UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

AUNT BERTHA, A PUBLIC BENEFIT CORPORATION D/B/A FINDHELP

Employer

and **Case 16-RD-351569**

AN INDIVIDUAL

Petitioner

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION

Union

ORDER DISMISSING PETITION

On September 27, 2024, the Petitioner filed a Petition seeking to decertify the Office of Professional Employees International Union (Union) as the exclusive collective-bargaining representative of the following appropriate unit of employees (Unit) employed by Aunt Bertha, A Public Benefit Corporation d/b/a Findhelp (Employer):

> **INCLUDED:** Account Executive; Associate Principal, Customer Success; Business Analyst; Business Intelligence Analyst; Business Intelligence Associate; Cloud Database Administrator; Commercial Paralegal; Community Engagement Manager; Community Engagement Manager – California; Community Engagement Manager – Indiana; Community Engagement Manager - New England; Community Engagement Manager – Southwest; Community Engagement Manager – Texas; Community Engagement Marketing Strategist; Curator; Curator Research Specialist; Customer Engagement Marketing Strategist; Customer Happiness Executive; Customer Success Manager; Customer Success Manager-Schoolcare; Customer Support Manager; Customer Support Specialist; Customer Training Manager; Data Analyst; Data Engineer; Data Engineer I; Digital Marketing Manager; Engineer; Engineer I; Executive Administrative Assistant; Government Sales; Account Executive; IT Support Admin; Lead UI/Integration Designer; Learning and Development Specialist; National Community Engagement Manager; Network Support Analyst; Network Support Analyst I; Network Support Analyst II; Northeast Organization Onboarding Specialist (OOS); Office Administrator; Operations Specialist; Organization Onboarding Specialist – Southwest; Principal Business Analyst; Principal Curator Specialist; Product

Manager; Product Owner; Production Coordinator; Production Support Analyst; Production Support Engineer; Program Manager; Project Manager; QA Engineer; Regional Director of State Government-Relations; Research Analyst; RFP Specialist; School Partnership Executive-Sales; Scrum Master; Senior Account Executive; Senior Business Intelligence Analyst; Senior Cloud Infrastructure Engineer; Senior Community Engagement Manager; Senior CSM; Senior Customer Success Manager; Senior Executive Assistant; Senior Financial Analyst; Senior Marketplace Analyst; Senior Partnership Analyst; Senior Policy Analyst; Senior Product Manager; Senior QA Engineer; Senior Site Reliability Engineer; Senior Software Engineer; Senior Staff Data Engineer; Senior Staff Engineer; Senior Staff Software Engineer; Senior Technical Writer; Software Engineer; Software Engineer I; Software Engineer II; Sr. Manager, Business Development; Staff Data Engineer; Staff Engineer; Staff Production Support Engineer; Staff Quality Engineer; Staff Software Engineer; Staff Technical Solutions Engineer; User Experience Designer; User Experience Generalist; Director of Government Relations; and Channel Partner Manager.

EXCLUDED: Director of Culture, Organizational and Leadership Development; People Operations Administrator; Senior Security Analyst; Talent Acquisition Specialist; all other employees including independent contractors, managerial, temporary, confidential, guards, and supervisors as defined in the Act.

For the reasons discussed below, I am dismissing the petition pursuant to *Rieth-Riley Construction Co., Inc.*, 371 NLRB No. 109 (2022) and, alternatively, *Master Slack*, 271 NLRB 78 (1984), subject to reinstatement upon Petitioner's request, if appropriate, after the final disposition of the pending unfair labor practice charges against the Employer.

Facts

On October 2, 2024, I issued an Order to Show Cause asking the Parties to submit their positions on whether the instant petition should be dismissed pursuant to *Rieth-Riley Construction Co., Inc.*, supra., subject to reinstatement based on the unfair labor practices found in Cases 16-CA-319893 and 16-CA-329129 and/or whether the unfair labor practices alleged in Cases 16-CA-311267, 16-CA-312143, 16-CA-313516, 16-CA-318102, 16-CA-318170, 16-CA-319893, and 16-CA-329129, if proven, would have caused the employee disaffection underlying the decertification petition. See *Master Slack Corp.*, supra.

