The National Labor Relations Board Thwarts Decertification Votes:

Welcome to the Hotel California

U.S. Chamber of Commerce

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Abstract:

The primary law governing labor relations in the United States is the National Labor Relations Act (NLRA or "Act"). Under the Act workers have the right to form unions and engage in other concerted activity, such as discussing wages, benefits, and working conditions with each other and with management. Under the Act, workers also have the right not to engage in concerted activity and to decertify a union they no longer want to represent them.

Unfortunately, under the Biden administration, the National Labor Relations Board (NLRB or "Board") is far more interested in having workers form unions than it is in allowing them to decertify a union. It is skirting the rulemaking process to block decertification elections and giving NLRB officials the discretion to prevent workers from decertifying a union without even holding a hearing. This is contrary both to the statute and existing regulations. More importantly, it is simply unfair to workers, the very group whose rights the NLRB is tasked with enforcing. While it can be a complex and technical discussion, this paper details the methods the NLRB is using to keep workers locked into unions they no longer want.

Introduction

The NLRB is tasked with ensuring that employees are able to freely exercise their rights under the NLRA to either join or refrain from joining a union.[1] The current Biden Administration Board, however, controlled by a pro-labor majority, is increasingly focused on promoting unions, and is diminishing or dismantling the tools workers may use to refrain from union representation. This includes workers who wish to no longer be represented by an existing union.

This report highlights the Board's recent actions to thwart employees' efforts to free themselves from union representation via decertification petitions. This has been enabled by the Board's 2022 decision in *Rieth-Riley Construction Co., Inc.*,[2] in which the Board bypassed the federal rulemaking process to create a new administrative rule. As a result, Regional Directors are empowered to dismiss petitions, including employees' decertification petitions, solely based on administrative investigations, which largely credit unproven union allegations designed to prevent decertification elections.[3]

A prime example of *Rieth-Riley*'s detrimental impact to workers is exemplified in several cases related to Starbucks. After being disappointed by union representation, Starbucks workers throughout the country have filed decertification petitions to oust the Starbucks Workers United union. However, the Board is using *Rieth-Riley* to dismiss these petitions and, in doing so, endorsing Starbucks Workers United's own unlawful tactics to delay collective bargaining. In dismissing these petitions, the Board is infringing upon Starbucks workers' Section 7 rights to not be represented by a union, in direct contravention of the Act.

1 See 29 U.S.C. § 157.

2 *Rieth-Riley*, 371 NLRB No. 109 (2022).

3 Id.

An Overview of the National Labor Relations Act and the Use of Blocking Charges in Decertification Petitions

A. The National Labor Relations Act

The NLRA became law in 1935, and set forth the policy of the United States to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[4] The Act imparted a number of distinct rights to workers, known as Section 7 rights, with one of the primary rights being a worker's right to form or join a labor organization (colloquially, a "union").[5] In 1947, Congress amended Section 7 to explicitly establish a worker's right to "refrain" from exercising Section 7 rights, which includes a right to refrain from forming or joining a union.[6]

In furtherance of these Section 7 rights, Congress created an Executive agency, the NLRB, to ensure Section 7 rights are protected from infringement.[7] Among the powers delegated to the NLRB is the power to direct and oversee how a worker exercises the right to join a union, or to refrain from joining a union.[8] In doing so, Congress established some parameters for the NLRB, such as:

- The method by which a worker exercises the right to join or refrain from joining a union. Initially, the method was an election by "a secret ballot of employees or ... any other suitable method."[9] In 1947, Congress revised the Act to clarify that the only permitted election method was "by secret ballot."[10]

4 29 U.S.C. § 151.

5 Id. § 157.

6 See Labor Management Relations Act, 1947 ("Taft-Hartley Act"), Pub. L. No. 80-101, § 101, 61 Stat. 136, 140 (1947).

7 See 29 U.S.C. § 153(a).

8 See id. § 153(b).

9 National Labor Relations Act ("Wagner Act"), Pub. L. No. 74-198, 49 Stat. 449, § 9(c) (1935).

10 See 29 U.S.C. § 159(c)(1) (dropping the "other suitable method" language from the Act). For more than half a century, secret ballot elections have been acknowledged as the "best" way to assess employee support for unions. See General Dynamics Corp., 175 NLRB 1035 (1969). Despite this, the Board has apparently decided that secret ballot elections are no longer the preferred way to measure employee support for unions. See Cemex Construction Materials Pacific, LLC, 372 NLRB No. 130 (2023). Before Cemex, signed cards signifying employee support for a union (authorization cards) could, when signed by a majority of employees, enable an employer to recognize the union as the employees' bargaining representative without the need for an election. See 29 C.F.R. § 103.21(a); Island Constr., 135 NLRB 13, 15 (1962) ("A union obtains exclusive representative status by establishing that a majority of the employees in an appropriate unit have selected it as their representative, either in a Board-conducted election, pursuant to Section 9(c) or by other voluntary designation, pursuant to Section 9(a). A union selected under either subsection of Section 9 is entitled to recognition as the representative of the employees and to negotiate an agreement on their behalf.").

- Congress gave the NLRB instructions for determining when to hold these secret ballot elections: when a petition for an election has been filed with the Board by an employee, group of employees, or union (or by an employer, subject to a modified standard) alleging that a substantial number of employees wish to either (1) be represented by a union, or (2) be represented by a different union, the Board generally must first hold a hearing to determine whether an election is appropriate, and then, if the Board determines that an election is appropriate, it "shall direct" an election.[11]

- Congress described how a union wins a secret ballot election, which occurs when "the majority of the employees in a unit appropriate for such purposes" vote in favor of appointing the union as "the exclusive representative of all the employees in such unit...."[12]

B. Decertification Petitions

Decertification petitions ("RD Petitions") are the mechanism by which workers can remove a union that was previously certified as the exclusive collective bargaining representative of the employees.[13] Over the past ten years, the number of RD Petitions that were filed with the Board has varied from a high of 472 in 2013 to a low of 214 in 2020.[14] They are processed in much the same way as a representation petition. In the case of an RD Petition, the petitioning employee must present evidence that at least 30% of the bargaining unit no longer wishes to be represented by a union. If an election occurs, the union must receive a majority of the valid votes cast in order to remain as the exclusive bargaining unit representative.[15]

11 29 U.S.C. § 159(c)(1).

12 Id. § 159(a).

13 See NLRB, Decertification Petitions–RD (last visited Sept. 1, 2023), available at https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/decertification-petitions-rd.

