if any, this action caused for the driver to exit. (Tr. 1549–1550.) Finally, during the first 2 weeks of the strike, Wright was using his CB radio, as he normally did, to communicate with drivers who were at the facility to load and transport asphalt. On several occasions, he could hear Bolinowski speaking on the CB interrupting Wright's instructions to a driver and then stating alternate instructions. This did not occur after the first 2 weeks. (Tr. 401–403.)

49. Tr. 635–643, 649.

50. Tr. 849–856, 871–878.

51. Tr. 1495. No foundation was laid for this conversation and, although Gardner said other picketers were present, it is unclear if they were striking Rieth-Riley employees.

52. Tr. 1545–1546, 1550–1551. I do not credit Czerkies' conclusory testimony that two vehicles were damaged by the

Finally, at Rieth-Riley's Big Rapids facility, striking operator Shawn Cassidy picketed at Big Rapids during the first 4 weeks of the Union's strike before returning to work. At one point, Union Representative Kurt Otterbach stated to Cassidy that the Ludington crew was going to be on delay due to flat tires. When Cassidy asked Otterbach what he meant by that, Otterbach responded "let's just say they are going to have some flat tires."[53] On August 19, Waldo went to the Big Rapids asphalt plant and observed that a number of strands of orange twine had been placed throughout the exterior of the facility.[54] In September, Huff was entering the Big Rapids facility with another supervisor in the vehicle with him. Two picketers were present. One of the picketers blew an air horn as they went by, a foot or two off the driver's side window.[55]

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screws, because he provided no foundation for his knowledge of this alleged fact or any further details concerning the alleged damage.

53. Waldo provided hearsay testimony that numerous drivers told him they got flat tires during a 2-week period in August at both the Ludington and Big Rapids facilities. (Tr. 288–292, 295, 327–328.) However, none of the drivers identified who damaged their tires. He also testified that Cassidy told him he saw Popps dropping nails in the driveway. I do not credit this testimony because Cassidy did not corroborate it when he testified. I further find all of this testimony insufficient to establish that union representatives placed nails at Ludington which damaged vehicles.

54. Tr. 297; RR Exhs. 7, 8.

55. Tr. 597–599.

Appendix C

I. Cadillac Truck Service in Cadillac, Michigan

Rieth-Riley utilizes Cadillac Truck Service in Cadillac, Michigan, to service and repair their trucks. Gene Gubbins is the owner of Cadillac Truck. On September 25, Cadillac was performing a trailer rebuild on one Rieth-Riley vehicle inside its facility. Two other Rieth-Riley trailers were parked outside at the back of the facility. Tires from the trailer being repaired also were out back leaning up against the building. Upon arriving the next morning, Gubbins found that the valve stems for the tires on the two Rieth-Riley trailers had been removed, causing the tires to deflate. At the back of one of the trailers, "324" appeared on the vehicle. The tires which had been left outside along the building were gone.[56]

V. The Union's Conduct in the Spring of 2020

In 2020, the Union resumed picketing at the start of the construction season sometime before the middle of March at three to four jobsites where Rieth-Riley was performing work. However, all picketing was shut down in March 2020 due to the COVID-19 breakout and the State of Michigan going into lockdown. At two of the jobsites where picketing occurred, Larson called the police to the sites after observing picketers walking back and forth on the driveway and causing unspecified impact on vehicles trying to enter and exit. In April 2020, Union Representative Robbins, at the direction of his superior, followed Rieth-Riley trucks on about five

56. Tr. 505, 527–531, 535, 539; RR Exh. 9.

occasions from the Roscommon facility. In May 2020, a union representative drove slowly through two jobsites at which Rieth-Riley was performing work and held a phone up in the air. At some point that spring, a vehicle driven by a union representative drove on a one-lane highway adjacent to a road construction job site and slowed down when other vehicles were behind him. At another jobsite, a union representative drove at a crawl and took pictures. Finally, in June 2020, a non-striking Rieth-Riley employee in a Rieth-Riley vehicle on his way to work observed a pickup truck come alongside the vehicle, take pictures of the truck, then moved in front of the vehicle and sped off.[57]

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57. Tr. 887–889, 893, 1406–1411, 1466, 2536; RR Exhs. 72, 73. Rieth-Riley Manager Larson testified that, at some unidentified time in 2020, he observed the Union picketing at one construction site and the picketing resulted in an unspecified impact on vehicles entering the facility, which resulted in the manager calling the police. That same manager called the police on another project after a hearsay report to him of the Union "impeding traffic." However, the manager's description of the Union's reported conduct there was that the Union was "walking back and forth on the way into" the project and "causing impact for our trucks." (Tr. 705–713.) That could describe either protected picketing or misconduct. In addition, Rieth-Riley Manager Sebela testified that he saw a union representative holding a phone in the air while driving by a construction site and speculated that he was "appearing to document [Rieth-Riley's] operation." (Tr. 1150–1154.) Finally, Rieth-Riley Foreman Gardner testified that, on a jobsite in the spring of 2020, he saw a union representative park on the side of the road on multiple occasions, causing traffic to "slow down." (Tr. 1495–1507, 1516–1527.) He said this caused a 5 to 10 minute delay, which is illogical given his description of vehicles only slowing down. I found these witnesses unreliable and give little weight to their generalized testimony.

Appendix C

ANALYSIS

I. Did the Union Violate Section 8(B)(1)(A) as a Result of Feighner Injuring Grinstern on the Picket Line on August 13, 2019?

