Wendt Corporation *and* David Wilhelm and Shopmen's Local Union No. 576. Case 03–RD–276476

September 30, 2022

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND PROUTY

On August 25, 2021, the Acting Regional Director for Region 3 issued a Decision and Direction of Election in which she found under *Master Slack Corp.*, 271 NLRB 78 (1984), that the Employer's unfair labor practices lacked a causal nexus with the instant decertification petition, and therefore directed an election. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Union filed a timely request for review of the Acting Regional Director's Decision. The Employer and the Petitioner each filed an opposition.

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

The Union's request for review is granted as it raises substantial issues warranting review. Upon review, for the reasons discussed below, we reverse the Acting Regional Director and find that the record establishes a causal connection under the *Master Slack* analysis between the Employer's severe and pervasive unfair labor practices and the employees' subsequent disaffection with the Union. The decertification petition is accordingly tainted and must be dismissed.

I.

The Employer designs and manufactures systems and machinery used by the scrap-metal recycling industry. On June 23, 2017, the Board certified the Union as the representative of a unit of the Employer's production and maintenance employees. At the time of certification the number of unit employees was approximately 33 (down from approximately 40 employees in those positions when organizing began earlier in 2017). The parties commenced bargaining in July 2017 and met 36 times over approximately the next year. Simultaneously with the bargaining sessions, however, the Employer embarked on a campaign of illegal actions.

On July 29, 2020, the Board unanimously found that the Employer had committed numerous violations of the Act during that initial year of first-contract bargaining. See *Wendt Corp.*, 369 NLRB No. 135 (2020), enfd. in part, review granted in part and remanded, 26 F.4th 1002 (D.C. Cir. 2022). The Employer's year-long course of unlawful conduct encompassed multiple violations of Sections 8(a)(1), 8(3), and 8(5) of the Act. The severe and pervasive unlawful conduct of the Employer, found by the Board, included threats of job loss by the highly-ranked Plant Manager Daniel Voigt, making good on those promises by eliminating unit jobs, a unit-wide curtailment of wage increases, the layoff and subsequent underemployment and loss of pay of the leading prounion employee who initiated the unionization campaign, and wide-ranging unlawful unilateral changes made during negotiations (including the temporary layoff of one-third of the bargaining unit) that severely undermined the bargaining process.[1]

[1] The Board found that the Respondent, through Plant Manager Voigt, violated Sec. 8(a)(1) of the Act by interrogating employee Dale Thompson about his union support; informing Thompson that union supporters would be laid off; threatening Thompson with reprisals by implying he should not support the Union because he had a family to support; on multiple occasions creating the impression of surveillance of employees' protected activity; impliedly instructing Jeff George to remove union insignia; informing George that prounion employees were targeted for future layoff; instructing George to remove a prounion photograph from his Facebook page; and threatening Dmytro Rulov during his annual performance review. The Employer did not contest before the Board any of these numerous violations showing its significant antiunion animus. The Board adopted these findings in the absence of exceptions by the Employer. The Board also found that the Employer unlawfully threatened Rulov in violation of Sec. 8(a)(1) of the Act by implying in his written performance review that he should focus on work rather than on union activity, thereby implicitly threatening him with unspecified reprisals for supporting the Union. The Board additionally found that the Employer violated Sec. 8(a)(1) of the Act when it denied employee John Fricano the right to a union representative during a disciplinary interview.

The Board found that the Employer violated Sec. 8(a)(3) and (1) of the Act by suspending Dennis Bush for alleged violation of its anti-harassment policy, assigning William Hudson exclusively to saw work and refusing him overtime, and failing to provide annual performance reviews and accompanying wage increases to unit employees from about November 2017 through April 2018.

The Board found that the Employer violated Sec. 8(a)(5) and (1) of the Act by temporarily laying off 10 shop employees on February 8, 2018, at a time when the parties, though bargaining for a first contract, had not reached overall impasse in the negotiations. The Board further found that the Employer violated Section 8(a)(5) and (1) of the Act by removing bargaining unit work and transferring it to three newly appointed "working" supervisors who were promoted from the bargaining unit and placed in the newly created supervisory positions where they performed bargaining unit work. The Board also found that the Employer violated Sec. 8(a)(5) and (1) of the Act by unilaterally requiring employees to work mandatory overtime, by failing to provide the Union with requested information, and by failing to afford the Union an opportunity to bargain over providing annual performance reviews and accompanying wage increases to unit employees from about November 2017 through April 2018.

The Employer petitioned for review and the Board cross-appealed for enforcement of its order. On March 1, 2022, the District of Columbia Circuit issued a decision enforcing the Board's order, with the

On May 3, 2021, the Petitioner, David Wilhelm, filed the instant decertification petition. The Union requested that the election be held in abeyance pursuant to the Board's blocking charge policy because the Employer's appeal of the Board's July 29, 2020, Decision and Order was pending in the D.C. Circuit at that time. The Union thus asserted that the Employer's unfair labor practices remained unremedied. On June 1, 2021, the Regional Director for Region 3 denied the Union's request and issued a Decision and Direction of Election. The Union thereafter filed a Request for Review of the Regional Director's decision and requested a stay of the decertification election. On June 25, 2021, the Board granted the Union's Request for Review and stayed the election. The Board found that the Regional Director erred in ordering an election before determining whether the unremedied violations required dismissal of the petition. The Board remanded the case to the Regional Director to determine the impact of the violations, if any, on the decertification petition. As noted above, the Acting Regional Director found that under *Master Slack* the Employer's unfair labor practices lacked a causal nexus with the decertification petition. We disagree.

The Board applies the four-factor *Master Slack* test to determine whether a causal relationship exists between unfair labor practices and the subsequent expression of employee disaffection with an incumbent union. The four factors are (1) the length of time between the unfair labor practices and the filing of the decertification petition; (2) the nature of the unfair labor practices, including the possibility of their detrimental or lasting effect on employees; (3) the tendency of the unfair labor practices 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. See 271 NLRB at 84. "The Board applies the *Master Slack* test to determine when a decertification petition should not be taken to reflect the voluntary choice of a bargaining unit's employees because it was signed in an atmosphere rendered threatening or coercive by an employer's unfair labor practices." *Veritas Health Services v. NLRB*, 895 F.3d 69, 82 (D.C. Cir. 2018). "'[I]t is the objective evidence of the commission of unfair labor practices that has the tendency to undermine the Union, and not the subjective state of mind of the employees, that is the relevant inquiry in this regard." Id., quoting *AT Sys. West, Inc.*, 341 NLRB 57, 60 (2004). The *Master Slack* inquiry calls on the Board to consider the nature and timing of the unfair labor practices as they bear on the reasonable likelihood of discouraging employees from continuing to support their union. See *Veritas Health Services v. NLRB*, 895 F.3d at 82.[2]

As we explain below, the Employer committed precisely the types of highly coercive violations that, under Board and court precedent, cause disaffection from the Union, are likely to have a lasting effect on employees, and warrant finding that the decertification petition was tainted. We further find insufficient evidence to establish under *Master Slack* that the coercive effect of the unremedied unfair labor practices has been ameliorated by subsequent events.[3]

II.

Because *Master Slack* factor 1, which examines the length of time between the unfair labor practices and the decertification petition,[4] is properly viewed in the context of whether the unfair labor practices "were of a more serious nature . . . and were disseminated throughout the bargaining unit," see *Champion Enterprises,* 350 NLRB 788, 792 fn. 19 (2007), we commence our *Master Slack* analysis by examining the second and third factors of the test: the nature of the unfair labor practices and their tendency to cause employee disaffection from the union.