14 Id.

15 See NLRB, Decertification Petitions–RD (last visited Sept. 1, 2023), available at https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/decertification-petitions-rd.

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C. Blocking Charges Under the Board's Rules and Regulations

In certain instances, where there is a pending unfair labor practice charge ("ULP," "charge," or "ULP charge"), the Board will not fully process a representation petition while the charge is pending. This is known as the blocking charge policy, and applies to charges the Regional Director determines that, if proven, would interfere with employees' free choice in an election.[16] That policy "is premised on the [Board's] intention to protect the free choice of employees in the election process by allowing them to expeditiously cast their ballots and resolve issues that may interfere with the election after the vote."[17]

There are two categories of blocking charges.[18] The first is known as a "paragraph (c)" charge. These allege violations of Sections 8(a)(1), 8(a)(2), or 8(b)(1)(A) of the Act. These challenge either the circumstances surrounding the petition or the showing of interest submitted in support of the petition, or assert that an employer has dominated a union.[19] When a party files a Section 8(a)(1), 8(a)(2), or 8(b)(1)(A) charge and a request to block, the Regional Director must assess whether such allegations challenge the circumstances surrounding the petition or showing of interest.[20] If the Regional Director determines that the charge impacts the legitimacy of the election process, or there is a dominated union, the ballots at any election which occurs are to be impounded, i.e., are not to be counted.[21] If the charge is dismissed or withdrawn less than 60 days after the ballots are impounded, the ballots are opened and counted.[22] If the charge is meritorious following a hearing in which both sides have the opportunity to put on evidence, the petition at issue may be dismissed.[23] How the Board, as currently composed, is modifying the process by which petitions can be dismissed will be discussed in detail in Section III below.

The second category of blocking charges are any ULP charges not meeting the definition of a "paragraph (c)" charge.[24] This includes allegations that an employer refused to furnish a union with information the union has requested in collective bargaining or that an employer unlawfully disciplined a union supporter. When this category of charge is at issue, the ballots will be opened and counted at the conclusion of the election, though the Regional Director will not certify the results of the election until there is a final disposition of the ULP charge.[25]

16 NLRB Casehandling Manual (Part One) Sec. 11730.

17 Id.

18 29 C.F.R. 103.20.

19 Id. at (c).

20 NLRB Casehandling Manual (Part One) Sec. 11730.2.

21 Id.

22 Id.

23 Id.

24 29 C.F.R. 103.20(b).

25 NLRB Casehandling Manual (Part One) Sec. 11730.3.

A Closer Look at Blocking Charges

Under the Board's current Rules and Regulations, which have gone through the rulemaking process under the Administrative Procedure Act, 5 U.S.C. § 553 ("APA"), a Regional Director's decision to "block" a representation election does not include the authority to halt or delay employee voting in an election.[26] Accordingly, a party's "request to block" means only that the results of an election will not be certified until final disposition of the ULP charges filed and a determination of their effect on the representation petition.[27] In other words, and assuming all preconditions are met, under the Board's Rules and Regulations, employees who file a proper decertification petition are guaranteed the ability to vote in the election.

26 See 29 C.F.R. 103.20.

27 *Saint Alphonsus Medical Center—Ontario, Inc.*, 371 NLRB No. 130 (2022).

For instance, courts have held that the Board cannot refuse to process a RD Petition based solely on an unproved ULP charge made by a union against an employer, because to hold otherwise would allow unions to effectively thwart the statutory provisions for a decertification election where a majority no longer supports the union.

A. Federal Courts' Historical Skepticism of Blocking Charges

The blocking charge procedure can be applied in any representation case, including union decertification cases.[28] However, some federal courts have viewed the application of such charges skeptically, particularly when the purpose or outcome of such a charge appears to be frustrating employee free choice under the Act.[29] For instance, courts have held that the Board cannot refuse to process a RD Petition based solely on an unproved ULP charge made by a union against an employer, because to hold otherwise would allow unions to effectively thwart the statutory provisions for a decertification election where a majority no longer supports the union.[30]

As will be explored in more detail in Section III below, the Board apparently no longer feels it is necessary for a factfinder to conclude the alleged ULPs have actually occurred as charged. But, as discussed above, federal courts have long disapproved of the approach the Board is again attempting to take.

28 NLRB Casehandling Manual (Part One) Sec. 11700-11886, § 11730.

29 *Multi-Color Co.,* 114 NLRB 1129, 37 LRRM (BNA) 1098, 1955 WL 13369 (1955), enforcement denied on other grounds *NLRB v. Multi-Color Co.,* 250 F.2d 573, 41 LRRM (BNA) 2278, 33 Lab. Cas. (CCH) P 71175 (6th Cir. 1957); *Int'l Powder Metallurgy Co., Inc.,* 134 NLRB 1605, 49 LRRM (BNA) 1388, 1961 NLRB Dec. (CCH) P 10768, 1961 WL 15906 (1961).

30 *NLRB v. Minute Maid Corp.,* 283 F.2d 705, 47 LRRM (BNA) 2072, 41 Lab. Cas. (CCH) P 16621, 95 ALR 2d 660 (5th Cir. 1960); *NLRB v. Gebhardt-Vogel Tanning Co.,* 389 F.2d 71, 67 LRRM (BNA) 2364, 57 Lab. Cas. (CCH) P 12431 (7th Cir. 1968); *Templeton v. Dixie Color Printing Co.,* 444 F.2d 1064 (5th Cir. 1971); *Surratt v. NLRB,* 463 F.2d 378 (5th Cir. 1972).

B. The Board's Rulemaking on Blocking Charges

From time to time the Board engages in the administrative process of rulemaking, and blocking charges are one such topic which has been, and continues to be, the subject of rulemaking. In 2019, the Board published a Notice of Proposed Rulemaking proposing three amendments to the Board's representation election regulations.[31] The amendments were coined the Election Protection Rule ("EPR").[32] One of these amendments addressed the blocking charge policy and created the vote and impound, and voting and counting procedures contained within Rule 103.[33] As correctly explained by the Board at that time, the Rule was necessary because the "previous blocking charge policy permitted a party to block an election indefinitely by filing unfair labor practice charges that allegedly create doubt as to the validity of the election petition or as to the ability of employees to make a free and fair choice concerning representation while the charges remain unresolved. This policy can prevent holding the petitioned-for election for months, or even years, if at all."[34]

Effective July 31, 2020, the EPR plainly prohibits the use of blocking charges to delay an election or to cause the dismissal of an election petition. In doing so, the EPR protects employees' statutory right of free choice in selecting, and removing, union representation. Under the EPR, NLRB staff handling the case must process a petition through the election and ballot count. It only allows a "blocking charge" to impact the vote process at the time the NLRB counts the ballots or certifies the results. Critically, the EPR does not allow "merit-determination" dismissals in response to the filing of blocking charges, nor does it permit placing the processing of petitions on hold or placing an election in abeyance pending the outcome of ULP charge litigation, which often takes years. The EPR plainly promotes, consistent with the Act, the ability of employees to vote in decertification elections when they have a filed a proper petition.