The General Counsel's complaint in Case 07–CB–247398 alleges that the Union violated Section 8(b)(1)(A) when, during its picketing of Rieth-Riley at the Lansing facility on August 13, 2019, Feigner "inflicted injury upon a non-striking employee by striking the employee with a picket sign."[58]

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58. On July 30, 2020, the General Counsel, through Terry Morgan, then the Regional Director for Region 7, issued the original complaint in Case 07–CB–247398 against the Union. (CB GC Exh. 1(c).) That complaint alleged nine additional 8(b)(1)(A) violations for picket line misconduct, in addition to the battery on August 13, 2019 on the Lansing picket line. On March 3, 2021, shortly after President Biden terminated Peter Robb from the General Counsel position, the Regional Director issued an order withdrawing 9 of the 10 picket line misconduct allegations. (CB GC Exh. 1(m).) The only remaining allegation concerned the battery on August 13, 2019. Rieth-Riley appealed that dismissal to then Acting General Counsel Peter Ohr, who denied the appeal. (CB GC Exh. 1(s).) On May 14, 2021, Rieth-Riley filed a complaint for declaratory judgment against Morgan and Ohr in the U.S. District Court for the Western District of Michigan. The complaint includes two counts alleging that the withdrawal of the nine complaint allegations was invalid. The first is that the action violated Sec. 102.19 of the Board's Rules and Regulations, which governs appeals to the General Counsel from a refusal to issue or reissue a complaint. The second is that Ohr was not a valid Acting General Counsel when ruling on the appeal because Robb's firing was unlawful. At Rieth-Riley's request, I took judicial notice of

Appendix C

Section 8(b)(1)(A) makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of the rights guaranteed them in Section 7. It goes without saying that the battery or assault of employees in connection with picket line activity is unlawfully coercive.[59] See, e.g., *Auto Workers Local 695 (T.B. Wood's)*, 311 NLRB 1328, 1336–1337 (1993); *Teamsters Local 812 (Sound Distributing)*, 307 NLRB 1267, 1271–1272 (1992); *Teamsters Local 612 (Deaton Truck)*, 146 NLRB 498, 501–503 (1964). In that same vein, spitting on employees during picket line activity likewise violates Section 8(b)(1)(A). *Teamsters Local 812 (Pepsi-Cola Newburgh)*, 304 NLRB 111, 116 (1991); *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168, 177–178 (1986). Union picket-line misconduct directed toward nonemployees likewise violates Section 8(b)(1)(A) if it occurs in the presence of employees whose Section 7 rights might be affected or the acts were sure to become known to employees and regarded as an indication of what might befall them if they fail to support the picketing. *Unite Here! Local 5 (Wakiki Beach Hotel)*, 365 NLRB No. 169, slip op. at 11 (2017); *Local Joint Executive Board of Las Vegas (Casino Royale)*, 323 NLRB 148, 159 (1997).

The credited testimony establishes that the Union was picketing at Rieth-Riley's Lansing facility on August 13,

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this case. At the time of this writing, the docket report for the case (21-CV-407) shows that the parties have fully briefed the defendants' motion to dismiss the complaint and are awaiting a ruling on that motion from the court.

59. Board decisions have utilized "assault" to connotate both a threat of physical harm (assault) and actual physical harm (battery).

2019. Union Representative Heurtebise was onsite that day, as part of the Union's attempt to ensure that picketers did not engage in misconduct. Striking employee Feigner was picketing, for which he was paid by the Union. During the course of picketing, third-party driver Grinstern struck Feighner with his vehicle weighing 80,000 to 160,000 pounds while driving at 3 to 4 miles per hour as he attempted to exit the plant. In response to being hit by the vehicle, Feigner repeatedly struck Grinstern in the arm with Feighner's picket sign. The two also fought over possession of the sign. As a result, Grinstern suffered injuries that, while minor, were significant enough to be visible on his arm and result in the police being called to the facility. After striking Grinstern with the sign, Feighner opened the driver side door to Grinstern's truck and took the vehicle's keys. Grinstern exited the vehicle and the two argued while standing face-to-face. During the argument, Feighner spit in Grinstern's face as he yelled at him. The altercation ended when Heurtebise arrived at the scene and stepped between the two. He ultimately suggested to Feigner that he go home for the day and Feighner did so. Feighner's actions were observed by Nevins, another striking employee, and Feibig, another third-party driver.

In these circumstances, the totality of Feighner's conduct, including in particular his striking Grinstern with the picket sign and spitting in his face, violated Section 8(b)(1)(A). *Service Employees Local 87 (Pacific Telephone)*, supra (picketer striking a contractor employee's arm with a picket sign violated Sec. 8(b)(1)(A)); *Auto Workers Local 695 (T.B. Wood's)*, supra (a picketer

who grabbed a replacement worker by the arm, left a red mark and a scratch, and had to be pulled away by another picketer violated Section 8(b)(1)(A)); *Lithographers Local 223 (Holiday Press)*, 193 NLRB 11, 16 (1971) (picketer assaulted supervisor and violated Sec. 8(b)(1)(A) by striking the supervisor in the back of his head with a picket sign while the supervisor was seated in his car).

To avoid this legal conclusion, the Union essentially asserts the "eye-for-an-eye" defense. It argues that Feighner's conduct was provoked by Grinstern striking Feighner with his vehicle, thereby justifying Feighner's response. Although this argument is not wholly without merit, Board precedent cuts both ways on this issue and I conclude that the better approach is not to apply the provocation defense in this case.

To begin, the Board previously has approved of the provocation defense in cases involving the question of whether an employer can discharge or deny reinstatement to a striking employee, due to the employee's misconduct on the picket line. See, e.g., *Medite of New Mexico, Inc.*, 316 NLRB 629, 634 (1995); *Ornamental Iron Work Co.*, 295 NLRB 473, 493 (1989); *Massachusetts Coastal Seafoods, Inc.*, 293 NLRB 496, 536 (1989); *Franzia Brothers Winery*, 290 NLRB 927, 927 fn. 2, 930–931, 933 (1988). In these cases, as the Union correctly asserts, the Board utilized a standard articulated in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984). Under that test, abusive conduct loses the Act's protection, and the employer accordingly may lawfully refuse to reinstate or otherwise discharge an employee, where "'the misconduct

is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'" The Union argues that, because the same legal standard applies to determine whether picket line misconduct violates Section 8(b)(1)(A), the provocation defense applies here. I further note that, many moons ago, the Board, without comment, approved of a judge's reliance on a provocation defense in dismissing an allegation, as here, that a picketer's conduct was provoked and thus did not violate Section 8(b)(1)(A). See *Garment Workers Union (Twin-Kee Manufacturing Co.)*, 130 NLRB 614, 618 (1961).