We find for reasons we explain below that the Employer here engaged in a campaign of serious and pervasive unlawful conduct that amply satisfies the second and third *Master Slack* factors. "These factors obviously are related because unfair labor practices that have a lasting effect on employees are likely to be serious enough to cause disaffection with a union." *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640, 649 (D.C. Cir. 2013). The Employer's highly coercive misconduct here encompassed unfair labor practices occurring both at and away

single exception of one issue that it remanded to the Board for further consideration: the Board's finding that the Employer violated Sec. 8(a)(5) and (1) of the Act by temporarily laying off 10 unit employees in February 2018. See 26 F.4th 1013–1014.

[2] See *Overnite Transportation Co.*, 333 NLRB 1392, 1397 fn. 22 (2001) ("Except for the fourth factor, the *Master Slack* analysis weighs the objective tendency of the unfair labor practices to undermine union support, and evidence of the actual impact of the [e]mployer's unfair labor practices is not required.").

[3] Our dissenting colleague, who was part of the unanimous Board panel finding all the unfair labor practice violations by the Employer in the underlying unfair labor practice proceeding, see 369 NLRB No. 135, now finds all those violations neither sufficiently serious nor of sufficiently long-lasting effect to cause employee disaffection from the Union, and dissents from our analysis of the *Master Slack* factors. We disagree. We note that we reject the dissent's unfounded assertion that we view the existence of serious unremedied unfair labor practices as "per se" grounds for precluding a decertification election. Rather, as fully explained below, we find that *these* serious and unremedied unfair labor practices, considered in light of the *Master Slack* factors, warrant dismissal of the petition.

[4] In *Veritas Health Services v. NLRB*, 895 F.3d at 83, for example, the District of Columbia Circuit approved the Board's finding that three years was too little time to ameliorate the effects of "severe and pervasive" unfair labor practices.

from the bargaining table, with antiunion discrimination on the shop floor and an environment suffused with coercive threats and antiunion animus.[5]

The Employer's unlawful threats and discrimination. The Employer committed hallmark violations of threats of job loss in violation of Section 8(a)(1) of the Act.[6] All of the unlawful threats were committed by the Employer's Plant Manager, Daniel Voigt. Voigt is a highly placed management official with authority over first-line supervisors. Voigt reported directly to Operations Director Richard Howe, who directly reported to the Respondent's president, Tom Wendt, Jr.

Voigt's express and implied threats of job loss were directly communicated to prominent pro-union employees who wore union apparel at work, but his threats took clear aim at the entire bargaining unit. Voigt expressly threatened employee Dale Thompson that "the Company was going to lay off people who were with the Union."[7] Voigt threatened Thompson months earlier "there's a lot of bad employees here" and that the Employer would "like to get rid of them in the shop." The shop is the bargaining unit. Voigt further, and egregiously, threatened that loss of employment could harm Thompson's young children. Voigt similarly unlawfully threatened union activist Jeff George about a month before the layoffs imposed in February 2018 by implying that pro-union employees were going to be targeted for a future layoff, and that the Employer was falsely contending it was not busy "until all this [the Union] goes away" and then the Employer "would bring in all new people" to replace the union adherents.[8] These threats were conspicuously paired with Voigt's intense impression of surveillance violations of Section 8(a)(1) that implicated the entire unit and were so severe that employees changed their social media status to shield their pro-union activity.[9]

In all, Voigt committed nine separate violations of Section 8(a)(1) of the Act, spanning a nine-month period, from September 2017 through April 2018, directly threatening three union activists but affecting the perceived job security of the entire unit—all while first contract bargaining was taking place, and contemporaneous with the Employer's unlawful conduct at the bargaining table. The Board found that these severe violations in this relatively small bargaining unit were "not the type of isolated, one-on-one threats or statements in which animus is cabined to the recipients." See *Wendt Corp.*, 69 NLRB No. 135, slip op. at 4. Indeed, the threats of job loss and other unlawful statements were widely disseminated in the unit.[10] They strongly reinforced the Employer's message to unit employees that continued allegiance to the Union posed employment danger to them and that job security and improved working conditions could only be achieved by abandoning the Union. Such a

[5] The District of Columbia Circuit enforced all the unfair labor practice findings of the Board, as noted, except for remanding for further consideration the Board's finding that the Employer violated Sec. 8(a)(5) and (1) of the Act by temporarily laying off 10 unit employees in February 2018. See 26 F.4th at 1013–1014. Accordingly, in finding causal nexus under *Master Slack*, we do not rely on the layoffs, because that issue is currently pending at the Board. Even disregarding the layoffs entirely, however, we find the quantum of the Employer's significant additional unlawful conduct to be more than sufficient to establish causal nexus under *Master Slack*. This conduct includes four distinct violations, enforced by the court, which are accorded hallmark status under the *Master Slack* analysis: threats of job loss; unilaterally withholding wage increases from unit employees; the suspension and underemployment of union adherents; and the unilateral elimination of bargaining unit jobs. While the District of Columbia Circuit has held that hallmark violations are not always necessary to satisfy the *Master Slack test (*see *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d at 651), their abundance here constitutes substantial and compelling evidence satisfying *Master Slack*.

[6] See *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d at 650, and cases cited therein.

[7] This threat occurred about one month before the Employer laid off 10 unit employees in February 2018.

[8] This unlawful threat of job loss so shook George that an hour later he returned to Voigt to plead that he could not afford to lose his job over the Union because he had a family. Voigt in the same conversation threatened George for wearing union apparel: "I'd take that off if I were you. That's how guys get in trouble around here."

[9] Voigt warned Thompson that there were "two people up in the [Employer's] office" who "could see everything [employees are] doing on the internet" and that the Employer would create a fake Facebook profile to monitor employees' union activities even if employees tried to block Facebook access. In fact, the day before employee Thompson had blocked Voigt on Facebook. Threatened employee George likewise thereafter changed his Facebook profile. Voigt further unlawfully declared to George that the Employer "could see everything'" from its "cameras outside" including "the color of somebody's underwear if he was bent over."

[10] The Union distributed notices of meetings ("Wendt Worker Updates") to the unit in early 2018—contemporaneous with Voigt's threats in January 2018 and shortly before the layoffs in February 2018 - highlighting Wendt's "attempts to intimidate workers" and referencing the threats of layoff ("Wendt workers testify on the threat of layoff before 120 community leaders") and that Wendt "has responded" to unionization "with threats and intimidation against the workers." The union distributions declared that "even after the workers voted to join the union, the company has continued threatening behavior against its workers" and that Wendt "intentionally maintained an atmosphere of fear and intimidation" and highlighted one unit employee's statement that "l feel like they're trying to intimidate us." In addition, the employees communicated in numerous, active social media forums, including a Facebook site for "Wendtworkers" as well as a dedicated twitter account and gmail account. Employee George took contemporaneous notes of Voigt's threats and transferred them to his phone for memorialization. The testimony of Anthony Rosaci, the Union's administrator for the bargaining unit, provides further confirmation of wide dissemination among the unit of the Employer's unlawful conduct under Sec. 8(a)(1) of the Act. Rosaci testified that when the Union was filing its unfair labor practice charges "there was increasing concern amongst the bargaining unit members about interrogations and unlawful threats and statements being made, and that was influential."

message from a highly placed manager is not easily forgotten by employees.[11] Cf. *Excel Case Ready*, 334 NLRB 4, 5 (2001) ("Thus, the Respondent's involvement in these discriminatory discharges implicates the company's upper hierarchy. Such involvement 'exacerbates the natural fear of employees that they [will] lose employment if they persist[] in their union activities[,]' and 'are likely to have a lasting impact not easily eradicated by the mere passage of time or the Board's usual remedies.'"), quoting *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1161 (3d Cir. 1995).