31 84 FR 39930.

32 NLRB, Election Protection Rule (last visited Sept. 1, 2023) available at https://www.nlrb.gov/about-nlrb/what-we-do/national-labor-relations-board-rulemaking/election-protection-rule.

33 NLRB, Election Protection Rule Final Fact Sheet (last visited Sept. 1, 2023) available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-7583/election-protection-final-rule-fact-sheet.pdf.

34 Id.

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C. The Current Pro-Union Board's Intent to Implement a New Blocking Charge Rule to Prevent Decertification Votes

Despite the fact that the EPR promotes employee free choice, the current Board majority announced its intention in November 2022 to amend the election rules.[35] Ironically calling this rulemaking "Fair Choice–Employee Voice," this proposed rule would have the opposite effect. It would prevent the running of elections, thereby stifling "Employee Voice."[36] When a ULP charge is filed and a union alleges interference with employees' free choice, it is expected that the new rule will allow Regional Directors to indefinitely postpone elections, including those that otherwise would be held pursuant to RD Petitions until the administrative investigation is concluded.

These proposed rules are still in process, so it is not clear what the final rule will look like. As explored in detail below in Section IV, however, the current Board has decided to not wait for the completion of its rulemaking process. Instead, it has undermined the existing rule by issuing a controversial decision enabling Regional Directors to dismiss RD Petitions based solely on administrative investigations that are not fully adjudicated.[37]

35 87 FR 668790.

36 NLRB, Fair Choice–Employee Voice (last visited Sept. 1, 2023) available at https://www.nlrb.gov/about-nlrb/what-we-do/national-labor-relations-board-rulemaking/fair-choice-employee-voice.

37 *Rieth-Riley*, 371 NLRB No. 109 (2022).

The Board is Forcing Continuing Unionization on Employees in Contravention of the Act

Since the beginning of her tenure as the Board's General Counsel in 2021, Jennifer Abruzzo ("GC") has sought to utilize the NLRB as a tool to increase union density, irrespective of other considerations, including genuine worker support. Specifically, the GC has been actively engaged in a campaign to reverse decades of Board precedent and severely restrict employer rights and protections afforded by both the United States Constitution and the Act.

The Board is not just acquiescing to this extremist approach, but is actively participating and encouraging it through the Board's legally flawed decisions. How the Board is currently treating RD Petitions is a prime example of this activism.

On June 15, 2022, the Board issued a decision in *Rieth-Riley Construction Co., Inc.,* wherein it authorized Regional Directors to issue merit-determination dismissals of election petitions before an evidentiary hearing is held, despite the clear language of the EPR.

A. *Rieth-Riley* and the Board's Push to Prevent Decertification

On June 15, 2022, the Board issued a decision in *Rieth-Riley Construction Co., Inc.,* wherein it authorized Regional Directors to issue merit-determination dismissals of election petitions before an evidentiary hearing is held, despite the clear language of the EPR.[38] More specifically, the Board held that when a ULP charge alleges conduct that would interfere with employee free choice in any representation election, and a Regional Director determines after conducting an internal administrative investigation that the charge has merit and should be prosecuted, the Regional Director may dismiss a pending election petition.[39]

Notably, the petition may be dismissed by a Regional Director–a high-ranking Board official–following his/her administrative investigation, i.e., without an evidentiary hearing or other avenue for an employer or the employees to effectively present their side. In other words, under *Rieth-Riley*, Regional Directors can determine, effectively as a matter of law, that alleged ULPs necessarily taint a representation petition without first conducting an evidentiary hearing.

Given the partisan nature of the Board, this is quite disturbing as it effectively strips employees who file RD Petitions of their due process rights and more importantly, may saddle employees with an unwanted union in contravention of the Act. It is even more concerning in light of an NLRB Inspector General Report that found that agency staff had engaged in "gross misconduct" to help a union win an election and then attempted to cover up their actions.[40]

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i. Background

In *Rieth-Riley*, the Regional Director of Region 7 issued a complaint and notice of hearing against the International Union of Operating Engineers Local 324, AFL-CIO, in 2018 for notifying certain employer-members of the Michigan Infrastructure and Transportation Association, Inc. ("MITA"), that it would not negotiate a successor collective bargaining agreement if MITA was their bargaining representative (which it had been since 1993). In May 2019, the Regional Director issued a complaint against *Rieth-Riley* for, among other things, unlawful bargaining tactics. As a remedy, the complaint noted that the Regional Director would seek an affirmative bargaining order. Shortly thereafter, the unit employees went on strike.

A consolidated hearing on the two cases began on October 21, 2019. An employee interested in decertifying filed his first RD Petition on March 10, 2020. The Regional Director ordered the RD Petition be held in abeyance based on the Board's then-effective blocking-charge policy. After the RD Petition was filed, the Board substantially modified its blocking-charge policy in the EPR. On August 7, 2020, the petitioner filed a second RD Petition. This second RD Petition was filed while many of the unit employees remained on strike, and the consolidated hearing was still underway. Applying the EPR, the acting-Regional Director found that the RD Petitions raised a question concerning representation of the unit employees and directed a mail-ballot election, which was common during the extraordinary period of Covid. The ballots were mailed on October 13, 2020, and were due by November 2, 2020.

Unit employees voted in the decertification election, and the ballot count was scheduled for November 9, 2020. However, on the day of the ballot count the Regional Director reversed the Region's prior determination, and administratively dismissed the RD Petitions.

In making this determination, the Regional Director conducted an ex parte administrative investigation into the allegations of the charge against *Rieth-Riley*, applied the *Master Slack* factors[41] and determined there was a "causal nexus" between the alleged ULPs and employee disaffection for the union, which thereby tainted the RD Petitions. Despite the Region (1) previously scheduling an election, (2) mailing out ballots, and (3) receiving those ballots, the Regional Director dismissed the decertification petitions on this basis without a hearing.

