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, 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 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] which

[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.

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

[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

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 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 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 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

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).

[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.

[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).

[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.

[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).

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, 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 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 (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.

[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 "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 (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).

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 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 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-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.

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[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).

[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).

[22] See fn. 11, supra.

1.

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

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' 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 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

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

[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).

[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."

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 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 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 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*, and *Saint*

[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.

[30] See fn. 25, supra.

[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.)

[32] The Board in *Saint Gobain* overruled *Priority One Services*, 331 NLRB 1527 (2000), 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 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.

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. Accordingly, the Regional Director's merit-determination dismissal under *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; *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 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

[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 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.").

[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 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.)

any subsequent petition (or withdrawal 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]

ORDER

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

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

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Lauren McFerran, Chairman

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Gwynne A. Wilcox, Member

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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.

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,

[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 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.

[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).

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 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 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

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

[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.

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 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 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 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

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

[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.

[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 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).

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.*

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 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]

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]

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

[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.

[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.

[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, 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.

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 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 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 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]

[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.

[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).

[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.

[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 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

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]

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

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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 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.