Starbucks Corporation *and* Ariana Cortes Petitioner *and* Workers United. Case 03–RD–316974

November 15, 2023

ORDER[1]

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND PROUTY

The Petitioner's and Employer's Requests for Review of the Regional Director's Decision and Order Dismissing Petition are denied as they raise no substantial issues warranting review.[2] The petition is subject to reinstatement, if appropriate, after final disposition of the unfair labor practice proceedings. Accordingly, the Petitioner is made a party-in-interest to Cases 01-CA-305952 et al. solely for the purpose of receiving notification of the final outcome of those cases. See generally NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11733.1(b).

Dated, Washington, D.C. November 15, 2023

Lauren McFerran, Chairman

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

I would grant review, reverse the Regional Director's decision to dismiss the decertification petition, and order an election. In appropriate circumstances, Regional Directors retain the discretion to dismiss an election petition, subject to reinstatement, after determining that pending charges are meritorious and that, if proven, the pending charges would require the dismissal of the petition. In our dissent in *Rieth-Riley Construction Co*., then-Member Ring and I indicated that merit-determination dismissals are appropriate where a causal nexus between alleged unfair labor practices and the employee disaffection is properly demonstrated through a "*Saint Gobain*" hearing. 371 NLRB No. 109, slip op. at 10–11 (2022) (Members Kaplan and Ring, dissenting) (citing *Saint Gobain Abrasives*, 342 NLRB 434 (2004)). We acknowledged an exception to this causal nexus requirement where the alleged unfair labor practices include bad-faith bargaining and an affirmative bargaining order is an appropriate remedy. Id., slip. op. at 11–12. However, we recognized that, even in cases involving unremedied bad-faith bargaining allegations, "there may be unusual and special situations" that nevertheless "impel the holding of elections." Id., slip. op. at 12 (quoting *Big Three Industries*, 201 NLRB 197, 197 (1973)). In *Rieth-Riley*, we found that such a special situation existed where the relevant unfair labor practice case had been pending for sixteen months before the decertification petition was filed. Id., slip op. at 12. In this case, I would likewise find that a merit-determination dismissal is not warranted due to a lengthy delay in the processing of the relevant unfair labor practice case. In this respect, the unfair labor practice charges in Cases 01–CA–305952 et al. had been pending for almost 12 months before the decertification petition was filed. As then-Member Ring and I observed in *Rieth-Riley*, "excessive delay in conducting elections based on unproven unfair labor practice allegations fails to strike the proper balance" between stability of industrial relations and employee freedom of choice. Id., slip op. at 10. Accordingly, I would grant review and find that the petition should be processed.

[1] The Employer asserts that Member Prouty should recuse himself, claiming that his "past, present and perceived relationships with the Service Employees International Union (SEIU) International Union, SEIU Local Unions, and their affiliates, including Workers United" create a conflict of interest. Member Prouty has determined, in consultation with the NLRB Ethics Office, that there is no basis to recuse himself from the adjudication of this case.

[2] In denying review, we observe that the Regional Director engaged in what we have termed a "merit-determination dismissal" by dismissing the petition, subject to reinstatement, because of a merit determination with respect to certain types of unfair labor practice charges. In *Rieth-Riley Construction Co., Inc.*, 371 NLRB No. 109 (2022), we held that merit-determination dismissals remain available under Board law. We find that a merit-determination dismissal was appropriate here, for the reasons stated in the Regional Director's decision. In this regard, and contrary to the Employer's and Petitioner's assertions, the Regional Director was not obligated to make a "causal nexus" finding before engaging in a merit-determination dismissal here because the Sec. 8(a)(5) refusal-to-bargain allegations in the complaint, if proven, would result in an affirmative bargaining order and/or extension of the certification year, which would, in turn, require the dismissal of the petition. See *Big Three Industries, Inc.*, 201 NLRB 197, 197 (1973). We further note that those outcomes would not depend on the existence of a causal nexus between the unfair labor practices and the petition. Our dissenting colleague acknowledges that a causal nexus finding is not necessary where the allegations would result in an affirmative bargaining order or extension of the certification year, but he contends—as he did in *Rieth-Riley*—that there should be an "exception" to the Board's merit-determination policy in "unusual and special situations," such as where there has been a lengthy delay in the related unfair labor practice proceedings. He finds such a "special situation" here. Consistent with our discussion in *Rieth-Riley*, above, slip op. at 7–8, however, we do not believe that carving out such an exception would advance any purpose of the Act, and we decline to do so here.

Dated, Washington, D.C. November 15, 2023

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Marvin E. Kaplan, Member

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