Assuming that the *Clear Pine Mouldings* test is applicable in this case[60], I nonetheless conclude that Feighner's conduct restrained and coerced employees in violation of Section 8(b)(1)(A). The General Counsel and Rieth-Riley properly assert that a picketer's subjective motivation, including provocation, for engaging in misconduct on the picket line is irrelevant to the determination of whether the conduct violates Section 8(b)(1)(A). See, e.g., *Consolidated Bus Transit, Inc.*, 350

60. In *General Motors LLC*, 369 NLRB No. 127 (2020), the Board overruled *Clear Pine Mouldings* and concluded that the question of whether abusive conduct results in a loss of the Act's protection should be evaluated using the burden-shifting framework in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). However, because this case does not involve a discharge or failure to reinstate a striking employee, the *General Motors* decision does not appear to have any impact on the Sec. 8(b)(1)(A) allegation herein.

NLRB 1064, 1066 (2007); *Boilermakers Local 686 (Boiler Tube Co. of America)*, 267 NLRB 1056, 1057 (1983). Thus, the proper legal question is whether an objective employee who observed the conduct of Feighner and Grinstern, in its totality, would be restrained or coerced from engaging in protected conduct in the future. I conclude that an objective employee who observed Feighner striking Grinstern with his picket sign would be weary in the future of crossing the picket line and returning to work, a protected activity. This is true regardless of whether the picketer was first struck by a vehicle and responded by hitting the driver with a picket sign. A reasonable employee who observed the entire sequence of events still would have great apprehension of crossing the picket line in the future.

Moreover, the Board has rejected the provocation defense in a case involving misconduct by a picketer in response to the conduct of an employer agent on the picket line. *Teamsters Local 918 (Tale Lord Manufacturing Co.)*, 206 NLRB 382, 382–383 (1973) ("conduct by a union agent otherwise coercive and thus violative of Section 8(b)(1)(A) of the Act cannot be justified merely because an employer agent also engaged in unlawful activity"). That same conclusion logically applies to the contention that Feighner's conduct was justified because Grinstern provoked it by also engaging in misconduct.

Make no mistake, being struck by a truck weighing between 80,000 and 160,000 pounds, even if it was going only 3 to 4 miles per hour, no doubt would cause an angry reaction from any reasonable person. But a line must be drawn somewhere in terms of what is and is

not a noncoercive response to being struck. Permitting Feighner to lawfully strike Grinstern with a picket sign and injure him in response to being hit by the truck essentially would be condoning eye-for-an-eye revenge. That unquestionably goes too far. Were the Union's defense accepted, the Act would protect an individual's misconduct on a picket line, as long as it was in response to another individual's misconduct and the conduct was of the same degree of severity. That would open the door to anyone on the picket line engaging in retaliatory acts as soon as a perceived act of misconduct occurred. In addition to potentially resulting in increases acts of misconduct on picket lines, this defense would needlessly increase litigation before the Board. Section 8(b)(1)(A) protects employees from any acts by a union agent that restrain or coerce them. Being struck repeatedly by a picket sign and injured while trying to legally cross a picket line cannot be condoned by the Act, whether provoked or not.[61]

The Union also argues that, even if Feighner's conduct violates Sec. 8(b)(1)(A), it is not culpable for his misconduct. I do not agree. At the start of picketing, the Union assigned multiple agents to each facility being picketed. According to Stockwell, this was done to ensure that misconduct did not occur. The Union had an agent,

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61. The Union also contends that, in the event Feigner's misconduct violated the Act, it was a single, isolated act. I conclude that, even if so, that fact does not excuse the violation. Drawing a clear line that battery is coercive is the desirable result to enforce the Act. The alternative would leave a gray area to determining when Section 8(b)(1)(A) is violated, contingent on how severe a battery was or how many incidents of battery occurred and how severe the response was.

Heurtebise, at the Lansing picket line on August 13, 2019, when the misconduct occurred. Heurtebise did intervene to diffuse the situation. Nonetheless, Heurtebise did not send Feighner home that day, but merely suggested he do so. The Union subsequently did not discipline Feigner for his misconduct or refuse to pay him for his picketing on August 13, 2019. The Union also did not inform striking employees thereafter of the misconduct and provide further instruction to avoid future misconduct. Under these circumstances, the Union is culpable for Feighner's misconduct. *Lithographers & Photo-Engravers Local 235 (Henry Wurst, Inc.)*, 187 NLRB 490, 490 (1970); *Garment Workers Local 222 (Valley Knitting Mills, Inc.)*, 126 NLRB 441, 448–449 (1960); *Teamsters Local 860* (*Delta Lines*), 229 NLRB 993, 994 (1977).

Accordingly, I find that Feighner's battery of Grinstern on August 13, 2019, on the picket line at Rieth-Riley's Lansing facility, violates Section 8(b)(1)(A).

II. Did Rieth-Riley Violate Section 8(A)(5) And (1) By Refusing To Provide The Union With Relevant, Requested Information?

A. Legal Framework

An employer has the statutory obligation under Section 8(a)(5) of the Act to provide, on request, relevant information that a union needs for the proper performance of its duties as a collective-bargaining representative. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967)

(citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956)). Those duties include the negotiation of collective-bargaining agreements. *West Penn Power Co.*, 346 NLRB 425, 427–428 (2006). Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the employer must provide it. *Palace Station Hotel & Casino*, 368 NLRB No. 148, slip op. at 4 (2019). Where the information requested concerns non-unit employees, the union bears the burden of establishing relevancy. *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997). This includes requests for subcontracting information. *Sunrise Health and Rehabilitation Center*, 332 NLRB 1304, 1305 fn. 1 (2000). To demonstrate relevancy, a liberal, discovery-type standard applies, and the union's initial burden is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983). Even so, "[t]he union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Disneyland Park*, 350 NLRB 1256, 1258 fn. 5 (2007); *Island Creek Coal Co.*, 292 NLRB 480, 490 fn. 19 (1989).

B. The Union's Request for Subcontracting Information

The General Counsel's complaint in Cases 07–CA–261954 and 07–CA–269365 alleges that Rieth-Riley refused to furnish the Union with one piece of information regarding subcontracting: the percentage of work covered by the road agreement which Rieth-Riley subcontracted.

