No. 26-

In the
Supreme Court of the United States

RIETH-RILEY CONSTRUCTION CO., INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondents.

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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QUESTION PRESENTED

Under the National Labor Relations Act, the National Labor Relations Board issues two kinds of decisions: representation decisions and unfair-labor-practices decisions. *See* 29 U.S.C. §§ 159, 160. Representation decisions address who is the proper bargaining representative for a group of workers, including petitions to certify or decertify a union. *Id.* § 159(c). Unfair-labor-practices decisions address alleged wrongdoing by the union or employer, including a refusal to bargain. *Id.* § 160.

The nature of the decision determines the path for judicial review. Unfair-labor-practices decisions are broadly appealable. *Id.* § 160(e)–(f). Representation decisions are also appealable, but only if an unfair-labor-practices decision is "based in whole or in part" on the representation case. *Id.* § 159(d).

In the decision below, the Sixth Circuit added a new jurisdictional requirement for reviewing representation decisions, holding they are reviewable only if they involve a "'bargaining unit determination' made by the Board, such that the decision creates, clarifies, or eliminates a bargaining obligation." Pet.App.17a–18a. It became the first court in the country to adopt such a rule.

Applying its new rule, the Sixth Circuit held that one category of representation decisions—Board dismissals of an employee's petition to decertify a union—should be entirely insulated from judicial review. On its view, the dismissal of a decertification petition merely "maintain[s] the status quo" and thus cannot be reviewed. Pet.App.18a.

The question presented is: Whether the NLRB's representation decisions are subject to judicial review only if they create, clarify, or eliminate a bargaining obligation.

PARTIES TO THE PROCEEDING

Petitioner is Rieth-Riley Construction Co., Inc., the petitioner-cross-respondent below. Respondents are the National Labor Relations Board, the respondent-cross-petitioner below, and Local 324, International Union of Operating Engineers, AFL-CIO, which intervened in support of the Board below.

CORPORATE DISCLOSURE STATEMENT

Rieth-Riley Construction Co., Inc. 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 Constr. Co. v. NLRB, Sixth Circuit Case Nos. 24-2123 & 25-1082. The court's opinion is reported at 172 F.4th 492 (Apr. 8, 2026), *reh'g en banc denied* (June 17, 2026). The appeal arose from 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 (Dec. 16, 2024). The Sixth Circuit's ruling is subject to a separate petition for certiorari filed on the same day as this petition.

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For nearly a century, Section 9(d) of the National Labor Relations Act has guaranteed judicial review of the Board's representation decisions. The statutory mechanism is straightforward: when an unfair-labor-practices order "is based in whole or in part upon facts certified following" a representation investigation, a court of appeals may review both the order and the underlying representation ruling. 29 U.S.C. § 159(d); *Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964). The practical mechanism is equally well-established: an employer that believes the Board erred may engage in a "technical refusal to bargain," inviting an unfair-labor-practices charge. No further limitation appears in the text—and none existed in practice until now.

In the decision below, the Sixth Circuit became the first court in the statute's history to hold that it lacked jurisdiction to review the Board's dismissal of a decertification petition, even when the employer adhered to the technical refusal-to-bargain doctrine. To reach that result, it invented an entirely new requirement found nowhere in the statute: that a representation decision is reviewable only if it "creates, clarifies, or eliminates a bargaining obligation." Pet.App.17a–18a. Because the Board's cancellation of a labor election after ballots had already been cast merely "maintained the status quo," the panel held, no court could review it. Pet.App.18a.

That holding cannot be reconciled with the text of Section 9(d), the strong presumption favoring judicial review of agency action, or decades of uniform circuit practice. The Second, Seventh, and D.C. Circuits have all exercised jurisdiction to review termination of decertification petitions following a technical refusal to bargain—precisely the posture here. *See NLRB v. Accurate Web, Inc.*, 818 F.2d 273, 275–76 (2d Cir. 1987); *NLRB v. Gebhardt-Vogel Tanning Co.*, 389 F.2d 71, 75–76 (7th Cir. 1968); *Transp. Maint. Servs., LLC v. NLRB*, 275 F.3d 112, 114–16 (D.C. Cir. 2002). Under the Sixth Circuit's rule, each of those cases would have been dismissed for want of jurisdiction rather than decided on the merits.

The consequences extend well beyond this case. Congress designed the National Labor Relations Act to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151. Section 7 of the NLRA thus guarantees employees not only "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," but also "the right to *refrain* from any or all of such activities …." *Id.* § 157 (emphasis added). Decertification elections are the principal means by which workers exercise the negative dimension of that right—the right to reject an unwanted union. Yet the Board has a long and documented history of disfavoring decertification through procedural gatekeeping. If decisions to cancel decertification elections are placed beyond any court's reach, workers will have no recourse when the agency abuses its processes to deny them their statutory right of free choice—as the Board did here.

Appellate courts should not abdicate statutory jurisdiction without support from the plain text. *See*

CC/Devas (Mauritius) Ltd. v. Antrix Corp., 605 U.S. 223, 226 (2025). This Court should grant certiorari to restore the uniform rule that has governed for decades: when an unfair-labor-practices order is based in whole or in part on a representation proceeding, federal courts have jurisdiction—and indeed a duty—to review that proceeding on the merits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet.App.1a) is reported at *Rieth-Riley Construction Co. v. NLRB*, 173 F.4th 269 (6th Cir. Apr. 13, 2026). An order denying rehearing en banc (Pet. App.134a) was entered June 11, 2026. The decision and order of the National Labor Relations Board (Pet.App.29a) is reported at *Rieth-Riley Construction Co.*, 374 NLRB No. 149 (Dec. 13, 2024).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its opinion and judgment on April 13, 2026, and denied rehearing en banc on June 11, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is filed on September 3, 2026, and is therefore timely. Sup. Ct. R. 13.1, 13.3.

STATUTORY PROVISIONS AND INTERNAL OPERATING PROCEDURE INVOLVED

29 U.S.C. § 159

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a);

* * *

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

29 U.S.C. § 160

(c) Reduction of testimony to writing; findings and orders of Board

* * *

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

* * *

(e) Petition to court for enforcement of order; proceedings; review of judgment

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

* * *

Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

6 Cir. I.O.P. 34 (Oral Argument - Calendaring; Panel Selection and Identity; Notice of Hearing, Postponement, and Presentation of Oral Argument; Screening and Summary Decisions)

(a) **Calendaring.**

(1) **Annual Schedule.** The court generally sits over one or two-week periods scheduled so as to afford all judges at least five weeks between sittings. Active judges are generally scheduled to sit four days during one of the sitting weeks. At least six active judges are assigned to one of the two sitting weeks at random; the balance of the court's active judges are assigned to the other sitting week. Judges are later assigned to panels during the sitting weeks using an automated routine which randomizes the creation of panels based on the judges assigned to the sitting week.

* * *

(b) **Panel Selection and Identity.**

(1) **Subsequent Appeals Returned to Original Panel.** In appeals after this court returns a case to the lower court or agency for further proceedings, or after the Supreme Court of

> the United States remands a case to this court, the original panel will determine whether to hear the appeal or whether it should be assigned to a panel at random.

STATEMENT OF THE CASE

1. Statutory Background: Judicial Review Under the National Labor Relations Act and the Technical Refusal-to-Bargain Doctrine

Under the National Labor Relations Act, the Board issues two kinds of decisions: representation decisions and unfair-labor-practice decisions. *See* 29 U.S.C. §§ 159, 160. Only unfair-labor-practice decisions are eligible for direct judicial review; representation decisions must take a more roundabout path. As it has for 90 years, the statute says:

> Whenever an order of the Board made pursuant to [the unfair-labor-practice section] of this title is *based in whole or in part* upon facts certified following an investigation pursuant to [the representation section] and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record …, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made ….

Id. § 159(d) (emphasis added).

In *Boire v. Greyhound Corp.*, this Court interpreted that section as providing "full ... judicial review of the underlying [representation] order" where "the dispute concerning the correctness of the [representation decision] eventuates in a finding by the Board that an unfair labor practice has been committed." 376 U.S. 473, 477 (1964). One example is "where an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit." *Id.*

In the decades since, federal courts have consistently held that this provision permits an employer to obtain judicial review of Board decisions in representation proceedings, including election proceedings, "in conjunction with an unfair labor practice order by the Board." *Heartland Hum. Servs. v. NLRB*, 746 F.3d 802, 805 (7th Cir. 2014) (Posner, J.) (collecting cases). As the Eleventh Circuit put it—in reviewing a decertification proceeding on the merits—"[t]he representation case and the unfair labor practice case become as one and the complete record is fully reviewable." *Lake Mary Health Care Assocs., LLC v. NLRB*, 211 F. App'x 878, 880 n.1 (11th Cir. 2006) (quoting *U.S. Rubber Co. v. NLRB*, 373 F.2d 602, 604 n.3 (5th Cir. 1967)).

Courts and the Board have recognized a four-step process for an employer seeking review of an erroneous election ruling. First, an employer who believes the Board materially erred in an election proceeding must wait for that proceeding to conclude. *Heartland*, 746 F.3d at 806. Second, once there is a final adverse decision, the employer must refuse to bargain with the union. *See Pro. Transp., Inc.*, 362 NLRB 534, 535 (2015). Third, when the union files an unfair-labor-practice charge for refusal to bargain, the employer must defend by relying on the error in the election proceedings. *See generally id.* Fourth, the employer must continue to refuse to bargain through the end of the proceedings, or else waive any appellate challenge to the election proceeding. *See, e.g.*, *Coffman v. Queen of the Valley Med. Ctr.*, 895 F.3d 717, 727–28 (9th Cir. 2018). If an employer walks this tightrope successfully and is substantively correct that the Board materially erred in the representation proceeding, then that error serves as a complete defense against enforcement of the Section 8(a)(5) charges for refusal to bargain, and the court of appeals may remand for further action in the representation proceedings. *See, e.g.*, *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287, 299 (5th Cir. 2015); *Transp. Maint. Servs., LLC v. NLRB* (*TMS*), 275 F.3d 112, 116 (D.C. Cir. 2002); *see also Boire*, 376 U.S. at 479 n.6 ("[T]he entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party." (quoting S. Rep. No. 573, 74th Cong., 1st Sess., 14)).

Finally, to protect this "unquestioned" right to appeal, the Board will not impose monetary penalties on employers who refuse to bargain to obtain judicial review of an earlier representation decision. *Ex-Cell-O Corp.*, 185 NLRB 107 (1970); *see also Longmont United Hosp.*, 374 NLRB No. 52 (Feb. 26, 2026) (reaffirming *Ex-Cell-O*).

This process is called a "technical" refusal to bargain.

2. Factual Background: the Dismissed Decertification Petitions and the Uncounted Ballots

This case involves Rieth-Riley's technical refusal to bargain with a union after the Board unlawfully canceled a labor election.

Rieth-Riley and Operating Engineers Local 324 have been embroiled in litigation since summer 2018, when the Union first refused to bargain a new contract on a multiemployer basis. Rieth-Riley (along with most of Michigan's road contractors) locked out the Union in September 2018 for four weeks. After ten bargaining sessions for a new single-employer contract, the Union went on a strike that continues to this day. AR4021, AR5074–76, AR7375.

In August 2020, a Rieth-Riley employee petitioned the NLRB for an election to decertify the Union as the bargaining representative of Rieth-Riley's engineers. Supplemental Administrative Record ("SAR"), Dkt. No. 51-1, at 144. The acting regional director ordered an election, with ballots to be opened and counted at 1:00PM on November 9, 2020. SAR176.

But at 9:39AM on November 9—after the election had already occurred and mere hours before the ballots were to be counted—the regional director dismissed the employee's decertification petition, and the votes were memory-holed. SAR181–91; SAR196. The result of the election remains unknown. This decision violated the principle that "when a valid [labor] election has been held, the results are to be counted and given effect except when there is a particularly compelling reason for not doing so." *TMS*, 275 F.3d at 115.

Rieth-Riley and the employee both appealed to the Board. The Board affirmed the dismissal 3–2. Pet. App.88a. The majority found a "causal nexus" between Rieth-Riley's lockout and the employee's petition for decertification—despite the absence of a hearing on that issue—and so dismissal was proper. Pet.App.102a. The dissent criticized the regional director's "remarkable about-face" in dismissing the decertification petition, without a hearing, after ballots had been cast, and the majority's affirmance of that decision, noting that Rieth-Riley's "employees will surely wonder why their Section 7 right freely to select, reject, or change their bargaining representative has been given so little weight." Pet. App.116a (emphasis omitted).

3. Procedural Background: Rieth-Riley's Technical Refusal to Bargain and the Board's Order

Believing the Board's decision wrong, Rieth-Riley invoked the technical refusal-to-bargain doctrine to obtain judicial review. The ALJ who heard the unfair-labor-practice charges noted as much, explaining that Rieth-Riley defended against the refusal-to-bargain charge by arguing that "both the [regional director's] decision and the Board's order affirming dismissal of the decertification petitions were in error." Pet.App.80a. Holding the Board's dismissal order binding, the ALJ rejected Rieth-Riley's defense, found it had committed an unfair labor practice, and ordered it to bargain in good faith. Pet.App.82a. She advised that Rieth-Riley should "file an appeal with the appropriate circuit court" if it wished to challenge the Board's decertification dismissal. Pet.App.63a.

The Board agreed that Rieth-Riley committed an unfair labor practice and adopted the ALJ's factual findings writ large—including as to the decertification proceedings. Pet.App.31a–32a. But it rejected the NLRB general counsel's request to add monetary penalties, holding that to impose them on these facts "would require overruling *Ex-Cell-O*." Pet.App.36a. In other words, the Board recognized that Rieth-Riley had properly invoked the technical refusal-to-bargain doctrine and its right to appeal had to be protected.

4. The Decision Below

As the ALJ and Board invited it to do, Rieth-Riley appealed to the Sixth Circuit. Because the ALJ cited facts exclusively contained in the decertification materials in ruling on the substantive NLRA violations, Rieth-Riley moved to compel the NLRB to supplement the appellate record with the decertification proceedings. Pet.App.27a. The Sixth Circuit granted the motion and "include[d] the 'Decertification Proceedings'" in the appellate record. *Id.* The court thus seemed primed to recognize, as did the ALJ and Board, that the refusal-to-bargain finding was "based in whole or in part upon" the decertification proceedings, which therefore needed to be included in the "record," 29 U.S.C. § 159(d), and would be subject to "full … judicial review," *Boire*, 376 U.S. at 477.

But Rieth-Riley's appeal did not reach a randomly assigned panel. Two years earlier, the same three judges heard a separate Rieth-Riley petition for review from a separate NLRB proceeding. *Rieth-Riley Constr. Co. v. NLRB*, 114 F.4th 519 (6th Cir. 2024), *cert. denied*. Although that decision did not return any case to the Board for further proceedings and did not concern the allegations at issue here, the panel assigned this case (along with a companion appeal concerning withdrawal from a multiemployer bargaining agreement, also involving Rieth-Riley) to itself and heard argument outside the ordinary argument calendar on February 26, 2026, before Judges Moore, Cole, and Mathis.

That gerrymandered panel refused to review the dismissal of the decertification petition. Pet.App.1a. It became the first appellate court in the NLRA's decades-long history of decertification petitions to hold that it lacked jurisdiction to consider their dismissal, even when the employer unquestionably adhered to the technical refusal-to-bargain doctrine. Pet.App.18a. To reach that result, it invented an entirely new requirement for reviewing the Board's election decisions: they must "create[], clarif[y], or eliminate[] a bargaining obligation" to be appealable. Pet.App.17a–18a. Rieth-Riley petitioned for rehearing en banc, which was denied. Pet.App.134a.

The same panel also ruled against Rieth-Riley in the companion case. *Rieth-Riley Constr. Co. v. NLRB*, 172 F.4th 492 (6th Cir. 2026), *reh'g en banc denied*. That decision is subject to a separate petition for certiorari.

REASONS FOR GRANTING THE WRIT

This case presents a clean, recurring, and exceptionally important question of federal labor law: whether an entire category of Board decisions—dismissals of employee decertification petitions—should be beyond any court's reach to review.

The Sixth Circuit answered yes. It grafted onto Section 9(d) a limitation appearing nowhere in the statute, broke from roughly 80 years of unquestioned practice, and handed the Board unreviewable control over decisions that determine whether American workers may exercise their statutory right to reject an unwanted union. The decision cannot be reconciled with Section 9(d)'s text, with the strong presumption favoring judicial review of agency action, or with the Board's own understanding of finality. Review is warranted.

1. The Question Presented Is of Exceptional Importance.

This case presents an issue of exceptional consequence for Labor, Management, and the NLRA's structure: whether the Board's decision to cancel a decertification election, even after votes have been cast, is entirely insulated from judicial review.

That issue goes to the heart of the interests the NLRA seeks to protect. The NLRA's official policy since 1935 has been to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives *of their own choosing*." 29 U.S.C. § 151 (emphasis added).

But throughout the statute's history, the Board has "'display[ed] an institutional or policy bias' … to expand the scope of the Act" to "maximize[] … the number of unions it certifies." *See Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992) (quoting Note, *The NLRB & Supervisory Status: An Explanation of Inconsistent Results*, 94 Harv. L. Rev. 1713, 1714 (1981) (discussing this bias in the context of supervisory status determinations)). The original NLRA (the Wagner Act) predominantly asserted positive rights; Section 7 guaranteed employees' right to organize, and Section 9(c) expressly granted the NLRB the right to certify bargaining representatives. Pub. L. No. 74-198, § 9, 49 Stat. 449, 453 (1935). The Board construed these positive statements as a one-way ratchet: once a union is in, that workforce is unionized in perpetuity. But that was not Congress's intent, as it later confirmed: "Although the terms of the act would permit them to do so, the Board has denied to employees who have designated an exclusive representative the right to have it decertified unless, at the same time, they subject themselves to control by another representative." H. Rep. No. 2451, at 35, *reprinted in* Legislative History of the Labor Management Relations Act, 1947, at 326 [hereinafter LMRA History] (1948);* *see also* S. Rep. No. 105, at 10, *reprinted in* LMRA History, at 416 (similar). The Labor Management Relations Act of 1947 thus deliberately clarified that this legislative scheme was intended to be union-neutral, to "restore[] to employees this right of which the Board deprived them." H. Rep. No. 2451, at 35, *reprinted in* LMRA History, at 326.

First, Section 7 was amended to expressly protect employees' negative rights as well as positive ones: employees were now equally empowered to "bargain collectively through representatives of their own choosing" and to "refrain from any or all of such activities" in their collective judgment. 29 U.S.C. § 157; National Labor Relations Act, ch. 120, sec. 101, § 7, 61 Stat. 136, 140 (1947). Thus, for the past 80 years, Section 7 has "guard[ed] with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all." *Balt. Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001).

Second, Section 9 was amended to expressly permit employees to file both certification and decertification petitions, *see* 29 U.S.C. § 159(c)(1)(A), to "make it necessary for the Board to entertain petitions from employees irrespective of the kind of relief sought." S. Rep. No. 105, at 10, *reprinted in* LMRA History, at 416.

* Available at: https://babel.hathitrust.org/cgi/pt?id=mdp.39015012950260&seq=378

Nevertheless, the LMRA still contained one key distinction: while both employees and unions can petition for either certification or decertification, employers are accorded no such right. *See* 29 U.S.C. § 159. Despite the clear mandate to be union-neutral, the Board has continued to rely on this procedural distinction to favor existing union representation over employee free choice.

For instance, while the Board does permit employers to file election petitions regarding existing represented employees, an employer petition must be backed by good-faith uncertainty as to the union's majority support, whereas viable certification and decertification petitions both require only 30% support from the workforce. *Compare D.O. Prods., LLC*, 370 NLRB No. 139, slip op. at *3 (June 17, 2021) (affirming dismissal of employer's election petition where the employer "only indicated that 44 percent of employees no longer supported the Union"), *with Representation—Case Procedures*, 79 Fed. Reg. 74308-01, 74421 (Dec. 15, 2014) (adhering to 30% support threshold as an "uncodified statement" of Board policy).

Likewise, the Board will refuse to process *any* election petition if a party merely alleges that a pending unfair-labor-practice charge caused it—a policy that, to Rieth-Riley's knowledge, has exclusively been applied by unions to "block" decertification petitions, never by employers to block certification petitions. As the decertification petitioner argued to the Sixth Circuit as amicus, this policy is "an affront to the 'philosophy of democratic institutions' embedded in the Act." Dkt. 57 at 21 (quoting *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 331 (1946)); *see also NLRB v. Midtown Serv. Co.*, 425 F.2d 665, 672 (2d Cir. 1970) (critiquing the Board's blocking charge policy, as enabling the union "merely by filing charges to achieve an indefinite stalemate designed to perpetuate the union in power"). And once a decertification petition is dismissed, an employer can do nothing about it, even if the basis for dismissal is ultimately found frivolous. *See Geodis Logistics, LLC*, 371 NLRB No. 102, slip op. at *3 (May 24, 2022).

Nothing, that is, except engage in a technical refusal to bargain. Only through judicial intervention under Section 9(d) can employees be protected from the Board's abuse of its election processes that deny them their freedom of choice. But the Sixth Circuit's decision makes such review impossible—leaving the Board free to disappear decertification petitions whenever and however it likes.

Say, for example, the Board determined that only employees who had worked for the employer for at least 12 months were eligible to sign a decertification petition, as an extension of its principle that "newly-hired employees are presumed to support the union in the same proportion as the employees they replace." *D.O. Prods.*, 370 NLRB No. 139, slip op. at *3 (citations omitted). Employees subject to seasonal layoff would *never* be able to file a viable decertification petition under that rule, *or* dispute dismissal of the petition on that basis, because "[t]he Board consistently has held that the showing of interest is a matter for administrative determination, and is not litigable by the parties." *Gaylord Bag Co.*, 313 NLRB 306, 306–07 (1993) (collecting cases). And under the panel's decision, no court would ever be able to strike that rule down, despite it being patently inconsistent with the purposes of the Act.

In this way, the Board could manufacture to its heart's content rules like the "blocking charge rule" disfavoring decertification, safe in the knowledge that it possesses exclusive "jurisdiction" over its administrative fiefdom since no employees affected by the rule will ever have their case heard by a federal court.

Judge Posner said it best in *Heartland Human Services v. NLRB*: "Errors committed in the electoral process must be corrigible on judicial review for certification *and* decertification to be acceptable as reliable determinations." 746 F.3d at 805 (emphasis added).

The interests at stake are of such magnitude that they would justify review even without conflict among the circuits. And indeed the Court will grant certiorari, and reverse, to correct errors regarding the scope of federal jurisdiction, even absent a circuit split. *Exxon Mobil Corp. v. Corporacion Cimex, S. A. (Cuba)*, 609 U.S. ----, 146 S. Ct. 1909, 1914 (2026). Immediate intervention through certiorari is also appropriate where, as here, the effect of the court's decision is to nullify cast ballots. *Watson v. Republican Nat'l Comm.*, 609 U.S. ----, 146 S. Ct. 2165, 2171 (2026). Here, however, the issue is not only important but has also received different treatment in other circuits.

2. The Circuits Have Divided Over the Question Presented.

2.1. The Sixth Circuit's decision to insulate an important category of Board decisions from judicial review conflicts with decades of practice among the courts of appeal.

No other court has adopted a rule insulating the Board's decisions to cancel decertification elections from review. Quite the contrary. For decades, courts have reached the merits in representation cases of all kinds, where the result at the Board was something other than an order to change an existing bargaining obligation. *See, e.g.*, *Lake Mary Health Care Assocs., LLC v. NLRB*, 211 F. App'x 878, 882 (11th Cir. 2006) (affirming that an employer had engaged in objectionable conduct prior to first decertification election, such that re-run election was proper); *Entergy*, 810 F.3d at 289 (vacating, in part, Board's denial of employer petition to remove specific classification from the bargaining unit); *Deferiet Paper Co. v. NLRB*, 235 F.3d 581, 583 (D.C. Cir. 2000) (vacating and remanding Board's denial of employer's petition asserting that employees previously represented by separate unions should be merged into one bargaining unit); *TCI W., Inc. v. NLRB*, 145 F.3d 1113, 1114 (9th Cir. 1998) (reversing Board's determination ordering employer to continue existing bargaining relationship following decertification election, finding the Board had improperly excluded a determinative ballot in the employer's favor).

Most directly, the Second, Seventh, and D.C. Circuits have all exercised jurisdiction to review similar Board decisions following similar refusals to bargain. When a single court breaks from decades of consistent practice on a question of national importance and renders agency action unreviewable, this Court's review is appropriate and necessary.