In 2022, the Board majority not only affirmed the Regional Director's authority to dismiss the RD Petition without a hearing, but went further by asserting that, "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."

41 271 NLRB 78, 84 (1984) (The *Master Slack* factors are: (1) the length of time between the ULPs and the RD Petition's filing; (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).

The dissenting Board members relied on *Saint Gobain Abrasives, Inc.*,[42] and correctly argued that the Regional Director should not have found a causal nexus between the ULPs and the employees' decision to file a RD Petition without holding a hearing on the matter, as "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*." The dissent asserted that any speculation on the causal nexus denies employees their fundamental Section 7 rights and "[s]urely, a hearing and findings are prerequisites to such a denial."

Further, the dissent noted that merit-determination dismissals based on the GC seeking an affirmative bargaining order, without the due process of a *Saint Gobain* evidentiary hearing, give controlling weight to the GC while simultaneously diminishing employees' Section 7 rights to reject a union. The Board's *Rieth-Riley* decision will prevent dissatisfied employees from exercising their Section 7 rights while awaiting the final disposition of ULPs, which could take years.

The decision also highlights the disagreement within the Board as to whether *Saint Gobain* requires an evidentiary hearing to decide whether a causal nexus between unproven ULP charges and employee disaffection for a union (which resulted in any RD Petition) exists. *Rieth-Riley* says no such hearing is needed, which not only strips the employer of its due process rights, but also violates workers' rights guaranteed by Section 7 of the Act.

42 342 NLRB 434 (2004).

ii. Practical Application

The Board's ultra vires holding in *Rieth-Riley* contravenes extant law under the EPR, which makes clear that any election petition is to proceed without delay and does not permit "merit-determination" dismissals before an election, without even so much as a causation hearing per *Saint Gobain*. In effect, through *Rieth-Riley* the Board has allowed a union to impose indefinite representation on employees, whether wanted or not, without any alternative. Not only is *Rieth-Riley* in direct contravention of the foundational principles and rights guaranteed by Sections 7 and 9 of the Act, but it is also contrary to the plain text of the EPR and improperly amends the EPR by disregarding the Notice of Rulemaking Procedures required by the APA.

1. The EPR Does Not Support The Board's *Rieth-Riley* Decision

The EPR, codified in Section 103.20 of the Board's Rules and Regulations, requires petitions to proceed promptly to an election despite the pendency of blocking charges, and further makes no exception for "merit-determination" dismissals absent a *Saint Gobain* hearing.

Nowhere does the EPR provide for dismissal of petitions due to a Regional Director's "merit determination" of a blocking charge without an election being conducted–not even when the charge challenges the circumstances surrounding the petition or alleges that the showing of interest submitted in support of the petition is tainted. Further, GC Memo 20-11 was issued to provide guidance on the EPR (among other items), and the then GC made abundantly clear that "[e]lections will no longer be blocked by pending unfair labor practice charges."

This approach is consistent with the Board's clearly stated purpose and intent behind the EPR: "one of [its] principal duties . . . is to resolve questions of representation by holding elections, and that duty is not discharged where the Board does not process a representation petition, especially where there is no legitimate basis for delaying an

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election . . . [T]he better policy protective of employee free choice is to eliminate blocking elections based on any pending unfair labor practice charge, even those that may ultimately be found to have merit."[43]

Further, the Board recognized that "revising the blocking-charge policy to end the practice of delaying an election represents a more appropriately balanced approach to the issue of how to treat election petitions when relevant unfair labor practice charges are pending. It ensures that employees can express their preference for or against union representation in prompt Board supervised election, while maintaining effective means for addressing election interference."[44]

2. The Board's Disregard of the EPR Through Its *Rieth-Riley* Decision

Despite the EPR's clarity, the Board, via *Rieth-Riley*, held that a Regional Director may dismiss an election petition based on their administrative investigation into the blocking charge. Not only is this incorrect as a matter of law, but it also amounts to a denial of due process. As discussed above, the EPR is clear: for paragraph (b) blocking charges, the petition must be processed, an election must be held, and the ballots must be counted.

In the *Rieth-Riley* decision, the Board admitted that "the [EPR] amendment provides that a blocking-charge request will no longer delay the conduct of an election in any case."[45] Thus, a Region is required to desist from issuing a certification of results (but not the election itself) until the charge is disposed of and a determination is made of its effect on the election petition.[46]

Nevertheless, *Rieth-Riley* indecorously tries to short circuit the EPR, disregarding the Board's intent and purpose in creating the rule. It encourages unions to circumvent the EPR by filing blocking charges to delay decertification elections and gives Regional Directors the authority to dismiss them through "merit-determinations."[47] This will unquestionably infringe upon employees' rights under Sections 7 and 9 of the Act.

43 Representation-Case Procedures: Election Bars, 85 FR 18366, 18378-18379 (April 1, 2020).

44 Id. at 18379.

45 85 FR 18366, 18375.

46 See Section 103.20(d).

47 This is not a hypothetical assertion, as Starbucks Workers United has already made it clear that it will file blocking charges for any decertification petition that is filed. See Parker Purifoy, Starbucks' Slow Union Bargaining: Decertification Explained (1), Bloomberg Law, Mar. 10, 2023, https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X3CVAV8S000000?bna_news_filter=daily-labor-report#jcite; see also Parker Purifoy, Starbucks Workers Face 'Uphill Battle' With Bids to Remove Union, Bloomberg Law, Jul. 12, 2023, https://news.bloomberglaw.com/daily-labor-report/starbucks-workers-face-uphill-battle-with-bids-to-remove-union.

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Through *Rieth-Riley*, the Board effectively revised the EPR, disregarding the formal rulemaking procedures required by the APA–which, notably, the EPR went through before becoming law. As made clear by the United States Supreme Court in Allentown Mack Sales & Service v. NLRB,[48] the Board is not immune from the APA's requirement that an agency engage in "reasoned decision making." The Supreme Court has further made clear that in certain "situations . . . the Board's reliance on adjudication [instead of formal rulemaking] would amount to an abuse of discretion or a violation of the Act."[49]

Rieth-Riley is a prime example of the Board's violation of the APA, as it undeniably shows the Board abusing its discretion by amending the EPR without engaging in formal rulemaking, by failing to "solicit [ ] the informed views of those affected in industry and labor before embarking on a new course," and not even attempting to obtain the "relevant information necessary to mature and fair consideration of the issues."[50] This is particularly so because the Board's ultra vires holding in *Rieth-Riley* amended the EPR that itself was the product of formal rulemaking under the APA. The shortcomings of the *Rieth-Riley* decision are exacerbated by the fact that the Board is already engaged in APA rulemaking to modify the EPR. But rather than follow the APA's requirements, the Board bypassed the APA by issuing *Rieth-Riley*, instead of waiting for its own rulemaking process to conclude.