Appendix C

1. The relevancy of the subcontractor information

In *Allison Corp.*, 330 NLRB 1363, 1364 fn. 8, 1365 fn. 15, 1367–1368 (2000), an employer refused to provide requested information to a union regarding its subcontracting of product manufacturing work to companies in Italy. The union requested the information after the employer laid off two employees and attributed the layoffs to its subcontracting. The employer also linked its decision to subcontract to labor costs. The requested information included product production at the company's U.S. plant before and after the subcontracting was implemented and the quantity of products ordered from the Italian subcontractors. The Board found the requested information relevant, in part, because the union needed it to assess the impact of the subcontracting on the bargaining unit. The Board further noted that, because the parties were in ongoing contract negotiations when the request was made, the union also could use the information to formulate new proposals to change subcontracting language in the existing collective-bargaining agreement. The Board required the employer to provide the information. See also *West Penn Power Co.*, supra (a union's request for information on the volume of an employer's subcontracting was relevant, in part, to determine its negotiating positions on subcontracting language during upcoming successor contract bargaining.)

In this case, subcontracting had been an issue between Rieth-Riley and the Union going all the way back to 2014. In successor contract negotiations, the Union sought to

secure language requiring Rieth-Riley subcontractors to pay the wage rates and fringe benefit contributions contained in the road agreement. Rieth-Riley opposed that language statewide and its last subcontracting proposal would have limited the Union's language to seven counties in and around Detroit. When Selwocki, the Union's attorney, sent the information request to Buttrick on June 1, 2020, he accurately stated that subcontracting was one of the remaining issues in negotiations for a successor contract. He added that the requested information would permit the Union to evaluate the proposals made by Rieth-Riley and potentially generate its own alternative proposals. Selwocki further explained how "extremely important" the amount of work being subcontracted was to those subcontracting proposals. He noted that subcontracting would take on less importance to the Union if only one to 10 percent of the work was being subcontracted, but would have the opposite impact if the Company was subcontracting 50 percent of its work. On its face, Selwocki's explanation is specific and provides a logical link between the request and the bargaining over subcontracting. Thus, the evidence establishes a probability that the requested information is relevant and would be of use to the Union in carrying out its statutory duties. Like in *Allison Corp.* and *West Penn Power Co.*, the Union needs the percentage of road agreement work which Rieth-Riley is subcontracting to assess the impact of subcontracting on unit work and to potentially alter its subcontracting proposal in negotiations for the successor contract. Thus, the Union established the relevance of the information.[62]

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62. In reaching this conclusion, I do not rely upon Selwocki's general, stock language in his request indicating the information

In defense, Rieth-Riley first argues that the requested subcontractor information was not relevant to the Union's collective-bargaining duties, because Selwocki's stated rationales for requesting it were "rebutted by the circumstances." Those circumstances are that the parties had not held a negotiation session since September 2019, as well as that the Union and Rieth-Riley had categorically rejected each other's subcontracting proposals back in July and August 2019. I find no merit to this argument.

Although not invoking the specific legal term, Rieth-Riley's contentions suggest that the parties reached some sort of impasse in negotiations over subcontracting language, rendering the requested information irrelevant. It notes that the Union made clear in negotiations that it would not move off its own subcontracting language, because limiting its geographic reach for Rieth-Riley would require it to limit it for all the road agreement contractors. However, even if they had reached a legal impasse, Rieth-Riley's duty to furnish the information remained. See, e.g., *Watkins Contracting, Inc.*, 335 NLRB 222, 225 (2001); *Raven Government Services, Inc.*, 331 NLRB 651, 658–659 (2000); *Retlaw Broadcasting Co.*, 324 NLRB 138, 141–142 (1997). An impasse does not altogether terminate the bargaining relationship, because it is viewed as "only a temporary deadlock or hiatus" in negotiations. *Charles D. Bonanno Linen Service*

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was necessary for the Union to monitor, enforce, and continue negotiations over the unit employees' terms and conditions of employment. This generalized, conclusory explanation is insufficient to trigger an obligation to supply information. *Disneyland Park*, supra at 1258 fn. 5; *Island Creek Coal*, supra at 490 fn. 19.

v. NLRB, 454 U.S. 404, 412 (1982). Here, no impasse occurred, just a hiatus in negotiations. The bargaining process itself contemplates that such a passage of time will lead one or the other party to modify its position on deadlocked issues. *Television Artists AFTRA v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968). That this conclusion applies here is further enhanced by the relevance of the requested subcontracting information to the Union's bargaining position in the successor contract negotiations. Moreover, at the time of the request, the Union remained the collective-bargaining representative of unit employees. An employer's duty to furnish information to a union, like its duty to bargain, arises out of a union's designation as the collective-bargaining representative of the bargaining unit. *NLRB v. Acme Industrial Co.*, supra. Thus, the passage of time here did not eradicate Rieth-Riley's continuing duty to furnish information, given the parties' 9(a) bargaining relationship.

As a result, I conclude that the General Counsel has established the relevancy of the requested subcontractor information to the Union's duties as the collective-bargaining representative of Rieth-Riley's operating engineers.[63]

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63. In light of this conclusion, it is unnecessary for me to address the General Counsel's and Union's additional arguments concerning the relevancy of this information. However, in the event the Board subsequently disagrees with my analysis here, I will address those arguments. The first is that the requested subcontractor information is relevant to verify Rose's claim to Stockwell during bargaining that the Union's subcontracting language would put Rieth-Riley "out of business." It is true that

2. Rieth-Riley's confidentiality defense

In defense of its refusal to provide subcontractor information, Rieth-Riley also contends that the requested information is confidential.

A party asserting that requested, relevant information is confidential bears an initial burden of establishing

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relevancy can be established where information is necessary to verify a claim made during bargaining. See, e.g., *Caldwell Manufacturing Co.*, 346 NLRB 1159, 1160 (2006); *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994). However, relevancy can be established in that manner only where an employer makes specific factual assertions which are capable of being verified. Id. at 259. Indeed, in *NLRB v. Truitt Manufacturing Co.*, 351 U.S. at 150, the Supreme Court found that a union was entitled to financial information of an employer after a claim that an hourly wage increase of more than 2-1/2 cents per hour would put the company "out of business." But the employer representative there also stated that "it could not afford to pay" the union's proposed 10 cents per hour increase, as well as that the company was "undercapitalized" and had "never paid dividends." Here, Rose made no specific factual assertions capable of verification to substantiate his assertion that the Union's subcontracting language would put the Company out of business. Even if his lone statement were capable of verification, the percentage of work being subcontracted, standing alone, is insufficient to do so and thus irrelevant to Rose's claim.