Second Circuit. In *Accurate Web*, the Second Circuit exercised jurisdiction in a remarkably similar posture. *NLRB v. Accurate Web, Inc.*, 818 F.2d 273 (2d Cir. 1987). The Board dismissed the employees' decertification petition because, under Board rules, it had been filed too soon after the union and employer had settled a previous unfair-labor-practices dispute. *Id.* at 274–75. "In order to obtain review of the decertification dismissal, the Employer thereafter refused to bargain with the Union." *Id.* at 275. As here, the Union filed additional unfair-labor-practices charges based on that refusal. *Id.* As here, the ALJ held that "the decision in the decertification proceeding controlled the issue before it." *Id.* And as here, the Board affirmed, adopting the ALJ's opinion. *Id.*

The Second Circuit exercised jurisdiction and reviewed the decertification dismissal on the merits. *Id.* at 275–76. It agreed with the Board that the decertification petition had been untimely and entered a judgment enforcing the Board's order to bargain in good faith, rather than one dismissing the petition for lack of jurisdiction. *Id.*

Seventh Circuit. The Seventh Circuit followed a similar path in *Gebhardt-Vogel Tanning Co.*, this time ruling for the employer. *NLRB v. Gebhardt-Vogel Tanning Co.*, 389 F.2d 71, 75–76 (7th Cir. 1968). There, too, the Board "dismiss[ed]" a "Decertification Petition filed by employees" based on alleged employer misconduct.

Id. at 72. Maintaining that the Board's dismissal "was erroneous," the employer refused to bargain, producing unfair-labor-practice charges and a Board order to bargain. *Id.*

The Seventh Circuit reviewed the Board's "decision dismissing the Petition for Decertification" for substantial evidence and found it lacking. *Id.* at 74–76. That was the "controlling" issue because the Board's unfair-labor-practices "order [was] dependent upon the Board's previous [representation] order." *Id.* at 73. Because the Board had erred in dismissing the petition, the employer "was not in violation of the Act by its refusal to bargain." *Id.* at 76; *see Heartland*, 746 F.3d at 806 ("It isn't an unfair labor practice for a company to refuse to recognize a union that should have been decertified ....").

D.C. Circuit. The D.C. Circuit also has exercised jurisdiction to review a representation decision in this posture. In *TMS*, as here, an employee petitioned to decertify the union. *Transp. Maint. Servs., LLC v. NLRB*, 275 F.3d 112, 114 (D.C. Cir. 2002). A decertification election was held and the ballots impounded. *Id.* Afterwards, the employee asked the Board for permission to withdraw his petition. *Id.* The Board granted the request, then denied the employer's motion to reconsider, canceling the election after it had already been held. *Id.* The employer refused to bargain "based upon its disagreement with the Board's ruling" and was charged with an unfair labor practice. *Id.* The Board ruled against the employer, who then petitioned for review. *Id.*

Like the Seventh Circuit, the D.C. Circuit reviewed the Board's representation decision—there, the decision to accept the employee's withdrawal—for substantial evidence and found none. *Id.* at 116. The agency had violated the fundamental principle that "[w]hen a valid election has been held, the results are to be counted and given effect except when there is a particularly compelling reason for not doing so, as in the case of the unwilling union." *Id.* at 115. So, in reviewing an unfair-labor-practices order, the D.C. Circuit vacated the Board's representation order and remanded for further proceedings in the representation case. *Id.* at 116.

If Rieth-Riley's case had arisen in any of these circuits, its petition would not have been dismissed for lack of jurisdiction. The court would have recognized that Rieth-Riley could "obtain review of the decertification dismissal" by "refus[ing] to bargain with the Union," as it did. *Accurate Web*, 818 F.2d at 275; *see TMS*, 275 F.3d at 114. It would have seen that the Board's unfair-labor-practices decision was "based in whole or in part," 29 U.S.C. § 159(d), on its decertification decision—not only because the ALJ expressly relied on that decision, *see* Pet. App.80a; *Accurate Web*, 818 F.2d at 275, but also because "[i]t isn't an unfair labor practice for a company to refuse to recognize a union that should have been decertified," *Heartland*, 746 F.3d at 806.

Because Rieth-Riley's case arose in the Sixth Circuit, however, it had to meet an additional jurisdictional requirement, wholly invented by that court and found nowhere in the statute: that the challenged representation decision "create[], clarif[y], or eliminate[] a bargaining obligation." Pet.App.17a–18a. Under that standard, the Sixth Circuit held, jurisdiction was lacking. Indeed, each case cited above would have been dismissed for lack of jurisdiction rather than decided on the merits, as each involved a Board decision that "just maintained the status quo." Pet.App.18a.

Less than two years ago, this Court granted certiorari to review whether the Sixth Circuit had improperly added requirements to a federal statute that other circuits had not. *See Ames v. Ohio Dep't of Youth Servs.*, 145 S. Ct. 118 (2024) (order granting certiorari); 605 U.S. 303, 307–08 (2025) (merits opinion). As this Court observed—in unanimously reversing the Sixth Circuit—"Congress left no room for courts to impose [such] special requirements[.]" 605 U.S. at 310. This Court should grant certiorari and hold the same here.

2.2. The attempts of the Sixth Circuit and the Board to downplay the circuit conflict are unpersuasive.

The Sixth Circuit's halfhearted attempt to harmonize its novel limitation with other circuit decisions falls short. The court called *TMS* "[t]he best case for Rieth-Riley," Pet.App.20a, then subjected it to a tortured reading. The panel determined that "withdrawal" of a decertification petition is "final." Pet.App.21a. So if the Board improperly permits withdrawal of a decertification petition, the panel's reasoning goes, that still meets its new "creates, clarifies, or eliminates a bargaining obligation" standard because "[t]he effect on the parties' bargaining relationship was as if the Board counted the votes and certified the union as the winner, which would qualify for indirect review under § 9(d)." Pet.App.21a. In other words, even though nothing is "created," "clarified" or "eliminated" by the Union winning a decertification election, *that* decision somehow satisfies Section 9(d), yet a dismissal of a decertification petition that leaves the prior bargaining unit intact does not.

This is the essence of a distinction without a difference. If the panel had applied this version of its standard to Rieth-Riley, it would have correctly found jurisdiction. The "effect" of the Board's dismissal of the decertification petition also "was as if the Board counted the votes and certified the union as the winner," and thus should "qualify for indirect review under § 9(d)." Pet.App.21a.

Instead, the panel said that dismissal of a decertification petition is "[n]othing so final" as a withdrawal, because the dismissal was "subject to reinstatement pending resolution of the [underlying] unfair-labor-practice charges," and thus to have its employees' ballots opened and counted. *Id.* The panel added: "[a]ll Rieth-Riley had to do was prevail in the unfair-labor-practice proceedings initiated in 2019." *Id.* This holding is incorrect as a matter of law. "An employer … may not attempt, either directly or through its counsel, to secure reinstatement of its employees' decertification petition." *Geodis Logistics*, 371 NLRB No. 102, slip op. at *3. So once a decertification petition is dismissed based on pending ULP charges, winning the ULP charges before the Board makes no difference whatsoever. *Id.* The dismissal decision was absolutely "final" *as to Rieth-Riley*, because there was no possibility of Rieth-Riley itself obtaining any relief from that decision.

That is why not even the Board considered the panel's distinction between withdrawals and dismissals plausible. In response to Rieth-Riley's motion to supplement the appellate record with the decertification proceedings, the Board asserted that "where the Board has dismissed a decertification petition prior to certifying the results of an election, there can be no court review because there is no final, reviewable order." Dkt. No. 23, at 7–8. But after Rieth-Riley cited *Geodis* and explained that "[a]s far as Rieth-Riley is concerned, … these decertification petitions have been 'finally' dismissed, and only through appellate review and reversal of the Decertification Ruling can Rieth-Riley get them reinstated," Dkt. No. 24, at 12, the Board abandoned that argument. In its merits briefing, the Board conceded that if Rieth-Riley prevailed in the ULP cases, only "the employee who filed the decertification petitions could have reinstated them." NLRB Br., Dkt. No. 54, at 41.

The Board will no doubt argue, as the Sixth Circuit believed, that no circuit split exists because these decisions overlooked the jurisdictional problem. *See* Pet.App.19a ("[W]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011)). But this shortchanges those decisions. The Second Circuit expressly noted that the employer refused to bargain to "obtain review" of the representation decision. *Accurate Web*, 818 F.2d at 275. The Seventh Circuit paraphrased the statutory standard when explaining why it reviewed the representation decision. *Gebhardt-Vogel Tanning*, 389 F.2d at 73 (finding the Board's unfair-labor-practices order "dependent upon the Board's previous [representation] order"). And the D.C. Circuit, whose analysis focused exclusively on the representation case, would have had no reason to note that the employer incurred an unfair-labor-practices charge for refusing to bargain "based upon its disagreement with the Board's [representation] ruling" unless it was confirming jurisdiction. *TMS*, 275 F.3d at 114. These courts did not need to walk through every step of their jurisdictional analyses to make their decisions precedential on the issue—especially when their jurisdiction was so well established as to be "unquestioned" by the Board itself. *Ex-Cell-O Corp.*, 185 NLRB 107, 109.

In any event, a court's failure to expressly address a jurisdictional point in its opinion only matters when the point was also not "raised in briefs or argument." *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). At least in the D.C. Circuit's *TMS* case, the Board's brief addressed in detail the contours of the court's jurisdiction under Section 9(d) to review "findings made in an underlying representation proceeding" when the Board's unfair-labor-practice order is "based, in part" on those findings. Br. for NLRB, *TMS*, 2001 WL 36039023, at *2–3. Therefore, "[t]he best case for Rieth-Riley"—*TMS*—is "binding precedent" on the jurisdictional issue. *L. A. Tucker Truck Lines*, 344 U.S. at 38.

In short, Section 9(d) of the NLRA is original to its enactment in 1935, and Section 9(c) has been unchanged since 1947. Yet no court has ever declined jurisdiction to consider the dismissal of a decertification petition on the merits on the ground that the ruling did not create, clarify, or eliminate a bargaining obligation. To the contrary, in a near-perfect factual comparator, the NLRB affirmatively represented in its briefing that the court of appeals had jurisdiction to reach the merits. Decades of prior precedent and practice should be taken for what it is.

This Court should grant certiorari to restore uniformity in federal jurisdiction.

3. The Decision Below Is Wrong.

3.1. The Sixth Circuit had jurisdiction to review the Board's dismissal of the decertification petition because the later refusal-to-bargain finding was "based … in part" on the decertification proceedings.

Section 9(d)'s plain text governs whether a court has jurisdiction to review a representation decision, including dismissal of a decertification petition. The only question is whether an unfair-labor-practices order "is based in whole or in part upon facts certified following" the representation investigation. 29 U.S.C. § 159(d). If so, "such certification and the record of such investigation shall be included in the transcript of the entire record …, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made." *Id.* Here, the Board's refusal-to-bargain order was plainly "based in whole or in part upon facts certified" following the decertification investigation.

First, ALJ Dibble, whose decision the Board adopted in relevant part, expressly relied on the Board's decertification order to reject Rieth-Riley's defense that it was wrongfully prevented from proving, through the requested election, that the Union had lost majority support. Pet.App.80a. She held that she could not *herself* determine whether there was any error in those proceedings, that they thus controlled in the unfair-labor-practices proceeding, and that Rieth-Riley could obtain its desired remedy only from the Board or an "appropriate circuit court." Pet.App.63a. Because the Board's decision that Rieth-Riley should have bargained with the Union was based at least "in part" on its prior dismissal of the decertification petition, the Sixth Circuit had jurisdiction to review both decisions.

Second, ALJ Dibble's decision contains numerous factual findings drawn exclusively from the decertification proceedings—not from the public decertification ruling itself. For instance: "The Union requested postponement of the pre-election hearing pending completion of the investigation, which the Regional Director (RD) denied." Pet.App.52a. This finding came directly from Rieth-Riley's post-hearing brief: "Counsel for the Union ... requested a postponement of the pre-election hearing until such time as the investigation was complete.... The Regional Director denied the postponement[.]" SAR Ex. A, at 10–11. And the materials Rieth-Riley cited to support those propositions came from the decertification record. *Id.* (citing materials in SAR Ex. C). The Board in turn fully endorsed ALJ Dibble's factual findings and legal conclusions. AR7589.

Third, the Board relied on the decertification proceedings, and Rieth-Riley's objections to them, to reject the NLRB general counsel's requested remedy: damages to redress purported lost-opportunity costs from the refusal to bargain. Pet.App.36a. Specifically, the Board expressly affirmed Rieth-Riley's right to rely on *Ex-Cell-O Corp.*, 185 NLRB 107, as a defense to make-whole damages (AR7590). Because *Ex-Cell-O* applies exclusively in technical refusal-to-bargain cases, this holding unambiguously indicates the Board's decision was based, at least in part, on the decertification proceedings—making judicial review of the decertification ruling proper.

Fourth, the Sixth Circuit's decision to grant Rieth-Riley's motion to include the decertification record in the appellate record confirms this. When the parties filed their cross-petitions at the appellate court, the NLRB refused to include any decertification records—despite Rieth-Riley's repeated requests before the ALJ and Board for administrative or judicial notice. *See* Dkt. No. 22. Rieth-Riley moved to compel supplementation, and the Sixth Circuit granted the motion: "Upon consideration of petitioner/cross-respondent's motion to supplement the administrative record to include the 'Decertification Proceedings', It is **ORDERED** that the motion be and it hereby is **GRANTED**." Pet.App.27a. At that moment, Section 9(d)'s jurisdictional requirements were satisfied: if "the record of such [decertification case] investigation [is] included in the transcript of the entire record," then "thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made." 29 U.S.C. § 159(d). The appellate record thus itself proves the court had jurisdiction to reach the merits. *See generally Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The focal point for judicial review should be the administrative record already in existence." (citation modified)).

Under the statutory standard, then, the Sixth Circuit had jurisdiction because the Board's decision that Rieth-Riley should have bargained with the Union was based in part on the decertification proceedings.

3.2. The Sixth Circuit's novel rule has no basis in text, precedent, or purpose.

The Sixth Circuit jettisoned the statutory standard for reviewing the Board's election decisions and invented an entirely new requirement: they must "create[], clarif[y], or eliminate[] a bargaining obligation" to be appealable. Pet.App.17a–18a. This Court should reject that approach. It has no basis in text, precedent, or purpose.

Text. The panel provided no textual basis for this rule. It baldly asserted the rule was "consistent" with Section 9(d). Pet.App.18a. It is not. Nothing in the statute requires the representation decision to directly affect a bargaining obligation before judicial review is permissible. The NLRA confers jurisdiction on federal appellate courts to review a Board representation decision whenever a subsequent unfair-labor-practice decision is "based in whole or in part" on that representation case. 29 U.S.C. § 159(d). The statutory standard thus asks whether the unfair-labor-practice order was "based in whole or in part" on the representation proceeding. By contrast, the panel's standard requires an additional inquiry into the relationship between the Board's representation decision and the parties' real-world rights and obligations—asking whether it sufficiently created, clarified, or eliminated them. As this Court recently told the Sixth Circuit, there is "no room" for courts to add special requirements to a federal statute. *Ames*, 605 U.S. at 310.

Nor can the Sixth Circuit's effective carve-out for decertification-petition dismissals be squared with the surrounding statutory text. Section 9(d) expressly contemplates review of any Board decision made "pursuant to subsection (c)," which includes cases, as the panel acknowledged, where the petitioner "assert[s] that ... the bargaining representative[] is no longer a representative"—that is, a decertification petition. 29 U.S.C. § 159(c)(1)(A).

Precedent. The Sixth Circuit identified no case stating or applying this rule, instead finding it "suggest[ed]" by "caselaw"—namely, dicta in a single prior Sixth Circuit decision. Pet.App.17a. But, as discussed earlier, the panel's new standard makes hash of decades of settled precedent.

What the court seems to have meant is that many previous cases involved representation decisions that created, clarified, or eliminated bargaining obligations. But that category—such as when a newly formed union wins an election—is merely the "textbook" example for judicial review, as the Sixth Circuit conceded. Pet. App.17a; *see also Boire*, 376 U.S. at 477 (stating this is what "normally" happens in "reviewable" representation decisions). The statute's normal application cannot add limitations to its plain text or exclude rarer applications. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007) ("[N]either the legislative history nor the reasonableness of the [agency's] method [is] determinative if the plain language of the statute" is unambiguous.).

Simply put, whether the panel's additional inquiry is wise is beside the point. Appellate courts may not abdicate statutory jurisdiction without support from the plain text. *See CC/Devas (Mauritius) Ltd. v. Antrix Corp.*, 605 U.S. 223, 226 (2025) (unanimously reversing the Ninth Circuit's "additional [jurisdictional] requirement" because it went "beyond the text of the [statute]"); *Golan v. Saada*, 596 U.S. 666, 678 (2022) (similar).

Purpose. Finally, the court asserted its rule was consistent with Section 9(d)'s "purpose," which it found was to delay judicial review until "after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election." Pet.App.18a (emphasis omitted) (quoting *Boire*, 376 U.S. at 478–79). But Section 9(d)'s indirect review scheme is meant to "delay[]" judicial review in representation cases, not deny courts the power to review them. *Boire*, 376 U.S. at 477; *see also Heartland Hum. Servs.*, 746 F.3d at 805 ("[A]lthough judicial review of a Board order confirming or setting aside an election is thus postponed, it is not eliminated."). The Sixth Circuit overread *Boire*—which declined to permit *direct* judicial review of representation cases *in federal district court* absent exceptional circumstances, and merely discussed NLRA Section 9(d) and its legislative history as one basis for that decision. *Boire*, 376 U.S. at 481–82. *Boire* should not be read to undermine "the strong presumption that Congress intends judicial review of administrative action." *Smith v. Berryhill*, 587 U.S. 471, 483 (2019) (citation omitted); *see* 5 U.S.C. §§ 702, 704.

Regardless, the panel's myopic focus on Section 9(d)'s alleged purpose is overshadowed by the NLRA's purpose as a whole. Refusing jurisdiction over dismissals of decertification petitions works serious harm to the entire legislative scheme. Decertification petitions are a crucial tool for ensuring workers can choose their own representatives—or choose no representative at all. For at bottom, "[t]he primary purpose of the Act is to protect employee rights. To deny to employees the right to determine whether or not they will be represented is tantamount to castrating [Section] 7, the heart of the Act." *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1070 (5th Cir. 1971).

This Court should grant certiorari and reject the Sixth Circuit's newly minted jurisdictional rule.

4. This Case Is an Ideal Vehicle to Decide the Question Presented.

Three factors make this case an ideal vehicle: preservation, specificity, and decisiveness.

First, the record shows Rieth-Riley has taken great pains to preserve its technical refusal-to-bargain defense on appeal. Indeed, Rieth-Riley risked contempt sanctions from the Sixth Circuit in another matter rather than risk "waiv[ing] the … technical refusal-to-bargain defense" asserted here, and fully complied with the court's order only after the panel assured no such waiver would result. *See Rieth-Riley Constr. Co. v. NLRB*, No. 23-1899, 2025 WL 3298085, at *2, *4 (6th Cir. Nov. 26, 2025). There is thus no doubt that this NLRA jurisdictional argument has been fully preserved.

Second, the Sixth Circuit set a new and specific standard for determining appellate jurisdiction to review NLRB representation decisions—contrary to the NLRA and all prior authority. Allowing that standard time to percolate would serve no purpose. This Court regularly grants certiorari to address (and reverse) circuit decisions that first cause a split. *See, e.g.*, *Parrish v. United States*, 605 U.S. 376, 381 (2025) (reversing Fourth Circuit decision setting a new standard for appellate jurisdiction under Federal Tort Claims Act); *Slack Techs., LLC v. Pirani*, 598 U.S. 759, 765 (2023) ("Because the Ninth Circuit's decision created a split of authority in the courts of appeals about § 11 [of the Securities Act]'s scope, we granted certiorari.").

Third, the Sixth Circuit's new standard was the sole basis for denying jurisdiction over Rieth-Riley's technical refusal-to-bargain claim. Pet.App.23a. The standard's correctness is thus squarely before this Court, with no predicate arguments to address first.

5. In the Alternative, the Court Should Summarily Reverse and Remand because Rieth-Riley Was Denied a Randomly Assigned Panel.

Even if this Court declines to grant plenary review on the jurisdictional question, it should summarily reverse and remand because the panel that decided Rieth-Riley's appeal was not randomly assigned. The same three judges—Judges Moore, Cole, and Mathis—had previously heard a separate Rieth-Riley petition for review from an entirely distinct NLRB proceeding. *See Rieth-Riley Constr. Co. v. NLRB*, 114 F.4th 519 (6th Cir. 2024), *cert. denied*. That earlier decision did not "return[] [the] case to the … agency for further proceedings," and did not concern the allegations at issue here. 6 Cir. I.O.P. 34(b) (governing "Panel Selection and Identity"). Yet the panel assigned itself both this case and a companion case also involving Rieth-Riley, heard argument in both outside the ordinary calendar, and ruled against the company in each. Rieth-Riley was thus deprived of the benefit of a randomly selected panel.

This Court has long recognized that the proper composition of an appellate panel implicates interests that transcend the merits of any individual case. In *Nguyen v. United States*, 539 U.S. 69 (2003), the Court vacated a Ninth Circuit judgment because one member of the panel had been improperly designated in violation of statute, holding that the panel's improper constitution could not be saved by harmless-error analysis or the parties' failure to object. And in *Williams v. Pennsylvania*, 579

U.S. 1, 14 (2016), the Court held that the participation of an interested jurist on a multimember appellate court violated due process and constituted structural error. The logic of both decisions applies here: where the very process by which the deciding panel is constituted is tainted, the integrity of the result cannot be salvaged by examining what the panel did on the merits. As Judge Batchelder once warned in addressing another irregular panel composition in the Sixth Circuit, "[p]ublic confidence in this court or any other" depends on "the certainty that the court follows the rules in every case …." *Grutter v. Bollinger*, 288 F.3d 732, 815 (6th Cir. 2002) (en banc) (dissenting).

The practical consequences confirm this is not a harmless technicality. The same three judges have now decided three Rieth-Riley cases—including the 2024 decision, the decision at issue here, and the companion multiemployer-bargaining case—and ruled against the company in every one, creating a body of adverse labor law that exists only in the Sixth Circuit. In the companion multiemployer-bargaining case, the panel held that Board adjudicative standards need not be read like statutes—a ruling squarely at odds with this Court's administrative law decisions and APA Section 706. *Rieth-Riley Constr. Co.*, 172 F.4th 492. And in this case, the panel became the first court in the NLRA's 80-year history of decertification petitions to hold that it lacked jurisdiction to review their dismissal.

Summary reversal and remand is the appropriate remedy. This Court has summarily reversed where a lower court "so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a); *see*

Nguyen, 539 U.S. at 83. The appropriate course is the one this Court took in *Nguyen*: vacate the judgment and remand for fresh consideration by a properly—that is, randomly—assigned panel. *See also United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 691 (1960).

CONCLUSION

The petition for a writ of certiorari should be granted.

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 APRIL 13, 2026

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 24-2105/25-1073

RIETH-RILEY CONSTRUCTION CO., INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Intervenor (24-2105).

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

Nos. 07-CA-285321; 07-CA-300190; 07-CA-300191.

Argued: February 26, 2026

Decided and Filed: April 13, 2026

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

OPINION

MATHIS, Circuit Judge. In 2018, Rieth-Riley Construction Company and its employees' union representative began negotiating a new collective-bargaining contract. After eight years of battling on the picket line and in the courts, the parties still have no agreement. In its third appearance before this court against the National Labor Relations Board, Rieth-Riley petitions us to review the Board's findings that the company engaged in unfair labor practices in 2021 and 2022. The Board asks us to enforce its order. For the reasons below, we deny Rieth-Riley's petition and enforce the Board's order.

I.

Rieth-Riley is an Indiana-based construction company that employs around 130 to 170 operating engineers in Michigan. Since at least 1993, Local 324, International Union of Operating Engineers, AFL-CIO (the "Union"), has been the engineers' designated union representative.

Until 2018, the Union was party to a multiemployer bargaining agreement (the "Road Agreement"). That meant it bargained with multiple companies—including Rieth-Riley—under a single collective-bargaining contract. On May 2, 2018, four weeks before the Road Agreement was set to expire, the Union informed Rieth-Riley that it was withdrawing from the Agreement in favor of bargaining on a single-employer basis. This created a conflict between Rieth-Riley and the Union that culminated in a lockout, multiple rounds of litigation, and a strike that continues to this day.

Rieth-Riley's conduct gave rise to an initial set of unfair-labor-practice charges filed by the Union. On May 29, 2019, the NLRB's General Counsel, finding merit in the Union's accusations, issued a complaint against Rieth-Riley. *See Rieth-Riley Constr. Co.*, 374 NLRB No. 13, slip op. at 6 (Dec. 16, 2024).

A.

As the initial complaint made its way through administrative proceedings, the parties made little progress in negotiating a successor agreement. Amid this stalemate, some employees grew dissatisfied with the Union. In March 2020, Rieth-Riley employee Rayalan Kent filed a petition with the NLRB's Regional Director to have the Union decertified. Kent requested an election to determine whether the employees wanted to keep the Union as their bargaining representative. But because the parties were still litigating the complaint against Rieth-Riley, the Acting Regional Director held the March 2020 petition in abeyance until that complaint was resolved. *Rieth-Riley Constr. Co.*, 371 NLRB No. 109, slip op. at 2 & n.6 (June 15, 2022). This was consistent with the Board's policy.

But the Board's policy changed. In July 2020, the NLRB's "Election Protection Rule" went into effect. *See id.* at 1-2. That rule limits a Regional Director's discretion to hold decertification petitions in abeyance. *Id.* Sensing an opening, Kent filed a second decertification petition on August 7. *Id.* This time, the Acting Regional Director ordered the decertification election to go forward, concluding that the Election Protection Rule required such a result. *Id.* Ballots were to be submitted by mail no later than November 2, 2020. And on November 9, 2020, at 1:00 p.m., all ballots would be opened and counted.