That message is particularly resonant when accompanied by unlawful discrimination violative of Section 8(a)(3) and (1) of the Act: the targeting of key union activists William Hudson and Dennis Bush. Hudson was the most prominent pro-union activist. He was the Union's initial contact in the organizing drive; was nicknamed by employees "The President" because he organized most of the employees; served as the Union's election observer; wore union apparel daily; regularly engaged in lawful picketing outside the Respondent's facility (along with other employees); and served on the Union's bargaining committee and attended almost all bargaining sessions. See *Wendt Corp.*, 369 NLRB No. 135, slip op. at 17. Hudson was one of the 10 employees laid off by Employer in February 2018. Following his recall from layoff, the Employer violated Section 8(a)(3) and (1) of the Act by assigning him—one of the Respondent's most highly skilled welders—to low-level work upon recall on the "saw," and denied him overtime pay. The unlawful underemployment of Hudson with accompanying wage loss lasted for over 4 months while first contract bargaining was occurring.

The Employer further violated Section 8(a)(3) and (1) of the Act by targeting prominent pro-union employee Dennis Bush.[12] The Board found the Respondent unlawfully suspended Bush without pay for 3 days for purportedly violating its anti-harassment policy. Suspension and underemployment of union adherents are hallmark violations under the *Master Slack* analysis. See *Goya Foods of Florida*, 347 NLRB1118, 1121 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008), cited with approval in *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d at 650. The targeting of Hudson, the paramount leader of the organizing campaign also admired by his unit peers for his skilled work, is a particularly indelible reminder to the other unit employees of the negative consequences that befall union adherents.[13]

The Employer's unlawful discrimination was unit-wide as well as individually targeted. The Board found that the Employer violated Section 8(a)(3) and (1) of the Act by failing to provide annual performance reviews and accompanying wage increases to unit employees from about November 2017 through April 2018. This unlawful conduct deprived the unit employees of those wage increases for six months. Withholding expected wage increases is a hallmark violation that has a detrimental and lasting effect on employees reinforcing the connection between loss of pay and union support. See *Overnite Transportation Co.*, 333 NLRB at 134; *Veritas Health Services*, 895 F.3d at 83.

The Employer's unlawful unilateral conduct. Within two months of the commencement of the parties' bargaining for a first contract, the Employer violated Section 8(a)(5) and (1) of the Act by unilaterally removing unit work by transferring it to three newly appointed supervisors, all three of whom had been in the bargaining unit, without hiring new shop employees to fill the three vacated unit positions. This decision resulted in the elimination of three unit positions and diminished the bargaining unit from 33 employees to 30 employees. See *Wendt Corp.*, 369 NLRB No. 135, slip op. at 7. Thus, the Respondent's opening salvo in the parties' nascent collective-bargaining relationship was the unlawful unilateral elimination of three important unit jobs.[14]

The District of Columbia Circuit, in applying *Master Slack,* "has agreed with the Board that 'the 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 at 650, quoting *Vincent Indus. Plastics, Inc. v. NLRB,* 209 F.3d 727, 738 (D.C. Cir. 2000). By definition, Section 8(a)(5) violations are necessarily also Section 8(a)(1) violations precisely because "an employer's refusal to bargain with the representative of his employees necessarily discourages and otherwise impedes the employees in their efforts to bargain through their representatives." *Tennessee Coach Co.*, 115 NLRB

[11] As of the July 16, 2021, decertification case hearing, Voigt was still employed in a management capacity by the Employer.

[12] Like Hudson, Bush wore union apparel, had union stickers on his welding helmet, and attended union rallies.

[13] We note that the Employer's discrimination did not include discharge as in *Goya Foods*. As noted, the presence of every hallmark violation—or of any—is not required to establish *Master Slack* causation, as the District of Columbia Circuit has explained. *See Tenneco Automotive, Inc. v. NLRB*, 716 F.3d at 651 ("We do not hold that 'hallmark violations' are always necessary to satisfy *Master Slack."*).

[14] As noted, the District of Columbia Circuit enforced the Board's finding that the Employer unlawfully transferred unit work with concomitant loss of bargaining unit jobs. See *Wendt Corp. v. NLRB*, 26 F.4th at 1011–1012.

677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956).[15] It is likewise a matter of settled law that the threat of job loss is a hallmark violation which has a "detrimental and lasting effect on employees" under the *Master Slack* analysis. See *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d at 650. The Employer's unlawful unilateral conduct here was different but no less damaging than its threats of job loss—it unlawfully eliminated bargaining unit jobs.

Moreover, the three formerly unit employees continued to work side-by-side with their unit former coworkers, but now as shop supervisors. While the remaining unit employees became the target of the Employer's unlawful campaign of job diminution, loss of wage increases, unlawful bargaining, discrimination, and deep anti-union animus including threats of job loss, those employees were reminded every day that their three promoted ex-colleagues were spared and protected from such pressure as the beneficiaries of the Employer's unlawful conduct. Employees reasonably would infer that aligning with management - rather than allegiance to the Union - protects job security. The effect of the Employer's hallmark violation is particularly enduring because five of the seven presently remaining unit employees were already working in the unit at the time of the unlawful unilateral job elimination.

The lasting impact of the Employer's unlawful elimination of unit jobs is compounded by the status of the other two currently remaining unit employees, Donald Fess II and Daniel Norway. These men had been in the unit throughout the organizing campaign and election, but were two of the three whose unit jobs were unlawfully eliminated when they were promoted to supervisory positions overseeing the unit.[16] More than two years later, the Employer unilaterally returned Fess and Norway back to the bargaining unit. But to date, however, the Employer has never remedied its unlawful violation of transfer of unit work and job elimination. Far from ameliorating the coercive impact of this violation, the presence back in the unit of the beneficiaries of the Employer's unlawful conduct—without any admission of wrongdoing or remedial assurances of future lawful conduct from the employer—provides a powerful daily workplace reminder that unit jobs may be conferred or eliminated by the Employer without regard to the Union, and concomitantly that individual employees may be permitted or denied union representation at the whim of the Employer.[17] We find this tactic has a tendency to provide a continuing reminder to the current bargaining unit of the Employer's unremedied unfair labor practices.[18]

But the Employer's unlawful unilateral conduct during bargaining did not stop there. The Employer further violated Section 8(a)(5) and (1) of the Act about two months later, from about November 2017 through April 2018, by failing to afford the Union an opportunity to bargain over providing annual performance reviews and accompanying wage increases to unit employees resulting in loss of wage increases for that period. Unilateral changes depriving employees of wages constitute a hallmark violation under *Master Slack*. See *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d at 650. Moreover, the Board and the courts find taint of a decertification petition where the employer's unilateral changes involve "bread-and-butter issues" like wage increases that lead employees to seek and gain union representation in the first place. Id.; *Goya Foods of Florida*, 347 NLRB at 1122. "Where unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages, the possibility of a detrimental or long-lasting effect on employee support for the union is clear." *Penn Tank Lines,* 336 NLRB 1066, 1067 (2001).[19]

In sum, the Employer's wide-ranging unilateral conduct on topics key to employees' livelihood has a lasting

[15] The Board has noted since its earliest days, with court approval, that "a violation by an employer of any of the four subdivisions of Section 8, other than subdivision one, is also a violation of subdivision one." American Bar Association, Section of Labor & Employment Law, THE DEVELOPING LABOR LAW, Ch. 6, Sec. I.C.1 (John E. Higgins, Jr. ed., 7th ed. 2019) (quoting 1938 NLRB Annual Report 52 (1939)); see also *NLRB v. Newark Morning Ledger Co.*, 120 F.2d 262, 265 (3d Cir. 1941) ("The five kinds of unfair labor practice with which alone the Board is empowered to deal are defined by Section 8. The first is '[t]o interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (157 of this title).' The other four all relate to particular species of the generic unfair practice first defined and are specifically mentioned merely because of their prevalence.") (internal citation omitted).