The General Counsel also repeatedly asserts in conclusory fashion that the subcontracting information was relevant to the Union's duty to monitor and enforce the existing road agreement. I do not agree. The expired road agreement contained no limitation on a contractor's right to subcontract. It simply required that the subcontractor pay the wages and benefits contained in the contract when performing road agreement work. The percentage of work being subcontracted is irrelevant to enforcing this language.

a legitimate and substantial confidentiality interest. *Public Service Co. of New Mexico*, 364 NLRB No. 86, slip op. at 3 (2016). Blanket or speculative assertions of confidentiality, standing alone, are insufficient. *Mission Foods*, 345 NLRB 788, 791–792 (2005). Even if an employer establishes a confidentiality interest, the employer bears the burden of notifying the union in a timely manner and proposing a reasonable accommodation of its concerns and the union's need for the requested information. *Olean General Hospital*, 363 NLRB 561, 568 (2015); *New York Post*, 353 NLRB 625, 629 (2008) (citing *Exxon Co. USA*, 321 NLRB 896, 898 (1996)).

I conclude that Rieth-Riley failed to meet its burden. First, the Company did not establish a legitimate and substantial confidentiality interest in the specific information that was requested. In response to the Union's request, Buttrick claimed that the names of Rieth-Riley subcontractors were a "trade secret" akin to a client list. But subcontractors are not clients or customers of Rieth-Riley. The Company hires subcontractors to perform road agreement work, meaning the subcontractors provide a service to Rieth-Riley. The subcontractors do not purchase goods or services from Rieth-Riley, as a customer would. The subcontractors also do not employ Rieth-Riley to obtain help or advice on how to perform road construction work, as a client would.

Even if the subcontractors were considered clients or customers, Rieth-Riley has not established a confidentiality interest in the subcontractors' names. An employer established such an interest where it had a policy of

safeguarding proprietary information, including sensitive customer information, and otherwise was legally required to safeguard such information. See *Oncor Electric Delivery, LLC*, 369 NLRB No. 40, slip op. at 3 (2020). Another employer failed to establish such an interest where it did not produce any evidence to show that customer identities were kept confidential pursuant to agreements with the employer. See *National Extrusion & Manufacturing Co.*, 357 NLRB 127, 130 (2011). Here, Rieth-Riley did not introduce evidence showing that it had any policy requiring employees to keep subcontractor information confidential or that it provided assurances to subcontractors that their identities would be kept confidential. Moreover, Buttrick did not ask the Union in his response to keep subcontractor names confidential if the information was provided, thereby undermining his confidentiality argument. *Geiger Ready-Mix Co. of Kansas City, Inc.*, 315 NLRB 1021, 1021 fn. 2 (1994) (citing *AGA Gas, Inc.*, 307 NLRB 1327, 1327 fn. 2, 1331 (1992)).

In his response to the information request, Buttrick also stated that publicly revealing the subcontractors' names could result in harm to Rieth-Riley's ability to negotiate for subcontractor services in the future. He provided no further explanation. The feared harm is nothing more than speculative. No rationale was given for how the subcontractor list would be "publicly" disclosed or why that would make subcontractors reluctant to perform work for Rieth-Riley in the future. Buttrick's response failed to give the Union meaningful insight into Rieth-Riley's concerns and equip the Union to bargain over an accommodation. See *American Medical Response*

of Connecticut, Inc., 371 NLRB No. 106, slip op at 2 fn. 5 (2022).[64]

Even if Rieth-Riley had established a confidentiality interest in the requested information, the Company also did not offer any accommodation to the Union to balance that interest with the Union's right to the information. Buttrick told Selwocki that he was "unable to conceive" of a way Rieth-Riley could provide responsive information to the Union if it withheld the confidential information. But redaction of subcontractors' names and street addresses from documents showing the work they were performing for Rieth-Riley is an obvious accommodation that the Company did not offer. Furthermore, Buttrick told Selwocki to let him know if he wished to "discuss" the confidentiality objections further. The onus was on Rieth-Riley to propose a reasonable accommodation, not to assert a confidentiality concern and then put the ball in the Union's court to address that concern. *Borgess Medical* Center, 342 NLRB 1105, 1106–1107 (2004) ("[t]he burden of formulating a reasonable accommodation is on the employer; the union need not propose a precise alternative to providing the requested information unedited) (citations omitted). Rieth-Riley's failure to offer a reasonable accommodation cements the conclusion that it has not met its burden of establishing a confidentiality defense. *Howard Industries, Inc.*, 360 NLRB 891, 893 (2014); *SBC California*, 344 NLRB 243, 243 fn. 3 (2005).

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64. I further note that the Union's request for the percentage of work being performed by subcontractors, on its face, does not even require production of the subcontractors' names.

For all these reasons, I conclude Rieth-Riley has not established a confidentiality defense entitling it to withhold the requested subcontract information from the Union.

C. The Union's Request for Bargaining Unit Employee Information

Finally, the General Counsel's complaint in Cases 07–CA–261954 and 07–CA–269365 alleges that Rieth-Riley violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with information concerning the compensation, names, and classifications of bargaining unit employees performing road agreement work from June 1, 2020, to the present.

As previously noted, a union's request for information pertaining to employees in the bargaining unit is presumptively relevant. *Palace Station Hotel & Casino*, 368 NLRB No. 148, slip op. at 4 (2019). Information pertaining to wages, hours, benefits, and working conditions of employees are "so intrinsic to the core of the employer-employee relationship (as to be) considered presumptively relevant." *Coca-Cola Bottling Co.*, 311 NLRB 424 (1993). Where information is considered presumptively relevant, no specific showing of relevance is required, and the employer has the burden of proving lack of relevance. *Grand Rapids Press*, 331 NLRB 296 (2000); *Ohio Power Co.*, 216 NLRB 987, 991 (1975). A liberal, discovery-type standard again applies, and the union is not required to prove that the requested data will be dispositive of the issue before the parties. *Reno Sparks Citilift,* 326 NLRB 1432, 1434 (1998). An employer can avoid production only if it either proves the

information is not relevant or demonstrates some reason why it cannot be provided. *Ormet Aluminum Mill Products Corporation,* 335 NLRB 788, 801 (2001); *A-Plus Roofing,* 295 NLRB 967, 970 (1989), enfd. 39 F.3d 1410 (9th Cir. 1994).