But on the morning of November 9, with all votes submitted, a different Regional Director came to a different conclusion about the Election Protection Rule. *See id.* As the Board would later clarify, the Election Protection Rule has no effect when (1) the employer is defending against unfair-labor-practice charges, (2) the Regional Director finds merit in the charges, and (3) there is a causal nexus between the unfair-labor-practice allegations and the decertification petition such that the alleged violations may have unfairly contributed to employee dissatisfaction with the union. *Id.*; *see also Master Slack Corp.*, 271 NLRB 78, 84 (1984). Finding that all three conditions were met here, the Regional Director dismissed Kent's decertification petitions subject to reinstatement if Rieth-Riley prevailed on the unfair-labor-practice charges. *Rieth-Riley*, 371 NLRB No. 109, slip op. at 2. Rieth-Riley appealed the dismissals to the Board.

B.

By 2021, the parties were still litigating their administrative cases—which by then included a second unfair-labor-practice complaint filed against Rieth-Riley, as well as a picketing-misconduct complaint filed against the Union. *See Rieth-Riley Constr. Co. v. NLRB*, 114 F.4th 519, 527-28 (6th Cir. 2024). And the parties were still no closer to a successor bargaining agreement.

Against this backdrop, we arrive at the events underlying the unfair-labor-practice allegations at issue here. On June 1, 2021, without bargaining with the Union, Rieth-Riley unilaterally raised bargaining-unit employees' wages—which, according to the Union, violated the company's statutory duty to bargain in good faith over essential terms of employment. And a year later, Rieth-Riley unilaterally raised wages again.

Mired in litigation and with no end in sight to the ongoing strike, Rieth-Riley and the Union decided to try again to reach a resolution. So they planned to meet on June 28, 2022, in hopes of further negotiating a successor contract.

But a week before the meeting, everything fell apart. The trouble began on June 15, 2022, when the Board affirmed the Regional Director's dismissal of Kent's decertification petitions. By that point, an administrative law judge had ruled against Rieth-Riley on the 2019 charges, and the company's appeal was pending before the Board. So unless the Board reversed the ALJ's unfair-labor-practice findings, the decertification petitions would remain dismissed and the votes uncounted.

From Rieth-Riley's point of view, the Regional Director's decision to dismiss the petitions was improper.

But appealing the dismissals directly to this court was not an option. Generally, the NLRA limits our jurisdiction to reviewing the Board's orders on unfair-laborpractice disputes; it does not provide for direct review of decisions related to certification or decertification proceedings. *See* 29 U.S.C. § 159(d). Under limited circumstances, however, an employer may obtain judicial review of an otherwise unreviewable certification decision or other bargaining-unit determination. It does so by refusing to bargain with the union for the purpose of inviting an unfair-labor-practice order that we *can* review. *See Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552, 558 (6th Cir. 2013) (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 154, 61 S. Ct. 908, 85 L. Ed. 1251 (1941)).

Rieth-Riley purported to do exactly that. On June 20, the company cancelled the June 28 meeting and announced to the Union that it "refuse[d] to bargain" until it "obtain[ed] judicial review" of the Board's decision to affirm the decertification dismissal. A.R. 7295. Rieth-Riley also informed the Union that it would not comply with pending or future information requests from the Union—including a May 25, 2022 request it was obligated to fulfill under the NLRA. In short, negotiations were over before they had really begun.

On November 4, 2022, the NLRB's General Counsel issued a new unfair-labor-practice complaint against Rieth-Riley. This time, the complaint alleged that Rieth-Riley violated § 8(a)(1) and 8(a)(5) of the NLRA by: (1) unilaterally granting wage increases in 2021 and 2022, (2) withdrawing recognition from the Union, (3) refusing to bargain with the Union, and (4) failing to provide the

Union with requested information. The ALJ found against Rieth-Riley on each claim. As a remedy, the ALJ issued an order demanding that Rieth-Riley recognize and bargain in good faith with the Union, cease and desist from committing unfair labor practices, and furnish the Union with the requested information. On December 13, 2024, the Board affirmed the ALJ's decision.

Rieth-Riley petitions for review of the Board's order. The Board cross petitions for enforcement of its order.

II.

The Board's decisions are "subject to limited judicial review." *Beth Isr. Hosp. v. NLRB*, 437 U.S. 483, 501, 98 S. Ct. 2463, 57 L. Ed. 2d 370 (1978) (quotation omitted). We review de novo the Board's legal conclusions, including the Board's interpretation of the NLRA. *NLRB v. Starbucks Corp.*, 159 F.4th 455, 468 (6th Cir. 2025).

We review the Board's factual findings, and its application of law to the facts, for substantial evidence. 29 U.S.C. § 160(e)-(f); *Hendrickson USA, LLC v. NLRB*, 932 F.3d 465, 469 (6th Cir. 2019). Substantial evidence "is more than a mere scintilla, but means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Urias-Orellana v. Bondi*, 146 S. Ct. 845, 850 (2026) (citation modified). We do not disturb the Board's findings just because "we may have reached a different conclusion" in the first instance. *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 304 (6th Cir. 2012).

III.

Rieth-Riley argues that: (1) its 2021 and 2022 wage increases to bargaining-unit employees were not unfair labor practices because the Union waived its right to bargain over them; (2) the Board erred by finding that Rieth-Riley withdrew recognition from the Union; (3) the Board erred by finding that Rieth-Riley refused to bargain in good faith with the Union; and (4) the Board's affirmative bargaining order is unenforceable. We address each argument in turn.

A.

The NLRA gives employees the right "to form, join, or assist" a union and "to bargain collectively through" their union. 29 U.S.C. § 157. An employer commits an unfair labor practice by "interfer[ing] with, restrain[ing], or coerc[ing] employees" in their exercise of these rights or by "refus[ing] to bargain collectively" with its employees' union. *Id.* § 158(a)(1), (5).

When it comes to collective bargaining, there are some mandatory subjects of bargaining. These include "wages, hours, and other terms and conditions of employment." *Id.* § 158(d); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964). Typically, an employer may not take "unilateral action with respect to any mandatory subject of bargaining." *NLRB v. Plainville Ready Mix Concrete Co.*, 44 F.3d 1320, 1325 (6th Cir. 1995). Thus, an employer may not change its employees' wages without first bargaining with their union. *Id.* at 1325-26.

The requirement to bargain, even over mandatory subjects like wages, is not absolute. "A union may waive its right to bargain." *Dupont Dow Elastomers, L.L.C. v. NLRB*, 296 F.3d 495, 507 (6th Cir. 2002). To demonstrate a union's waiver of the right to bargain, the employer must make two showings. First, the employer must prove that it provided "clear and unequivocal notice" to the union of the proposed change. *NLRB v. Henry Vogt Mach. Co.*, 718 F.2d 802, 807 (6th Cir. 1983). Second, the employer must prove that "the union consciously relinquished its right to bargain." *Dupont Dow*, 296 F.3d at 507. The union's waiver "must be clear and unmistakable." *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983). To prevent waiver, a union, after receiving proper notice, "must act with due diligence to request bargaining." *Bell Atl. Corp.*, 336 NLRB 1076, 1086 (2001).[1]

Rieth-Riley does not dispute that it implemented wage increases for bargaining-unit employees in 2021 and 2022 without bargaining with the Union. But the company claims the Union waived its right to bargain over the increases. The Board concluded that Rieth-Riley failed to prove waiver. This is a factual question that we review

1. Rieth-Riley claims that the Board changed the notice standard to require "a heightened 'actual and unequivocal notice' requirement." D. 53 at p.31. The proper standard, according to the company, is "adequate notice." *Id.* We disagree. True, the Board has sometimes used terms like "adequate notice" or "sufficient notice" in its waiver precedents. But it has made clear that notice is "sufficient" or adequate only when it is "clear and unequivocal." *See Sunrise Nursing Home, Inc.*, 325 NLRB 380, 387 (1998) (finding that the notice was not "sufficient" because it was not "clear and unequivocal").

for substantial evidence. *See Henry Vogt Mach. Co.*, 718 F.2d at 809.

Substantial evidence supports the Board's finding that Rieth-Riley failed to provide clear and unequivocal notice of the 2021 and 2022 wage increases to the Union. The company contends that it gave sufficient notice during a 2020 hearing, when two of its executives testified before one of the Board's ALJs about the 2019 unfair-labor-practice allegations against Rieth-Riley. At the hearing, Rieth-Riley executives testified about wage increases the company unilaterally gave bargaining-unit employees in 2018 and 2020. Specifically, they explained that the company had regularly adjusted its wages to remain in compliance with the Davis-Bacon Act, a federal law requiring employers to pay prevailing wages on federal public-works projects. *See* 40 U.S.C. § 3142.

This supposed notice was far from "clear and unequivocal." *Dupont Dow*, 296 F.3d at 507 (quotation omitted). As the Board pointed out, such general statements, without essential details like timing and amounts, are too broad to qualify as adequate notice. *See San Juan Tchrs. Ass'n*, 355 NLRB 172, 176 (2010) ("More than general statements about changes that might be necessary are required [to show waiver]."). At best, the executives' testimony implied that future wage changes were possible—maybe even likely. But the Board "does not require a labor organization to demand negotiations every time an employer mentions a potential, future change" to avoid the risk of waiver. *Id.* And because Rieth-Riley's waiver defense fails, the Board did not err by finding that the company committed unfair labor practices by granting unilateral wage increases in 2021 and 2022.

Rieth-Riley disagrees. The company claims that it provided the Union with all the relevant information about the 2021 and 2022 wage increases during the hearing. But the record shows otherwise. Start with the dollar amounts. Rieth-Riley contends that because the Davis-Bacon Act required certain wage increases, the Union had constructive notice of the amount of the wage increases. But while the Davis-Bacon Act[2] may set the *floor* for wage increases, there remained plenty of room to negotiate for increases above what the statute required Rieth-Riley to pay. *See, e.g., Standard Candy Co.*, 147 NLRB 1070, 1073 (1964) (finding a duty to bargain over wage increases made pursuant to a new minimum-wage law that "exceeded the minimum wage rate and were granted for the purpose of maintaining wage differentials").

There are many other missing details pertaining to timing and the allocation of the increases between wages and benefits. Rieth-Riley believes the Union should have extrapolated these specifics from the generalized testimony of the company's witnesses. But the Board rejected that argument. And because it did so based on evidence "that a reasonable person might accept as adequate," we will not reverse that decision. *Frenchtown Acquisition Co.*, 683 F.3d at 304.

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2. The Davis-Bacon Act applies only to federally funded projects.

Rieth-Riley further argues that the Union admitted to receiving notice of the 2021 and 2022 raises in a separate proceeding before the Board when it referred to Rieth-Riley's wage increases as an "uninterrupted continuation" of the company's prior conduct. D. 51-3 at p.65. But a review of the Union's motion (filed in March 2021) reveals that the Union referred to the wage increases Rieth-Riley implemented in 2018 and 2020, not future wage increases in 2021 or 2022. So this argument also fails.

B.

As mentioned above, an employer commits an unfair labor practice when it refuses to bargain collectively with its employees' union. 29 U.S.C. § 158(a)(5). Thus, to comply with the NLRA, an employer may not withdraw recognition from a union unless the union has lost majority support among the employees. *Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 957 (6th Cir. 2006); *Levitz Furniture Co. of the Pac.*, 333 NLRB 717, 717 (2001), *overruled on other grounds by Johnson Controls, Inc.*, 333 NLRB No. 20 (2019).

In cases where the employer expressly withdraws its recognition, the outcome will generally turn on whether the union had lost majority support. *See Levitz Furniture*, 333 NLRB at 717. Here, however, Rieth-Riley acknowledges that the Union maintains an "ongoing presumption of majority support." D. 53 at p.78. The only question is whether Rieth-Riley withdrew recognition in the first place. Under such circumstances, the Board must analyze whether the employer "intended to completely sever its relationship with the Union." *Douglas Autotech Corp.*, 357 NLRB 1336, 1345 (2011). In doing so, the Board will "examine an employer's statements and actions in context to determine whether a violation has occurred." *Lou's Produce, Inc.*, 308 NLRB 1194, 1196 (1992), *enforced*, 21 F.3d 1114 (9th Cir. 1994).

Substantial evidence supports the Board's finding that Rieth-Riley withdrew recognition from the Union. Taken together, the company's conduct—its unilateral wage increases over multiple years, its June 2022 letter to the Union explicitly refusing to bargain, and its failure to provide requested information to the Union—demonstrated an intent to completely sever its relationship with the Union. Of course, a single unfair labor practice may not convey such an intent. But Rieth-Riley committed several serious ones. *See Arbah Hotel Corp.*, 371 NLRB No. 126, slip op. at 6 (2022) (finding that serious unfair labor practices—including unilateral changes, a refusal to bargain, and a failure to provide information—demonstrated a withdrawal of recognition); *Corson & Gruman Co.*, 284 NLRB 1316, 1317 (1987), *enforced*, 899 F.2d 47, 283 U.S. App. D.C. 239 (D.C. Cir. 1990) (finding withdrawal where, as here, the employer made both "a blanket statement to the effect that further negotiations would not occur" and an "unlawful change in [the] terms and conditions of employment"); *cf. Douglas Autotech*, 357 NLRB at 1345 (finding no withdrawal where the employer made unilateral changes but continued to respond to information requests and offered to bargain over the effects of the changes).

Rieth-Riley nevertheless argues that its conduct, though contentious toward the Union, fell short of demonstrating an intent to completely sever the bargaining relationship. For support, it cites numerous withdrawal-of-recognition cases—but its analysis misses the mark. For example, Rieth-Riley cites *Douglas Autotech* for the proposition that "[a] mere refusal to bargain is insufficient." D. 53 at p.76. But here, the refusal to bargain was only one of many unfair labor practices Rieth-Riley committed.

Rieth-Riley further claims that "it appears the Board implicitly ruled that Rieth-Riley's technical-refusal-to-bargain defense is automatically a withdrawal of recognition as well." *Id.* at 33. But we do not read the Board's order that way. On our read, a "reasonable mind" could find that the evidence was "adequate" to support the Board's separate conclusion that Rieth-Riley improperly withdrew recognition from the Union. *See Biestek v. Berryhill*, 587 U.S. 97, 103, 139 S. Ct. 1148, 203 L. Ed. 2d 504 (2019) (quotation omitted).

C.

We next consider Rieth-Riley's refusal to bargain and its failure to provide requested information to the Union. As part of the duty to bargain collectively, an employer must provide the union with the "relevant information" it needs to properly perform "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). The underlying principle is that "[g]ood faith bargaining requires full disclosure by the parties of relevant information in order to produce informed, effective negotiations." *Rieth-Riley*, 114 F.4th at 532 (quotation omitted).

Rieth-Riley does not deny that it refused to bargain with the Union and that it failed to provide requested information. It instead purports to assert a technical refusal to bargain to obtain our review of the dismissal of Kent's decertification petitions. The only question, then, is whether Rieth-Riley properly invokes the technical-refusal-to-bargain doctrine. To answer this, we start with some background on how the doctrine works and why it exists.

Our jurisdiction to review a Board decision "is specially conferred" by the NLRA. *Am. Fed'n of Lab. v. NLRB*, 308 U.S. 401, 404, 60 S. Ct. 300, 84 L. Ed. 347 (1940). The Act determines which actions are reviewable and "prescrib[es] the manner and extent of the review." *Id.* "Except as authorized by statute, a court of appeals does not have jurisdiction to review actions of the Board." *United Nat. Foods, Inc. v. NLRB*, 138 F.4th 937, 943 (5th Cir. 2025) (quotation omitted).

The Board primarily adjudicates two types of disputes: unfair-labor-practice cases and representation cases. 29 U.S.C. §§ 159, 160. The NLRA explicitly provides for review of Board orders by the circuit courts in unfair-labor-practice cases. *Id.* § 160(e)-(f). The Board can petition a circuit court to enforce the Board's orders in these cases. *Id.* § 160(e). And "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought [in unfair-labor-practice cases] may obtain a review of such order" in the circuit courts. *Id.* § 160(f). The NLRA, however, contains "no provision . . . for review" of Board orders in representation disputes—like an order to hold an election or, as relevant here, a dismissal of a decertification petition. *Am. Fed'n of Lab.*, 308 U.S. at 406. Instead, the statute provides for indirect review of *some* representation orders, but only in limited circumstances. *See* 29 U.S.C. § 159(d). What circumstances?

Start with the statute's language. Under § 9(d), when an employer appeals an unfair-labor-practice violation and that violation is "based in whole or in part upon facts certified following an investigation" into a question over the certification of a union, "such certification and the record of such investigation shall be included in the transcript of the entire record" filed with the circuit court. *Id.* These disputes over certification are initiated through petitions, which allege "that a substantial number of employees" either "wish to be represented" or "assert that . . . the bargaining representative[] is no longer a representative." *Id.* § 159(c)(1)(A).

In interpreting these provisions, the Supreme Court has recognized a small category of Board certification orders over which circuit courts can maintain jurisdiction. *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77, 84 S. Ct. 894, 11 L. Ed. 2d 849 (1964). Circuit courts can review those orders "only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed." *Id.* at 477.

Consider this textbook example. Employees elect a union as their representative, but the employer believes the election was flawed. If the employer challenges the election and the Board certifies the union over the employer's objections, then the employer cannot directly appeal the Board's certification order to a circuit court—even if the employer has legitimate doubts about the Board's decision. Under § 159(d) and *Boire*, however, the employer may pursue this challenge by refusing to bargain with the union, thereby inviting an unfair-laborpractice complaint and eventually a finding by the Board that the employer's refusal to bargain violated the NLRA—which circuit courts *can* review.

Courts refer to this as a technical refusal to bargain. It operates like a collateral attack on the Board's certification order. The employer has refused to bargain not necessarily because negotiations have broken down. Instead, it questions whether the union's certification was lawful. And if in the end we agree with the employer and conclude that the Board erred in its certification decision, then the employer could not have violated its duty to bargain because it never had one. In effect, then, a technical refusal to bargain is a jurisdictional hook that allows the employer to "argue the invalidity of the union's certification as an affirmative defense to the unfair labor practice charge." *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225, 319 U.S. App. D.C. 418 (D.C. Cir. 1996).

The technical-refusal-to-bargain doctrine may apply to other scenarios. But caselaw suggests there must be, at the very least, a "bargaining unit determination" made by the Board, such that the decision creates, clarifies, or eliminates a bargaining obligation. *See Kindred Nursing Ctrs.*, 727 F.3d at 558. And relevant here, "[u]ntil a union is decertified following an election, the company's obligations to it are the same as they had been before the election and if it spurns those obligations it is guilty of an unfair labor practice." *Heartland Hum. Servs. v. NLRB*, 746 F.3d 802, 804 (7th Cir. 2014) (Posner, J.). This is consistent with the text of § 9(d). It is also consistent with "the purpose of [§] 9(d)," which is "to provide for review in the courts only *after* the election has been held and the Board has ordered the employer to do something predicated upon the results of the election." *Boire*, 376 U.S. at 478-79 (emphasis added) (citation modified).

Applying these principles, Rieth-Riley's attempt to invoke our jurisdiction over the dismissal of the decertification petitions fails. The company told the Union that it "refuse[d] to bargain" only to "obtain judicial review" of the dismissal of Kent's decertification petitions. A.R. 7295. But that dismissal just maintained the status quo; it did not result in the creation, clarification, or elimination of a bargaining obligation. *See Heartland Hum. Servs.*, 746 F.3d at 804. In other words, the dismissal did not require Rieth-Riley "to do something predicated upon the results of an election." *Am. Fed'n of Lab.*, 308 U.S. at 411 (quotation omitted). Rather, the company's obligations to the Union were "the same as they had been before the election and . . . it spurn[ed] those obligations," making Rieth-Riley "guilty of an unfair labor practice." *See Heartland Hum. Servs.*, 746 F.3d at 804.

Consider that any error in dismissing the petitions would not eliminate the company's preexisting duty to bargain with the Union. Only after the ballots were counted, only if the employees voted for decertification, and only if the Board was satisfied with the validity of the election would Rieth-Riley be relieved of its bargaining duties to the Union.

The NLRA does not grant us jurisdiction—not even indirectly under § 9(d)—to provide the judicial review Rieth-Riley seeks. And because Rieth-Riley's refusal to bargain cannot confer us with jurisdiction over the Board's affirmance of the dismissal of the decertification petitions, there is nothing *technical* about it. It is simply a violation of the NLRA. *See id.*

Rieth-Riley encourages us to look beyond the classic technical-refusal-to-bargain scenarios. It cites circuit cases granting review of representation decisions outside the standard context of certification or decertification following an election. None of these cases, however, addressed the jurisdictional question before us. And "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144, 131 S. Ct. 1436, 179 L. Ed. 2d 523 (2011); *see also Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

But even if we assume that those courts properly exercised jurisdiction, those cases do not persuade us that jurisdiction is appropriate here.

Take *NLRB v. Accurate Web, Inc.*, 818 F.2d 273 (2d Cir. 1987) (per curiam), and *NLRB v. Gebhardt-Vogel Tanning Co.*, 389 F.2d 71 (7th Cir. 1968). When those cases were decided, an employer could withdraw recognition from a union based solely on its good-faith belief that the union had lost majority support. *See Gebhardt-Vogel*, 389 F.2d at 72. And because a pending decertification petition was evidence of that good-faith belief, dismissing a petition would potentially deprive an employer of a defense to the unfair-labor-practices allegations. But since the Board's 2001 decision in *Levitz Furniture*, employers must show that the union no longer has majority support; their belief that the union's support has dissipated will not suffice. 333 NLRB at 717.

Consider next *Maccabees Mutual Life Insurance Co. v. NLRB*, 757 F.2d 767 (6th Cir. 1985) (per curiam), and *David Wolcott Kendall Memorial School v. NLRB*, 866 F.2d 157 (6th Cir. 1989). These are unit-clarification cases where the Board's representation decision controlled the outcome of the unfair-labor-practice proceedings. *Maccabees*, 757 F.2d at 768-69 (finding that an employer could not escape its bargaining obligations by classifying a group of employees as "managerial"); *Kendall Mem'l*, 866 F.2d at 159 (same). Put simply, these were "bargaining-unit determination[s]," and the employers could therefore seek court review via a technical refusal to bargain. *See Kindred Nursing Ctrs.*, 727 F.3d at 558.

The best case for Rieth-Riley is *Transportation Maintenance Services, LLC v. NLRB*, 275 F.3d 112, 348 U.S. App. D.C. 333 (D.C. Cir. 2002). There, a decertification election had already concluded, and the results were impounded pending Board certification. *Id.* at 114. Over a year later, the employee who initiated the decertification petition asked to withdraw it, and the Board granted his request. *Id.* Without addressing the jurisdictional question, the D.C. Circuit reversed the Board's decision to grant the withdrawal request. *Id.* at 116.

Despite some similarities between the two cases, *Transportation Maintenance* does not help Rieth-Riley. That case did not involve a decertification *dismissal*; it involved a decertification *withdrawal*, which is final. Indeed, in ruling against the employer, the Board "expressly closed the decertification case," sealing the incumbent union's status as bargaining representative. *Transp. Maint. Servs., LLC*, 331 NLRB 1050, 1050 (2000). The effect on the parties' bargaining relationship was as if the Board counted the votes and certified the union as the winner, which would qualify for indirect review under § 9(d). Nothing so final happened here. Rieth-Riley's decertification petitions were merely dismissed subject to reinstatement pending resolution of the unfair-labor-practice charges underlying *Rieth-Riley Construction Co. v. NLRB*, F.4th , 2026 U.S. App. LEXIS 10129, 2026 WL 948312 (6th Cir. Apr. 8, 2026). The votes remained live, with certification still in the balance. All Rieth-Riley had to do was prevail in the unfair-labor-practice proceedings initiated in 2019. And it has had a full and fair opportunity to do so.

Finally, Rieth-Riley argues that the Board accepted the company's technical-refusal-to-bargain arguments.

Following the ALJ's decision, the parties filed various exceptions with the Board. Relevant here, the General Counsel excepted to the ALJ's failure to enter a make-whole damages award for the lost opportunity to bargain. The Board denied this request, explaining that "to do so would require overruling *Ex-Cell-O Corp.*, 185 NLRB 107 (1970)." A.R. 7590. That decision rejected enforcement of a make-whole remedy against an employer in a technical-refusal-to-bargain case. *Ex-Cell-O*, 185 NLRB at 110. So Rieth-Riley concludes that the Board, by analogizing to *Ex-Cell-O*, implicitly endorsed the company's technical-refusal-to-bargain arguments as valid.

This argument reads too much into the Board's remedy determination. *Ex-Cell-O*'s suspicion toward certain make-whole remedies was rooted in two major concerns. The first was that, in a technical-refusal-to-bargain case, an employer is often acting in good faith, incurring an unfair-labor-practice violation simply to ensure it gets its day in court. *See id.* at 109 ("Where the wrong in refusing to bargain is, at most, a debatable question . . . the imposition of a large financial obligation . . . may come close to a form of punishment for having elected to pursue a representation question."). But the Board was equally concerned about imposing make-whole remedies any time a bargaining agreement had lapsed with no successor agreement in place. *Id.* at 110. The Board concluded that, to calculate damages based on a "*presumed* contractual agreement" that "never existed" would be too speculative. *Id.* Thus, we do not read the Board's reluctance to impose a make-whole remedy here as an endorsement of Rieth-Riley's technicalNos. refusal-to-bargain arguments. And even if it were, the Board's contrary view could not cure our lack of jurisdiction over the decertification dismissals.