[16] Fess and Norway were promoted at the very outset of the Employer's campaign of unfair labor practices. Thus, they experienced all the Employer's unfair labor practices—as did the other five current unit employees—but as supervisors they avoided being directly targeted by the unlawful conduct.

[17] The returned two individuals, Fess and Norway, comprise nearly one-third of the current bargaining unit of just seven employees.

[18] The third unit job unlawfully eliminated has likewise never been remedied. Indeed, the former holder of that job, Americo Garcia, Jr., currently serves as the supervisor for the unit employees, providing another indelible reminder of the Employer's unlawful conduct.

[19] The detrimental effect on employee support for the Union was amplified in this case because the Employer's non-unit employees, who comprise the majority of its workforce, timely received wage increases and evaluations.

The Board also found that the Employer violated Sec. 8(a)(5) and (1) of the Act by unilaterally laying off 10 unit employees—including the layoff of the lead employee union activist, William Hudson - in early February 2018 while bargaining was ongoing. As noted, we do not rely on the Board's prior finding of unlawful layoffs because that issue is pending on remand from the court.

detrimental effect on their support for the Union because it demonstrates to them that their union is irrelevant and powerless in protecting their jobs and terms and conditions of employment. See *Goya Foods of Florida*, 347 NLRB at 1122; *Penn Tank Lines,* 336 NLRB at 1067.[20] We highlight the threat to the continued existence of bargaining unit jobs based on the Employer's unlawful unilateral elimination of those jobs[21] and its position, maintained throughout years of the Employer's unsuccessful appeals on that issue, that it could do so.[22] The pernicious effect of the Employer's unilateral conduct is intensified where the Union is bargaining—as here—for its first contract on the employees' behalf and thus has no reserve of historical employee allegiance. See *Broadway Volkswagen,* 342 NLRB 1244, 1247 (2004). The Employer's substantial and widespread bargaining violations would reasonably lead employees to conclude that the Union could not protect or help them and would reasonably tend to coerce employees into abandoning support for the Union. See *May Department Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945) (by unilaterally changing employees' terms and conditions of employment, the employer "minimize[d] the influence of organized bargaining" and "emphasiz[ed] to the employees that there is no necessity for a collective-bargaining agent.").

The substantial evidence of the Employer's severe and pervasive unfair labor practices including multiple hallmark violations fully satisfies factors 2 and 3 of the *Master Slack* analysis and weighs heavily in favor of finding that the Employer's prior wrongdoings tainted the decertification petition.

III.

With the scope of the Employer's unlawful conduct in mind, we return to Master Slack factor 1, which examines the length of time between the unfair labor practices and the decertification petition. The length of time between the unfair labor practices committed in 2017 – 2018 (and found unlawful by the Board in 2020), and the May 3, 2021, filing of the decertification petition, is two years and nine months.[23] The Board and the courts have found causal nexus established even when time periods exceeding the instant case are present where the unfair labor practices have been shown to be serious and widely disseminated in the bargaining unit. In *Veritas Health Services v. NLRB*, 895 F.3d at 83, the District of Columbia Circuit approved the Board's finding of causal nexus where three years had elapsed because of the effects of the respondent's "severe and pervasive" unfair labor practices. In *United Supermarkets v. NLRB*, the Fifth Circuit affirmed the Board's finding that the decertification petition had been tainted by unremedied unfair labor practices which had occurred more than five years before the petition. See 862 F.2d 549 (5th Cir. 1989), affg. 287 NLRB 119, 120 (1987). In *Overnite Transportation Co.*, 333 NLRB 1392, the Board found causal nexus under *Master Slack* when nearly four years had elapsed.

Our evaluation of the nature of the Employer's unlawful conduct here shows it to be severe. It includes multiple hallmark violations that were pervasive throughout the unit. The violations are of particularly long-lasting effect because they involved enduring misconduct, including unit job elimination. The threat to job security that is an essential feature of many of the violations here is particularly resistant to temporal amelioration.

Further, the Employer has never repudiated its unlawful conduct, pledged to cease it, or remedied it.[24] Accordingly, throughout the time period to be examined under *Master Slack* factor 1, the employees saw that the Employer had not undertaken appropriate remedies for its unfair labor practices, had not posted the Board's notice, and had not in any other way taken responsibility for violating the Act, or offered assurances that employee

[20] See *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d at 649 (unilateral change hallmark violations normally involve issues that lead employees to seek union representation "particularly employee earnings").

[21] The dissent minimizes the unlawful job eliminations on grounds that the Respondent admitted only that 22 percent of the work routinely performed by each of the three unit-employees promoted out of the bargaining unit is bargaining unit work. But as the Board found in the unfair labor practice case, not only is this "plainly a significant loss of unit work," but moreover, the three vacated unit positions were never filled and the unit work that did not follow the three new supervisors did not remain in the unit:

> [T]he Respondent does not … contend that the work … has been permanently lost by the Respondent or redistributed in some fashion to the remaining unit employees . . . . Rather, the Respondent's senior managers . . . testified that they compensated for the loss of three-unit positions by adding nonunit temporary workers and by subcontracting. The record as a whole fully supports that the Respondent removed from the unit the work of the three-unit positions.

Wendt, supra at 7. The dissent's assertion that we have exaggerated the effect on employees of the elimination of jobs and lost work is not supported by the record. The dissent simply refuses to recognize that "significant" work and job loss occurred.

[22] The Employer consistently asserted in its appeals that there is no exclusive bargaining unit work, a proposition which threatened the very existence of the bargaining unit itself.

[23] The last unfair labor practice occurred on August 13, 2018, when the unlawful discrimination against employee Hudson ended.

[24] See *Veritas Health Services v. NLRB*, 895 F.3d at 83. We recognize that the Employer ceased *some* of its unlawful violations, by, for instance, implementing the wage increase that it unlawfully delayed. But it never *remedied* this violation in any way: it simply stopped further accrual of the backpay (still) owed.