In this case, the Union requested the compensation, including wages and benefits, for employees who performed work under the road agreement, as well as the names and job classifications of the employees, from June 1, 2020 to the present (then November 3, 2020). The Union also requested the same information for any employee on whose behalf Rieth-Riley ever made contributions to the Union's fringe benefit funds. The names, job classifications, and compensation of bargaining unit employees are presumptively relevant. See, e.g., *Maple View Manor,* 320 NLRB 1149 (1996) (lists of current employees, including their names, dates of hire, last known addresses, telephone numbers, social security numbers, rates of pay, and job classifications are presumptively relevant); *Phoenix Coca-Cola Bottling Co.*, 337 NLRB 1239, 1244–1245 (2002) (wages, hours, and other terms and conditions of employment of unit employees are presumptively relevant). Presumptively relevant information also includes the names and payroll records of strike replacement workers because they are bargaining unit employees. *Page Litho, Inc.*, 311 NLRB 881, 882 (1993), enfd. in part, denied in part mem. 65 F.3d 169 (6th Cir. 1995); *Grinnell Fire Protection Systems Co.*, 332 NLRB 1257 (2000). Because the information requested is presumptively relevant, Rieth-Riley bears the burden of proving either the lack of relevance of the information or another, valid legal reason for not providing the information.

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As a reminder, the exact language of the Union's request for this information was:

> From June 1, 2020, to the present, provide the compensation, both wages and fringe benefits, for all employees (including their names and classifications) doing work covered by the *work jurisdiction provisions* of the expired 2013-2018 MITA/IUOE 324 Road Agreement. (Emphasis added.)

Rieth-Riley contends it was not required to produce the presumptively relevant information concerning unit employees because the Union's request was vague and ambiguous as to the definition of "work jurisdiction provisions" in the road agreement.

A union's vague or ambiguous request for information does not excuse an employer's blanket refusal to comply. *Keauhou Beach Hotel*, 298 NLRB 702, 702 (1990). Rather, an employer "must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information." Ibid (citing *A-Plus Roofing*, 295 NLRB 967, 972 fn. 7 (1989)); *Colgate-Palmolive Co.*, 261 NLRB 90, 92 fn. 12 (1982)).

Rieth-Riley did request a clarification from the Union regarding how it defined "work jurisdiction provisions." The Company identified the first article of the road agreement as being such and asked the Union to confirm. That first article contained detailed descriptions of the operating engineers work that was and was not covered by the agreement. The Union then responded

and confirmed that, at a minimum, it agreed that the contractual provisions identified by Rieth-Riley addressed work jurisdiction. The company argues that the Union's additional comment "However, not by limitation" meant the request remained ambiguous. I do not agree. As soon as the Union confirmed its agreement that the identified contractual provisions addressed work jurisdiction, Rieth-Riley had an obligation to turn over the compensation, names, and job classifications of employees performing the work identified in those provisions. Furthermore, and as the Union advised Rieth-Riley, the Company had been operating under the terms of the expired road agreement for more than 7 years and thus could identify what work had been performed, and by whom, under that agreement.

Thus, Rieth-Riley has not established a vague-and-ambiguous defense allowing it to withhold the requested, presumptively relevant information from the Union.

D. Rieth-Riley's Clear and Present Danger Defense to Both Information Requests

In its answer to the General Counsel's complaint, Rieth-Riley also asserted as an affirmative defense to its refusal to provide both the subcontractor and unit employee information that it had a reasonable fear that the Union would use the information to harass employees, subcontractors, and/or replacement workers. It further pled that it communicated this concern to the Union and the Union did not respond with reasonable assurances to the contrary. In Board parlance, this is known as the clear and present danger defense.[65]

65. In its brief, Rieth-Riley contends that, on 37 different occasions, the Union's picket line misconduct rose to the level of

Appendix C

An employer may be justified in withholding relevant, requested information from a union if a clear and present danger exists that the information would be misused, including to harass. *Poudre Valley Rural Electric Assn.*, 366 NLRB No. 21, slip op. at 9–10 fn. 16 (2018); *NTN Bower Corp.*, 356 NLRB 1072, 1072 fn. 3, 1138–1139 (2011). The Board has not set forth a specific test to determine if an employer's fear is reasonable and such a danger exists. Instead, it has relied on a variety of different factors, without requiring that any or all of them be considered in every case. Thus, it appears the particular circumstances of a case control. The factors the Board has relied upon include the passage of time between the misconduct and the information request; any assurances from the union that the information will not be misused; the specific acts of misconduct, including their quantity and severity; and whether the union was involved in the misconduct. See, e.g., *Page Litho, Inc.*, 311 NLRB 881, 882 (1993); *Chicago Tribune Co.*, 316 NLRB 996, 996 fn. 3 (1995), enf. denied 79 F.3d 604 (7th Cir. 1996). The passage of time most frequently has been relied upon by the Board to determine if a clear and present danger exists.

Despite the extensive evidence presented by Rieth-Riley, one very simple fact establishes that no clear and

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independent violations of Sec. 8(b)(1)(A), thereby justifying its refusals to provide information. None of these occasions are pled in the General Counsel's complaint. Although I set forth facts from all of the incidents relied upon by Rieth-Riley to support its affirmative defense (in Sec. IV of the Findings of Fact), I decline the Company's request to evaluate whether the Union's conduct constituted any unpled violations of Sec. 8(b)(1)(A). See *Winn-Dixie Stores*, 224 NLRB 1418, 1420 (1976).

present danger of harassment existed when the Company refused to provide the Union with relevant, requested information: the passage of time between the alleged misconduct and the requests. In its brief, Rieth-Riley relies on 37 alleged acts of union misconduct, all but one of which occurred in August and September 2019. The picketing that year continued in October and ended in mid-November at the end of the construction season without further incidents. The Union's strike continued in 2020 and no evidence was presented of any picket line misconduct that year. In fact, at the start of the construction season in 2020, the Union picketed at three or four jobsites where Rieth-Riley was performing work. However, all picketing was shut down in March 2020 due to the COVID-19 breakout. The Union's subcontracting information request was made on June 1, 2020, and its bargaining unit employee request was made on November 3, 2020. Thus, 8 months had passed without incident at the time of the first request and 13 months had passed without incident at the time of the second request. Given that lengthy passage of time, no present danger of harassment existed. *Page Litho*, supra (no clear and present danger where 4 months had passed between last reported incident of misconduct and information request); *Circuit-Wise, Inc.*, 308 NLRB 1091, 1097–1098 (1992) (same where 7 months had passed between the request and employees' asserted fear of harassment); *Pearl Bookbinding Co.*, 213 NLRB 532, 535 (1974) (same where 16 months passed between last reported harassment and refusal to provide information).[66]