In sum, none of the Board's unfair-labor-practice findings was "based in whole or in part" on the decertification petition dismissals. 29 U.S.C. § 159(d). And because Rieth-Riley's longstanding obligations to the Union remained the same—whether or not the Board dismissed the petitions—it could not test those obligations by refusing to bargain.

D.

Rieth-Riley argues that the Board improperly expanded the ALJ's bargaining order. But Rieth-Riley failed to raise this challenge before the Board. So we lack jurisdiction to consider it. *See Quickway Transp., Inc. v. NLRB*, 117 F.4th 789, 818 (6th Cir. 2024).

Section 10(e) of the NLRA states: "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). This jurisdictional bar applies to objections to actions taken by the Board sua sponte, *see Van Dorn Plastic Mach. Co. v. NLRB*, 881 F.2d 302, 306 (6th Cir. 1989), that could have been raised in "a petition for reconsideration or rehearing," *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666, 102 S. Ct. 2071, 72 L. Ed. 2d 398 (1982).

Rieth-Riley did not object to the Board's supposed expansion of the ALJ's bargaining order in a petition for reconsideration or rehearing. Nor has the company identified any "extraordinary circumstances" that would excuse its failure to do so. 29 U.S.C. § 160(e).

IV.

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

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 24-2105/25-1073

RIETH-RILEY CONSTRUCTION CO., INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Intervenor (24-2105).

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

JUDGMENT

THIS MATTER came before the court upon the petition for review and cross-application for enforcement of an order of the National Labor Relations Board.

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.

ENTERED BY ORDER OF THE COURT

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

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED JUNE 30, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 24-2105/25-1073

RIETH-RILEY CONSTRUCTION CO., INC.,

Petitioner Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner,

and

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Intervenor (24-2105).

ORDER

Upon consideration of petitioner/cross-respondent's motion to supplement the administrative record to include the "Decertification Proceedings",

It is **ORDERED** that the motion be and it hereby is **GRANTED**. The documents filed February 5, 2025, with petitioner/cross-respondent's motion will be accepted and filed as Supplemental Administrative record items.

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

/s/ Kelly L. Stephens

Issued: June 30, 2025

APPENDIX C — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED DECEMBER 13, 2024

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

Rieth-Riley Construction Co., Inc. *and* Local 324, International Union of Operating Engineers (IUOE), AFL–CIO. Cases 07–CA–285321, 07–CA–300190, and 07–CA–300191

December 13, 2024

DECISION AND ORDER

By Chairman McFerran and Members Kaplan and Prouty

On August 23, 2023, Administrative Law Judge Christine E. Dibble issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed answering briefs, and the Respondent filed a reply brief to each answering brief. The General Counsel also filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. Additionally, the Charging Party filed cross-exceptions with supporting argument, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified and set forth in full below.

We agree with the judge, for the reasons she states, that the Respondent violated Section 8(a)(5) and (1) by unilaterally granting wage increases to unit employees.[2]

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1. The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's finding that the unit represented by the Union is:

> 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.

2. The Respondent excepts to the judge's finding that these allegations were not time barred under Sec. 10(b) of the Act. The

We also agree with the judge, for the reasons she states, that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with relevant information requested on May 25, 2022.[3]

In addition, we agree with the judge, for the reasons she states, that the Respondent violated Section 8(a)(5) and

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Respondent, however, does not state, either in its exceptions or supporting brief, any grounds on which this purportedly erroneous finding should be overturned as required by Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations. Accordingly, we disregard these bare exceptions. See, e.g., *St. Paul Park Refining Co., LLC d/b/a Western Refining*, 366 NLRB No. 83, slip op. at 1 fn. 3 (2018), enfd. 929 F.3d 610 (8th Cir. 2019).

Member Kaplan notes that the Board's Rules and Regulations expressly grant the Board discretion to consider any issue raised by a party on exceptions, regardless of whether the exception includes supporting argument. See *Hilton Hotel d/b/a Hilton Hawaii Village,* 372 NLRB No. 61, slip op. at 15 fn. 12 (Member Kaplan, dissenting) (explaining that the second sentence of Sec. 102.46(a)(1)(ii) states that exceptions that do not conform with the requirements of Sec. 102.46(a)(1)(i)—including Sec. 102.46(a)(1)(i)(D), pertaining to bare exceptions containing no supporting argument—"*may* be disregarded") (emphasis added). Nevertheless, Member Kaplan declines to consider the Respondent's bare exceptions on this issue, consistent with the discretion afforded under the Board's Rules and Regulations.

3. Although the Respondent excepts to the judge's finding that the requested information was relevant, the Respondent did not present any argument in support of these exceptions. Again, we disregard these bare exceptions. *St. Paul Park Refining Co.*, supra, at 1 fn. 3. Member Kaplan joins his colleagues in declining to consider the Respondent's bare exceptions on this issue, consistent with the discretion afforded under the Board's Rules and Regulations.

(1) by refusing to bargain in good faith with the Union. We also find that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union. The complaint alleges the Respondent's refusal to bargain and its withdrawal of recognition independently violated the Act. The judge's analysis and the record support finding two violations of the Act even though the judge combined these violations in her conclusions of law. See *Arbah Hotel Corp. d/b/a Meadowlands View Hotel*, 371 NLRB No. 126, slip op. at 5–6 (2022); *Lou's Produce, Inc.*, 308 NLRB 1194, 1196 (1992), enfd. 21 F.3d 1114 (9th Cir. 1994).[4]

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4. Chairman McFerran specifically rejects the Respondent's argument that it was lawfully entitled to refuse to bargain with the Union or withdraw recognition in order to obtain judicial review of the Board's representation-case decision in *Rieth-Riley Construction Co., Inc.*, 371 NLRB No. 109 (2022) (affirming the regional director's decision to dismiss two decertification petitions filed by a unit employee). Sec. 9(d) of the Act provides for judicial review of a representation decision only when an order in an unfair labor practice case is "based in whole or in part upon facts certified" in that representation decision. See *Boire v. Greyhound Corp.*, 376 U.S. 473, 479 (1964) (representation case reviewable when an "election has been held and the Board has ordered the employer to do something predicated upon the results of the election.") (internal quotation omitted). Here, the Board has ordered the Respondent to recognize and bargain with the incumbent Union, not based on the results of an election or any facts certified in the representation case, but because it withdrew recognition without objective evidence of a loss of majority support. See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723 (2001).

Chairman McFerran additionally notes that *Transportation Maintenance Services LLC v. NLRB*, 275 F.3d 112 (D.C. Cir. 2002), cited by the Respondent in support of its position, is readily

AMENDED REMEDY

As requested by the General Counsel and the Charging Party, we amend the judge's remedy in the following respects. First, we shall order the Respondent to post the

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distinguishable. There, the Board allowed a decertification petitioner to withdraw the petition, after the election had been held and the ballots had been impounded, without ruling in the representation case on whether the employer's recognition of the union barred processing of the petition. In refusing to enforce the Board's subsequent decision finding that the employer had unlawfully refused to bargain, the court faulted the Board for failing to justify its failure to certify the results of the election and remanded the case so the Board could resolve the recognition bar issue. Here, the Board has already determined that the decertification petitions at issue in *Rieth-Riley Construction Co., Inc.*, 371 NLRB No. 109 must be dismissed, subject to reinstatement, for the reasons stated there. Moreover, the Board's brief in *Transportation Maintenance Services LLC v. NLRB* stated that the bargaining order at issue in that case was "based, in part, on findings made in an underlying representation proceeding." Regardless of whether that statement was accurate, the bargaining order in this case is not based on any findings in the representation case for the reasons stated above.

Member Kaplan agrees that the Respondent violated Sec. 8(a)(5) and (1) by refusing to bargain in good faith with the Union, but he does not pass on whether the Respondent's action amounted to a "technical" refusal to bargain or whether the Respondent may, by refusing to bargain, obtain judicial review of the merit-determination dismissals that the Board affirmed, over his dissent, in *Rieth-Riley*, 371 NLRB No. 109. Additionally, Member Kaplan finds it unnecessary to pass on the allegation that the Respondent unlawfully withdrew recognition from the Union, as that finding does not materially affect the remedy.

attached notice at its Michigan facilities, in addition to posting the notice at its Indiana headquarters, since the unit employees perform work in Michigan. Next, we shall order the Respondent to mail a copy of the attached notice to all current and former unit employees employed by the Respondent in Michigan at any time since June 1, 2021. "The Board provides for the mailing of individual notices when posting will not adequately inform the employees of the violations that have occurred and their rights under the Act." *Bill's Electric, Inc.*, 350 NLRB 292, 297 (2007) (internal quotations omitted). Here, a notice mailing remedy is justified as the unit is comprised of construction employees who primarily work at locations away from the Respondent's facilities and, further, it appears from the record that unit employees are still on strike and may not be reporting to the Respondent's facilities. See *Abramson, LLC*, 345 NLRB 171, 171 fn. 3 (2005) (ordering notice mailing where unit employees worked on individual construction sites across a two-state region).[5]

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5. Member Kaplan believes that notice mailing is unwarranted in the circumstances of this case. As he explained in *Amerinox Processing, Inc.*, 371 NLRB No. 105, slip op. at 4 fn. 10 (2022), enfd. 2023 WL 2818503 (D.C. Cir. 2023), notice posting is the Board's traditional means of advising employees of their Sec. 7 rights and of a respondent's unlawful conduct. See, e.g., *Consolidated Edison Company of New York, Inc.*, 323 NLRB 910, 912 (1997) (finding that notice mailing was unnecessary where there was no evidence that traditional notice posting was insufficient to inform employees of their rights and of the employer's unfair labor practices). Indeed, a notice-mailing remedy that is not contingent on the respondent's having gone out of business or having closed the facility involved in the proceeding is seldom granted. *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 5 (2020) (citing *Delta Sandblasting Co.*,

The General Counsel and Charging Party also request that the Board: (1) order the Respondent to conduct a mandatory meeting during work time to distribute copies of the notice and to read it or have it read aloud by a Board agent; and (2) grant Board agents access to verify compliance with the Order. We deny the request for these additional remedies as it has not been shown that the additional measures are needed to remedy the effects of the Respondent's unfair labor practices in this matter. In addition, we decline, at this time, the requests by the General Counsel and Charging Party that the Board reconsider the *J. Picini Flooring*, 356 NLRB 11 (2010), standard for electronic distribution of notices.[6]

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367 NLRB No. 17, slip op. at 1 fn. 3 (2018), enfd. 969 F.3d 957 (9th Cir. 2020)), enfd. 5 F.4th 759 (7th Cir. 2021). In directing notice mailing here, his colleagues rely on the fact that unit employees primarily work at locations away from the Respondent's facilities and their inference that unit employees may still be on strike. Here, however, the Respondent is ordered to distribute the notice electronically in addition to traditional notice posting, which is more than sufficient to reach the Respondent's employees and makes the mailing of the notice unnecessary.

6. Member Prouty would grant the General Counsel's and Charging Party's requests for notice reading and for distribution of the notice at the reading for the reasons stated in his concurrence in *CP Anchorage Hotel 2 d/b/a Hilton Anchorage*, 371 NLRB No. 151 (2022), enfd. 98 F.4th 314 (D.C. Cir. 2024). In addition, he would grant their request for Board agent access to monitor the notice posting. Member Prouty would also be open to, in a future appropriate case, addressing the General Counsel's suggestion that the Board reconsider and possibly broaden the standard for electronic distribution of notices currently set forth in *J. Picini Flooring*, 356 NLRB 11 (2010).

Finally, we also deny the General Counsel's and Charging Party's requests that we adopt a compensatory remedy requiring the Respondent to make its unit employees whole for the lost opportunity to bargain at the time and in the manner contemplated by the Act because to do so would require overruling *Ex-Cell-O Corp.*, 185 NLRB 107 (1970), an issue which we have previously severed and retained for future consideration. See, e.g., *Longmont United Hospital*, 371 NLRB No. 162, slip op. at 2 (2022).[7]

Because the Respondent did not except to the judge's recommended affirmative bargaining order, we find it unnecessary to provide a justification for that remedy. See *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002); *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998), cert. denied 525 U.S. 1067 (1999); *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001).[8]

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7. Member Kaplan notes that in *Longmont*, he would not have severed this issue and instead would have applied *Ex-Cell-O* to deny the General Counsel's request for a make-whole remedy. See 371 NLRB No. 162, slip op. at 2 fn. 4. He would likewise deny the General Counsel's request for a make-whole remedy here.

8. Additionally, we shall modify the judge's recommended Order to conform to the amended remedy, the Board's standard remedial language, and our decision in *Paragon Systems Inc.*, 371 NLRB No. 104 (2022). We shall substitute a new notice to conform to the Order as modified.

Member Kaplan acknowledges and applies *Paragon Systems* for institutional reasons, although he expressed disagreement there with the Board's approach and would have adhered to the

ORDER

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 the International Union of Operating Engineers, Local 324, AFL–CIO by failing and refusing to provide 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) Unilaterally changing the terms and conditions of employment of its unit employees at a time when it has not reached a valid overall impasse in negotiations with the Union for a new collective-bargaining agreement.

(c) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(d) Withdrawing recognition from the Union and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of unit employees.

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position the Board adopted in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020).

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

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

(a) Furnish to the Union in a timely manner the information requested by the Union on May 25, 2022.

(b) On request by the Union, rescind the changes in the terms and conditions for its unit employees that were unilaterally implemented on June 1, 2021, and June 1, 2022.

(c) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

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.

(d) Post at it Goshen, Indiana facility and all of its facilities in the State of Michigan, copies of the attached notice marked "Appendix."[9] 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. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be

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9. 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 and Mailed by Order of the National Labor Relations Board" shall read "Posted and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense, after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix" to all current and former unit employees employed by the Respondent at any time since June 1, 2021, at their home addresses.

(f) 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. December 13, 2024

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the International Union of Operating Engineers, Local 324, AFL–CIO 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 change your terms and conditions of employment at a time when we have not reached a valid overall impasse in negotiations with the Union for a new collective-bargaining agreement.

We will not fail and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

We will not withdraw recognition from the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

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 May 25, 2022.

We will, on request by the Union, rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on June 1, 2021, and June 1, 2022.

We will, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> 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.

RIETH-RILEY CONSTRUCTION CO., INC.

The Board's decision can be found at www.nlrb.gov/case/07-CA-285321 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.

[QR CODE GRAPHIC]

Robert A. Drzyzga, Esq., for the General Counsel.
Amy Bachelder, Esq., for the Charging Party.
Stuart R. Buttrick, Esq., *Alexander E. Preller, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

Christine E. Dibble, Administrative Law Judge. This case was tried, by agreement of the parties, using Zoom technology on December 12, 2022. The International Union of Operating Engineers (IUOE), Local 324, AFL–CIO (the Union/Charging Party) filed a charge in case 07–CA–285321 on October 28, 2021, and an amendment on May 13, 2022. On July 26, 2022, the Charging Party filed charges in cases 07–CA–300191 and 07–CA–300190. On November 4, 2022, the General Counsel issued a complaint and notice of hearing. On November 22, 2022, Rieth-Riley Construction Company, Inc. (the Respondent) filed a motion to consolidate cases 07–CA–285321 and 07–CA–300191 with case 07–CA–300190, which I granted on December 2, 2022.

The complaint alleges that (1) since about June 1, 2021, and June 1, 2022, the Respondent unilaterally granted wage increase to its unit employees without affording the Union notice and an opportunity to bargain with the Respondent with respect to the wage increases and the effects of the conduct in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act); (2) since about May 25, 2022, and continuing, the Respondent, in violation of Section 8(a)(1) and (5) of the Act, has unlawfully failed and refused to furnish the Union with the following information:

> From May 1, 2021 to present, 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 including, but not limited to, all employees on whose behalf Respondent has previously paid employee benefit contributions to the Operating Engineers Local 324 Fringe Benefit Funds.

and (3) beginning on June 20, 2022, and continuing, the Respondent unlawfully refused to bargain with and recognize the Union as the exclusive bargaining representative of the unit employees in violation of Section 8(a)(1) and (5) of the Act. (RR3 GC Exh. 1(e), (p) and (s).)[1] The Respondent filed a timely answer to the complaint denying all material allegations. (RR3 GC Exh. 1(g), (r), and (u).)

During the hearing, the parties moved and I granted their request to take judicial notice of Administrative Law Judge decisions in JD 03-22, Michigan Infrastructure and Transportations Association (MITA), and Local 324, International Union of Operating Engineers (IUOE) and Rieth-Riley Construction Company, Inc., Case Nos. 07–CA–234085 and 07–CB–226531, also known as Rieth-

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1. Abbreviations for the hearing held in this case are as follows; “RR3 GC Br.” for General Counsel’s posthearing brief; “RR3 GC Exh.” for General Counsel’s exhibit; “RR3 CP Br. for the Charging Party’s posthearing brief; “RR3 R. Br.” for the Respondent’s posthearing brief; “RR3 R. Exh.” for the Respondent’s exhibits; and “RR3 Tr.” for the hearing transcript.

Riley 1 (RR1);[2] and JD 42-22, Rieth-Riley Construction Company, Inc. and Local 324, International Union of Operating Engineers (IUOE), Case Nos. 07–CA–261954, 07–CA–269365 and 07–CB–247398, known also as Rieth-Riley 2 (RR2). (RR3 Tr. 12–15; RR3 GC Br. 2.)[3] The parties requested that the transcripts and exhibits from RR1 and RR2 be admitted into evidence in this matter for background information, ability to cite in posthearing briefs, and to avoid relitigating issues already litigate in those matters. Without objections from the parties, I granted the request and admitted the transcripts and exhibits into evidence. (RR3 Tr. –Second, the Respondent stipulated that it gave bargaining unit employees across the board wage increases on June 1, 2021 and June 1.

On January 4, 2023, the General Counsel filed a Motion to Correct the Transcripts Stipulation noting that the transcript does not accurately reflect the stipulations orally agreed upon by the parties. The General Counsel

2. Abbreviations for the hearing in Cases 07–CA–234085, 07–CB–226351 are as follows: "RR1 GC Br." for General Counsel's posthearing brief; "RR1 GC Exh." for General Counsel's exhibit; "RR1 CP Br. for the Charging Party's posthearing brief; "RR1 R. Br." for the Respondent's posthearing brief; "RR1 R. Exh." for the Respondent's exhibits; and "RR1 Tr." for the hearing transcript.

3. Abbreviations for the hearing in case nos. 07–CA–261954, 07–CA–269365, 07–CB–247398 are as follows: "RR2 GC Br." for General Counsel's posthearing brief; "RR2 GC Exh." for General Counsel's exhibit; "RR2 CP Br. for the Charging Party's posthearing brief; "RR2 R. Br." for the Respondent's posthearing brief; "RR2 R. Exh." for the Respondent's exhibits; and "RR2 Tr." for the hearing transcript.

attached Exhibit 1 which is a stipulation signed by all parties. Based on a review of the stipulations and the transcript, I order that Exhibit 1 is admitted into evidence with no objections from the parties.

On the entire record, including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following,

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the business of road construction, with an office and place of business in Goshen, Indiana and job sites in the State of Michigan. During the calendar year ending December 31, 2021, the Respondent, in conducting its business, purchased, and received at its job sites in the State of Michigan goods valued in excess of $50,000 directly from points outside the State of Michigan. The Respondent

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4. My findings and conclusions are based on my review and consideration of the entire record not just those cited in this decision, and the demeanor of the witnesses. I have also considered the relevant factors in making my credibility findings which includes: "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, e.g., *Daikichi Corp.*, 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

admits, and I find, that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (NLRA/the Act).

The Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.[5]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of the Parties' Roles

Since I granted the parties joint request to admit the transcripts and exhibits from the hearings in RR1 and RR2, I will not engage in a rehash of a detailed description of the Respondent's business operation and management structure. The Respondent is engaged in road, underground, highway, airport, and heavy construction, including building parking lots and bridges. It has job sites in Michigan state with an office and place of business in Goshen, Indiana. Since January 1, Chad Loney (Loney) has been the Respondent's vice president of operations. He is responsible for payroll and ensuring that the Respondent is submitting work bids with correct pay rates, meeting federal guidelines for wage rates, among other duties. As the vice president of operations, he is the most senior employee of the Michigan-based employees who perform these responsibilities. (Tr. 57–58.) Keith Rose (Rose) is the Respondent's president.

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5. For additional clarity, the Union referred to throughout the decision is IUOE Local 324, unless otherwise indicated.

The record establishes that the following constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> 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.

(RR3 GC Exh. 1(e), (p) and (s).) The Union has had a collective bargaining relationship with the Respondent since at least November 2, 1993. For about the past 10 years, David Stockwell (Stockwell) has been the business manager for the Union. He oversees the daily operation of the Union and is its highest ranking official. The Respondent had been in a multiemployer collective bargaining relationship with the Union for more than 20 years. The most recent multiemployer Collective Bargaining Agreement (CBA/Road Agreement) negotiated between the Union and the Respondent was effective from March 19, 2013 to June 1, 2018.[6]

6. The shorthand name for the agreement is the "Road Agreement." (GC Exh. 2.)

B. Background Facts on the Parties' Bargaining History

For at least twenty years, the Respondent and other road construction companies were represented in contract negotiations with the Union by the Michigan Infrastructure and Transportation Association (MITA), a multiemployer bargaining association. MITA represents the bargaining interests of road construction companies in Michigan. (RR1 ALJD) Pursuant to a previously signed power of attorney (POA), the Respondent had designated MITA as its agent to negotiate and sign collective-bargaining agreements with the Union.

On May 2, 2018, the Union notified certain member employers, including the Respondent, that it was withdrawing from multiemployer bargaining with MITA for a successor agreement. Thereafter, MITA made several attempts to engage the Union in negotiations prior to the expiration of the Road Agreement. Included in one of MITA's attempts to jumpstart negotiations was a May 18, 2018 proposal for annual wage increases for the next five years beginning June 1, 2018. The Respondent, through MITA, proposed raising the wages of employees by $2 an hour starting on June 1, 2028. After several months of no negotiations or agreement between the parties regarding the Respondent's proposal, on about July 23, 2018, the Respondent unilaterally implemented its May 18, 2018, proposal with wage increase beginning retroactive to June 1, 2018.[7]

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7. According to the Union, it refused to engage in discussions on the May 18, 2018 proposal because it had notified the

On or about August 8 or 9, 2018, the Respondent withdrew its POA for multiemployer bargaining with MITA, "along with more than fifty other MITA power of attorney contractors." (RR1 ALJD at 22–24; RR1 GC Exhs. 23, 25; RR1 R. Exh. 53-54.) Mark Johnson, president of Ajax Paving and lead negotiator for MITA contacted the Union on behalf of the Respondent to restart contract negotiations. On August 25, 2028, the Union held a one-day picket at an Ajax Paving job site, which began a month-long lock-out of the Union by the Respondent . Consequently, the Respondent, along with other contractors, re-authorized its POA with MITA and on September 4, 2018, locked out the Union for four weeks. During this period there was also a dispute between the parties regarding employer contribution to the Fringe Benefits Fund. (RR1 GC Exh. 34; RR3 GC Exh. 10; RR3 Tr. 68.) Subsequently, the Union filed an Unfair Labor Practice (ULP) charge and a complaint issued on or about May 29, 2019, charging a violation of the Act over the May 18, 2019, wage increase, the employer lock-out, and the "clawback" of contribution to the Fringe Benefits Fund.

Following the lock-out, the parties engaged in various efforts at bargaining until about September 19, 2019, when bargaining for a new CBA ceased. On March 10, 2020, an employee filed the first decertification petition in case no. 07–RD–257830. (RR1.) The Region notified the parties that the decertification petition would be held in abeyance pending the investigation into the Union's ULP charge. On about August 7, 2020, the employee

Respondent of its withdrawal from multiemployer bargaining with MITA due to its dissatisfaction with MITA's bargaining stance.

filed a second decertification petition in case no. 07–RD–264330. (RR2.) Again, the parties were informed that the Region was investigating if the ULP charge had tainted the decertification petition requiring its dismissal. The Union requested postponement of the pre-election hearing pending completion of the investigation, which the Regional Director (RD) denied. On August 28, 2020, a preelection hearing was held. On September 25, 2020, the acting RD issued a decision which, among other things, delineated the steps that would be taken for scheduling and holding the decertification election. The election was scheduled for November 9, 2020, at 1:00 p.m. However, on the morning of November 9, 2020, the RD issues a Dismissal Decision in case nos. 07–RD–257830 and 07–RD–264330 dismissing both decertification petitions. The Respondent and the employee who filed the decertification petition submitted a request to the Board for review of the RD's decision. The Board granted the request.