The Employer, the Union, and the Petitioner submitted positions in response to the Order. As discussed in further detail below, the Employer and the Petitioner urge that the petition continue to be processed and, absent such, that the Region conduct a *Saint Gobain*[1] hearing to address the potential causal nexus between alleged conduct and loss of support for the Union. The Union contends that the petition should be dismissed.

[1] 342 NLRB 434 (2004).

After carefully reviewing the parties' positions, the relevant law, and the circumstances of this case, I have concluded that the unfair labor practices found to be meritorious in the cases referenced above warrant dismissal of this petition, subject to reinstatement of the petition after disposition of the pending unfair labor practice cases.

The Positions of the Parties

Employer's Position

The Employer asserts that the Region should expedite the processing of the petition pursuant to the Board's 2020 Election Protection Rule. The Employer asserts that, alternatively, the Region hold a *Saint Gobain* hearing to make an informed and fact-based determination as to whether the alleged unfair labor practices cited have a causal nexus to the employees' disaffection and the decision to file the petition. The Employer argues that under the factors in *Master Slack*, there is no causal nexus with employee disaffection because of the length of time between the alleged unfair labor practices and the filing of the petition and the allegations were not hallmark violations, such as the ones that led to the dismissal of the petition in *Rieth-Riley*.

Petitioner's Position

The Petitioner contends that the Region should continue processing the decertification petition. The Petitioner asserts that any adverse action taken on the instant petition without a hearing denies Petitioner due process and employees their right to an election. The Petitioner argues further that to the extent *Rieth-Riley,* supra, provides a rationale for dismissal in this matter, it contradicts the Board's Rules and Regulations and the Election Protection Rule. The Petitioner is unaware of and not a party to the unfair labor practice cases referenced in the Region's Order to Show Cause. The Petitioner argues that the petition cannot be dismissed based upon unproven bargaining order allegations and an affirmative bargaining order being sought. The Petitioner asserts that the allegations in Case Nos. 16-CA-311267, 16-CA-312143, 16-CA-313516, 16-CA-318102, 16-CA-318170, 16-CA-319893, and 16-CA-32912 do not support a causal nexus finding in disaffection for the Union pursuant to *Master Slack,* supra. The Petitioner also seeks a *Saint Gobain* hearing, which would allow Petitioner the opportunity to address the specific allegations and participate in developing the record. Finally, in a footnote, the Petitioner contends that the Board is unconstitutionally structured.

Union's Position

The Union asserts the instant petition should be dismissed because the Employer's widespread unfair labor practices have tainted the petition and caused employee disaffection. The Union argues that the Board's decision in *Rieth-Riley* supports dismissal of the instant matter because an affirmative bargaining order would be sought by the General Counsel. The Union also argues that the *Master Slack* factors, as applied to the instant petition, support a causal nexus finding between the pending unfair labor practices and the filing of the petition.

Complaint Allegations

On April 12, 2024, I issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 16-CA-311267, 16-CA-312143, and 16-CA-313516, alleging, *inter alia,* that the Employer violated Section 8(a)(3) and (1) of the Act by discharging two employees because of their union and/or protected concerted activities; engaging in surveillance and/or creating an impression that employees' union and/or protected concerted activities were under surveillance; selectively and disparately enforcing its employment policies to prohibit union solicitations; prohibiting employees from talking about the union during working time; blocking union-related content from the Employer's e-mail system; deleting a Google Chat channel to remove union-related posts; and prohibiting employees from using the Employer's electronic communication systems to discuss the union.

On September 6, 2024, I issued an Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing adjoining the Consolidated Complaint in Cases 16-CA-311267, 16-CA-312143, and 16-CA-313516 with Cases 16-CA-318102 and 16-CA-318170. The Second Consolidated Complaint includes, in addition to the allegations described above, allegations that the Employer violated Section 8(a)(3) and (1) of the Act by terminating an employee because of the employee's union and/or protected concerted activities; and issuing and maintaining Severance Agreements with employees including Non-Disparagement, Confidentiality, and Cooperation policies that interfere with, restrain, and coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