[24] See *Veritas Health Services v. NLRB*, 895 F.3d at 83. We recognize that the Employer ceased *some* of its unlawful violations, by, for instance, implementing the wage increase that it unlawfully delayed. But it never *remedied* this violation in any way: it simply stopped further accrual of the backpay (still) owed.

rights under the Act would be respected. Where "serious unfair labor practices remain unremedied . . . the passage of time, in and of itself, is not likely to dissipate their coercive effect." *Overnite Transportation*, 333 NLRB at 1397.[25] Thus, in this case the passage of time magnified to employees the Union's powerlessness rather than ameliorated it.[26]

We reiterate that almost the entire current bargaining unit (5 of 7 employees, down sharply from 33 when the Union was certified) was also working in the unit throughout the Employer's year-long campaign undermining the Union, and in the case of the two promoted individuals returned to the unit, were working as unit supervisors during the unlawful campaign. The employees' personal experience of the Union's powerlessness to counter that campaign would have the tendency to leave an enduring stamp.[27] That experience encompasses the Employer's many threats of job loss against the employees, its willingness to eliminate unit jobs, and the Union's concomitant inability to stop the Employer's actions. The subsequent passage of time can only confirm this particular employee fear.[28]

We find that given the unfair labor practices, their unremedied status, and the overall circumstances, the length of time between the unfair labor practices and the decertification petition does not undermine the concern that the Employer's unfair labor practices have tainted the instant decertification petition.[29]

IV.

The Employer argues that *Master Slack* Factor 4—concerning the effect of its unlawful conduct on employee morale, organizational activities, and membership in the Union—militates against a finding of a causal relationship between the unfair labor practices and the subsequent expression of employee disaffection evidenced by the petition. The Employer points out that following the unfair labor practices the parties re-commenced bargaining free of additional misconduct allegations and, on July 29, 2019, reached a collective-bargaining agreement effective for two years. The Employer also presented testimony from the seven current unit employees that they do not currently support the Union. The Employer attributes that disaffection to the Employees' dissatisfaction with the terms of the agreement.[30] In other words, the Employer contends that it is the Union's bargaining performance, and not the Employer's unfair labor practices, that account for employee dissatisfaction with the Union. We cannot conclude based on the record evidence that employee disaffection here is properly attributed to the Union's bargaining performance.

We first observe that while all seven of the current bargaining unit employees testified at the decertification hearing, only one of them testified that the collective-bargaining agreement was a reason they did not support the Union.[31] This uncorroborated testimony provides a weak basis for finding that the terms of the agreement,

[25] See *Veritas Health Services v. NLRB*, 895 F.3d at 83 (a decertification petition may be "'unreliable as an indicator of uncoerced employee sentiment'" if it "'arose during the time when the [employer] had not yet fully remedied its many unfair labor practices'"), quoting *United Supermarkets*, 287 NLRB at 119–120.

[26] See *Veritas Health Services v. NLRB*, 895 F.3d at 82 (*Master Slack* considers the "reasonable likelihood of discouraging employees under a given set of circumstances from continuing to support their union").

[27] While the *Master Slack* causation analysis does not require actual knowledge by the employees of the unfair labor practices, *Veritas Health Services v. NLRB*, 895 F.3d at 82, here the employees' personal experience with the unfair labor practices increases the tendency of the unlawful conduct in this case to continue to exert an effect on the bargaining unit.

[28] Our dissenting colleague does not dispute that *Master Slack* temporal factor 1 requires an examination of the seriousness of the unfair labor practices committed, and that taint under *Master Slack* has accordingly been found in cases where the passage of time exceeded that in the instant case. Rather, he argues that those cases involved more serious unfair labor practices than is found here, including a nationwide campaign of unlawful conduct. But those cases do not suggest that the severity of the unlawful conduct must equal that found in those cases in order to have lasting ramifications sufficient to satisfy factor 1. The unlawful conduct here of the Employer—who does not have nationwide facilities—is indeed serious, featuring multiple hallmark violations along with a range of additional unlawful conduct, as we have explained. In these circumstances, factor 1 does not weigh against a finding that the Employer's unlawful conduct has tainted the decertification petition. Further, the dissent does not dispute that the Employer's multiple violations of Sec. 8(a)(3) and (5) of the Act were widely known and disseminated. All the current unit employees actually experienced that unlawful conduct because they were working for the Employer when it occurred. The dissent's assertion that the multiple, serious violations of Sec. 8(a)(1) were not disseminated is refuted by the record evidence. See fn. 10 above. It is thus of little consequence, contrary to the claim of the dissent, that the employees directly targeted by the Employer's serious 8(a)(1) violations no longer work in the unit.

[29] That the parties ultimately reached a collective-bargaining agreement does not establish, contrary to the Acting Regional Director's finding, that sufficient time had passed to ameliorate the taint of the Employer's unfair labor practices. The agreement was reached while the Employer's unfair labor practices remained unremedied and the Union's resulting weakened bargaining power continued, as we explain infra.

[30] The agreement permitted the Employer to conduct layoffs by seniority (and it then permanently laid off 13 employees under that provision), permitted supervisors to perform unit work, and did not provide for a Christmas bonus (which offset the wage increase in the agreement). The parties also reached a successor collective-bargaining agreement after the 2-year agreement.

[31] Employee Sean McCarthy. In addition, the Petitioner, David Wilhelm, testified that "the guys were happy" with the three percent raise contained in the successor collective-bargaining agreement.

not the Employer's own unfair labor practices, caused employee disaffection from the Union.[32]

We further cannot conclude that, in the face of the Employer's unfair labor practices, and their demonstrable tendency to cause employee disaffection, it was the Union's bargaining that caused employee disaffection. As explained above, the Employer's unfair labor practices encompassed and dominated an entire year from July 23, 2017, to July 22, 2018, and remain unremedied. The certification year is typically when a Union has its optimal power following victory and brings that to bear at the bargaining table. The Employer's severe and pervasive unfair labor practices thus "substantially undermined the Union's opportunity to effectively bargain, without unlawful interference, during the period when unions are usually at their greatest strength." See *NLRB v. Goya Foods of Florida*, 525 F.3d at 1132. As the Eleventh Circuit has explained, "[t]he effect of rampant violations in the first year of union representation underscores the fact that the Union never had an opportunity to bargain with and adequately represent its members." Id. It is thus a matter accepted by longstanding Board law that unions are in a weakened bargaining position when they negotiate in the face of serious unremedied unfair labor practices after the first year of bargaining has been lost to the Employer's unfair labor practice. Indeed, more generally, it is recognized by the Board that unremedied unfair labor practices, whenever they occur, undermine a Union's bargaining power as a matter of law. Hence, parties generally cannot reach a lawful bargaining impasse in the context of serious unremedied unfair labor practices. See, e.g., *Royal Motor Sales*, 329 NLRB 760, 762 (1999)(citing cases), enfd. 2 Fed.Appx. 1 (D.C. Cir. 2001).