Due to various delays, the hearing in RR1 was held at various intervals between 2019 to 2021, regarding the May 29, 2019, ULP complaint. On February 18, 2021, about two weeks into the RR1 hearing, Rose included testimony about wage increases the Respondent gave its employees in 2019 and 2020 without first bargaining with the Union. The General Counsel, therefore, moved to amend the complaint to add allegations of unilateral wage increases in 2019 and 2020, which the ALJ granted. The RR1 hearing was continued to May 2021. During the hearing on May 7, 2021, Loney testified about the wage increases the Respondent gave all of its employees in 2019, and 2020. Loney attested that the Respondent was mandated to give the wage increases under the Davis-Bacon Act.

He further explained the Respondent's rationale for the amounts of the wage increases. Stockwell was present during Loney's testimony. On January 21, 2022, the ALJ issued a decision in RR1, with the ALJ finding that the Respondent violated the Act when it: (1) unlawfully locked out bargaining unit employees in support of a permissive subject of bargaining; (2) unilaterally gave wage increases to employees in 2018 and 2020; and (3) unilaterally reclaimed money from employees' paychecks. (RR3 Tr. 45, 69.) The case is still pending on appeal to the Board.

On or about April 20, 2022, the Union requested to restart bargaining with the Respondent for a new CBA. The Respondent suggested that the parties meet on June 28 or 29, 2022, and the Union agreed. On June 15, 2022, the Board issued a decision sustaining the Regional Director's decision to dismiss the decertification petitions for cases 07–RD–257830 and 07–RD–264330.[8] Consequently, on June 20, 2022, the Respondent notified the Union that it was withdrawing from the bargaining session scheduled for June 28, 202, and claiming it is engaged in a "'technical' refusal to bargain, in order to obtain judicial review of the Board's affirmance of the Regional Director's dismissal order." (RR3 R. Br. 16; RR3 GC Exh. 8.) However, the Respondent vehemently denies that it has ever withdrawn recognition from the Union.

On July 18, 2022, the ALJ issued a decision in RR2, with the ALJ finding that the Respondent violated the Act when it: (1) failed and refused to provide to the Union

8. *Rieth-Riley Construction Co., Inc.*, 371 NLRB No. 109 (June 15, 2022).

information on the Respondent's subcontracting and wage and benefits. The case is still pending on appeal to the Board.

C. 2021 and 2022 Wage and Benefit Increases

It is undisputed, and the Respondent stipulated, that it provided across-the-board wage increases to all employees on both June 1, 2021 and June 1, 2022 without bargaining with the Union over the increases. Loney noted that the Respondent gives wage increases to employees every June. According to Loney, the wage and benefit increases are given to comply with the Davis-Bacon Act[9] and the Michigan Department of Transportation (MDOT) guidelines.[10] Under the Davis-Bacon Act, contractors and subcontractors awarded contracts to work on federal projects must pay the locally prevailing wages and benefits for the same work on similar projects in the area. In effect, the Davis-Bacon Act sets minimal wage rates and fringe benefits on federally funded contracts, but the employer may also exceed those wage and benefits levels. MDOT implements those requirements. The Davis-Bacon Act does not require the employer to pay a designated amount to wages and fringe benefits so long as the total compensation package paid to employees meets the MDOT overall minimum compensation rate. Consequently, the Respondent has to ensure on an annual basis that its wage rates and fringe benefits levels meet

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9. Davis-Bacon Act of 1931, 40 U.S.C. 276.

10. Loney also testified that the wage increases were given because the expired Road Agreement required annual wage increases. (RR3 Tr. 59.)

the Davis-Bacon Act and MDOT standards. (RR3 Tr. 58—60; RR3 R. Exh. 1.) Although all work performed by the Respondent's employees is not subject to the Davis-Bacon Act, it nevertheless raised wages for all of them.

It is undisputed that often MDOT does not publish the wage rates until after the date the rates have become effective. Sometimes the rates are not published until months after the effective date. In order to account for the wage and benefit increases, the Respondent works to annually calculate and set rates on June 1 that it estimates will meet the published rates and cover them through the construction cycle. To that end, Loney testified that the Respondent would increase the wage and fringe benefit rates to slightly more than the minimum. He gave undisputed testimony that on June 1, 2020 that the actual wage and benefits rate the Respondent paid was \$60.62. However, on June 1, 2021, the federally mandated minimum wage and benefit rate was \$62.62. The Respondent insists that it had to raise its rates to ensure compliance with the Davis-Bacon Act and the MDOT guidelines. Consequently, on June 1, 2021, the Respondent unilaterally increased its wage and benefits by \$2 an hour with \$1.73 going to wages and \$0.27 to the vacation and holiday pay fund. (RR3 Tr. 62—65; RR3 GC Exh. 10.) Loney testified that he understood that the \$0.27 of the \$2 wage and benefit increase went into the vacation and holiday fund because it was mandated by paragraph 4(a) of the expired Road Agreement. Loney admitted that despite the expiration of the agreement, the Respondent was still legally obligated to honor the Road Agreement's "terms and conditions." (RR3 Tr. 59.)

The evidence shows that for June 1, 2021, the Respondent's overall compensation rate was $62.62. Therefore, the Respondent had to increase its rate to remain in compliance with the Bacon-Davis rate for 2022 published by MDOT. Accordingly, the Respondent unilaterally increased its compensation rate with a $1.75 the base wage rate and 26-cents towards the vacation and holiday fund for a total compensation increase of $2.01. (RR3 GC Exh. 10.)

It is undisputed that the Respondent had over the past 30 years bargained with the Union over the wage and benefit increases. However, bargaining over the issues ceased with the expiration of the contract in 2018. Consequently, the only notification the Union received about the June 1, 2021 wage increase was when Loney heard Stockwell's testify about it in the RR1 hearing. Stockwell admits the Respondent did not give the Union advanced notice that it was implementing a wage increase on June 1, 2022. Moreover, he acknowledged in his testimony that wages, subcontracting, and fringe benefit funds were still open issues for the bargaining session. Stockwell also noted that in bargaining over wages, the parties sometimes discuss a flat rate without discussing what portion goes into a particular fund and sometimes leaving that decision to the Union.

D. May 25, 2022, Request for Information

Due to the Respondent's wage and benefit increases in 2021 and 2022, by letter dated May 25, 2022, Stockwell, on behalf of the Union, submitted an information request

(RFI/items) to Loney and Rose, requesting the following information:

> From May 1, 2021 to the present, provide 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 it 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.

(RR3 GC Exh. 5.) In the letter, Stockwell informed the Respondent that the information was necessary so the Union could fulfill its exclusive representative role to "monitor, enforce, and continue to negotiate over the terms and conditions of employment of its bargaining unit members." Id. Stockwell requested that the Respondent reply "within the next 10 days." The Respondent submitted a written response to Stockwell on June 7, 2022, agreeing to provide the requested information but with several caveats. In order to release the information, the Respondent demanded that the Union take the following actions: clarify the intent of "work jurisdiction provisions"; prove the relevancy of the information in paragraph two of the request; prove relevancy for the request for employees that the Respondent believe are not part of the bargaining unit; and provide "assurances regarding its intended use of the requested information." (RR3 GC Exh. 6.) The Respondent followed up with a letter to the Union dated June 20, 2022. In the letter, the Respondent wrote that because it disagreed with the Board's decision to uphold the Region's dismissal of the decertification petitions filed by an employee in 2020, it would refuse to continue to bargain with the Union. According to the Respondent, its refusal was a "technical refusal to bargain" and would allow it to obtain judicial review of the Region's dismissal. The Respondent asserted,

> Rieth-Riley will not meet and bargain with you on the scheduled June 28, 2022 bargaining session and at any point thereafter until judicial review is complete.

(RR3 GC Exh. 8; RR3 R. Exh. 4.) By letter dated June 22, 2022, Stockwell replied to the Respondent's June 7, 2022, letter writing that (1) the Respondent's claim the term "work jurisdiction provisions" is vague is without merit; and (2) the Union denied it would use the requested information for improper purposes. Stockwell further demanded that the Respondent,

> Please immediately provide the information in response to the May 25, 2022, information request that you are not disputing. For any information that is going to be withheld, please provide the exact basis for withholding the requested information.

(RR3 GC Exh. 7.) On June 27, 2022, the Respondent replied to Stockwell that it was concerned that complying with the Union's information request would be viewed as a waiver of its "technical refusal to bargain" claim. Consequently, the Respondent informed the Union that,

> [I]n order to provide a substantive response to your last correspondence, we would first require your written agreement that the Company is not bargaining with the Union by responding to your request for information, or otherwise waiving its position regarding the decertification petitions.

(RR3 GC Exh. 9.) There is no evidence of additional communication between the parties about complying with the Union's request for information. Subsequently, the Union filed a ULP charge over the issue.

III. DISCUSSION AND ANALYSIS

A. May 25, 2022, Request for Information

Section 8(a)(5) of the Act mandates that an employer must provide a union with relevant information that is necessary for the proper performance of its duties as the exclusive bargaining representative. *NLRB v. Truitt Mfg. Co.* 351 U.S. 149, 153 (1956); *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303 (1979). ". . . [T]he duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967). Information requests regarding bargaining unit employees' terms and conditions of employment are "presumptively relevant" and must be provided. *Whitesell Corp.*, 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 649 (2010), enfd. 638 F.3d 883 (8th Cir. 2011); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). If the requested information is not directly related to the bargaining unit, the information is not presumptively relevant, and the requesting party has the burden of establishing the relevance of the requested material. *Disneyland Park and Disney's California Adventure (Disneyland Park)*, 350 NLRB 1256, 1257 (2007); *Earthgrains Co.*, 349 NLRB 389 (2007).

The standard for establishing relevancy is the liberal, "discovery-type standard." *Alcan Rolled Products*, 358 NLRB 37, 40 (2012), citing and quoting applicable authorities; *Shoppers Food Warehouse, Corp.*, 315 NLRB 258, 259 (1994); *Bacardi Corp.*, 296 NLRB 1220 (1989). In *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992), the Board summarized its application of the principles as:

> [T]he Board has long held that Section 8(a)(5) of the Act obligates an employer to furnish requested information which is potentially relevant to the processing of grievances. An actual grievance need not be pending nor must the requested information clearly dispose of the grievance. It is sufficient if the requested information is potentially relevant to a determination as to the merits of a grievance or an evaluation as to whether a grievance should be pursued. *United Technologies Corp.*,

> 274 NLRB 504 (1985); *TRW, Inc.*, 202 NLRB 729, 731.

The requested information does not have to be dispositive of the issue for which it is sought, but only has to have some relation to it. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104–1105 (1991). Moreover, the Board does not assess the merits of the underlying dispute to determine the relevancy of the request for information. *Postal Services*, 332 NLRB 635 (2000). Even if the union is unable to articulate a reason for the requested information, the surrounding circumstances may show that the employer is "on notice of a relevant purpose which the union has not specifically spelled out" and is therefore required to produce the requested information. *Beverly Enterprises*, 310 NLRB 222, 227 (1993) (citing *Brazos Electric Power*, 241 NLRB 1016, 1018 (1979); *Disneyland Park* at 1257; *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). Once the relevancy of the request for information has been demonstrated, the burden shifts to the employer to establish that the information is not relevant, does not exist, or some other valid and acceptable reason why it could not be furnished. *Samaritan Medical Center*, 319 NLRB, 392, 398 (1995), citing *Somerville Mills*, 308 NLRB 425 (1992), and *Postal Service*, 276 NLRB 1282 (1985).

The General Counsel argues that the Union' request for information is presumptively relevant because the information pertains to the bargaining unit. Moreover, the portion of the request that may also cover nonunit employees is proven relevant and necessary to "allow the Charging Party to craft informed wage proposals" in upcoming negotiations. (RR3 GC Br. 38 – 39.) The Respondent counters that it is not obligated to comply with the request because "the refusal-to-bargain charge in 07–CA–300190 and the failure to provide information charge in 07–CA–300191 rise and fall with Rieth-Riley's invocation of the "technical refusal to bargain" doctrine." (RR3 R. Br. 39.)

I find the Respondent's argument unpersuasive. The Respondent argues that the Board's "technical refusal to bargain" doctrine applies to its challenge to the Regional Director's dismissal of the decertification petitions, which the Board wrongly upheld. According to the Respondent, "the administrative law judge retains discretion to find the Board's decision in the representation case erroneous." It cites *Stuttgart Shoe Corp.*, 149 NLRB 663, 673 fn. 3 (1964), to support its argument. The Respondent further contends that the Board erred in dismissing the decertification petitions filed in cases 07–RD–257830 and 07–RD–264330 for several reasons: no hearing held to show a causal nexus between the alleged unfair labor practices and the employee dissatisfied with the Union; the Board applied the wrong standard in affirming the RD's dismissal of the decertification petitions; the Board erred in rejecting the Respondent's Rule 103.20 argument; and the Board erred in its deference to a request for an affirmative bargaining order as independent grounds for dismissal. (RR3 R. Br. 43–44.)

I find that *Stuttgart* is inapposite because the ruling in that case did not address whether the ALJ has authority to ignore or overrule Board findings and decisions. The

Stuggart case noted in a footnote that the ALJ in the ULP proceeding is not bound by the formal facts in the representation case but did not indicate that the ALJ may ignore or overturn the findings of the Board. Last, the ALJ in *Stuggart* noted that the finding of facts made in the representation case was not binding on him because the representation case involved "different issues and a different standard of proof" than the ULP case before him. That is not the situation in the case before me.

More importantly, I find that there is absolutely no case law to support a finding that the ALJ can overrule or ignore a decision or findings of the Board that the ALJ believes is erroneous. Breaking down the Respondent's elaborate argument to its simplest core, it is contending that as the ALJ, I can exercise judicial review over the Board's findings and decisions and overturn them if I decide the Board erred. This argument is diametrically opposed to extensive and consistent Board law which holds that ALJs are bound by Board law until it is overturned by the Supreme Court. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963); *Pathmark Stores*, 342 NLRB 378, fn. 1 (2004). Consequently, I do not have the authority to overturn the Board's decision by finding that it incorrectly affirmed the RD's dismissal of the decertification petitions in case nos. 07–RD–257830 and 07–RD–264330. The appropriate procedure for the Respondent to take if it believes the Board was incorrect in affirming dismissal of the decertification petitions is to seek a rehearing by the Board, if possible, or file an appeal with the appropriate circuit court.

Turning to the merits of the allegation, I find that the information sought by the Union is presumptively relevant to the performance of its statutory obligations. The Board has consistently held that certain information is presumptively relevant. "It is well settled that information concerning names, addresses, telephone numbers, as well as wages, hours worked, and other terms and conditions of employment of unit employees is presumptively relevant . . ." *Bryant & Stratton Business Institute*, 323 NLRB 410 (1997); see also, *Georgetown Holiday Inn,* 235 NLRB 485 (1978) (names and addresses of unit employees, like wage data, are presumptively relevant to a union's role as bargaining agent and no showing of particularized need required.); *Deadline Express*, 313 NLRB 1244 (1994); and *Dyncorp/Dynair Services*, 322 NLRB 602 (1996). Since the requested information relates to wages it is presumptively relevant, the burden is on Respondent to rebut the relevancy. *Leland Stanford Junior University*, supra at 80.

Even assuming the requested information is not presumptively relevant because it involves unit and nonunit employees, I find that the General Counsel has established that the information is relevant and necessary for the Union to effectively perform its duties as the exclusive representative of the bargaining unit. See *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994) ("it is well settled that an employer, on request, must provide a union with information that is relevant to carrying out its statutory duties and responsibilities in representing employees."); *NLRB v. Truitt Mfg. Co.*, 351 US 149, 152–153 (1956) ("employer has the statutory obligation to provide, on request, relevant information that the Union needs for the proper performance of its duties as the collective-bargaining representative."); *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976) (bargaining unit related information is presumptively relevant and does not require a showing of relevancy). In this case, the Union informed the Respondent that it needed the information to assist it in continuing to negotiate over the employees' terms and conditions of employment and monitor the Respondent's compliance with the contract. The Union attempted to overcome some of the Respondent's objections by asking it to simply send the Union the information the Respondent did not dispute and explain its reasons for objecting to the remaining requests. However, the Respondent did not comply. I also find the RFI is relevant because it directly relates to the Union's statutory responsibility to negotiate a successor agreement and more specifically to provide a response or decide on possible actions or proposals to the Respondent's unilateral wage increases. I find that the Union clearly articulated and established that it was entitled to the information requests so that it could fulfill its representational role in bargaining for an agreement and crafting counterproposals to the Respondent's proposed CBA modifications. *NLRB v. Truitt Mfg. Co.*, 351 US 149, 152–153, 76 S. Ct. 753, 100 L. Ed. 1027 (1956); *Galaxy Towers Condo Assn.*, 361 NLRB 364, 375 (2014). The record contains objective evidence that the Union expressed to the Respondent via correspondence and emails that it needed complete responses to its requests to assist it in weighing the impact the Respondent's unilateral wage increases on bargaining unit members and compliance with the CBA.

The burden shifts to the Respondent to show that the information does not exist or some other valid and acceptable reason why it could not be furnished. As noted above, I have rejected the Respondent's argument that it could not comply with the RFI for fear of waiving its "technical refusal to bargain" defense. The Respondent has no basis for a "technical refusal to bargain" defense because the Board's decisions in representation proceedings are not appealable. See, e.g., *AFL v. NLRB*, 308 U.S. 401, 410 (1940) (no judicial review of Board orders in representation proceedings "except as incidental to review of an order restraining an unfair labor practice."); *U.S. Electrical Motors, Div. of Emerson Electric Co. v. NLRB*, 722 F.2d 315, 320 (6th Cir. 1983) (no judicial review of Board's order requiring a new election in a representation proceeding because it is not a final order); *Chicago Truck Drivers, Helpers & Warehouse Workers Union v. NLRB*, 599 F.2d 816, 819 (7th Cir. 1979) (no judicial review of union's petition for certification unless board acted contrary to specific statutory directive). When the Board in a representation proceeding also presented with a question of whether a party has committed an unfair labor practice, then judicial review of the record of the representation proceeding along with the evidence in the unfair-labor practice proceeding is appropriate. *AFL*, 308 U.S. at 406. None of the long line of cases, however, contemplate authorizing an ALJ to review and overturn the Board's decision in a representation proceeding or any other proceeding.

Accordingly, I find that the Respondent's failed and refused to furnish the Union with the requested information as described in the complaint in violation of the Act.

B. June 1, 2021 and June 1, 2022 Wage Increases

The General Counsel argues that it is undisputed that the Respondent provided its employees wage increases on June 1, 2021, and June 1, 2022, without first notifying the Union or giving the Union a "meaningful opportunity" to bargain prior to implementing the wage increases in violation of the Act. According to the General Counsel, the expiration of the CBA did not relieve the Respondent of its obligation to bargain over the wage increases. Moreover, the General Counsel disputes that the Union waived its right to bargain over the increases. The Respondent counters that the wage increases were lawful because (1) the Union had advance notice of the increases with "adequate time to bargain;" (2) the Union waived its right to bargain over the increases; and (3) the Union's charges are untimely under Section 10(b) of the Act.

An employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). "Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes." *Lawrence Livermore National Security, LLC*, 357 NLRB

203, 205 (2011). The duty to bargain, however, only arises if the changes are "material, substantial and significant." *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *Flambeau Airmold Corp.*, 334 NLRB 165, 171 (2001). The General Counsel bears the burden of establishing this element of the prima facie case. *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006). In order to find that an employer made unilateral changes to an employee benefit in violation of the Act, it must be shown that (1) material changes were made to the employees' terms and conditions of employment; (2) the changes involved mandatory subjects of bargaining; (3) the employer failed to notify the union of the proposed changes; and (4) the union did not have an opportunity to bargain with respect to the changes. *San Juan Teachers Assn.*, 355 NLRB 172, 175 (2010). *Alamo Cement Co.*, at 738; *Flambeau Airmold Corp.*, supra; *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 657 (2011).

An employer to a contractual agreement may unilaterally take certain actions that result in changes to the terms and conditions of employment if there has been a "clear and unmistakable" waiver of the Union's right to bargain over the changes. *Pavilions at Forrestal*, 353 NLRB 540 (2008) (impasse irrelevant where employer unilaterally implemented new health insurance plan without providing union information, notice and opportunity to bargain concerning new plan); *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232 (2008) (employer prematurely declared impasse and unilaterally implemented changes in health insurance and other benefits where union requested and employer agreed to schedule subsequent bargaining session, union indicated willingness to "look at other plans," and union stated that it would prepare counterproposal). The "clear and unmistakable" standard requires that the contract language is specific, or it must be shown that the subject matter that was alleged to have been waived was fully discussed by the parties; and the party claimed to have waived its rights did so explicitly and with the full intent to release its interest in the matter. *Allison Corp.*, 330 NLRB 1363, 1365 (2000); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). There is no contention or evidence that the Union waived its right to bargain over the matter at issue.

Based on the record of evidence, I find that on June 1, 2021, and June 1, 2022, the Respondent unilaterally gave its employees wage increases without providing the Union with notice or an opportunity to bargain in violation of the Act.

I find, and neither party has disputed, that giving employees wage increases is a material change to their terms and conditions of employment. Therefore, I will turn to the issue of whether those increases were mandatory subjects of bargaining. In *Axelson, Inc.,* 234 NLRB 414, 415 (1978), the Board defined mandatory subjects of bargaining as,[11]

> those comprised in the phrase "wages, hours, and other terms and conditions of employment" as set forth in Section 8(d) of the Act. While

11. *Operating Engineers Local 12 (Association General Contractors of America, Inc.*) 187 NLRB 430, 432 (1970).

> the language is broad, parameters have been established, although not quantified. The touchstone is whether or not the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees.

The evidence is undisputed that the employees' wages are mandatory subjects of bargaining. Wages and benefits are considered mandatory subjects of bargaining. 29 U.S.C. § 158(d); See *Also NLRB v. Frontier Homes Corp.*, 371 F.2d 974, 978 (8th Cir. 1967). Wages have been defined broadly by the courts and the Board. *Waxie Sanitary Supply*, 337 NLRB 303, 304 (2001) (holding that a holiday bonus is a mandatory bargaining subject if employer's conduct raises the employees' reasonable expectation that the bonus will be paid); *Laurel Bay Health & Rehabilitation Center* (merit increase is a mandatory subject of bargaining); *Mining Specialist (Mining Specialists III)*, 335 NLRB 1275, 1283 (2001), enfd. 326 F.3d 602 (4th Cir. 2003)[12] ("bonus was a mandatory subject of bargaining since it was compensation for services rendered and not a gift"); *NLRB v. Katz*, supra at 746 (merit wage increase is a mandatory subject of bargaining).

Moreover, the parties agree that the Respondent gave its employees wage increases on June 1, 2021, and June 1,

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12. The Board's Decision and Order in the underlying unfair labor practice proceeding in the case is reported at 314 NLRB 268 (1994) (*Mining Specialist I*). The Board's initial Supplemental Decision and Order in the compliance proceeding is reported at 330 NLRB 99 (1999) (*Mining Specialist II*).

2022. By unilaterally providing the wage increases to all of its employees, the Respondent's actions have significantly impacted the union's ability to represent its unit employees in disputes that are "those most essential of employee concerns—rates of pay, wages, hours, and conditions of employment." *Arizona Portland Cement Co.,* 302 NLRB 36, 44 (1991). In implementing the unilateral changes, the Respondent deprived the Union of an opportunity to negotiate the amount of the wage increases, duration and, or frequency of the increases, possible tax implications of the increases, among other factors. I therefore find that the changes are material, substantial and significant. Unless a valid impasse has been reached, an employer cannot make unilateral changes to the terms and conditions of employment. *Newcor Bay City Division,* 345 NLRB 1229, 1237 (2005) (defining a bargaining impasse as the "situation where 'good-faith negotiations have exhausted the prospects of concluding an agreement). The record is devoid of evidence that a bargaining impasse had been reached on the subject.

Next, I turn to the questions of whether the Union was provided with notice of the wage increases and a reasonable opportunity to bargain. The Board has held that for notice to be effective and timely, it must be precise about future plans and timing and "afford the union a reasonable opportunity to evaluate the proposals and present counter proposals" before implementation. *Pan American Grain Co.*, 343 NLRB 318, 318 (2004), vacated, 448 F.3d 465 (1st Cir. 2006), reaffirmed 351 NLRB 1412 (2007); see also *Gannett Co.*, 333 NLRB 355, 357 (2001); *UAWDaimlerChrysler National*

Training Center, 341 NLRB 431, 433 (2004); *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982). A union has a responsibility to demand bargaining only when the employer has made “a clear announcement that a decision affecting the employees’ terms and conditions of employment has been made and that the employer intends to implement this decision.” *Oklahoma Fixture Co.*, 314 NLRB 958, 960–961 (1994), enf. denied 79 F.3d 1030 (10th Cir. 1996). *Centurylink*, 358 NLRB 1192, 1193 (2012), appeal dismissed, 2014 WL 1378759 (D.C. Cir. 2014); *San Juan Teachers Assn.*, 355 NLRB 172, 176 (2010). Once an employer communicates to the union a clearly stated decision that it intends to implement at a specific time, the union is considered to have received timely notice of that change. *Sierra International Trucks*, 319 NLRB 948, 950 (1995).