In addition, in Cases 16-CA-319893 and 16-CA-329129, I have further determined that post-certification, the Employer violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union over changes in terms and conditions of employment, including the unilateral implementation of the Return-to-Office policy and unilaterally changing health insurance providers, respectfully. A Complaint is pending issuance in these cases. In order to remedy the violations of the Act, the Complaint will seek, inter alia, an affirmative bargaining order and an extension of the certification year pursuant to *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

Analysis

In *Rieth-Riley Construction Co., Inc*., the Board determined that § 103.20 of the Board's Rules and Regulations preserved merit-determination dismissals of representation petitions, notwithstanding changes made to the Board's election procedures in 2020. 371 NLRB, slip op. at 2-4 (2022). The Board defined "merit-determination dismissals" as those situations where a Regional Director elects "to dismiss a representation petition, subject to reinstatement, when the Regional Director (on behalf of the General Counsel) has found merit in an unfair labor practice charge involving misconduct that would irrevocably taint the petition and any related election. Id.

The instant petition was filed during the pendency of the unfair labor practice cases referenced above. For the reasons that follow, I conclude that the instant Petition should be dismissed because: (1) there was a "causal nexus" between the Employer's alleged unfair labor practices and the employee disaffection underlying the decertification petition, and (2) regardless

of any "causal nexus," the Complaint will seek an affirmative bargaining order precluding a finding that a question concerning representation existed at the time of the filing of the petition.

The Board has long held that it "generally will dismiss a representation petition, subject to reinstatement, where there is a concurrent unfair labor practice complaint alleging conduct that, if proven, (1) would interfere with employee free choice in an election, and (2) is inherently inconsistent with the petition itself." *Overnite Transportation Co*., 333 NLRB 1392, 1392-93 (2001). However, "[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." Id., 333 NLRB at 1393 (citations omitted).

The Board applies a multi-factor test to determine whether a causal nexus exists between an employer's unfair labor practices, as alleged, and the subsequent loss of support for an incumbent union. Id., 333 NLRB at 1393. These factors, outlined by the Board in *Master Slack* Corp., 271 NLRB 78 (1984), include:

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

In addition to the legal rationale pursuant to Board decisions *Rieth-Riley* and *Overnite Transportation* as described above, dismissal of the petition is required where the General Counsel seeks a *Mar-Jac* remedy. In *Mar-Jac Poultry Co.*, supra, the Board held that an employer's refusal to bargain during the one-year certification period set forth in Section 9(c)(3) of the Act[2] warrants extension of the certification year. The Board noted that allowing the certification year to lapse while an employer has delayed and undermined the bargaining process "would be to allow it to take advantage of its own failure to carry out its statutory obligation, contrary to the very reasons for the establishment of the rule that a certification requires bargaining for at least 1 year." *Id*.

Initially, regarding the first factor under *Master Slack*, i.e., the length of time between the unfair labor practices and the filing of petition, while the conduct described above occurred in 2023, these unfair labor practices remain unremedied and preclude a question concerning representation. "Serious unremedied unfair labor practices" that "tend to produce disaffections from a union" will preclude a question of representation because under such circumstances, there is no basis to demonstrate free choice on the part of employees. *Olson Bodies, Inc.*, 206 NLRB 779, 779-780 (1973).

Here, the Employer's unremedied unfair labor practices described above are serious, with lasting impact on employees such that the Union's majority status cannot be questioned. Notably, "[d]iscriminatory discharges of employees because of their union activities strike at the very heart of the Act." *Id*. at 779. It is well-settled that such conduct has a "lasting impact, including the

[2] Section 9(c)(3) states, in pertinent part, that "[n]o election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held…."

likelihood of . . . causing employees to defect from unions and the tendency to undermine a union's majority status by discouraging union membership and deterring organizational activity[.]" *Id*. At the same time, the Employer conveyed futility of union representation by refusing to bargain in good faith with the Union by unilaterally changing significant terms and conditions of employment affecting all Unit employees. This conduct would also likely cause disaffection and undermine the Union's majority status as employees were subject to significant changes in their working conditions, including their benefits, without the Employer's collective-bargaining with the Union.