The Union here was thus in a deeply compromised state due to the unremedied unfair labor practices when the Employer finally was ready to bargain without engaging in additional unlawful conduct. That the Union would have been under substantial pressure to produce some sort of agreement for the bargaining unit after the long delay must be attributed to the Respondent's misconduct. The Union faced a Hobson's choice: reach a contract while bargaining from a diminished status or accept further delay while waiting for final legal adjudication and remediation of the unfair labor practices. The Union's selection of the former choice cannot on this record be alchemized into evidence of amelioration of the significant deleterious effect of the Employer's unremedied unfair labor practices. This backdrop substantially diminishes the probative value to the *Master Slack* analysis of the collective-bargaining agreement.[33] As the District of Columbia Circuit has explained, "so long as serious violations remain unremedied, 'bargaining by the Employer with the Union . . . cannot suffice to cure the [t]aint of the decertification petitions.'" *Veritas Health Services v. NLRB*, 895 F.3d at 82, quoting *Overnite Transportation Co.,* 333 NLRB at 1396. Further, any negative perception by employees of contract terms negotiated by the Union dovetails neatly with the Employer's unremedied unfair labor practices that themselves negatively impacted working conditions, including the unlawful denial of wage increases (for which no backpay has yet been paid) and allowing supervisors to perform unit work.[34] Employee testimony that "they're a weak Union" that "fell short" and is "not strong enough to fight" is fully consistent with frustration over the Union's inability to prevent, deter, or obtain a remedy for the Employer's unlawful conduct.[35] Thus, any dissatisfaction with the contract or other aspects of Union representation would likely have been entangled with the sequence of unfair labor practices, including those deleteriously affecting the working conditions of unit employ-

[32] Anthony Rosaci, the Union's administrator for the bargaining unit, testified that the level of employee participation with the union remained stable, with about 50 percent of them participating through meetings, contacting union representatives, and wearing union paraphernalia, until July 2020. Rosaci testified it was after July 2020 that employee participation dwindled. The collective-bargaining agreement was reached by the parties a year earlier in July 2019.

[33] Unfair labor practices are neither mooted nor abrogated because the parties reach a bargaining contract. See, e.g., *Utility Workers Union of America (Ohio Power Co)*, 203 NLRB 230, 240 (1973) ("The fact that the charging [party] Employers in these cases have capitulated to the Respondents' bad-faith bargaining tactics and have knuckled under, at least in major part, to the Respondents' unlawful designs to merge the separate bargaining units, is no grounds to withhold either a finding or a remedy"). See, *NLRB v. General Electric Co.*, 418 F.2d 736, 736 (1969) ("Almost ten years after the events that gave rise to this controversy, we are called upon to determine whether an employer may be guilty of bad-faith bargaining, though he reaches an agreement with the union, albeit on the company's terms"), enfg. 150 NLRB 192 (1964). The unfair labor practice still is an interference with employees Section 7 rights and still requires remediation because, despite the parties' ability to reach a bargaining agreement, the violation shaped that bargaining outcome and its tendency to coerce employees in the exercise of Section 7 rights remains. For the same reason one must not assume that the Union's achievement of a collective-bargaining agreement that employees dislike is unrelated to or displaces the Employer's unremedied unfair labor practices as the source of employee dissatisfaction with the Union.

[34] As noted, the Employer contended throughout this proceeding that it possesses the extra-contractual right to unilaterally effectuate such measures.

[35] As current unit employee Sean McCarthy testified,

> the Union is weak, and—and you know, whatever—whatever my wants would be, they're not strong enough to fight for it. You know, you're—you know, in some regards, you're lucky to have a job, you know. And I don't want to upset that by, you know, being blackballed or whatever.

ees. Moreover, while we certainly factor in the testimony of the few remaining unit employees, in these circumstances we must also consider that their "testimony is not necessarily dispositive because it may be nothing more than the product of employer intimidation." *Tenneco Automotive v. NLRB,* 716 F.3d at 651; see also *Veritas Health Services v. NLRB*, 895 F.3d at 84 (doubting probativeness of testimony concerning employees' subjective motivation for rejecting union in aftermath of unfair labor practice, as "employees may often wish both to be represented by a union and to avoid antagonizing their employer").

Further, the mere fact that the parties bargained and executed a contract is not a signal to employees that they need no longer worry about their employer's hostility to their Section 7 rights. Even as employees or their union may be able to assert themselves in the workplace in spite of unremedied unfair labor practices, this does not mean future rights—in this case the right to freely choose whether to support decertification—will remain unclouded by the lingering effects of past unlawful conduct. This is especially true in the case of serious unfair labor practices more resistant to dissipation over the course of time. Cf. *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 408 (3d Cir. 1990) (observing that "the record reflects specific support for the conclusion that the effects of Kenrich's coercive conduct, if left unremediated, would be felt long after the election").

We accordingly find that applying *Master Slack* factor 4, any diminishment on employee morale, organizational activities and membership attributable to the negotiated contract terms and unrelated to the Respondent's unremedied unfair labor practices does not outweigh the substantial evidence establishing causal nexus under the first three *Master Slack* factors.

V.

Master Slack provides that "the unfair labor practices must have caused the employee disaffection here or at least had a 'meaningful impact' in bringing about that disaffection." 271 NLRB at 84. Our scrutiny of all the *Master Slack* factors in the circumstances of this case warrants the conclusion that the Employer's unremedied unfair labor practices had, at the very least, a significantly meaningful impact in engendering employee disaffection from the Union and therefore that the decertification petition is tainted.[36]

[36] Our main disagreement with the dissent is with its view that the Employer's unlawful conduct—including the unlawful elimination of unit work—was not sufficiently serious and had little tendency to cause employee disaffection from the Union. The record evidence of multiple hallmark violations, which would have seriously undermined the Union and which are established to have long-lasting effect, refutes the dissent's view. Our dissenting colleague incorrectly suggests that unlawful discharges must be present to satisfy *Master Slack* (contrary to the District of Columbia Circuit's instruction in *Tenneco Automotive*, see fn. 13 above) while closing his eyes to the Employer's unlawful elimination of unit work and the significant disaffection such an action would entail.

In addition, in advancing his position here, our dissenting colleague asserts that the union in a decertification proceeding bears the burden of proof under *Master Slack.* In so doing, he relies on cases that are inapposite in that they address the General Counsel's burden of proving causal connection under *Master Slack* in the unfair labor practice proceeding context, or that do not place the burden of proof on the union in the representation context. In any event, we find the dissent's burden discussion here to be misplaced as this this case does not turn on the allocation of burden of proof (as to factor four or elsewhere). As we have discussed, the evidence here, viewed objectively and making all reasonable inferences, favors the conclusion—as to factor four and in general -- that employees at the time of the petition would have remained under the shadow of the serious, unremedied unfair labor practices and that, overall, the *Master Slack* test favors a finding that the petition here was tainted by these unfair labor practices. See, e.g., *Veritas Health Services v. NLRB*, 895 F.3d at 82 (upholding Board conclusion that effects of serious unfair labor practices were not ameliorated in context of evidence as a whole and notwithstanding minor testimony that employees were motivated not by the employer's unlawful conduct but by the progress of contract negotiations); *Wire Prods. Mfg. Corp.*, 326 NLRB 625, 627 & fn.13 (1998) (noting that essential inquiry is whether one can reasonably infer that petitioning employees were affected by the unfair labor practices; proof of actual knowledge of the violations is unnecessary). In so concluding, we have placed no burden of proof on the Employer, contrary to the claim of the dissent.

Finally, while we take seriously employees' right to file a decertification petition and thereby trigger an election to determine whether to retain their bargaining representative, such right must be exercised in an environment free from coercion. Here, the Employer's multiple serious unfair labor practices and their long-lasting effect made a meaningful choice to decertify the Union impossible. To be very clear, that unlawful conduct is the source of infringement on employees' Sec. 7 rights, not the majority decision today, as the dissent contends.

ORDER

The petition is dismissed.

Dated, Washington, D.C. September 30, 2022

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Lauren McFerran, Chairman

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, dissenting.