48 522 U.S. 359, 374 (1998).

49 *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

50 416 U.S. at 295.

The EPR's purpose is to protect the rights of employees as guaranteed by Sections 7 and 9 of the Act. The use of "merit-determination" dismissals wholly circumvents the EPR. Employees have a legally protected right to vote out a union they are dissatisfied with, and a Regional Director should not be able to abolish that right based solely upon vague, unproven allegations.

The EPR is clear, and nothing within it grants a Regional Director any discretion at all to ignore its clear directives and to substitute their own judgment for the EPR they are mandated to follow by dismissing a petition. The Board's holding in *Rieth-Riley* is in direct defiance of the EPR, which prohibits these merit-determination dismissals and is clearly an attempt to short circuit the APA's mandated rulemaking process.

B. Post *Rieth-Riley*, Starbucks' Employees Are Being Forced to Remain in a Union Despite Numerous Attempts to Decertify

The harm created by *Rieth-Riley* is not theoretical. As one example of ongoing harm to the very employees the Act is intended to protect, the Board has allowed Starbucks Workers United (the "Union") to block all RD Petitions that have been filed against it to date through its application of *Rieth-Riley*.

While this report focuses on Starbucks employees' efforts to decertify,[51] it must be noted that Starbucks employees are not the only employees who have their right to a decertification election stripped away due to *Rieth-Riley*.[52]

51 For previous U.S. Chamber of Commerce discussions regarding decertification petitions at Starbucks, see here and here.

52 See, e.g., *Wendt Corp.,* 371 NLRB No. 159, 2022 WL 5148360 (Sept. 30, 2022); *Station Casinos LLC,* 2022 WL 3082504 (Aug. 2, 2022); *Akima Global Services, Inc.,* 372 NLRB No. 14, 2022 WL 17361428 (Nov. 29, 2022); see also, Emily Brill, *NLRB OKs Toss Of Decertification Bid Due To Labor Violations,* Law360 (Mar. 29, 2023), https://www.law360.com/employment-authority/articles/1591212;
Beverly Banks, *Ballot Count Canceled, ULPs Sustained In Decertification Row,* Law360 (Nov. 29, 2022), https://www.law360.com/employment-authority/articles/1553202;
Beverly Banks, *NLRB Denies Decertification Bid At Ex-Station Casinos Site,* Law360 (Aug. 2, 2022), https://www.law360.com/employment-authority/articles/1517408;
Beverly Banks, *NLRB Official Blocks Union Ouster Vote At Warrior Met Coal,* Law360 (Sept. 8, 2023), https://www.law360.com/employment-authority/articles/1719490/nlrb-official-blocks-union-ouster-vote-at-warrior-met-coal.

The harm created by *Rieth-Riley* is not theoretical. As one example of ongoing harm to the very employees the Act is intended to protect, the Board has allowed Starbucks Workers United (the "Union") to block all RD Petitions that have been filed against it to date through its application of *Rieth-Riley*.

i. Recent Attempts at Decertification

As of October 16, 2023, there have been 16 attempts by Starbucks employees to decertify the Starbucks Workers United union from their workplace. While Starbucks has attempted to bargain at each of these 16 locations, amazingly, none of these decertification petitions have made it to an election. In fact, all have been blocked and even dismissed via a merit-determination dismissal. This has had the effect of forcing ongoing unionization upon employees who do not want union representation and have had followed the process set forth in by the Board's Rules and Regulations to seek the removal of their union.

ii. NLRB's "Reasoning" to Block the Decertification

Despite *Rieth-Riley* being factually distinguishable from the Starbucks petitions on several grounds, the Board has nevertheless allowed the Union to use *Rieth-Riley* to prevent employees from exercising their Section 7 rights to refrain from union representation. In fact, Regional Directors in Starbucks cases across the country have used *Rieth-Riley* to dismiss the RD Petitions, meaning there has been no decertification vote at all.

To support these merit determination dismissals, the Board has relied on the extraordinary remedies imposed in two employer failure to bargain cases, *Big Three Industries*[53] and *Mar-Jac Poultry*.[54] However, these cases are irrelevant to Starbucks because while the union has accused Starbucks of failing to bargain, no adjudication of the merits or resolution of this allegation has been made. *Big Three Industries* and *Mar-Jac Poultry* are applicable to cases where the merits of a general refusal to bargain or egregious ULPs are (1) alleged to be causally connected to the petition, (2) have been adjudicated or resolved and, as a result, (3) a remedy extending or otherwise insulating the mandatory 1-year bargaining period under the law should be imposed.[55]

In *Big Three Industries*,[56] an Administrative Law Judge of the Board ("ALJ") found that the employer engaged in unlawful "surface bargaining." Thus, the ALJ imposed an affirmative bargaining order.[57] While the employer appealed to the Board, the employees filed an RD Petition, citing that the union, during bargaining, "has accomplished nothing in our favor[.]"[58] The Board dismissed the RD Petition because (1) the ULPs were found to be meritorious, (2) the remedial bargaining

53 201 NLRB 197 (1973).

54 136 NLRB 785 (1962).

55 See, e.g., *J.G. Kern Enterprises, Inc.,* 371 NLRB No. 91 (2022) ("Under *Mar-Jac Poultry*, [] the Board awards a remedial extension of the certification year—i.e., an additional period of insulated majority status beginning on the date the parties resume good-faith bargaining following issuance of the Board's decision—up to a maximum of 12 months, when the employer's unfair labor practices have deprived the union of its full certification-year rights.").

56 201 NLRB 197 (1973).