The evidence is undisputed that on June 1, 2021, and June 1, 2022, the Respondent gave its employees wage increases. The Respondent argues that the Union was given notice of the increases on May 7, 2021, in the RR1 hearing when Rose and Loney testified about increases the Respondent gave employees in 2018 and 2020 and would give annually thereafter. Since Stockwell was present for the testimony, the Respondent argues that the Union had sufficient notice. According to the Respondent, the Union was given adequate notice in the RR1 hearing of the June 2021 and June 2022 wage increases because Loney testified that; (1) the Respondent is mandated to award annual wage increases in order to remain in compliance with Davis-Bacon; (2) the wage increases applied to the entire bargaining unit; and (3) each June "since the contract expired" all unit employees have gotten the increases and noted the range of the increases. Among other cases, the Respondent prominently cites *New York Paving*, 371 NLRB No. 139, slip op. at *1 fn. 2, *15, to support its argument that notice given "through sworn testimony at a hearing" is adequate. (R. Br. 22.) The General Counsel counters that the Respondent never gave the Union "actual and unequivocal notice" verbally nor in writing that it was implementing unilateral wage increases "on dates certain" in 2021, 2022, or any other time. (R. Br. 17; Tr. 76.) The General Counsel notes that the Respondent never told the Union in clear and unequivocal terms that it was implementing the 2018 wage increase or subsequent increases.[13] Similarly, the General Counsel contends the argument that Loney's testimony at the RR1 hearing constitutes adequate notice to the Union of the June 1, 2021 and June 1, 2022 wage increases should also be rejected.

Based on the evidence, I find unpersuasive the Respondent's argument that its managers' testimonies in the RR1 hearing was adequate notice to the Union of the June 1, 2021 and June 1, 2022 wage increases to unit employees. First, Rose testified in the RR1 hearing that the 2018 increase was given consistent with past practice and the MITA's 2018 contract proposal with the Union. I find, however, that a contract proposal cannot serve as a substitute for an "actual and unequivocal" notice of an

13. In the RR1 hearing, Rose testified that he believed the operating engineers received a wage increase in June 2019 and June 2020, but the evidence established it was only given in June 2020. (JD 03-22, p. 35, fn. 98.)

employer's intention to institute a unilateral employment action. Rather, a contract proposal is merely an invitation for an opposing party to engage in the normal back-and-forth of negotiations. Moreover, the Respondent's award of wage increases to its operating engineers in June 2020 but not 2019 also indicates that the increases were not necessarily automatic in order to remain in compliance with the Davis-Bacon Act. (JD 03–22, p. 35, fn. 98.) The Davis-Bacon Act did not mandate that the Respondent pay one specific amount to wages and another amount to fringe benefits as long as the total package met the overall minimum DOT package. (RR3, Tr. 89–90.) Further, Loney gave undisputed testimony that in bargaining over wages the parties sometimes discuss a flat rate without discussing how much goes into a particular fund, with the Union occasionally telling the Respondent how to allocate the lump sum between wage increases and the fringe benefits fund. Therefore, the Respondent had alternatives on how to comply with the Davis-Bacon Act which may have affected its impact on employees. This is the very reason why the Respondent is legally obligated to engage in bargaining with the Union. See, *Good Samaritan Hospital*, 335 NLRB 901, 903 (2001); *Allison Corp.,* 330 NLRB 1363, 1366 (2000).

Rose's and Loney's general statements about the need for future compliance with the Davis-Bacon Act fail to rise to the level of specificity for adequate notice. It is mere speculation on how much, if at all, the Respondent would need to annually increase the overall wage and benefit package to remain in compliance with the Davis Bacon Act. The evidence established that until the expiration of the most recent CBA in 2018, the parties had always bargained over the annual wage rate increases in contract negotiations. (RR3 Tr. 75) The Respondent acknowledged that wage and benefit rates, subcontracting, and fringe benefits were still open issues for future bargaining sessions, even after expiration of the CBA. During the RR1 hearing, the parties were still in negotiations over a successor agreement to the expired CBA. Therefore, it is not likely that Rose's and, or Loney's testimonies at the RR1 hearing would reasonably lead the Union to believe the Respondent was notifying them it was terminating negotiations and unilaterally implementing the wage and benefit increases for 2021, 2022, and into the indeterminate future. Accordingly, I find that the Respondent did not provide the Union with notice and an opportunity to bargain over the June 1, 2021, and June 1, 2022 wage increases.

The Respondent also argues that the Union waived its right to bargain over the wage increases because the Union failed to request bargaining after being notified on May 7, 2021, of the upcoming increases. It is significant, according to the Respondent, that between May 7, 2021, and June 1, 2021, the Union made no requests to bargain. (R. Br. 26; RR3 Tr. 69—70.) Moreover, the Respondent contends that the Union cannot use its filing of an ULP as an excuse for failing to request bargaining over the increases. In support of its position, the Respondent points to the five-month lapse before the ULP related to the 2021 wage increase and the two-month delay before filing a charge about the 2022 wage increase. The Respondent argues that these delays "between wage changes taking effect and any request to bargain themselves constitute waivers of bargaining rights." (R. Br. 27.) *11 W. 51 Realty, LLC*, 371 NLRB No. 83, slip op. at *3 (2022) (quoting *Associated Milk*, 300 NLRB 561 (1990); *YHA, Inc. v. NLRB*, 2 F.3d 168 (6th Cir. 1993). I find the Respondent's arguments unpersuasive because, as discussed above, the evidence established that the Respondent did not give the Union "actual and unequivocal" notice of the wage increases until after their implementation.

The Respondent also argues that the Union is time barred from pursuing the present complaint pursuant to Section 10(b) of the Act. According to the Respondent, the 10(b) time began to run no later than March 4, 2021, when the Union was clearly on notice of the wage increases. The Respondent contends that the Union had unequivocal knowledge on that date of the Respondent's wage increases because when it moved to reopen the record in the decertification petition, the Union noted to the Board that the Respondent ""continued to grant yearly raises to Unit employees . . . consistent with the multi-employer offer made in May 2018,'" that this was an ""uninterrupted continuation[s]"" of Rieth-Riley's prior conduct, and that this conduct amounted to an ""ongoing yearly demonstration by the Respondent of the powerlessness of the Union."" (RR3, R. Br. 32.) Moreover, the Respondent reiterates that Rose's and Loney's testimonies at the RR1 hearing also put the Union on notice of the wage increases. However, the judge in the RR1 case rejected these same arguments. Rose testified in the RR1 hearing that the Union waived its right to bargain over the wage increases because it was notified of the change when the Respondent submitted a May

18 initial contract proposal which included the increase wages. The ALJ in RR1 noted, "The May 18 contract proposal was not notification of a planned wage increase to be implemented on July 23. It was, as Nystrom himself called it, a "first proposal to initiate negotiations" for a successor contract. . .Rieth-Riley was not privileged to unilaterally implement the 2018 wage increase based upon the Union's waiver of its right to bargain." (JD 03–22, P 46.) I see no reason to contradict the judge's well-reasoned conclusion on this point. Second, I have already found that Loney's testimony at the RR1 hearing did not constitute "actual and unequivocal" notice of the wage increases.

The Respondent's argument that the Union's March 4, 2021 action seems to also arise out of its insistence that the May 18 proposal was sufficient notice to the Union of the wage increases. As acknowledged by the Respondent, in the Union's motion to reopen the decertification petition, the Union points to the "multi-employer offer" made as part of the May 18 contract proposal. Again, this brings us back to the contract proposal that the RR1 judge concluded was not sufficient notice of its unilateral employment action, and I agree for reasons stated earlier in this decision. The Respondent pushes back against any argument the General Counsel makes that the Respondent could not implement the wage increase because the parties had not bargained to impasse regarding the overall contract because the complaint does not allege unlawful wage increase during overall bargaining. However, the complaint uses the conduct described in paragraphs 6, 7, and 9 to illustrate the Respondent's overall failure to bargain collectively and in good faith with the Charging Party, in violation of Section 8(a)(1) and (5) of the Act.

Last, the Respondent's argument that it was not required to bargain with the Union because it would have put it out of compliance with the Davis-Bacon Act is unpersuasive. The Union was requesting that the Respondent bargain over the effects of the increase which would have allowed the Respondent to remain in compliance. There is no evidence that the Union was demanding the Respondent not provide wage increases. Moreover, the Respondent gave wage and benefits increases to all employees, including those not covered by the Davis-Bacon Act. It is therefore obvious that the Respondent could have remained in compliance with the Davis-Bacon Act and met its obligation to negotiate over the effects or distribution of the wage and benefit increases with the Union. Even if the Respondent believed it was not obligated to bargain over the wage increases because it had to take the action to comply with the Davis-Bacon Act, it was still required to bargain over the effects of the wage increases. The Board has consistently held that employers must give unions notice and an opportunity to bargain over the effects on unit employees of the employer's employment actions regardless of whether it has to bargain over the actual act. *Tramont Manufacturing, LLC*, 369 NLRB No. 136, slip op. at 5 (2020).

Accordingly, I find that the Respondent violated the Act as alleged in the complaint.

C. Refusal to Bargain with and Recognize the Union

The General Counsel argues that the Respondent unlawfully refused to bargain with the Union and withdrew recognition when on June 20, 2022, the Respondent notified the Union it was refusing to meet and bargain with the Union until there was a final judicial decision on the RD's dismissal of the two certification petitions as discussed above. The General Counsel contends that the action was unlawful because (1) the Respondent cannot use a test-of-certification case or "technical refusal to bargain" as defenses; and (2) the Respondent withdrew recognition of the Union without any evidence that the Union had lost support. The Respondent denies that it withdrew recognition of the Union. According to the Respondent, under a "technical refusal to bargain" doctrine, "the employer must refuse to bargain with the union following a representation proceeding, thereby deliberately drawing the union's Section 8(a)(5) charge for refusal to bargain; the propriety of the Board's decision in the representation proceeding is then reviewed in the Section 8(a)(5) proceeding." (RR3 R. Br.40.) The Respondent insists that the "technical refusal to bargain" doctrine is the only way to get a judicial review and ruling on what it argues is the Board's wrongly decided affirmance of the RD's decision to dismiss the decertification petitions.[14]

I find the Respondent's argument unpersuasive. Under *Levitz Furniture Company of the Pacific*,[15] the Board held that, "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the bargaining unit employees." In the matter at hand, the Respondent

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14. *Rieth-Riley Construction Co.*, 371 NLRB 109 (2022).

15. 333 NLRB 717 (2001).

withdrew recognition of the Union on June 20, 2022, without any evidence that the Union had lost majority support of the bargaining unit. While a single employee had filed two decertification petitions, there is no evidence that the decertification petitions comprised a majority of the employees in the bargaining unit. According to the Respondent both the RD's decision and the Board's order affirming dismissal of the decertification petitions were in error. The Respondent therefore contends that it has been precluded from showing that there is actual evidence that the Union lost majority support. The Respondent's line of reasoning is that if the RD's and Board's actions were overturned and an election was held, the results of the election would show the Union had lost majority support, thereby justifying the Respondent's withdrawal of recognition and refusal to bargain. The Respondent argues for me to overturn the Board's order affirming the RD's decision to dismiss the petitions without an election. However, as I previously found I do not have the authority to overturn a Board decision or order. Equally important is the years of case law holding that the Board's order in a representation proceeding is not appealable because it is not a final order. See, e.g., *Associated General Contractors, Inc. v. NLRB*, 564 F.2d 271, 277, 277 fn. 6 (9th Cir. 1977) (no judicial review of Board order in representation proceeding against union certification even if the Board's action was in error); *AFL,* 308 U.S. at 410; *U.S. Electrical Motors*, 722 F.2d at 320.

Accordingly, I find that the Respondent has violated the Act as alleged in the complaint.

CONCLUSIONS OF LAW

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

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

3. By its failure and refusal to provide the necessary and relevant information requested by the Union since about May 25, 2022, the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) and (5) of the Act.

4. By its failure to afford the Union an opportunity to bargain over the Respondent granting a June 1, 2021 unilateral wage increase to unit employees, the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) and (5) of the Act.

5. By its failure to afford the Union an opportunity to bargain over the Respondent granting a June 1, 2022 unilateral wage increase to unit employees, the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) and (5) of the Act.

6. By its failure and refusal to bargain in good faith with the Union and withdraw recognition from the Union starting on June 20, 2022, the Respondent has engaged

in an unfair labor practice in violation of Section 8(a)(1) and (5) of the Act.

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

8. The Respondent has not violated the Act except as set forth above.

REMEDY

The Respondent will be ordered to cease and desist from failing and refusing to bargain collectively with the Charging Party by refusing to provide the requested information. Moreover, the Respondent will be ordered to furnish the Charging Party with the information requested as specified in paragraph 10 of the complaint. The Respondent will also be ordered to recognize and bargain in good faith with the Union until and/or unless the official certified results of a decertification election establish that the Union has lost majority support. Last, only upon request by the Charging Party, the Respondent will rescind the wage increases given to unit employees on about June 1, 2021, and June 1 2022.

The Respondent will also be ordered to post and communicate by electronic post to employees the attached Appendix and notice. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

16. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions,

ORDER

The Respondent, Rieth-Riley Construction Co., Inc., and its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the International Union of Operating Engineers, Local 324, AFL–CIO by failing and refusing to provide the Charging Party with information requested that is necessary and relevant for its ability to prepare for and bargain with the Respondent for a current collective bargaining agreement.

(b) Refusing to bargain collectively with the International Union of Operating Engineers, Local 324, AFL–CIO by unilaterally giving unit employees wage increases without affording the Union notice and an opportunity to bargain over the actions.

(c) Refusing to recognize and bargain collectively with the International Union of Operating Engineers, Local 324, AFL–CIO by unlawfully withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit.

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

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and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of the Board's Order, furnish the Charging Party with the information, as specified in paragraph 10 of the complaint, it has requested since about May 25, 2022.

(b) Upon request by the Union, rescind the wage increases give to Unit employees on about June 1, 2021, and June I, 2022.

(c) Bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit with respect to wages, fringe benefits, and other terms and conditions of employment.

(d) Within 14 days after service by the Region, post at its facilities in Goshen, Indiana copies of the attached notice marked "Appendix."[17] 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees

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17. 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."

by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2021.

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

Dated: Washington, D.C., August 23, 2023

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

> Choose representatives to bargain with us on your behalf
>
> Act together with other employees for your benefit and protection
>
> Choose not to engage in any of these protected activities.

We will not fail and refuse to provide the International Union of Operating Engineers, Local 324, AFL–CIO with requested information that is relevant and necessary to its ability to bargain for a new agreement with the Respondent.

We will not unilaterally implement wage increases without first giving the International Union of Operating Engineers, Local 324, AFL–CIO with advance notice and an opportunity to bargain over the action.

We will not unlawfully withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit.

We will not in any like or related manner restrain or coerce you in the exercise of your rights under Section 7 of the Act.

We will, to the extent we have not already done so, provide the International Union of Operating Engineers, Local 324, AFL–CIO with the information it requested as set forth below:

From May 1, 2021 to present, 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 including, but not limited to, all employees on whose behalf Respondent has previously paid employee benefit contributions to the Operating Engineers Local 324 Fringe Benefit Funds.

WE WILL Upon request by the Union, rescind the wage increases give to Unit employees on about June 1, 2021, and June I, 2022.

WE WILL recognize the Union as the exclusive collective-bargaining representative of the unit with respect to wages, fringe benefits, and other terms and conditions of employment and bargain collectively and in good faith with it.

RIETH-RILEY CONSTRUCTION CO., INC.DT, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-285321 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

[QR CODE GRAPHIC]

APPENDIX D — DECISION ON REVIEW AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED JUNE 15, 2022

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

Rieth-Riley Construction Co., Inc. *and* Rayalan A. Kent, Petitioner and Local 324, International Union of Operating Engineers (IUOE), AFL–CIO Union.
Cases 07–RD–257830 and 07–RD–264330

June 15, 2022

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, RING, WILCOX, AND PROUTY

Since the earliest days of the National Labor Relations Act, the National Labor Relations Board has protected employee free choice and the integrity of Board elections through two distinct aspects of its blocking-charge policy. First, the Board has given Regional Directors the discretion to hold a representation petition in abeyance (to "block" it) when a pending unfair labor practice charge alleges conduct that, if proven, would interfere with employee free choice. Second, the Board has authorized Regional Directors to issue a "merit-determination dismissal": to *dismiss* a representation petition, subject to reinstatement, when the Regional Director (on behalf of the General Counsel) has found merit in an unfair labor practice charge involving misconduct that would irrevocably taint the petition and any related election. In 2020, the Board issued the "Election Protection Rule,"[1] which addressed the first aspect of the blocking-charge policy and limited the circumstances in which Regional Directors could hold petitions in abeyance in the face of pending unfair labor practice charges.[2] But the Election Protection Rule did not address the second aspect of the blocking-charge policy: merit-determination dismissals. For the reasons explained below, we hold that merit-determination dismissals remain available under the Election Protection Rule, a point on which the Board is unanimous. In turn, we conclude, contrary to our dissenting colleagues, that the Regional Director properly dismissed the representation petitions at issue here.

I.

The Union has represented the Employer's asphalt plant, paving, and grading employees in Michigan since 1983. On May 29, 2019, after investigating and finding merit in an unfair labor practice charge filed by the Union,

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1. NLRB, Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed.Reg. 20156 (Apr. 1, 2020) (Election Protection Rule).

2. This aspect of the Election Protection Rule is not at issue in this case.

the Regional Director issued a complaint and notice of hearing in Case 07–CA–234085 (“the ULP case”). The complaint alleges that that the Employer unlawfully (1) increased its employees’ wages in July 2018, without bargaining with the Union; (2) insisted on a permissive subject of bargaining during negotiations over a successor collective-bargaining agreement in September 2018; (3) locked out employees in September 2018, in furtherance of its unlawful bargaining objective; and (4) began deducting money from unit employees’ paychecks for vacation and holiday funds in October 2018, again without bargaining with the Union. The complaint alleges that when combined, these acts constituted a bad-faith refusal to bargain with the Union, in violation of Section 8(a)(5) of the Act. Accordingly, the complaint seeks an affirmative bargaining order against the Employer.

Starting on or about July 31, 2019, the unit employees went on strike.[3] Meanwhile, litigation in the ULP case proceeded throughout late 2019, 2020, and 2021, as the administrative law judge continued to hold in-person and videoconference hearings during the Covid-19 pandemic and the parties litigated a variety of issues.

As the strike continued, and as unfair labor practice litigation moved forward, the Petitioner filed his first decertification petition with the Board on March 10, 2020, initiating Case 07–RD–257830, a representation proceeding. The Acting Regional Director, applying

3. The Union asserts that the strike was in response to the unremedied unfair labor practices alleged in Case 07–CA–234085.

the Board's then-current blocking-charge policy, held the petition in abeyance pending resolution of the charges in the ULP case; the Board denied review of this determination.[4] Although the Board issued its new Election Protection Rule on April 1, 2020, which revised the blocking-charge policy, the petition in Case 07–RD–257830 continued to be blocked under the old policy. The Election Protection Rule applied only to petitions filed after the Rule's effective date of July 31, 2020.[5]

In order to circumvent the prior blocking-determination, the Petitioner filed a second decertification petition, in Case 07–RD–264330, on August 7, 2020—about a week after the Election Protection Rule went into effect. This time, the Regional Director decided to process the second petition under the Election Protection Rule,[6]

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4. *Rieth-Riley Construction Co., Inc.*, Case 07–RD–257830 (June 8, 2020) (not reported in Board volume).

5. See *Arakelian Enterprises, Inc.*, Case 21–RD–223309 (Sept. 22, 2020) (not reported in Board volume).

6. Dissenting from the grant of review in this case, Chairman McFerran suggested that the Regional Director erred in processing the second petition under the Election Protection Rule. On review, we find it unnecessary to resolve this issue, because we conclude that under the Election Protection Rule, merit-determination dismissals remain available and that the Regional Director ultimately appropriately determined that such dismissal was warranted here.

We note that Acting Regional Director Dennis R. Boren held the first petition (07–RD–257830) in abeyance, and Regional Director Terry A. Morgan subsequently dismissed both the first and the second petitions (07–RD–257830 and 07–RD–264330).

which precluded her from holding the petition in abeyance before the certification stage of the proceedings.[7] The petition, therefore, proceeded to a mail ballot election.

However, because the Election Protection Rule was silent with respect to merit-determination dismissals, the Regional Director subsequently concluded that a merit-determination dismissal—a dismissal predicated on the meritorious unfair labor practice charge that led to the complaint that was being prosecuted—was still available with respect to both the first and the second petitions. Applying the factors set forth in *Master Slack Corp.*, 271 NLRB 78, 84 (1984),[8] the Regional Director found that the unfair labor practice violations alleged in the complaint, if proven, would have caused the employee disaffection underlying both decertification petitions. She also conducted an administrative investigation of the petitions and found that, according to multiple affidavits, the employees filed the decertification petitions to end

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7. See Secs. 103.20(b), (c), and (d) of the Board's Rules and Regulations, which state that for charges other than the ones specified in subsection 103.20(c) the petition will proceed through an election and the counting of ballots, with the certification of results held in abeyance pending final disposition of the charges. None of the charges at issue here are ones specified in 103.20(c).

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

the strike allegedly prompted by the allegations at issue in the ULP case. According to the Regional Director's administrative investigation, the strike was ongoing as of the preelection hearing in the case involving the second petition (Case 07–RD–264330), and the Union had apparently enjoyed majority support before the alleged unfair labor practices and the strike occurred. The Regional Director therefore dismissed both petitions, subject to reinstatement, because of the "causal nexus" between the alleged unfair labor practices and the petition itself.

The Petitioner and the Employer filed requests for review of the Regional Director's decision, which the Board granted on February 8, 2021. See 370 NLRB No. 85. In granting review, the Board observed that the case raised "substantial issues warranting review especially with respect to whether the Regional Director's decision to dismiss the petitions is consistent with Section 103.20 of the Board's Rules and Regulations"—i.e., with respect to the Election Protection Rule. Id. The Petitioner and the Employer subsequently filed briefs on review, and the Union filed a motion to reopen the record.[9] On January 21, 2022, Administrative Law Judge Charles J. Muhl issued a 64-page decision in Case 07–CA–234085, finding that the Employer committed some (but not all) of the unfair

9. Because our decision today affirms the Regional Director's dismissal of the relevant petitions, we deny the Union's motion to reopen the record. See *Manhattan Center Studios*, 357 NLRB 1677, 1679 (2011) (the Board will only grant a motion to reopen the record where the proffered evidence would have changed the result of the proceeding).

labor practice violations alleged in the complaint.[10] That decision is not before us today.

II.

We conclude that Section 103.20 of the Board's Rules and Regulations effectively preserved merit-determination dismissals, notwithstanding other changes made to the blocking-charge policy. The Regional Director's dismissal of the petitions here was not contrary to Section 103.20 and was consistent with preexisting, well-established practice concerning merit-determination dismissals.

A.

The "Board generally will dismiss a representation petition, subject to reinstatement, where there is a concurrent unfair labor practice complaint alleging conduct that, if proven, . . . would interfere with employee free choice in an election, and . . . is inherently inconsistent with the petition itself. The Board considers conduct that taints the showing of interest, precludes a question

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10. The administrative law judge found that the Employer violated Sec. 8(a)(5) and (1) of the Act by locking out unit members in support of a permissive subject of bargaining; and also by unilaterally granting employees a wage increase in 2018 and 2020, as well as unilaterally deducting money from employees' paychecks related to vacation fund contributions in 2018, without having reached a collective-bargaining agreement or a good-faith impasse in bargaining with the Union for a successor contract. The General Counsel, the Employer, and the Union filed exceptions, which are pending before the Board.

concerning representation, or taints an incumbent union's subsequent loss of majority support to be inconsistent with the petition."[11] This merit-determination dismissal practice has been regularly followed by the Board in published cases.[12]

For decades before adoption of the Election Protection Rule, the Casehandling Manual drew a distinction between two types of unfair labor practice charges: (1) those charges that, if proven, were inherently inconsistent with the petition (termed "Type II" charges) and (2) those charges pertaining to any allegation of conduct that, if proven, had a tendency to interfere with employee free choice ("Type I" charges).[13] If a party filed either type of charge, along with an offer of proof supporting its unfair labor practice allegations, the Regional Director had the discretion to pause processing of the related representation petition (i.e., to "block" the petition, holding it in abeyance) until the unfair labor practice charge was resolved.[14] A merit-determination dismissal, however,

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11. *Overnite Transportation Co.*, 333 NLRB 1392, 1392–1393 (2001) (citations omitted).

12. See, e.g., *Overnite Transportation Co.*, supra, at 1392–1393; *Linwood Care Center*, 365 NLRB No. 8 (2017); *Priority One Services*, 331 NLRB 1527 (2000); *Brannan Sand & Gravel*, 308 NLRB 922 (1992); *Big Three Industries, Inc.*, 201 NLRB 197 (1973).

13. See NLRB Casehandling Manual (Part Two) Representation Proceedings Secs. 11730.2, 11730.3 (1/2017).

14. See id. See also *Mark Burnett Productions*, 349 NLRB 706, 706–707 & fn. 3 (2007) (distinguishing between "Type I" and

was available only with respect to a Type II charge, i.e., a charge that if proven was inherently inconsistent with the petition.

This distinction was by careful design. While a Type I charge, if proven, would likely (but not always) result in an election being set aside,[15] Type II charges pertained to conduct that, if proven, would undisputedly taint any subsequent showing of employee disaffection and so would preclude any proper basis for conducting an election, necessitating dismissal of the petition.[16] As the Board has

"Type II" charges and denying review of a Regional Director's decision to hold the petition in abeyance pursuant to pending Type I charges).