On May 3, 2021, unit employee David Wilhelm filed a timely decertification petition, supported by at least 30 percent of his coworkers, seeking an election to end the Union's status as the unit employees' exclusive collec-

tive-bargaining representative. The Acting Regional Director scheduled an election after concluding, in a well-reasoned decision, that the Union had failed to satisfy its burden of proving that the employees' decertification petition was tainted by certain unfair labor practices committed by the Employer approximately 3 to 4 years earlier.[1] Specifically, the Acting Regional Director found that each of the four factors identified in *Master Slack Corp.*, 271 NLRB 78 (1984), for assessing causation weighed against a conclusion that the employees' decertification petition was attributable to the Employer's violations of the Act.[2] She relied heavily on the fact that the Employer had not committed a single unfair labor practice in nearly 3 years preceding the petition's filing, the Union did not show that employees were aware of certain violations that had been committed earlier, the unfair labor practices were not of a nature likely to have caused the employees' disaffection years later, the parties had successfully negotiated two collective-bargaining agreements since the violations occurred, and the Union's significant decline in support did not coincide with the violations. Pursuant to the Acting Regional Director's decision, a decertification election was conducted on September 15, 2021, and the ballots were impounded pending Board resolution of the Union's request for review. For all the reasons set forth by the Acting Regional Director, I would affirm her sound decision and remand the case to her to open and count the ballots and to issue the appropriate certification.

My colleagues err in reversing the Acting Regional Director's determination. As explained below, they wrongly find that the long passage of time between the unfair labor practices and the petition weighs in favor (rather than against) a finding of causation, they consider unfair labor practices that were unknown to the current unit employees (at least so far as the record shows), they misjudge the nature of the illegal acts and their possible tendency to cause disaffection, and they fail to acknowledge the Acting Regional Director's finding that the Union's precipitous decline in employee support did not occur until 11 months after the last unfair labor practice was committed.

The Acting Regional Director was surely correct that the long passage of time (3 to 4 years) between the unfair labor practices and the petition weighs against a finding that the petition was tainted. See, e.g., *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640, 649 (D.C. Cir. 2013) ("[A] lapse of months fails to support, and typically weighs against, a finding of close temporal proximity."); *Champion Home Builders Co.*, 350 NLRB 788, 791-793 (2007) (5-to-6-month interval between disaffection petition and employer's unlawful threat, layoff, and confiscation of union materials weighed against finding that petition was tainted); *Garden Ridge Management*, 347 NLRB 131, 134 (2006) (5-month gap between disaffection petition and employer's last refusal to meet and bargain at reasonable times weighed against finding petition tainted). My colleagues turn *Master Slack*'s first factor on its head when they find that the years-long "passage of time magnified to employees the Union's powerlessness rather than ameliorated it."[3]

[1] The Employer's unfair labor practices occurred between September 2017 and August 2018, i.e., from 3 years and 8 months to 2 years and 9 months before the decertification petition was filed. *Wendt Corp.*, 369 NLRB No. 135 (2020), enfd. in part, review granted in part and remanded 26 F.4th 1002 (D.C. Cir. 2022). As my colleagues note, I participated in the Board's decision. There is no question that the Employer committed the unfair labor practices enforced by the court of appeals and that some of them were serious. My colleagues appear to view the existence of serious unremedied unfair labor practices as per se grounds for precluding any decertification election. But that is not what our precedent holds. Under *Master Slack Corp.*, 271 NLRB 78 (1984), taint is not presumed and must instead be shown based on all of the relevant circumstances. For the reasons stated herein, I agree with the Acting Regional Director that this showing has not been made here.

[2] The four factors are (1) the length of time between the unfair labor practices and the decertification petition (or withdrawal of recognition); (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on morale, organizational activities, and membership in the union. *Master Slack*, 271 NLRB at 84.

The burden of proving that unfair labor practices tainted a decertification petition rests with the party alleging taint. *Alamo Rent-A-Car*, 359 NLRB 1373, 1388 (2013), incorporated in 362 NLRB 1091 (2015), enfd. sub nom. *Enterprise Leasing Co. of Florida v. NLRB*, 831 F.3d 534 (D.C. Cir. 2016); *Rieth-Riley Construction Co.*, 371 NLRB No. 109, slip op. at 5 fn. 23 (2022) ("'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.'") (quoting NLRB Casehandling Manual (Part II) Representation Sec. 11733.1(a)(3)) (ellipsis in *Rieth-Riley*; emphasis added); *Overnite Transportation Co.*, 333 NLRB 1392, 1393 (2001) (explaining, in a representation proceeding, that "[w]here a case involves unfair labor practices other than a general refusal to recognize and bargain, *a causal connection must be shown* between the unfair labor practices and the subsequent employee disaffection with the union in order to find that a decertification petition is tainted, thereby requiring that it be dismissed") (emphasis added). As this precedent makes clear, taint must be proven by the union, not disproven by the employer.

[3] The cases cited by the majority, finding taint *despite* an interval of several years, are distinguishable based on the fact that they involved more serious unfair labor practices than those here, such as discriminatory discharges, threats of plant closure, and/or a "national" campaign of unfair labor practices conducted at all of the employer's facilities. In *Veritas Health Services, Inc. v. NLRB*, 895 F.3d 69 (D.C. Cir. 2018), the employer had unlawfully discharged a prominent union supporter, threatened to close its facility, cut employees' benefits, refused to provide information to the union, and committed various violations of the

Further, in finding the petition tainted, the majority errs in relying heavily on the Employer's violations of Section 8(a)(1) of the Act, which included statements made back in 2017 and 2018 to several individuals who were not in the unit when the petition was filed in 2021. As the Acting Regional Director explained, *not one* of those statements was made to any employee in the unit at the time the petition was filed years later, and the Union failed to prove that news of those violations was ever disseminated to current unit employees.[4]

The majority claims that "threats of job loss and other unlawful statements were widely disseminated." In support, they cite several notices of meetings ("Wendt Worker Updates") purportedly distributed by the Union back in 2018 that tersely mention unspecified threats and intimidation. (Employer Exh. 13.) However, the Union failed to prove that any of the 7 employees in the unit when the petition was filed had ever seen or read those notices. The Union itself, in its request for review, does not rely on the notices to establish dissemination.[5] Rather, the Union argues, without elaboration, that "the Board would be safe in assuming that knowledge of the ULPs had spread throughout the plant" based on the structure of the workplace at Wendt and the nature of the violations. Making that assumption would have no support in Board precedent or logic.[6] The Union separately claims that a majority of employees "admitted at the hearing that they knew of the ULPs." That is not accurate. The employees testified that they were generally aware that *charges had been filed*, but they specifically testified that they did not know the particular allegations made.[7] In short, the Union failed to establish a basis for relying on the Employer's violations of Section 8(a)(1) to find the petition tainted.

Additionally, the majority misjudges the tendency of certain other unfair labor practices to have caused the employees' disaffection so long afterward. The Employer unlawfully suspended union supporter Bush for 3 days without pay in December 2017 and unlawfully assigned union supporter Hudson to perform low-skill work (while maintaining his rate of pay) and denied him overtime between April 2018 and August 2018. While those violations had some tendency to diminish support for the Union, they were far less severe than something like an unlawful discharge. In my view, the Acting Regional Director correctly concluded that these violations were unlikely to have caused the unit employees' disaffection years later, especially in light of the fact that Bush and Hudson voluntarily left the unit well before the petition was filed.