57 Id.

58 Id.

order was imposed, and (3) the petitioning employee stated that the employer's conduct had a clear effect on the decision to seek decertification.[59] These affirmative bargaining orders are only imposed when an employer has refused to bargain or has committed a "hallmark" violation of the Act.[60] "Hallmark" violations include allegations such as "an unprecedented wage increase," or threats employees "would lose their jobs" or the facility "would close" if the employees unionized.[61]

In *Mar-Jac Poultry*,[62] the Board dismissed an RD Petition because it was filed during a remedial extension of the certification year after the employer and union had entered into a settlement agreement that resolved a refusal to bargain allegation based on employer conduct that significantly delayed negotiations.[63]

These cases support the notion that dismissing an RD Petition may be proper only where a remedial measure insulating the certification period is levied after an adjudication or other resolution of the allegations. The effect of any such remedial measures in Starbucks remains entirely theoretical. Dismissing the 16 RD Petitions because affirmative orders to bargain and certification year extension remedies could be imposed for not yet litigated allegations is detrimental to workers' rights and erodes the trust the general public has instilled in the Board. Regional Directors should not have the authority to quash a representation election based solely on a potential remedy that may be imposed due to unverified allegations by a union whose represented workers have decided to divorce themselves from the union, as the law permits them to do.

59 Id.

60 *Overnite Transp. Co.*, 333 NLRB at 1394 (employer threatened to close if the employees engaged in protected activity); see also *Goya Foods of Florida*, 347 NLRB 1118, 1122 (2006) (finding hallmark violations are those "issues that lead employees to seek union representation").

61 Id.

62 136 NLRB 785 (1962).

63 Id. at 786-87.

Moreover, any argument that an extension of the certification year should be imposed on Starbucks is specious at best, as delays in collective bargaining negotiations over the past year are largely due to the Union's unlawful and imprudent conduct, which in turn caused the employees to sour on union representation.

Moreover, any argument that an extension of the certification year should be imposed on Starbucks is specious at best, as delays in collective bargaining negotiations over the past year are largely due to the Union's unlawful and imprudent conduct, which in turn caused the employees to sour on union representation. For example, instead of engaging in good-faith bargaining on a store-by-store basis, consistent with the single-store certification they sought and won over Starbucks' objection, the Union has, among other things:

- Refused to bargain in-person;
- Demanded to bargain a single, nationwide contract; and
- Refused to discuss or agree to ground rules for how the parties will conduct themselves during the bargaining process.

Under Board precedent,[64] a union's conduct during the certification year should be considered before any extension is imposed. In the case of Starbucks, and as further discussed below, the Union refused to bargain based on its single-store bargaining unit certifications and, instead, attempted to force Starbucks to agree to bargain a nationwide contract before any bargaining sessions occurred. Further, the Union unilaterally refused to bargain unless Starbucks agreed to a "hybrid" bargaining session, which, as discussed below, is not a mandatory subject[65] of bargaining. Further, and unlike in *Rieth-Riley*, where employees were illegally locked out, had their wages and work hours reduced, and the employer bargained in bad faith, the allegations against Starbucks are neither severe nor of the "hallmark" variety.

Despite the Board's Regional Directors receiving these RD Petitions, they have failed to hold a *Saint Gobain* hearing to gather the necessary information in support of a meaningful assessment of whether any causal nexus between the alleged ULP charges and the RD Petition exists.[66] As discussed, evidentiary hearings are essential whenever a factual question exists as to whether the alleged conduct, if proven, caused the RD Petition to be filed. But without holding such a hearing, these significant factual issues affecting the causal analysis are left to pure speculation by the Regional Director. This is a direct violation of the petitioning employees' rights and Starbucks' rights to due process.

As a result, Starbucks' employees nationwide are being forced to keep union representation that many of them no longer want. Further, and because of *Rieth-Riley*, these Starbucks employees are being improperly denied the processes they were guaranteed under the Board's EPR when they chose certification.

64 *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 617 (1996).

65 Mandatory subjects are, as their name suggests, required to be bargaining over. Likewise, permissive subjects, like their name suggests, do not have to be bargained over, and both the employer and the union are prohibited from conditioning a collective bargaining agreement on the other party's acceptance of a permissive subject. See, e.g., NLRB, Bargaining in good faith with employees' union representative (Section 8(d) & 8(a)(5)), https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/bargaining-in-good-faith-with-employees-union-representative (last visited Sept. 15, 2023). Not only is it a ULP for either party to insist to impasse on a permissive subject of bargaining, but under certain circumstances, the insistence to impasse on bargaining demands about permissive bargaining subjects might suspend the other party's statutory bargaining obligation.

66 342 NLRB 434 (2004).

As a result, Starbucks' employees nationwide are being forced to keep union representation that many of them no longer want. Further, and because of *Rieth-Riley*, these Starbucks employees are being improperly denied the processes they were guaranteed under the Board's EPR when they chose certification.

iii. The Union's Own Delay and Strategy Are Being Unlawfully Used to Block Starbucks Employees' Decertification Petitions

Any delay in the collective bargaining process is not attributable to Starbucks' tactics, but rather to the Union's failure to accept that it chose to organize single-store units and thus cannot now unilaterally change the scope of the bargaining unit because it does not like the outcome. The Board has long held that "the scope of an established bargaining unit is a nonmandatory subject of bargaining," and a party "may not insist on such a proposal as a condition precedent to entering negotiations."[67] Nevertheless, the Union has attempted to side-step these principles by twisting its bargaining arguments and blaming Starbucks for the resulting delay. The Board has improperly allowed, and arguably encouraged, the Union to make these arguments in its efforts to maintain representation status over workers not interested in union representation.

Under well-settled precedent, once a bargaining unit is certified, the Act's interest in maintaining stability and certainty in bargaining obligations requires adherence to the established bargaining unit.[68] The parties' intent to be bound in collective bargaining by group rather than individual action must be unequivocal.[69] Intent to be bound by joint bargaining is found where employers participate in meaningful multiemployer bargaining for a substantial period of time and there is a uniform adoption of the agreement resulting therefrom.[70]

Over 60 years ago, in *Sav-On Drugs*, the Board abandoned its prior general policy in the retail chain context of making unit determinations coextensive with the employer's administrative division or the involved geographic area.[71] The Board decided that it would "apply to retail chain operations the same unit policy that it applies to multi-plant enterprises in general, that is . . . in the light of all the relevant circumstances of the particular case."[72] The Board expanded upon this policy in Haag Drug, stating, "[o]ur experience has led us to conclude that a single store in a retail chain, like single locations in multilocation enterprises in other industries, is presumptively an appropriate unit for bargaining."[73]

67 See *Canterbury Gardens & Manchester Gardens, Inc.,* 238 NLRB 864 (1978); see also *Chicago Truck Drivers (Signal Delivery),* 279 NLRB 904, 907 (1986) ("[T]he enlargement of a bargaining unit is not a mandatory subject of bargaining under the Act. Thus, in the absence of mutual consent, one party may not insist on a change in the scope of an existing bargaining unit.").