66. Rieth-Riley attempts to shorten the passage of time by claiming that the Union's harassment continued into 2020. However, the evidence cited to support the claim is insufficient to

Other factors likewise support the conclusion that no clear and present danger existed. First, although Rieth-Riley's stated fear was the harassment of subcontractors and non-striking employees, the Company is unable to explain how the specific information would enable the Union to engage in such harassment. In order to harass a subcontractor it did not already know was performing work for Rieth-Riley, the Union would need to receive the name and address of the subcontractor. However, the request at issue in this case is not for the names and addresses of subcontractors, but rather the percentage of work that subcontractors are performing for Rieth-Riley. No need exists to turn over subcontractors' names and addresses to provide that information. Rieth-Riley could furnish the Union with that percentage and underlying documents used to determine the percentage while

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establish that the Union engaged in any misconduct during that year. (Tr. 705–713, 887–889, 1151–1154, 1406–1411, 1466, 1495–1505, 1516.) Larson's testimony about the Union's picketing, at some unidentified time in 2020, was conclusory as to the picketers "impeding traffic" at two jobsites. His most specific description of the conduct was that, at one jobsite, picketers were "walking back and forth on the way into" the project and "causing impact for our trucks." That could be lawful primary picketing or misconduct. A union representative following Rieth-Riley trucks out of the Roscommon asphalt plant is not definitively misconduct either. The Union was on strike against Rieth-Riley and could follow Rieth-Riley vehicles from the Company's facilities to determine if they were performing work on any construction sites, where the Union could picket. That same rationale applies to any union representative driving adjacent to a jobsite where Rieth-Riley was performing work or photographing, to the extent it actually was proven, of Rieth-Riley vehicles at jobsites.

redacting any information that would identify the specific subcontractors. Instead of doing that, the Company instead asserted it could not conceive of any way to provide confidential and nonconfidential information such that the percentage could be determined. That assertion simply is implausible. Providing relevant, requested information concerning the percentage of work being subcontracted was not going to create additional risk of harassment for any Rieth-Riley subcontractor.

Similarly, as to the request for employee information, the Union already was in possession of all the information it would need ostensibly to harass nonstriking employees. About 1 month prior to the employee information request, the Union received almost all of this information from Rieth-Riley as part of the General Counsel's processing of the second decertification petition. Rieth-Riley provided the Union with a list of employees with their full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular "cell" telephone numbers). The job category identified whether the individual employee was a striker, a replacement employee, or an employee who crossed the picket line and returned to work. Rieth-Riley raised no objection to providing this information to the Union in support of decertification. Thus, the list provided the Union with every piece of information it could need to harass employees (but it did not do so). The only additional piece of information the Union had requested was the employees' wage rates. That information absolutely would not impact any existing danger that the Union would harass employees, a point that Loney, the person

responsible for Rieth-Riley's response to the information request, readily acknowledged.

Finally, regarding alleged improper use of the information, Selwocki responded to Buttrick's harassment concern by stating that the Union was "requesting information for proper purposes and will use same for such." Buttrick called that assertion "perfunctory", but did not propose an alternative. Admittedly, Selwocki's assurance is not the most specific one ever written. Nonetheless, it is specific enough to support the conclusion that no clear and present danger existed to providing the information. *Page Litho*, supra; *Circuit-Wise*, supra.

Therefore, I find that the evidence is insufficient to establish that a clear and present danger existed that permitted Rieth-Riley to refuse to provide the requested information.

E. Rieth-Riley's Contention that the Information Requests Were Made in Bad Faith

In a similar vein, Rieth-Riley asserts that the Union requested the information in bad-faith for the sole purpose of harassing subcontractors and employees who crossed the picket line. Board law is well settled that, if the only reason a union requests information is harassment, an employer is not required to comply with the request. *Island Creek Coal Co.*, 292 NLRB 480, 489 (1989), enfd. mem. 899 F.2d 1222 (6th Cir. 1990). Such bad faith must be pled and proved as an affirmative defense. Id. at 489

fn. 14. However, where a union's information request is for at least one proper and legitimate purpose, the good faith of the request is established. *Ormet Aluminum Mill Products*, 335 NLRB 788, 805 (2001). It then is irrelevant if other reasons exist for the request or the information may be put to other non-representational uses. *Hawkins Construction Co.*, 285 NLRB 1313, 1322 (1987), enf. denied 857 F.2d 1224 (8th Cir. 1988); *Utica Observer-Dispatch, Inc.*, 111 NLRB 58, 63 (1955), enfd. 229 F.2d 575, 577 (2d Cir. 1956). As described above, the subcontractor percentage information was relevant for a proper purpose—to determine how much subcontracting Rieth-Riley actually did and whether that percentage could impact the Union's contract proposal concerning subcontracting. Because wages also still were an open issue in bargaining, the Union's request for that information concerning bargaining unit employees also was relevant to a proper purpose—to determine what the Union's contract proposal on wages should be. As a result, the Union's requests were made in good faith.

F. Conclusion on Information Requests

For all these reasons, I conclude that Rieth-Riley violated Section 8(a)(5) and (1) by refusing to provide the Union with the requested, relevant information regarding the percentage of road agreement work the Company was subcontracting. I also find that Rieth-Riley violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide presumptively relevant information to the Union regarding bargaining unit employees.[67]

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67. Rieth-Riley also argues that the General Counsel's

Appendix C

Conclusions of Law

1. Rieth-Riley Construction Co., Inc. (Rieth-Riley) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 324, International Union of Operating Engineers, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and at all material times was, the exclusive collective-bargaining representative of the following appropriate unit: operating engineers employed by Rieth-Riley in the State of Michigan in building construction, underground construction, and/or heavy, highway and airport construction, at the site of construction, repair, assembly and erection, including equipment operators, field mechanics, oilers, apprentices, and on the job trainees; but, excluding employees represented by other labor organizations, and professional, office and clerical employees, guards and supervisors as defined under the Act.