15. See *Custom Trim Products*, 255 NLRB 787, 787 (1981) (when an unfair labor practice violation occurs during the "critical period" of an election, the election is set aside and a new election is directed unless it is "virtually impossible to conclude that the violation could have affected the results of an election").

16. See NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11730.3 (1/2017); *Hearst Corp.*, 281 NLRB 764, 764 (1986), enfd. mem. 837 F.2d 1088 (5th Cir. 1988) ("Where an employer engages in [conduct designed to undermine employee support for the union], the decertification petitions will be found to have been tainted by the employer's unfair labor practices and the latter, consequently, will be precluded from relying on the tainted petition as a basis for questioning the union's continued majority status and withdrawing recognition from that labor organization."); *Riviera Manor Nursing Home, Inc.*, 220 NLRB 124, 125 (1975) ("[I]t is the Board's established policy to dismiss pending representation petitions upon the issuance of a bargaining order."), enf. denied mem. 539 F.2d 714 (7th Cir. 1976); *Lee Lumber and Building Material Corp.*, 322 NLRB 175, 178

recently affirmed, the precedent requiring dismissal once such violations are proven remains good law,[17] and the Board's current Casehandling Manual continues to reflect procedures relating to merit-determination dismissals.[18]

Thus, merit-determination dismissals represent their own longstanding, distinct aspect of the Board's broader blocking-charge policy. They hinge on a determination by a Regional Director that an unfair labor practice charge has merit (instead of resting on the mere pendency of a charge). They are reserved for a narrow subset of particularly egregious charges (those that, if proven, require dismissal of the petition). And, as is fitting, they constitute a much stronger agency response to the charge

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(1996) (a general refusal to bargain, which generally results in an affirmative bargaining order, presumptively taints any subsequent petition), affd. in part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997); *Overnite Transportation Co.*, supra, 333 NLRB at 1397 (petition will be dismissed if there is a causal nexus between the unfair labor practice violations and the employee disaffection underlying the petition).

17. See *Wendt Corporation*, Case 03–RD–276476, 2021 WL 2657453 (June 25, 2021) (not reported in Board volumes).

18. See NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11733.1 (9/2020). The current version of Part Two of the Casehandling Manual does not explicitly distinguish between "Type I" and "Type II" charges, but Sec. 11733.1(a)—which outlines the types of charges warranting a merit-determination dismissal—describes the exact same types of charges formerly known as "Type II" charges. Compare NLRB Casehandling Manual (Part Two) Representation Proceedings Secs. 11730.3(a)-(c), 11733.2(a) (1/2017).

(termination of representation proceedings, subject to reinstatement, as opposed to holding the petition in abeyance).

B.

The Board's Election Protection Rule, codified at Section 103.20 of the Board's Rules and Regulations, reflects a revision to the Board's blocking-charge policy. Section 103.20(a) retains the requirement that parties file an offer of proof whenever they file an unfair labor practice charge accompanied by a blocking request. Section 103.20(c) outlines a narrow subset of charges that permit the Regional Director to impound the ballots at the close of the election if the relevant charges have not been dismissed or withdrawn. If a complaint issues within a 60-day period following the election, then the Regional Director should continue to impound the ballots; but, if no complaint issues within that timeframe, or the charges are dismissed or withdrawn, the Regional Director should open and count the ballots. Section 102.30(b) states that, for all other charges, "the ballots will be promptly opened and counted at the conclusion of the election." And finally, Section 103.20(d) clarifies that, for all charges described in paragraphs (b) and (c), the certification of results will be held in abeyance until "there is a final disposition of the charge and a determination of its effect, if any, on the election petition."

The Employer and the Petitioner argue that the Election Protection Rule broadly precludes merit-determination dismissals. They assert that Section

103.20(b) and (c) require the Regional Directors to process *all* petitions up until an election, even if the Regional Director has found merit to the type of charge that has historically resulted in merit-determination dismissals. (These are the types of charges now listed in Section 11733.1(a) of the Casehandling Manual, which were formally known as "Type II" charges.) We reject the position of the Employer and the Petitioner.

While Section 103.20 clearly modifies the Board's practices for holding petitions in abeyance, it does not speak to merit-determination dismissals, either explicitly or implicitly. The Board did not address merit-determination dismissals in the course of the rulemaking process that culminated in the Election Protection Rule. In its Notice of Proposed Rulemaking, rather, the Board proposed to "adopt the vote and impound procedure suggested by the General Counsel in response to the 2017 Request for Information," under which Regional Directors would "continue to process a representation petition and . . . conduct an election even when an unfair labor practice charge and blocking request have been filed," and "[i]f the charge has not been resolved prior to the election, the ballots will remain impounded until the Board makes a final determination regarding the charge."[19] Thus, the Board proposed to modify the point in the election process at which a petition could be held in abeyance due to a pending unfair labor practice charge. But the Board

19. See Notice of Proposed Rulemaking, Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 84 Fed.Reg. 39930, 39937 (Aug. 12, 2019).

did not mention, much less propose to eliminate, the well-established practice of merit-determination dismissals. In fact, the Board seemingly presumed that its proposed vote-and-impound procedure would occur *before* any merit determination had been made with respect to a pending charge. It explained that "[a]doption of a vote-and-impound protocol *while the region investigates a charge* would allow for balloting when the parties' respective arguments are fresh in the mind of unit employees."[20]

The final Election Protection Rule largely adopted this proposal, although it did change the timing for when petitions could be held in abeyance. The Board specified that, for most charges, the petition would be held in abeyance at the certification stage (as opposed to before the ballot count) and that impoundment would only be retained for a small subset of charges (those now outlined in Section 103.20(c) of the Board's Rules).[21] Nevertheless, neither the Board's final rule nor preamble to the rule mentioned merit-determination dismissals, much less overruled published precedent relating to such

20. Id. at 39937–39938 (emphasis added).

21. See the Election Protection Rule, 85 Fed.Reg. at 18378–18780 (explaining that "our final-rule amendment retains the proposed vote-and-impound procedure for only a limited category of cases, but *certification will in any event be postponed for some period of time* if a blocking charge is still pending when an election concludes;" and that "we agree with commenters who state that it would be preferable for ballots to be counted immediately after the conclusion of the election, but *holding the certification of the election results in abeyance* pending the resolution of the unfair labor practice charge") (emphasis added).

dismissals.[22] Rather, the Rule simply prohibited Regional Directors from holding a petition in abeyance before an election based on the mere *pendency* of a related unfair labor practice charge, which may or may not have merit. As we have explained, a merit-determination dismissal is something quite different.

Contrary to the assertions of the Employer and the Petitioner, a general rule that elections should proceed until the certification stage—despite the filing of a charge of undetermined merit—is not incompatible with the pre-existing practice of merit-determination dismissals, which is based on the Regional Director's finding that the charge is meritorious. Indeed, the Board's current Casehandling Manual, which was updated in light of the Election Protection Rule, recognizes as much. It retains prior provisions relating to merit-determination dismissals, while adding the Board's new mandate to refrain from holding petitions in abeyance until certification.

The language of Section 103.20 does not compel a different interpretation. Section 103.20(b) and (c) state that the ballots should be opened and counted (or alternatively, impounded) at the conclusion of the election, should an election occur. In contrast, those provisions do not say that a representation petition *must always* proceed to an election, even if the Regional Director has made a determination that an unfair labor practice charge (of a certain type) has merit. If the Board had intended to eliminate its longstanding practice of merit-

22. See fn. 11, supra.

determination dismissals—a unique aspect of the Board's broader blocking-charge policy addressing a distinct situation—it surely would have said so. But it did not, not in the proposed rule or its preamble, and not in the final rule or its preamble. Accordingly, we have no difficulty in concluding that merit-determination dismissals remain available under the Election Protection Rule, just as they were before. Our dissenting colleagues do not disagree with this conclusion.

C.

Having determined that merit-determination dismissals remain available under the Election Protection Rule, we conclude that a merit-determination dismissal was warranted in the present dispute for two independent reasons. First, as the Regional Director found, there was a "causal nexus" between the unfair labor practices, as alleged, and the employee disaffection underlying the decertification petition. Second, regardless of any "causal nexus," the General Counsel sought an affirmative bargaining order in the complaint, which precludes finding that a question of representation was presented by the petition.

1.

A merit-determination dismissal was appropriate under the "causal nexus" rationale advanced by the Regional Director, applying the *Master Slack* decision.[23]

23. See Sec. 11733.1(a)(3) of the Board's Casehandling Manual ("If the Regional Director finds merit to an unfair

Here, the complaint alleged "hallmark violations" of the Act, including unilateral changes to bread-and-butter subjects of bargaining, the unlawful lockout of unit employees with its attendant loss of work and pay, and a broader bad-faith refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. The Regional Director specifically found here that the Employer's conduct affected the entire bargaining unit.[24] The Board and the courts have regularly found that similar conduct, under similar circumstances, requires dismissal of a decertification petition under *Master Slack*.[25]

labor practice charge . . . and there is specific proof of a causal relationship between the unfair labor practice allegations and ensuing events indicating that the alleged unfair labor practices caused a subsequent expression of employee disaffection with an incumbent union, then the Regional Director should dismiss a petition that was filed based upon that disaffection.").

24. As the Regional Director recognized, key to finding *Master Slack* causal nexus is whether the unlawful conduct at issue had—as here—a pervasive effect on the bargaining unit. See *Veritas Health Services v. NLRB*, 895 F.3d 69, 83 (D.C. Cir. 2018); *Champion Enterprises*, 350 NLRB 788, 792 fn. 19) (2007) (dissemination of unlawful conduct throughout the bargaining unit).

25. Thus, the District of Columbia Circuit in applying the *Master Slack* analysis "has agreed with the Board that 'the [employer's] unilateral implementation of changes in working conditions has the tendency to undermine confidence in the employees' chosen collective-bargaining agent.'" *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640, 650 (D.C. Cir. 2013), quoting *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000). Such unlawful unilateral conduct has a particularly long-lasting effect under *Master Slack* when it involves, as here, employees' bread-and-butter monetary issues

Our dissenting colleagues make no argument that the Regional Director's *Master Slack* analysis is substantively faulty. Instead, they insist that the Regional Director was required, under *Saint Gobain Abrasives*, 342 NLRB 434 (2004), to hold a hearing before dismissing the petition subject to reinstatement. They expansively interpret *Saint Gobain* to require a hearing in every single *Master Slack* representation case. We reject this interpretation, which is contradicted by the plain language of *Saint Gobain*, the facts confronting the Board there, and the decision's discussion of precedent, which it preserved in relevant part.

In *Saint Gobain*, the Regional Director dismissed a decertification petition after finding a causal nexus between employee disaffection and the alleged unfair labor practice. The allegation there involved only "a single unilateral change on a single subject": the employees'

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like increased paycheck deductions, which reasonably leads employees to conclude that the Union cannot help or protect them, and that the employer may confer or withdraw economic benefits without regard to the presence of the Union. See, e.g., *Denton County Electric Cooperative, Inc. d/b/a Coserv Electric*, 366 NLRB No. 103, slip op. at 3 (2018) ("[E]ach time the employees received a paycheck [demonstrating the unilateral changes] they were reminded of the Union's ineffectiveness), rev. denied in relevant part 962 F.3d 161, 167-171 (5th Cir. 2020); *Goya Foods of Florida*, 347 NLRB 1118, 1122 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008); *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001). The threat to job security posed by the unlawful lockout also has a long-lasting effect on employees under the *Master Slack* analysis. See *Tenneco Automotive, Inc. v. NLRB*, supra, 716 F.3d at 650 (threat of job loss is a hallmark violation).

health care plan. 342 NLRB at 434. The *Saint Gobain* Board explained that "there are significant factual issues as to the impact of that change."[26] "In such circumstances," the Board clarified, "it [was] not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection." Id.

Here, however, taking the complaint allegations as true, there is no factual question concerning the impact of the Employer's multiple alleged acts of unlawful misconduct.[27] The alleged lockout affected all unit employees, and, thus, there is no question about the widespread impact of the lockout, including lost work, lost wages, and the concomitant threat to job security throughout the bargaining unit. The Employer's unilateral

26. The Board in *Saint Gobain* observed that it did not know "how many employees incurred an increase in the cost of health care; how much was the increase; how many employees enrolled in different plans as a result of the alleged unilateral change; how many employees switched care givers as a result of the change; and how many employees expressed dissatisfaction with the Union prior to the change." Id. The impact of the unilateral change in health care benefits on employee dissatisfaction was critical in *Saint Gobain* because that was the only allegation of unlawful conduct.

27. Of course, for purposes of the analysis, we must presume the allegations true. A *Saint Gobain* hearing cannot resolve, and is not intended to resolve, whether the conduct alleged in the unfair labor practice actually occurred, as "unfair labor practice allegations are not properly litigable in a representation proceeding." *Town and Country*, 194 NLRB 1135, 1136 (1972); *Warren, Nathan and Sons, Inc.*, 119 NLRB 292, 294 (1957).

changes in wages and in deducting money from unit employees' paychecks for a vacation fund was also widely felt by the entire bargaining unit. Indeed, the Regional Director's finding of a causal nexus was specifically predicated on the fact that that the alleged unlawful conduct was "not discrete or isolated but instead affected the entire unit." And that is precisely why the Regional Director found that a *Saint Gobain* hearing was not necessary.[28] Although the dissent suggests that a hearing must be held to elicit evidence about whether employees were disaffected with the union prior to the Employer's alleged unfair labor practices, this additional evidence would not, in our view, undercut the Regional Director's conclusion that the alleged unfair labor practices, if proven, would require dismissal under the Board's *Master Slack* precedent.[29] Significantly, our dissenting colleagues

28. The Regional Director explained: "Inasmuch as the Employer's unfair labor practices affected the entire unit and had a detrimental and long-lasting effect on employees' relationship with the Union, I find that no evidentiary hearing is necessary to establish the causal connection."

29. See *Overnite Transportation*, 333 NLRB 1392 (2001) (Board dismissed representation petition based on a widespread pattern of unfair labor practices, without any discussion of whether the union enjoyed majority support before the unfair labor practices were committed). Crucially, *Master Slack* is an objective test: the Board does not consider testimony or evidence regarding employees' subjective reasons for supporting the petition. *See Denton County Electric Cooperative, Inc. d/b/a Coserv Electric*, 366 NLRB No. 103, slip op. at 3 fn. 10. Therefore, in finding a causal nexus here, we do not rely on the Regional Director's "administrative investigation" of the petitions to the extent that it considered such evidence.

make no effort to explain how this evidence would tip the scales in terms of the Regional Director's *Master Slack* analysis, much less to distinguish the present dispute from prior cases in which similar conduct, under similar circumstances, has been found to warrant dismissal under *Master Slack*.[30] Instead, they claim that it is "unnecessary to pass" on such arguments simply because a hearing as not been held with respect to one minor factor, even though the vast majority of facts relevant to the *Master Slack* analysis are alleged in the underlying unfair labor practice proceedings and, therefore, must be accepted as true.

The crux of our dissenting colleagues' argument is that a causal nexus determination can never be made as a matter of law, even in situations where the facts as alleged in the complaint are substantially similar (or even identical) to facts that have required dismissal under *Master Slack* in prior Board cases; rather, they contend that, in each case, every individual *Master Slack* factor must be litigated at a hearing before a causal nexus dismissal is warranted. However, this proposition is wholly inconsistent with *Saint Gobain*, its discussion of Board precedent, and the very nature of a merit-determination dismissal. The need for a hearing in *Saint Gobain* was specifically tied to the Board's inability to assess the impact of the "single unilateral change on a single subject" at issue in in that case. The purpose of a *Saint Gobain* hearing is to obtain the information necessary to determine whether the *alleged* unfair labor

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30. See fn. 25, supra.

practices, if proven, would result in a finding of taint under *Master Slack*; it is not to litigate the merits of the alleged unfair labor practices themselves. Such a hearing is only necessary where, to quote *Saint Gobain* itself, there are "significant factual issues as to the impact of" the alleged conduct. Id. The Board has accordingly never held, in the 18 years that have elapsed since the *Saint Gobain* decision, that a hearing is required in *every* representation case presenting the *Master Slack* issue, or even hinted as much; instead, the Board has consistently signaled that *Saint Gobain* does not necessarily require a hearing in every case.[31]

Moreover, the Board's decision in *Saint Gobain* explicitly upheld the Board's ability to make causal nexus determinations as a matter of law, where appropriate. In *Saint Gobain*, the Board pointedly relied on *Overnite Transportation*, 333 NLRB at 1392, to support the proposition that the Board may properly apply *Master Slack* in a representation case to find a decertification petition tainted without a hearing. Id. at 434 ("[T]he Board has applied *Master Slack* in the context of a representation

31. See *D.O. Productions, LLC*, 370 NLRB No. 139 (2021) (the Board, including the two dissenters here, found it unnecessary to pass on the argument that the decertification petition could not be dismissed under *Master Slack* without a *Saint Gobain* hearing); *CPL (Linwood) LLC d/b/a Linwood Care Center*, 365 NLRB No. 24 (2017) ("A regional director *may* be required to hold a *Saint Gobain* hearing when dismissing a petition based on charges that raise an issue of a causal relationship between the unfair labor practices and an incumbent union's subsequent loss of majority support.") (Emphasis added.)

case, so as to dismiss a decertification petition without a hearing"), citing *Overnite Transportation*, supra, and *Priority One Services,* 331 NLRB 1527 (2000). While the Board overruled *Priority One Services* to the extent that it was "contrary" to *Saint Gobain* (Id. at 434 fn. 4),[32] it did not overrule *Overnite Transportation*, to which it had just cited (Id. at 434 fn. 3) for the proposition that the Board has applied *Master Slack* to dismiss a decertification petition without a hearing. And, although the Board stated in *Saint Gobain* that "a factual determination of causal nexus should not be made without an evidentiary hearing,"[33] this language cannot be read out of context and as absolute—after all, the Board had just upheld its prior decision in *Overnite Transportation*, in which the Board found that certain unfair labor practices objectively tainted a petition as a matter of law.[34] Thus, *Overnite Transportation*,

32. The Board in *Saint Gobain* overruled *Priority One Services*, 331 NLRB 1527 (200), faulting it for relying on a "conclusionary phrase" that the alleged unilateral changes had the "inherent tendency" to undercut the union's support. In contrast, the causal nexus finding here is grounded in well-established *Master Slack* precedent involving similar conduct under similar circumstances, not inherent tendencies.

33. Id. at 434.

34. In *Overnite Transportation*, a petitioner filed a representation petition some years after the Board had found several violations in an unfair labor practice case. The Board did not hold a separate hearing to adduce facts specific to the "causal nexus" issues, even though that issue was not (and could not have been) litigated in the prior unfair labor practice case. Instead, the Board considered the unfair labor practices as proven in the underlying proceeding and then determined that such conduct

and *Saint Gobain*'s approving citation to it, makes clear that, under appropriate circumstances, the "causal nexus" between certain conduct and a representation petition can be established as a matter of law, with no hearing necessary.

In sum, the Regional Director correctly concluded (and our dissenting colleagues do not meaningfully dispute) that the widespread misconduct alleged in the complaint, if proven, would require dismissal as a matter of law, and the merits of the underlying unfair labor practice case (including the facts as alleged in the unfair labor practice complaint) are not properly litigable in a representation proceeding. In this regard, causal nexus merit-determination dismissals are no different than any other merit-determination dismissal: the Board accepts the complaint allegations as true and then determines whether the allegations, if proven, would require setting aside the election under Board law.[35] That is the case here.

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would objectively taint employee sentiment towards the union. See 333 NLRB at 1394–1397. Here, of course, the Board *cannot* hold a hearing as to merits of the underlying unfair labor practices, as they are not properly litigable in a representation proceeding. But the Board *can* determine whether these allegations, if proven, would require dismissal under *Master Slack* by accepting the complaint allegations as true and applying the *Master Slack* factors to the facts as alleged.

35. It is incorrect to say that there is "little practical difference" between holding a petition in abeyance under the Board's prior blocking-charge policies and making a causal-nexus merit-determination dismissal. We have already explained why merit-determination dismissals are distinguishable from other

Accordingly, the Regional Director's merit-determination dismissal un-der *Master Slack* was fully warranted in this case.[36]

2.

Even absent a "causal nexus" between the unfair labor practices alleged in the Complaint and the petition, a merit-determination dismissal was warranted here because the General Counsel sought an affirmative bargaining order in the Complaint.[37] See *Big Three Industries*, supra;

applications of the blocking-charge policy: they are utilized only where there is a high probability that the representation petition at issue is tainted and no free and fair election (including a rerun election) can occur.

36. Our dissenting colleagues correctly observe that in unfair labor practice cases such as *Denton County Electric Cooperative* and *Penn Tank Lines*, supra, a hearing occurred before the petitions were dismissed. But those cases do not speak to the need for a hearing in this representation case. We cite them to demonstrate that similar conduct to the conduct alleged here, once proven, requires dismissal under *Master Slack.*

37. The dissent contends that an affirmative bargaining order may not be an appropriate remedy for the violations alleged in the complaint. We observe, however, that the complaint alleged that the Employer insisted on a permissive subject of bargaining, which constitutes a refusal to bargain in good faith. See *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) ("[G]ood faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.").

Brannan Sand & Gravel, supra; Section 11733.1(a)(2) of the Board's Casehandling Manual ("If the Regional Director finds merit to charges involving violations of Section 8(a)(1), (2), (3), (5) or 8(b)(3), and the nature of the alleged violations, if proven, would condition or preclude the existence of a question concerning representation, the petition should be dismissed with a dismissal letter setting forth the specific connections between the alleged unfair labor practice allegations and the petition, subject to a request for reinstatement by the petitioner after final disposition of the charge.").

We review the propriety of the dismissal at the time it was made. That the administrative law judge ultimately did not include an affirmative bargaining order in his decision is immaterial. We reject any suggestion by the dissent that we should take the judge's decision—which is not before us today—into account, for the purpose of reinstating the petition. Under the Casehandling Manual, reinstatement is appropriate "only if the allegations in the unfair labor practice case, which caused the petition to be dismissed, are ultimately found to be without merit."[38] That is not the case here.

Furthermore, we disagree with our dissenting colleagues that the "lengthy delay in the processing of Case 07–CA–234085"[39] warrants an exception to the Board's

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38. See Sec. 11733.1(b).

39. Although the dissent characterizes the progress in Case 07–CA–234085 as "glacial," there is no indication that any extraordinary or undue delay occurred. Rather, the parties

general practice of merit-determination dismissals where the General Counsel seeks an affirmative bargaining order. No such "exception" has been established in Board law. Although *Big Three Industries*, supra, acknowledges that "unusual and special situations" may permit processing a representation petition even where the General Counsel is seeking an affirmative bargaining order, lengthy litigation is not one of them. Indeed, *Big Three Industries* explicitly states that a representation petition should not be processed while the Board is litigating a refusal-to-bargain allegation, even though it might cause delay.[40]

The Board's willingness to accept this delay is rooted in longstanding principles. It is well established under Board law that an unlawful refusal to bargain is so extraordinarily damaging to employee support for a union that it taints any subsequent petition (or withdrawal

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engaged in a constant flurry of litigation (including hearings) over numerous side issues, such as cross-petitions to revoke various subpoenas duces tecum, as well as the Employer's motions to depose a particular individual and consolidate several unfair labor practice cases; the General Counsel amended the Complaint to include additional allegations, which then had to be litigated; and the case was one of considerable breadth and complexity, as evidenced by the administrative law judge's lengthy decision.

40. See 201 NLRB at 197 ("The Board recognizes that this view postpones the employees' opportunity to decertify the Union herein but believes that the orderly procedure of collective bargaining under the Act requires that the employees be bound by their choice of representatives during the period of ongoing negotiation *as well as the period of litigation of the bona fides of an employer's bargaining efforts*.") (Emphasis added.)

of recognition) until a reasonable period of good-faith bargaining has occurred—the mere passage of time does not serve to dissipate the taint.[41] Any election sought prematurely cannot be said to represent employees' genuine and uncoerced desires—in this regard, our dissenting colleagues' repeated references to the effect of delay on the employees (who may not even genuinely desire an election in the first place) seem somewhat misplaced. To hold a representation election simply because there has been too much "delay" in determining whether the employer has met its bargaining obligations—even though the petition itself may be a direct result of the employer's unlawful conduct—does not advance any purpose of the Act.

Finally, we disagree with our dissenting colleagues that the petitions should be reinstated, so that the results of the earlier mail ballot election can be held in abeyance. As discussed above, the Board's procedures do not provide for reinstatement unless and until the pending unfair labor practices have been found to be without merit. That has not occurred here.[42]

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41. See *Lee Lumber and Building Material Corp.*, supra, at 178.

42. Nor do we agree with the dissent's characterization of the Regional Director's merit-determination dismissal as a "remarkable about-face" with respect to the propriety of an election. Prior to the issuance of the Election Protection Rule, the first petition in this dispute had been (correctly) held in abeyance under the Board's prior blocking-charge policy. The Regional Director had previously determined that an election was *not* warranted in this dispute. The second petition was filed under

ORDER

The Regional Director's dismissal of the petitions, subject to reinstatement, is affirmed.