68 See, e.g., *Local Union #323 (Active Enterprises),* 242 NLRB 305 (1979); *Utility Workers Local 111 (Ohio Power Co.),* 203 NLRB 230 (1973), enforced, 490 F.2d 1383 (6th Cir. 1974); *Douds v. Int'l Longshoremen's Ass'n.,* 241 F.2d 278, 282-83 (2d Cir. 1957).

69 *Donaldson Traditional Interiors,* 345 NLRB 1298, 1299 (2005); *Hunts Point Recycling Corp.,* 301 NLRB 751, 752 (1991); *Kroger Co.,* 148 NLRB 569, 572–573 (1964); *Morgan Linen Service,* 131 NLRB 420, 422 (1961); *Artcraft Displays,* 262 NLRB 1233, 1236 (1982).

70 *American Publishing Corp.,* 121 NLRB 115, 122–123 (1958); *Architectural Contractors Trade Assn.,* 343 NLRB 259 (2004); *Arbor Construction Personnel, Inc.,* 343 NLRB 257 (2004); *Krist Gradis,* 121 NLRB 601, 609–612 (1958); *Hi-Way Billboards,* 191 NLRB 244, 245 (1971).

71 138 NLRB 1032 (1962); accord *Frisch's Big Boy Ill-Mar, Inc.,* 147 NLRB 551 (1964).

72 *Frisch's Big Boy,* 147 NLRB at 551-52.

73 169 NLRB 877, 877 (1968); see also *NLRB v. So-Lo Foods, Inc.,* 985 F.2d 123 (4th Cir. 1992) (contrary to employer's assertion that one of its retail grocery stores is not an appropriate unit but rather that only a single, company-wide unit is appropriate, the Board's policy is that "a single store in a retail chain ... is presumptively an appropriate unit for bargaining").

Accordingly, Starbucks cannot be forced to bargain on a basis other than the units that were certified, and it is lawful for Starbucks to insist on confining bargaining within established single-store units.[74] The Union's position of nationwide bargaining[75] is contrary to Board precedent and has caused delayed bargaining. Most importantly, it should not be held against Starbucks and its employees by causing decertification petitions to be dismissed without a hearing.

For similar reasons, Starbucks' position on in-person negotiations is correct and should not be used as a basis to dismiss RD Petitions. The Union's insistence on "hybrid" negotiations, i.e., in-person and via Zoom, is improper and caused the very delay it now complains of. "Face-to-face negotiations" between the "bargaining principals" is "an elementary and essential condition of bona fide bargaining."[76] In fact, insisting on a negotiating method that would hinder meaningful negotiations is frowned upon by the Board and constitutes bad-faith bargaining.[77]

74 *Shell Oil Co.,* 194 NLRB 166 (1972); *Frito-Lay, Inc. v. Int'l Brotherhood of Teamsters,* 623 F.2d 1354, 1359-60 (9th Cir. 1980) (union engaged in bargaining with an "illegal purpose" to force multi-unit bargaining where it insisted on identical contract provisions for three separate bargaining units and conditioned its approval of one of the employer's proposals on the acceptance of the same proposal for the other units).

75 See, e.g., Bryan Wassel, *Report: Starbucks Union Seeks to Bargain for a National Contract,* Retail Touchpoints (May 26, 2023) https://www.retailtouchpoints.com/topics/store-operations/workforce-scheduling/report-starbucks-union-seeks-to-bargain-for-a-national-contract; Dave Jamieson, *Starbucks Union Demands Company Bargain A National Contract,* HuffPost (May 24, 2023) https://www.huffpost.com/entry/starbucks-union-bargaining_n_646d1e5ce4b0ab2b97eadccd; *Addressing Recent Mischaracterizations on Bargaining, Benefits and Allegations,* One.Starbucks (Oct. 23, 2022) https://one.starbucks.com/negotiations/addressing-mischaracterizations/.

76 *Colony Furniture Co.,* 144 NLRB 1582, 1589 (1963) (affirming ALJ decision that union violated the Act by requiring employer to conduct negotiations over phone calls and written correspondence); see also *G. Heileman Brewing Co.,* 290 NLRB 991, 1002 (1988) ("the Company effectively prevented any meaningful bargaining by refusing to meet and deal directly with the Union"); *Redway Carriers,* 274 NLRB 1359, 1377 (1985) ("[e]ven assuming the truth of Sullivan's testimony, his telephone contacts with Kutzler did not constitute contract negotiations under Board law").

77 *Pennsylvania Tel. Guild,* 277 NLRB 501, 502 (1985) ("Because it is our statutory obligation to foster and encourage meaningful collective bargaining and the resolution of industrial disputes, we conclude that . . . a party fails to bargain in good faith by insisting to impasse on the use of a recording device during a grievance meeting. . . [T]herefore the Union's insistence to impasse on tape-recording the meetings constituted . . .unlawful insistence on a nonmandatory subject of bargaining in violation of Section 8(b)(3) of the Act.").

Accordingly, Starbucks cannot be forced to bargain on a basis other than the units that were certified, and it is lawful for Starbucks to insist on confining bargaining within established single-store units.

The Board has routinely concluded that parties may not unlawfully insist to impasse on preconditions to bargaining over permissive "threshold issue[s]" that "stifle negotiations in their inception."[78] Any delay as a result of Starbucks protecting its right to a fair bargaining process cannot be said to be bad faith conduct that would justify dismissing RD Petitions.

In blocking all RD Petitions and using merit-determination dismissals to dispose of them, the Board is endorsing the Union's bad acts and violating–or at least ignoring–long-standing precedent. The Union petitioned-for and received certifications for single-store bargaining units despite Starbucks objection.[79] Thus, a nationwide contract, and the Union's demand to negotiate one, is a permissive, not mandatory, bargaining subject, and Starbucks' position–that the parties negotiate individual contracts for each store, which is how the elections were conducted–is lawful. Given that there are over 300 stores that have had a bargaining unit certified, coupled with the fact that a part of the Union's organizing strategy is the filing of hundreds of ULP charges, delay in negotiation is expected and attributable to the Union's conduct rather than Starbucks'.[80]

The Union has filed ULP charges against individual stores across the country, as well as nationwide charges. Those nationwide charges are preventing employees throughout the country from having an opportunity to vote in a decertification election. The time it will take to adjudicate or resolve the charges, appeal, and receive a final disposition will force employees to be represented for years by the very Union they no longer desire.[81] This, in effect, permits the pending charges to delay elections and