In applying the second and third *Master Slack* factors, i.e., the nature of the alleged illegal conduct, including any possible detrimental or lasting effect on employees, and any possible tendency to cause employee disaffection from the union, the Employer's unfair labor practices are of such a scale and quality that they would inevitably cause employees to believe that the Union was ineffective in representing the Unit. Even assuming, *arguendo,* that some of the Employer's alleged unlawful conduct is remote, the Employer has not remedied any of the violations; therefore, the effects are still present. The Employer's acts unquestionably would cause disaffection with the Union and have a deleterious effect on employee morale, organizational activities, and membership in the Union.

The merit finding of the allegations in Cases 16-CA-319893 and 16-CA-329129 involve violations of § 8(a)(5) and (1) of the Act by failing to bargain in good with the Union by unilaterally implementing the Return-to-Office policy and unilaterally changing health insurance providers. The issuance of a formal complaint in these matters is imminent. The Board has held that an affirmative bargaining order is an appropriate remedy for such a violation. See, e.g., *Columbus Elec. Coop., Inc*., 372 NLRB No. 89, slip op. at 2 (2023), quoting *Caterair Int'l*., 322 NLRB 64, 68 (1996); *Noah's Ark Processors, LLC d/b/a WR Reserve*, 372 NLRB No. 80, slip op. at 3 n.9 (2021); *Kalthia Group Hotels, Inc*., 366 NLRB No. 118, slip op. at 2 (2018). Thus, if the Complaint allegations are proven, the appropriate remedy would include an affirmative bargaining order and a corresponding decertification bar; this means a question concerning representation at the time the petition was filed would be precluded. See *Big Three Indus*., 201 NLRB 197 (1973).

I have determined that the Employer's previous conduct in Case 16-CA-311267, *et al*. and the recent conduct as described above reveal a systematic effort to undermine the Union and that the effects of those actions continue to be present: employees have been discharged; the Employer has engaged in surveillance and/or created an impression that employees' union and/or protected concerted activities were under surveillance; employees have been prohibited from talking about the Union during working time; the Employer has blocked union-related content from the Employer's e-mail system and deleted a Google chat channel to remove union-related posts; the Employer has prohibited employees from using the Employer's electronic communication systems to discuss the Union; and has failed to bargain in good faith by unilaterally changing employees' working conditions.

The totality of the Employer's alleged misconduct including, but not limited to, its failure to bargain with the Union before unilaterally changing employees' terms and conditions of employment before the filing of the Petition in this matter warrants finding a casual nexus. In *Coreslab Structures (Tulsa) Inc*., 372 NLRB No. 31, slip op. at 10 (2022) (footnote omitted), the Board noted that employees' ongoing "concern about their benefits reasonably would have been at the forefront of employees' minds at the time the petition was circulating."

As to the final *Master Slack* factor, the effect of the unlawful conduct on employee morale, I find that it, too, is sufficiently present. As stated previously, Board has held that the *Master Slack* test "is an objective one" and that "the relevant inquiry … does not ask employees why they chose to reject the Union." *Saint Gobain*, 342 NLRB at 434 n.2 (emphasis in original). Here, the Employer's unilateral actions were calculated to discourage support for the Union representing its employees. All charge allegations directly impacted the entire Unit and projected a message that the Union was powerless to do anything for the Unit employees. The Employer's unfair labor practices are of such a scale and quality that they would inevitably cause employees to believe their elected Union is ineffective in representing the Unit, even though the Union's inability to represent employees was caused by the Employer's unilateral action and refusal to bargain. In turn, such conduct, if proven, frustrated the collective-bargaining process, and would undoubtedly impact employee morale.

The Employer and the Petitioner both argue the instant petition cannot be dismissed without a *Saint Gobain* hearing. In some cases, it may be necessary to conduct an evidentiary hearing to gather testimony and evidence pursuant to the Board's decision in *Saint Gobain Abrasives*, 342 NLRB 434 (2004). However, "in the 18 years that have elapsed since the [this] decision, … the Board has consistently signaled that *Saint Gobain* does not necessarily require a hearing in every case." *Rieth-Riley*, 371 NLRB, slip op. at 6 & n.31 (collecting cases). Instead, "casual nexus determinations may be made as a matter of law, where appropriate." Id., 371 NLRB, slip op. at 6, citing *Overnite Transportation*, 333 NLRB at 1392. As such, I am denying the request for an evidentiary hearing in this matter.