Dated, Washington, D.C. June 15, 2022

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

the Election Protection Rule, and, because the plain language of the Rule precluded the Regional Director from holding the petition in abeyance, she had to continue processing the petition, while investigating whether a merit-determination dismissal was appropriate. Given the recent change in Board law and the need for a "causal nexus" analysis, it is unsurprising that the petition proceeded through a mail-ballot election (but not through the ballot count) while this investigation occurred. At all points, however, the Regional Director followed extant law, first by processing the petition under the Election Protection Rule and then by dismissing it subject to reinstatement.

Members Kaplan and Ring, dissenting.

The employees in this unit have been seeking an election since March 2020 but have faced obstacles at every turn. Their first petition was blocked under the then-extant blocking-charge policy. After the blocking-charge policy was revised by the Board's Election Protection Rule, a second petition was processed by the Acting Regional Director and a mail-ballot election was held in the fall of 2020.[1] In a remarkable about-face, the Regional Director cancelled the count mere hours before it was to take place, impounded the ballots, and dismissed both petitions based on a pending unfair labor practice complaint issued in 2019, long before either petition was filed. The majority affirms this about-face in today's decision. Worse, the result of their decision is that the ballots cast in 2020 will be discarded and that election will be nullified regardless of how the unfair labor practice case turns out—even if the complaint on which they rely today is ultimately dismissed. Meanwhile, the employees are prevented from having *any* election in the future until that case is resolved, no matter how long it takes. Our colleagues in the majority frequently stress the importance of providing full protection of employees' Section 7 rights. After reading today's decision, however, *these* employees will surely wonder why *their* Section 7 right freely to select, reject, or change their bargaining representative has been given so little weight.

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1. See "Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships," 85 Fed.Reg. 18366 (Apr. 1, 2020) (Election Protection Rule).

Our colleagues invoke a regional director's authority to issue a "merit-determination dismissal" to justify their actions. We agree with the majority that regional directors retain the authority to dismiss an election petition, subject to reinstatement, in appropriate circumstances, at least where, as here, the regional director has found merit to unfair labor practice charges and issued a complaint before the petition was filed. But those appropriate circumstances are not present in this case. The majority finds a causal nexus between the alleged unfair labor practices and employee disaffection, but no valid causal nexus can be found because there has been no hearing on that issue, as our precedent requires. The majority also cites the fact that the complaint seeks an affirmative bargaining order, but the delay in this case has been far too extensive to permit the petitions to be dismissed on that basis.

Dismissal of the second petition is especially unjustified because an election has already been held, with the ballots currently impounded. The Board should, at a minimum, reinstate that petition and hold it in abeyance, with the ballots remaining impounded, until the unfair labor practice case is resolved. There is no valid justification for the majority's position that those ballots must be discarded now, regardless of how the unfair labor practice case is ultimately resolved.

FACTS

The paving and grading employees at the Employer's asphalt plant have been represented by Operating Engineers Local 324 (the Union) since 1993 under a series of multiemployer collective-bargaining agreements between the Union and Michigan Infrastructure and Transportation Association, Inc. (MITA). After the 2013–2018 agreement expired, the Union filed unfair labor practice charges challenging some of the Employer's post-contract actions. On December 28, 2018, the Regional Director issued a complaint in Case 07–CB–226531, alleging that the Union violated the Act by notifying certain employer-members of MITA that it would not negotiate a successor agreement if MITA was their bargaining representative.

On May 29, 2019, the Regional Director issued a complaint in Case 07–CA–234085, alleging that the Employer unlawfully locked out its unit employees for three weeks in furtherance of the allegedly unlawful bargaining objective of requiring the Union to engage in multiemployer bargaining, a permissive subject of bargaining, and engaged in unilateral actions such as granting wage increases and making improper deductions from unit employees' paychecks. That complaint, which seeks an affirmative bargaining order as part of the remedy for the alleged violations, was subsequently consolidated with Case 07–CB–226531. On July 31, 2019, the unit employees went on strike.

The hearing in Cases 07–CA–234085 et al. (hereafter Case 07–CA–234085) opened on October 21, 2019. The Petitioner filed his first decertification petition in Case 07–RD–257830 on March 10, 2020. As noted above, that petition was held in abeyance based on the Board's then-effective blocking-charge policy.[2] After that petition was filed, the Board substantially modified its blocking-charge policy in its Election Protection Rule, which became effective on July 31, 2020. On August 7, 2020, the

Petitioner filed a second decertification petition in Case 07–RD–264330. At that time, many of the unit employees were still on strike, and the hearing in Case 07–CA–234085 was still underway and far from being completed. Applying the Election Protection Rule, the Acting Regional Director found that the petition raised a question concerning representation of the unit employees and directed a mail-ballot election. The ballots were mailed on October 13, 2020, and were due in the Regional Office by November 2, 2020.

Unit employees voted in this election in good faith. Nevertheless, on November 9, 2020, the very day scheduled for a virtual ballot count, the Regional Director administratively dismissed the petitions, subject to reinstatement upon the Petitioner's application after the final disposition of the complaint in Case 07–CA–234085 and impounded the ballots. Reversing the region's prior determination, the Regional Director found that a question concerning representation could not be appropriately raised at that time. In support, she cited the complaint in Case 07–CA–234085, which, of course, had been pending long before the prior direction of election. Applying *Master*

2. See *Reith-Riley Construction Co.,* Case 07–RD–257830, 2020 WL 3065369 (June 8, 2020).

Slack Corp., 271 NLRB 78 (1984),[3] the Regional Director concluded that there was a causal nexus between the alleged unfair labor practices and employee disaffection without first holding the causal-nexus hearing prescribed by *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004). Instead, the Regional Director relied on ex parte evidence gathered through an administrative investigation of the petition and on the alleged conduct's purported inherent tendency to cause employee disaffection.

Thereafter, the Employer and the Petitioner each timely filed requests for review. No party requested review of the Acting Regional Director's application of the Election Protection Rule to the second petition. On February 8, 2021, the Board granted the requests for review because they raised substantial issues warranting review, particularly regarding whether the merit-determination dismissals were consistent with the Election Protection Rule. 370 NLRB No. 85 (2021). Meanwhile, the hearing in Case 07–CA–234085 closed in the summer of 2021. On January 21, 2022, Administrative Law Judge Charles J. Muhl issued a decision in the consolidated case recommending that the allegations

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3. Under the *Master Slack* standard for determining whether an employer's misconduct had an effect on unit employees' disaffection from the union, the Board considers: (1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. Id. at 84.

in Case 07–CB–226531 be dismissed, that violations be found as to the lockout and some of the unilateral changes, but that the strike was not an unfair labor practice strike.[4] The judge recommended a make-whole remedy for the unlawful lockout and a limited bargaining order for the unlawful unilateral changes. The judge did not include an affirmative bargaining order provision in his recommended order. The parties' exceptions to the judge's decision are now pending before the Board.

The majority affirms the Regional Director's dismissal of the petitions. They conclude that the Election Protection Rule modified the Board's blocking-charge policy but did not affect merit-determination dismissals. Our colleagues then conclude that dismissal is warranted here, both on the Regional Director's causal-nexus rationale and on the separate basis that the complaint seeks an affirmative bargaining order.

DISCUSSION

We agree with our colleagues that merit-determination dismissals were not eliminated by the Election Protection Rule. Even so, "the Board is required to balance the statutory goal of promoting labor relations stability against its statutory responsibility to give effect to employees' wishes concerning representation." *Silvan Industries, a Division of SPVG*, 367 NLRB No. 28, slip op. at 3 (2018). For the reasons fully explained in the

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4. *Rieth-Riley Construction Co.*, Case 07–CA–234085, 2022 WL 204088 (Jan. 21, 2022).

Election Protection Rule, excessive delay in conducting elections based on unproven unfair labor practice allegations fails to strike the proper balance between these competing considerations.[5] Accordingly, merit-determination dismissals must be limited to situations in which employees' Section 7 right to choose their own representative is not unduly delayed. The majority fails to properly apply that basic principle here.[6]

First, we agree that merit-determination dismissals may be warranted where a causal nexus between alleged unfair labor practices and employee disaffection is properly established. But an important safeguard in our precedent requires that before dismissing a petition based on an alleged causal nexus, there must be a "causal nexus" hearing as prescribed by *Saint Gobain*, above. As the Board there explained, "it is not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the [alleged unfair labor practice] and the disaffection. To so speculate is to deny employees their fundamental Section 7 rights. Surely, a hearing and findings are prerequisites to such a denial." 342 NLRB at 434.

While *Saint Gobain* involved a single unilateral change, the Board's holding is not limited to that specific scenario. To the contrary, the Board there specifically

5. See 85 Fed. Reg. 18377–18379.

6. The majority properly disclaims reliance on the Regional Director's administrative investigation of the petitions to the extent that it considered testimony or evidence regarding employees' subjective reasons for supporting the petition.

rejected the notion that an unfair labor practice's "inherent tendency" to undercut the union's support could substitute for an evidentiary inquiry into the matter. Id. at 434 fn. 4. Moreover, the *Saint Gobain* Board specifically contrasted unfair labor practice cases, where the General Counsel establishes a causal nexus at the hearing, from "a finding of causal nexus, *without a hearing* [in a representation case]. There is no reasoned basis for a lack of hearing in this situation." Id. at 434 (emphasis in original).[7] Insofar

7. Accordingly, *Denton County Electric Cooperative, Inc. d/b/a CoServ Electric*, 366 NLRB No. 103 (2018), enfd. in relevant part 962 F.3d 161 (5th Cir. 2020), *Goya Foods of Florida*, 347 NLRB 1118 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008), and *Penn Tank Lines, Inc.*, 336 NLRB 1066 (2001), cited by the majority, are readily distinguishable. In those cases, like the unfair labor practice cases mentioned in *Saint Gobain,* the General Counsel established, *at an unfair labor practice hearing*, that there were unfair labor practices and that there was a causal nexus between that unlawful conduct and the employee disaffection. In contrast, the instant case, like *Saint Gobain*, involves a finding of causal nexus between alleged unlawful conduct and employee disaffection *without a hearing.* In view of this difference, we find it unnecessary to pass on the majority's speculation that the effect of the alleged conduct in Case 07–CA–234085 on unit employees would be similar to that of the unfair labor practices found in *Denton County*, *Goya Foods of Florida*, and *Penn Tank Lines*, under similar circumstances. In any event, the focus of the *Master Slack* analysis is not on whether the alleged misconduct is similar to unfair labor practices that were found to have caused employee disaffection in another case. Rather, that analysis requires an examination of specific facts in light of all four *Master Slack* factors, including how much time elapsed between the unfair labor practice or practices and the employees' expression of disaffection with the union. This inquiry is especially critical in light of the 16- to 19-month gap between the alleged unfair labor practices

as any unpublished decision cited by the Regional Director does find a causal nexus without a hearing, those decisions are contrary to the holding of *Saint Gobain* itself and in any event not precedential.

Our colleagues disagree with this interpretation of *Saint Gobain,* but their analysis is unpersuasive. Noting that the case involved a single unilateral change on a single subject, the majority reads *Saint Gobain* to require a hearing only "in such circumstances." But the *Saint Gobain* Board stated its holding more broadly: "The Regional Director's finding of causal nexus was made without a hearing. . . . We conclude that such a factual determination of causal nexus should not be made without an evidentiary hearing." 342 NLRB at 434. As noted above, *Saint Gobain* also contrasted cases where petitions had been dismissed after a hearing in an unfair labor practice case, where the procedure "was proper," with "the instant case[, which] involves a finding of causal nexus, without a hearing. There is no reasoned basis for a lack of hearing in this situation." Id. The majority fails to grapple with these portions of the Board's decision in *Saint Gobain.*

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and the filing of the first petition. See *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640, 649 (D.C. Cir. 2013) (stating that *Master Slack*'s "temporal factor typically is counted as weighty only when it involves a matter of days or weeks"); see, e.g., *Champion Home Builders Co.*, 350 NLRB 788, 791–792 (2007) (finding unfair labor practices too remote in time to have caused disaffection where they were committed 5 to 6 months before the employees rejected union representation); *Garden Ridge Management*, 347 NLRB 131, 134 (2006) (5-month gap weighed against finding that unfair labor practices caused disaffection).

Nor is there any merit to our colleagues' suggestion that there are no valid factual issues to be resolved at a *Saint Gobain* hearing. As the majority notes, the *Saint Gobain* Board identified several factors as relevant to the causal nexus inquiry in that case.[8] The majority finds that several of those issues are resolved by the allegations in the complaint, which our colleagues accept as true for this purpose. We need not pass on that analysis because at least one issue identified in *Saint Gobain* cannot be so resolved: "how many employees expressed dissatisfaction with the Union prior to the [alleged unfair labor practice]." Even assuming that the causal nexus inquiry in this case is properly limited to the issues identified by the Board in *Saint Gobain,* our colleagues fail to justify their view that this issue may properly be resolved without a hearing.

The majority's contention that precedent supports their narrow reading of *Saint Gobain* fares no better. *Overnite Transportation Co.*, 333 NLRB 1392 (2001), cited by the majority in this regard, is not to the contrary. There, the Board dismissed a decertification petition, finding that the petition was tainted by the employer's unfair labor practices found by the Board and enforced by the United States Court of Appeals for the Fourth Circuit in a prior unfair labor practice case. Indeed, the Board explicitly relied on the Board's analysis in

8. "[T]hose factors would include, at a minimum, such issues as: how many employees incurred an increase in the cost of health care; how much was the increase; how many employees enrolled in different plans as a result of the alleged unilateral change; how many employees switched care givers as a result of the change; and how many employees expressed dissatisfaction with the Union prior to the change." 342 NLRB at 434.

the unfair labor practice case as the basis for its causal nexus determination.[9] Accordingly, *Overnite* provides no support for the majority's refusal to require a hearing in this case.[10]

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9. *Overnite*, 333 NLRB at 1394 ("Applying the *Master Slack* factors in the instant cases, we find a causal connection between the Employer's unfair labor practices and the employee sentiment expressed in the decertification petitions. *We make this finding based on the Board's 1999 decision, which was enforced by the Fourth Circuit*. In that decision the Board analyzed whether the Employer's national unfair labor practices warranted the imposition of a *Gissel* bargaining order at four facilities where the Local Unions had lost representation elections. That analysis examined factors similar to those in the *Master Slack* analysis, and *the Board's findings there support a finding of a causal connection between the Employer's national unfair labor practices and the expressions of dissatisfaction with the Union embodied in the decertification petitions*.") (Internal footnotes omitted; emphasis added.)

10. *D.O. Productions, LLC*, 370 NLRB No. 139, slip op. at 3 (2021), also cited by the majority, is even less apposite. There, the Board found it unnecessary to pass on "the Employer-Petitioner's argument that the petition could not be dismissed on the basis that it was tainted by unfair labor practices without a hearing, consistent with *Saint Gobain*" "[b]ecause we have affirmed the dismissal on other grounds." Obviously, those circumstances are not present here. *CPL (Linwood) LLC d/b/a Linwood Care Center*, 365 NLRB No. 24, slip op. at 1 (2017), also cited by the majority, is inapposite for other reasons. There, the Board affirmed the decision to hold a petition in abeyance under the Board's former blocking-charge policy. As the Board there explained, a *Saint Gobain* hearing is only required before a petition is dismissed. Because the petition in that case was not dismissed but instead held in abeyance, "a *Saint Gobain* hearing [was] not required as a matter of law." Id.

We therefore strongly disagree with the majority's position that a regional director may impose a merit-determination dismissal based on a causal nexus between alleged unfair labor practices and employee disaffection *without* a *Saint Gobain* hearing. A *Saint Gobain* hearing ensures that the causal nexus issue is determined based on evidence presented at a hearing, after the parties have been afforded an opportunity to be heard on the issue. Absent such a hearing, there is little practical difference between a merit-determination dismissal and the practice, under the former blocking charge policy, of placing election petitions in abeyance while unfair labor practice charges are investigated. In both situations, the petition is placed on hold on the basis of unilateral administrative determinations by a regional director subject to limited review by the Board.[11] Permitting regional directors to dismiss election petitions based on unproven allegations without a *Saint Gobain* hearing is therefore counter to the intent and spirit of the Election Protection Rule.[12]

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11. The majority attempts to distinguish a merit-determination dismissal from the practice of placing election petitions in abeyance under the former blocking-charge policy, but the attempt fails. They say that a merit-determination dismissal is "utilized only where there is a high probability that the representation petition at issue is tainted." But that explanation begs the question because, as discussed above, under *Saint Gobain*, a factual determination of causal nexus cannot be made based solely on the complaint allegations.

12. See 85 Fed.Reg. at 18377 ("[F]rom the Board's perspective, the current blocking-charge practice denies employees supporting a petition the right to have a timely election based on charges the merits of which remain to be seen, and many of which will turn out to have been meritless. Moreover,

Second, as the Board properly recognized in *Big Three Industries*, 201 NLRB 197 (1973), it normally would be contrary to the statutory scheme of the Act to find the existence of a "real question concerning representation" in the face of a bad-faith bargaining allegation in a related unfair labor practice case where an affirmative bargaining order is an appropriate remedy.[13] Accordingly, we agree

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even assuming that some commenters are correct that for every meritless charge there are two 'meritorious' charges that have appropriately blocked an election, this does not justify the very real consequences that employees experience when unfair labor practice charges indefinitely delay their ability to vote.").

As noted above, the complaint in this case issued long before the petitions were filed. The question of whether a merit-determination dismissal should be permitted prior to the issuance of a complaint is therefore not presented here.

13. Sec. 9(c)(1) of the Act provides that the Board "shall direct an election" if it finds that "a question of representation exists." In finding no "real" question concerning representation, the *Big Three* Board did not dispute that a "question of representation" existed within the meaning of Sec. 9(c)(1). To the contrary, the Board's Rules and Regulations provide that "[a] question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative." See 29 CFR § 102.64(a). Plainly, both petitions at issue in this case present questions of representation in this sense. For the reasons explained in the Election Protection Rule, the pendency of unproven unfair labor practice allegations does not affect the Board's statutory authority to direct an election or its responsibility to do so in appropriate circumstances. See 85 Fed. Reg. 18376.

with the majority that a merit-determination dismissal *may* be appropriate where an affirmative bargaining order would be an appropriate remedy for the complaint allegations, if proven.[14] The question of whether an affirmative bargaining order is an appropriate remedy for the violations alleged in the complaint is less clear, inasmuch as the complaint does not allege a refusal to recognize the Union or a general refusal to bargain.[15] We observe that the administrative law judge did not include

14. See *BOC Group*, 323 NLRB 1100, 1100 (1997) (dismissing petition because "pending 8(a)(3) and (5) allegations in [complaints] . . . if proven, may result in a bargaining order"); *Brannan Sand & Gravel*, 308 NLRB 922, 922 (1992) (dismissing petition because "if the General Counsel prevails on the 8(a)(5) aspect of [the] complaint, the [u]nion will be found to have been the majority representative at the time of the filing of the . . . petition, and an affirmative bargaining order will result"); *Big Three Industries*, above at 197 (dismissing petition because "if the allegations of the complaint [are] proved, the appropriate remedy would include an affirmative bargaining order, and an extension of the certification year even though during the interim the [u]nion may have lost its majority adherence").

15. See, e.g., *CPL (Linwood) d/b/a Linwood Care Center*, 367 NLRB No. 14, slip op. at 1 fn. 5 (2018) (deleting the judge's recommended affirmative bargaining order where a general refusal-to-bargain was neither alleged nor found); *United Memorial Gardens*, 340 NLRB 98, 99 fn. 1 (2003) (denying the General Counsel's request for an affirmative bargaining order because "the complaint does not allege that the [r]espondent has generally failed or refused to recognize or bargain in good faith with the [u]nion following its certification, and there is no indication that the [r]espondent's unilateral change affected the parties' negotiations"), enfd. sub nom. *NLRB v. Siena-Meadco, LLC*, 93 Fed.Appx. 759 (6th Cir. 2004).

an affirmative bargaining order in his recommended order.

We need not resolve this issue for the purpose of deciding this case. Even assuming, arguendo, that the unfair labor practices alleged in the complaint could properly support an affirmative bargaining order, the Board recognized in *Big Three* that "there may be unusual and special situations which may impel the holding of elections in the face of unremedied refusal-to-bargain charges." Id. at 197. The lengthy delay in the processing of Case 07–CA–234085 presents precisely the sort of equitable consideration that the *Big Three* Board anticipated. As noted above, the complaint in Case 07–CA–234085 issued on May 24, 2019—nearly three years ago now. And the pace of litigation has been glacial. Case 07–CA–234085 had been pending for 16 months when the petition in Case 07–RD–264330 was filed. It remains pending today, more than 21 months later. While the judge has issued a decision, a final disposition of the case must await a Board decision as exceptions were filed.[16]

Moreover, it bears emphasis that, under the majority's view, Case 07–CA–234085 requires the dismissal not only of the current petitions, but also of any future petition filed

16. Adding insult to injury, the majority states that "there is no indication that any extraordinary or undue delay occurred" here, citing the complexity of the case. While that may be how the litigants perceive the case, the delay certainly would seem extraordinary to the employees whose right to an election has been forestalled for so long. Surely, their perspective is relevant to this case as well.

at any time until the final disposition of the unfair labor practice case. If past is prologue, that day will be a long time coming. Nor will the Board's final disposition of Case 07–CA–234085 necessarily put an end to these employees' ordeal. Their long-sought election will be further delayed if the Board decides that an affirmative bargaining order should be issued, and may be delayed even further if one of the Board's various election bars subsequently becomes applicable.[17] Imposition of a merit-determination dismissal under these circumstances, based on the fact that the *complaint* seeks an affirmative bargaining order, improperly gives controlling weight to the General Counsel's prosecution of Case 07–CA–234085, while completely subordinating employees' Section 7 rights to reject or retain a union as their collective-bargaining representative.[18]

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17. *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001) (affirmative-bargaining-order bar), enfd. 310 F.3d 209 (D.C. Cir. 2002); see also *Hexton Furniture Co.*, 111 NLRB 342 (1955) (contract bar); *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011) (successor bar).

18. Notably, both *Big Three* itself and its progeny involved merit-determination dismissals imposed after much shorter periods of time than those involved in this case. See, e.g., *BOC Group*, above (dismissing petition filed six months after filing of initial charges and two months *before* issuance of complaint); *Brannan Sand & Gravel*, above (affirming the regional director's dismissal of RM petition filed the same day that the complaint issued); *Big Three Industries*, above (affirming the regional director's dismissal of RD petition filed less than 9 months after issuance of the complaint). Accordingly, we reject the majority's suggestion that delay can never be a relevant consideration under *Big Three* regardless of how long that delay may be. The

Dismissal of the second petition is especially unwarranted in the circumstances presented here, where the Acting Regional Director found that there was a question concerning representation and directed an election based on that finding, and the election has been held. We disagree with our colleagues' view that the election should not have been held. Even assuming the majority were correct, however, the fact is that it has been held and the ballots are currently impounded. Rather than dismiss the petition and discard the ballots, the Board should at the very least maintain the status quo by reinstating the petition and directing that it be held in abeyance with the ballots continuing to be impounded until the unfair labor practice case is resolved. Until that case is resolved, there is no valid justification for the Board to discard ballots already cast. Doing so wastes Board resources and is an affront to the employees who voted in the election in good faith.[19]

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federal courts do not agree that employee Section 7 rights may be indefinitely forestalled in this way. See, e.g., *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1069 (5th Cir. 1971) ("The short of the matter is that the Board has refused to take any notice of the petition filed by appellees and by interposing an arbitrary blocking[-]charge practice, applicable generally to employers, has held it in abeyance for over 3 years. As a consequence, the appellees have been deprived during all this time of their statutory right to a representative 'of their own choosing' to bargain collectively for them, 29 U.S.C. 157, despite the fact that the employees have not been charged with any wrongdoing. Such practice and result are intolerable under the Act and cannot be countenanced."). Neither do we.

19. We are unpersuaded by the majority's after-the-fact explanation that the processing of this case was driven by the

CONCLUSION

Congress granted the Board, alone, the power to resolve questions concerning representation. As explained above, the proper exercise of that authority sometimes requires the Board to take into account related unfair labor practice proceedings initiated and prosecuted by the General Counsel. In this case, however, the majority improperly gives those proceedings controlling weight. Their decision makes clear that the question concerning the representation of these employees will not be resolved until the litigation of Case 07–CA–234085 is completed, no matter how long that takes. This abdication of the Board's representation-case responsibilities is contrary to the intent of Congress and wrongfully disregards these employees' right to decide their bargaining representative for themselves. Accordingly, we respectfully dissent.

Dated, Washington, D.C. June 15, 2022

Marvin E. Kaplan, Member

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

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need to investigate whether a merit-determination dismissal was warranted insofar as that determination was based on the face of the complaint, which had been pending for more than a year at the time the second petition was filed and whose contents were presumably well known to the region. Again, viewing the matter from the perspective of the employees, discarding the ballots would reasonably seem like a bait and switch.

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED JUNE 11, 2026

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 24-2105/25-1073

RIETH-RILEY CONSTRUCTION CO., INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO,

Intervenor (24-2105).

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.

ENTERED BY ORDER OF THE COURT

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