78 See *Bartlett-Collins, Co.,* 237 NLRB 770, 773 (1978) (insisting on court reporter to record negotiations); see also *UPS Supply Chain Solutions, Inc.,* 366 NLRB No. 111, slip op. at 2 (2018) ("As a general proposition, it is a per se violation of Section 8(a)(5) and (1) for either party to hold collective bargaining hostage to unilaterally imposed preconditions on negotiations."); *Columbia College Chicago,* 363 NLRB 1428, 1432 (2016) (finding unlawful requirement that, before face-to-face bargaining, union respond to employer's proposal or submit its own counterproposal); *Regency House of Wallingford, Inc.,* 356 NLRB 563, 577 (2011) (noting "a party may not unilaterally impose conditions upon bargaining"); *Success Village Apartments,* 347 NLRB 1065, 1068 (2006) (unilaterally imposed precondition resulting in impasse that the parties meet indirectly through their selected mediator as an intermediary and not face-to-face violated 8(a)(5)).

79 See, e.g., *Starbucks Corp.,* 03-RC-282115, 03-RC-282127, 03-RC-282139, Decision and Direction of Election (Oct. 28, 2021) ("On August 30, 2021, Workers United Upstate ("Petitioner" or "Union") filed three representation petitions with the National Labor Relations Board ... Petitioner seeks single-facility elections at three stores in and around Buffalo, New York...Starbucks contends that a multi-facility unit ... is the smallest appropriate unit... Based on the record and consistent with Board law, I find that the Employer has not sustained its burden of demonstrating that the petitioned-for unit must include the [multi-store unit] it seeks. I shall therefore direct elections for the three petitioned-for units."); *Addressing Recent Mischaracterizations on Bargaining, Benefits and Allegations,* One.Starbucks (Oct. 23, 2022) https://one.starbucks.com/negotiations/addressing-mischaracterizations/.

80 See, e.g., *Starbucks Corp.,* 02-RD-317733, Starbuck's Request for Review (Aug. 15, 2023); *Starbucks Corp.,* 03-RD-316974, Ariana Cortes' Request for Review (June 9, 2023); *Starbucks Corp.,* 03-RD-317482, Starbuck's Request for Review (June 16, 2023); see also *What You Need to Know About Collective Bargaining,* One.Starbucks (last visited Sept. 1, 2023), https://one.starbucks.com/negotiations/.

81 See, e.g., National Right to Work Legal Defense Foundation, Foundation Fights For Starbucks Workers Seeking to Oust Union, (Aug. 18, 2023), https://www.nrtw.org/newsletter-articles/starbucks-reserve-roastery-08182023/ ("'We have seen our workplace both with and without the union. We believe that the union is looking out for itself more than it is looking out for Starbucks partners, who do not want forced dues and who can advocate for ourselves,' stated [Kevin] Caesar[, an employee of the high-end Starbucks Reserve Roastery location in Manhattan who filed the RD Petition] about why he wants to be free of the union. 'That is why a majority of us have decided we would be better off without the union. The fact that the union officials have forced us to go through this decertification process despite the majority of workers stating they do not want to be represented by this union shows how little regard the union has for the will of the workers,' he added."); National Right to Work Legal Defense Foundation, Starbucks Worker Asks Labor Board to Review Order Denying Vote to Remove Unwanted Union, (June 12, 2023), https://www.nrtw.org/news/buffalo-starbucks-order06122023/ ("'They have treated us like pawns, promising us that we could remove them after a year if we no longer wanted their representation, and are now trying to stop us from exercising our right to vote,' [Ariana] Cortes[, who filed the RD Petition at her Buffalo store] said in a statement about why so many of her coworkers support removing the union. 'It's obvious they care more about power and control than respecting our individual rights.'").

indefinitely prevents employees across the country from even voting to decertify the Union.

The Union's refusal to bargain because it now wants to bargain a nationwide contract despite petitioning–and being certified–for single-stores, as well as its request for hybrid bargaining, should not be grounds for delaying, much less dismissing, RD Petitions. Yet that is exactly what the Board is doing.[82]

Finally, it is worth highlighting that the Union's allegations that are causing RD Petitions to be dismissed are merely over a bargaining dispute. These allegations do not implicate the termination of employees, an outright refusal to meet/bargain, or any other historically coercive or unlawful conduct sufficient to taint an RD Petition. The employees who have chosen to file decertification petitions and their colleagues who have supported these efforts are intelligent enough to observe the parties' conduct, decide which party is behaving appropriately, and, most importantly, decide whether they want the Union to continue to represent them. Yet, the Board is allowing the Union to use illusory reasoning for allegations that are not egregious enough under Board precedent to block RD Petitions. As a result, Starbucks employees–the ones who should decide who they want to work with on their terms and conditions of employment moving forward, Starbucks or the Union–are having their Section 7 rights stripped away by the Board.

82 The same is true for other RD Petitions filed throughout the country by employees of other employers. For example, workers at Warrior Met Coal in Alabama had their RD Petition dismissed by the Board despite blatantly unlawful strike misconduct by the union. See Beverly Banks, NLRB Official Blocks Union Ouster Vote At Warrior Met Coal, Law360 (Sept. 8, 2023), https://www.law360.com/employment-authority/articles/1719490/nlrb-official-blocks-union-ouster-vote-at-warrior-met-coal ("It is unfortunate that the clearly expressed desire of a supermajority of mine workers who just want the right to vote over continued UMWA representation has been completely ignored," said the employee's legal counsel. "This decision only serves to protect the UMWA from accountability to its own constituents for its proven record of strike misconduct in this matter.").

In blocking all RD Petitions and using merit-determination dismissals to dispose of them, the Board is endorsing the Union's bad acts and violating–or at least ignoring–long-standing precedent.

Conclusion

While the current GC and Board may take issue with the EPR, the EPR must be followed until such time as it is amended in a proper APA rulemaking (which may also mean waiting until an amended rule survives court challenges). Failing to follow the EPR as required leads to unjust results, including the violation of workers' Section 7 rights. The experience of Starbucks' employees shows exactly that. Essentially, the Board is flouting its congressional mandate to protect the interests of workers, and instead putting the interests of unions first. To quote the famous Eagles song "Hotel California," the NLRB has decided that unionized workers can check out any time they like, but they can never leave.

As a result, Starbucks employees–the ones who should decide who they want to work with on their terms and conditions of employment moving forward, Starbucks or the Union–are having their Section 7 rights stripped away by the Board.

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