The majority also exaggerates the likely impact of the Employer's unilateral transfer of unit work to three newly promoted supervisors in September 2017. The majority repeatedly characterizes this violation as the unlawful elimination of three unit jobs. However, these three new

duty to bargain in good faith. The court noted that retaliatory firings can have long-lasting effects and that the employer had "attack[ed] the [Board's] causation evidence only by reference to the fourth *Master Slack* factor—the effect on employee morale . . . ." Id. at 83. In *United Supermarkets, Inc. v. NLRB*, 862 F.2d 549 (5th Cir. 1989), the employer committed over thirty separate violations of the Act, including discharging 9 employees for their union activities, interrogating employees, threatening to close the store, reducing employees' hours, laying off employees, and promising increased wages and benefits for rejecting the union. Here, unlike in *Veritas* and *United Supermarkets*, there were no discharges and no threats of plant closure.

In *Overnite Transportation Co.*, 333 NLRB 1392 (2001), also cited by the majority, the employer engaged in a nationwide campaign of extensive unfair labor practices, including threatening employees that they would lose their jobs and that the business would be closed if the employees selected the union, conveying the impression that collective bargaining would be futile and that the only way the union could bring pressure on the employer was by striking, threatening employees with loss of pension benefits and more onerous working conditions, promising employees to remedy their grievances and grant them benefits, granting a wage increase to employees at unrepresented facilities while denying the increase to those at represented facilities, withholding improved benefits from the employees at its represented facilities, bypassing the union and dealing directly with represented employees, and failing to bargain with the union over the withholding of improved benefits. Wendt did not engage in a remotely comparable campaign of unfair labor practices.

[4] On this point, the Acting Regional Director properly relied on *Quazite Corp.*, 323 NLRB 511, 512 (1997) ("[T]he two affected employees were not among those employees who signed the petitions showing loss of majority support and . . . there is no evidence these threats were disseminated to other employees."), and *Champion Home Builders*, 350 NLRB at 792 (no proof of dissemination). My colleagues note that union representative Anthony Rosaci answered in the affirmative when asked whether, when the Union was filing its unfair labor practice charges, "there was increasing concern amongst the bargaining unit members about interrogations and unlawful threats and statements being made," but this testimony does not warrant reversing the Acting Regional Director's finding. For one thing, Rosaci did not clarify whether the number of concerned employees increased or whether a few employees felt increasingly concerned. Moreover, he did not identify which employees were concerned or whether they remained in the unit when the petition was filed. Rosaci's vague testimony is insufficient to establish that the Employer's 8(a)(1) statements were disseminated, either widely or to employees who remained in the unit in 2021.

[5] This is not surprising. The notices were placed in the record *by the Employer* to show that none of the current unit employees had ever supported the Union.

[6] The Board has not required a showing of actual knowledge by the employee of the unfair labor practices in cases where the unfair labor practices and the disaffection were contemporaneous. See, e.g., *Veritas Health Services, Inc. v. NLRB*, 895 F.3d at 82 and cases cited therein. But there is no valid justification for the majority's extension of this principle here, in a case where they so plainly were not.

[7] While Petitioner Wilhelm testified that he was aware of the Union's allegations that the Employer had discriminated against employees Dennis Bush and William Hudson, he did not testify that he was aware of the alleged 8(a)(1) violations.

supervisors performed unit work during only 22 percent of their work time. *Wendt Corp.,* 369 NLRB No. 135, slip op. at 7. As the majority notes, the Board found that the loss of unit work was "significant." Id. However, this was in the context of its finding that the unilateral removal of this work from the unit constituted "a material and substantial change" for purposes of determining that Wendt had violated Section 8(a)(5), id., and Board precedent sets a low bar in that regard. See, e.g., *Verizon New York, Inc.*, 339 NLRB 30, 30–31 (2003) (finding 8(a)(5) violation for unilateral termination of twice-yearly practice of permitting employees to donate blood during worktime), enfd. 360 F.3d 206 (D.C. Cir. 2004); *Rangaire Co.*, 309 NLRB 1043, 1043 (1992) (finding 8(a)(5) violation for unilateral withdrawal of extra 15 minutes for Thanksgiving lunchbreak), enfd. mem. 9 F.3d 104 (5th Cir. 1993); *Appalachian Power Co.*, 250 NLRB 228, 229 (1980) (finding 8(a)(5) violation for unilateral cancellation of 5-minute washup period), enfd. mem. 660 F.2d 488 (4th Cir. 1981). It does not follow that the removal of what was—viewed from outside this context—a relatively small amount of work from the unit had a lasting detrimental impact on employees who remained in the unit in 2021, and I see no reason to disagree with the Acting Regional Director's determination that this unfair labor practice had "little tendency in practice to cause employee disaffection among those in the Unit."

Finally, *Master Slack*'s fourth factor—the effect of the unlawful conduct on employee morale, organizational activities, and membership in the Union—counsels against finding the petition tainted. The Acting Regional Director correctly found that there was no direct evidence in support of the Union's argument that the unfair labor practices adversely affected employee morale, despite the fact that every single unit employee testified at the hearing. The Acting Regional Director also properly found, based on Rosaci's testimony, that employees' support for the Union "remained reasonably consistent until after the first contract, when it declined precipitously." The first contract was reached in July 2019, about 11 months after the Employer's last unfair labor practice was committed. While Rosaci also testified that union participation remained stable until July 2020, it would be unreasonable to conclude from this that the unfair labor practices years before, rather than employees' ongoing experience working under that contract, was the cause of the disaffection that ensued.[8]

The majority says that it "cannot conclude" that the Union's bargaining performance prompted employee disaffection and the subsequent decertification petition. The burden, of course, is not on the Employer to show that the Union's performance caused the disaffection. Rather the burden is on the Union to show "specific proof of a causal relationship between the unfair labor practice[s] and the ensuing events indicating a loss of support." *Garden Ridge Management*, 347 NLRB 131, 134 (2006); see also cases cited in fn. 2, above. The timeline of events—years-past unfair labor practices, followed by a collective-bargaining agreement, followed by union disaffection—further persuades me that the Union failed to sustain this burden.

In sum, I would affirm the Acting Regional Director's decision finding that each of the four *Master Slack* factors weighs against a conclusion that the Union satisfied its burden of proving that the Employer's unfair labor practices tainted the employees' decertification petition. In holding otherwise, the majority unjustifiably fails to give effect to these employees' wishes concerning representation as reflected in the election held in September 2021, nearly a year ago now. Nor does this case stand alone. In *Rieth-Riley Construction Co*, supra, my colleagues similarly discarded ballots already cast in a decertification election, indefinitely forestalling employees' Section 7 right to select or reject their bargaining representative. Under the circumstances, Wendt's employees may well view with skepticism the majority's assurance that they "take seriously employees' right to file a decertification petition and thereby trigger an election to determine whether to retain their bargaining representative." Rather, as in *Rieth-Riley*, 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." Id., slip op. at 8 (Members Kaplan and Ring, dissenting) (emphasis omitted).

Accordingly, I respectfully dissent.

Dated, Washington, D.C. September 30, 2022

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John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

[8] Indeed, my colleagues implicitly acknowledge that employees were dissatisfied with the contract, but they dismiss the significance of this evidence on the grounds that the Union was effectively forced to agree to a bad deal because of the unremedied unfair labor practices. I respectfully disagree that the Union may properly be relieved of any responsibility for its own actions years after the unfair labor practices were committed, or for the impact of those actions on employee disaffection.