Based on the Employer's above cited unfair labor practices[3] precluding a question concerning representation and causing employee disaffection with the Union, the petition cannot be processed further. Accordingly, I am dismissing the petition pursuant to *Rieth-Riley* and, alternatively, *Master Slack*, subject to reinstatement upon Petitioner's request, if appropriate, after the final disposition of the charges.

In a footnote in the position statement, the Petitioner submitted the affirmative defense claim that the removal protections Congress granted to Board members are unconstitutional. This affirmative defense fails because the Petitioner has not shown or even alleged that those removal protections caused any harm. *See SJT Holdings, Inc.*, 372 NLRB No. 82, slip op. at 1 n.4 (2023) (citing *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021), and *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022), *rev'd per curiam on other grounds*, 598 U.S. 623 (2023)); *YAPP USA Auto. Sys., Inc. v. NLRB*, No. 24-12173, 2024 WL 4119058, at *9-10 (E.D. Mich. Sept. 9, 2024) (applying causal-harm standard to reject constitutional challenge to removal protections enjoyed by Board members and administrative law judges), *appeal docketed*, No. 24-1754 (6th Cir. Sept. 9, 2024);

[3] On October 3, 2024, the Union filed Case 16-CA-352130 against the Employer alleging, in part, that the Employer solicited employees to sign the decertification petition through an agent. Section 103.20(c) of the Rules and Regulations provides that paragraph (c) charges are those that challenge the circumstances surrounding the petition or the showing of interest in support of the petition. Case 16-CA-352130 appears on its face to be a paragraph (c) charge, and under the 2020 Board Rules, with the instant petition filed on September 27, 2024, and a request to block, the election would normally proceed with the ballots being impounded up to 60 days following an election until there is a final determination on the merits of the unfair labor practice allegations. Because I am dismissing the petition as described in this Order, it is unnecessary to apply the Board's 2020 Rules to the petition.

Cortes v. NLRB, No. 1:23-cv-02954, 2024 WL 1555877, at *7 (D.D.C. Apr. 10, 2024) (declining to address the constitutionality of Board members' removal protections because "the Court could 'dispose of the case' on the harm requirement" (quoting *Bond v. United States*, 572 U.S. 844, 855 (2014))), *appeal docketed*, No. 24-5152 (D.C. Cir. June 10, 2024). Furthermore, "Supreme Court precedent recognizing that Congress may establish expert agencies like the Board, led by a group of principal officers and removable by the President only for good cause, forecloses [any] claim" that the Act unconstitutionally shields Board members from removal. *SJT Holdings*, above, at 1 (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)).

ORDER

IT IS HEREBY ordered that the Petition in this matter is dismissed, subject to reinstatement, pending the resolution of the unremedied unfair labor practices, as alleged.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A copy of the request for review must be served on each of the other parties, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. The request for review must contain a complete statement of the facts and reasons on which it is based.

***Procedures for Filing Request for Review*: Pursuant to Section 102.5 of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlrb.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden.** A request for review filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. The request for review must comply with the formatting requirements set forth in Section 102.67(i)(1) of the Board's Rules and Regulations. Detailed instructions for using the NLRB's E-Filing system can be found in the E-Filing System User Guide.

A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business **(5 p.m. Eastern Time)** on **October 23, 2024**, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on **October 23, 2024.**

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure

to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which must also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Any party may, within 5 business days after the last day on which the request for review must be filed, file with the Board a statement in opposition to the request for review. An opposition must be filed with the Board in Washington, DC, and a copy filed with the Regional Direction and copies served on all the other parties. The opposition must comply with the formatting requirements set forth in §102.67(i)(1). Requests for an extension of time within which to file the opposition shall be filed pursuant to §102.2(c) with the Board in Washington, DC, and a certificate of service shall accompany the requests. The Board may grant or deny the request for review without awaiting a statement in opposition. No reply to the opposition may be filed except upon special leave of the Board.

DATED at Fort Worth, Texas, this 9th day of October 2024.

Timothy L. Watson
Regional Director
National Labor Relations Board
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