4. Rieth-Riley violated Section 8(a)(5) and (1) by refusing to provide the Union with information the Union requested on June 1, 2020, and November 3, 2020, that is relevant and necessary to the Union's performance

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complaint against it is invalid because President Biden's discharge of prior General Counsel Peter Robb was unlawful. However, the Board already has ruled that the discharge was lawful, thereby foreclosing Rieth-Riley's argument. *Park Central Care and Rehabilitation*, 371 NLRB No. 46 (2021).

of its functions as the exclusive collective-bargaining representative of employees in the above-described, appropriate unit.

5. The Union, by picketer Michael Feighner, violated Section 8(b)(1)(A) when he inflicted injury upon a non-striking employee by repeatedly hitting the employee with a picket sign and spitting on the employee in the presence of other employees on August 13, 2019, at Rieth-Riley's Lansing facility.

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

Remedy

Having found that Rieth-Riley engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Rieth-Riley violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with certain relevant information requested on June 1, 2020, and November 3, 2020, I shall order Rieth-Riley to provide that information to the Union. I also shall order Rieth-Riley to post an appropriate remedial notice to its employees.[68]

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68. The General Counsel's complaint in Case 07–CA–261954 sought an affirmative bargaining order. However, the General Counsel made no argument in the post-hearing brief as to why this remedy should be ordered. As a result, I decline to order that remedy.

Appendix C

Having found that the Union engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Union violated Section 8(b)(1)(A) by engaging in picket line misconduct, I shall order it to post an appropriate remedial notice to its employees.

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

Order

A. Rieth-Riley, of Goshen, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Local 324, International Union of Operating Engineers, AFL–CIO (the Union) by failing and refusing to furnish it with information that is relevant and necessary to its performance of its duties as the collective-bargaining representative of Rieth-Riley's Michigan operating engineer bargaining unit employees.

(b) 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) Furnish the Union with documents indicating the percentage of work covered by the expired 2013–2018 road agreement that has been subcontracted from June 1, 2016, to June 1, 2020.

(b)Furnish the Union with documents showing the compensation, both wages and fringe benefits, for all employees (including their names and classifications) doing work covered by the work jurisdiction provisions of the expired 2013–2018 road agreement, including any employees on whose behalf Rieth-Riley has made contributions to the Union's fringe benefit funds, from June 1, 2020 to the present.

(c) Within 14 days after service by the Region, post at its Goshen, Indiana facility and all of its facilities in the State of Michigan copies of the attached notice marked "Appendix A."[69] Copies of the notice, on forms provided by

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69. If a 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 Rieth-Riley 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

the Regional Director for Region 7, after being signed by Rieth-Riley's authorized representative, shall be posted by Rieth-Riley 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Rieth-Riley customarily communicates with its employees by such means. Reasonable steps shall be taken by Rieth-Riley to ensure that the notices are not altered, defaced, or covered by any other material. If Rieth-Riley has gone out of business or closed the facilities involved in these proceedings, Rieth-Riley shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Rieth-Riley at any time since June 1, 2020.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Rieth-Riley has taken to comply.

B. The Union, of Broomfield Township, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing employees in the exercise of their rights under Section 7 of the Act by striking

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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."

employees with picket signs or spitting in employees' faces in the presence of employees on a picket line.

(b) 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) Within 14 days after service by the Region, post at its Broomfield Township, Michigan facility copies of the attached notice marked "Appendix B."[70] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Union's authorized representative, shall be posted by the Union

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70. If a 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 Union customarily communicates with its employees and members 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."

and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Union customarily communicates with its members by such means. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, the Union has gone out of business or closed the facility involved in these proceedings, the Union shall duplicate and mail, at its own expense, a copy of the notice to all current and former unit employees employed by Rieth-Riley at any time since August 13, 2019.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.[71]

Dated, Washington, D.C., July 18, 2022.

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71. The General Counsel's complaint in Case 07–CB–247398 also sought as a remedy that the Union make Rieth-Riley whole for any loss of property damaged and/or lost as a result of the Union's picket line misconduct. This appears to have been in reference to the allegations later withdrawn by the Regional Director. The complaint did not seek the same as to any losses suffered by Grinstern as a result of the battery against him and the General Counsel makes no argument for this in the posthearing brief. Accordingly, I decline to order this remedy as to Grinstern.

Appendix C

APPENDIX A

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.

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively with Local 324, International Union of Operating Engineers, AFL–CIO (the Union) by failing and refusing to furnish the Union with requested information that is relevant and necessary to the performance of its functions as the collective-bargaining representative of our Michigan

operating engineer bargaining unit employees.

WE WILL NOT, 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.

WE WILL furnish the Union with documents indicating the percentage of work covered by the expired 2013–2018 road agreement that has been subcontracted from June 1, 2016, to June 1, 2020.

WE WILL furnish the Union with documents showing the compensation, both wages and fringe benefits, for all employees (including their names and classifications) doing work covered by the work jurisdiction provisions of the expired 2013–2018 road agreement, including any employees on whose behalf Rieth-Riley has made contributions to the Union's fringe benefit funds, from June 1, 2020 to the present.

Reith-Riley Construction Co., Inc.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/07-CA-261954 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.

Appendix C

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
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.

Appendix C

WE WILL NOT, on a picket line we have established and are maintaining, inflict injury on non-striking employees by hitting employees with picket signs or spitting on them.

WE WILL NOT, 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.

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

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/ 07-CA-261954 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.

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED OCTOBER 23, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 23-1899/1946

RIETH-RILEY CONSTRUCTION CO., INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ORDER

BEFORE: MOORE, COLE, and MATHIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Appendix D

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX E — ORDER STAYING MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED DECEMBER 20, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 23-1946/23-1899

RIETH-RILEY CONSTRUCTION CO., INC.,

Petitioner Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner.

ORDER

BEFORE: MOORE, COLE and MATHIS, Circuit Judges

Upon consideration of motion to stay mandate,

It is **ORDERED** that the mandate be stayed to allow Rieth-Riley Construction Co., Inc. time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case.

Issued: December 20, 2024

ENTERED BY ORDER OF THE COURT
Kelly L. Stephens, Clerk

/s/ Kelly L. Stephens