UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

TREASURE ISLAND FOODS, INC.,

Employer,

and

DAN SCHALIN,
Petitioner, Case No. 13-RD-2515

and

UNITED FOOD & COMMERCIAL WORKERS,
LOCALS 881 and 1546,
Union.

PETITIONER DAN SCHALIN'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS REQUEST FOR REVIEW; ALTERNATIVELY, PETITIONER'S BRIEF IN SUPPORT OF THE EMPLOYER'S REQUEST FOR REVIEW

1) Introduction: On December 29, 2005, the Acting Regional Director of Region 13 dismissed without a hearing the Petition for a Decertification Election filed in this case by Petitioner Dan Schalin, an employee of Treasure Island Foods, Inc. (Copy attached as Exhibit 1). That dismissal was based upon a rigid and reflexive interpretation of the Board's "Master Slack" factors, Master Slack Corp., 271 NLRB 78 (1984). But see Saint-Gobain Abrasives, 342 NLRB No. 39 (2004) (holding that employees' decertification petition should not be dismissed based upon allegations of employer misconduct, unless the union proves that there is a "causal nexus" between the alleged employer misconduct and the employees' disaffection from the union); see also

Roosevelt Memorial Park, Inc., 187 NLRB 517, 517-18 (1970) (in a "contract bar" case, the party asserting a contract bar "bears the burden of proof that the contract was fully executed, signed and dated prior to the filing of the petition"); S. Abraham & Sons, Inc., 193 NLRB 523 (1971) (in a "voluntary recognition bar" case, the party seeking to block an election bears the burden of proving that there was actual majority support for the union and a legitimate voluntary recognition).

Here, the facts conclusively show that union malfeasance and arrogance, not employer misconduct, led the Petitioner and his fellow employees to attempt not one but three separate decertifications over the past two years. Under no stretch of the imagination could the union ever prove the requisite "causal nexus" in this case.

Yet the Regional Director summarily dismissed the instant petition without a hearing, and in the process trampled employees' statutory right to have a decertification election conducted. See NLRA §§ 7 and 9(c)(1)(A)(ii). "The wrongs of the parent should not be visited on the children, and the violations of [the employer] should not be visited on these employees." Overnite Transportation Co., 333 NLRB 1392, 1398 (2001) (Member Hurtgen dissenting); Saint-Gobain Abrasives, 342 NLRB No. 39 (2004).

On or about January 8, 2006, Petitioner Schalin filed a pro se Request for Review. Thereafter, on January 13, 2006, the undersigned was retained as an attorney to represent Petitioner Schalin in this case, and promptly submitted a Notice of Appearance. On or about January 12, 2006, the employer Treasure Islands Foods, Inc. (hereinafter "Treasure Island") filed for an extension of time to file its own Request for Review. On January 13, 2006, the Board granted that Motion and gave Treasure Island until January 19, 2006 to

file its Request for Review. This Brief constitutes Petitioner Schalin's Supplemental Brief in support of his Request for Review. Alternatively, this Brief should be considered as Petitioner's Brief in Support of Treasure Island's Request for Review.[1]

Pursuant to R & R §§ 102.67 and 102.71 et alia, this Request for Review should be granted because this case presents a novel situation whereby the Regional Director has inflexibly applied the Board's "blocking charge" rules to prevent employees from holding a decertification election, even though the facts show that employees have filed not one, but three separate decertification petitions over the past two years, and have also provided their employer with a petition opposing UFCW representation signed by **85%** of the employees! Despite all of this, the Board's rules have been used (and abused) time and time again to deny these employees their statutory right to an election at a time of their choosing. It is high time for the Board to revamp or overrule its "blocking charge" rules, and make employee free choice the highest priority under the Act, not the lowest.

2) Background Facts and History: For many years Treasure Island was party to collective bargaining agreements with UFCW Locals 881 and 1546, covering a single bargaining unit of approximately 400 employees in six retail stores. These parties had a long and successful bargaining history.

---

[1] To the extent that the Board deems it necessary for the Petitioner to file a Motion for leave to file this Brief, Petitioner Schalin hereby moves for leave. This Motion is based on the fact that Mr. Schalin, a grocery worker, was proceeding pro se up until January 13, 2006.

However, Treasure Island was in serious financial difficulty as it faced negotiations prior to the March 7, 2004 expiration of its most recent contract. Much of its financial difficulties can be traced to massive increases in its required hourly contributions to the UFCW's health & welfare fund, and these payments led Treasure Island to the brink of bankruptcy. So severe was this problem that the company openly offered to allow the union to fully scrutinize its books and records.

Before the March 7, 2004 expiration date, both parties advised the other that they desired to change or terminate the contract. The first meeting between the parties occurred on February 13, 2004. There were no employees in attendance as the union does not have any employees on its negotiating committee.

In early March, 2004, the parties began meeting with Federal Mediator Gerald Hughes in attendance. Negotiations were mostly devoted to insurance and matters concerning the UFCW's health & welfare fund.

On or about March 7, 2004, the union held a membership meeting to advise the employees on the status of negotiations. At this meeting the union gave employees some information regarding its review of Treasure Island's books and records, confirmed that the company was losing money and raised the possibility of store closure because of this. Faced with store closings and the employer's possible bankruptcy, employees were very unhappy with the UFCW and its position in bargaining. Their concerns were voiced, and employees began circulating a decertification petition (the first one in this matter) shortly thereafter.

Negotiations continued, and the union ultimately agreed to allow employees to vote on an employer proposal that altered the health care policies. Ratification meetings were to be held at the Hotel Claridge in Chicago on Sunday, March 14, 2004, at two different times, 10:00 AM and 6:00 PM, and the union distributed flyers to members announcing the contract ratification meetings. According to the union's flyer, the purpose of the meetings was to vote on a contract settlement offer including Treasure Island's proposed health insurance package. The flyer also stated that "if the contract is not ratified, a strike vote may be taken."

However, the UFCW reneged on its agreement to present the employer's proposal at the ratification meetings. It never allowed a vote on the proposal and never took a strike vote. Instead, the union announced a consumer boycott of all Treasure Island stores, effective the very next day. Needless to say, the Treasure Island employees were incensed that their employer, already on the brink of financial ruin, was made the target of a consumer boycott, yet they (the employees) were not allowed to vote on a contract offer and were not even told that they were on strike. It was these arrogant and underhanded tactics that turned so many employees against the UFCW and its supposed "representation" of their interests.

On Monday, March 15, 2004, the UFCW began picketing and boycotting all Treasure Island stores. Few if any Treasure Island employees participated, even though the union offered full wages to any employees who did so. As a result, the UFCW hired non-Treasure Island employees to carry the boycott signs it prepared for them.

As noted, the union's failure to permit a ratification vote and the ensuing events caused a great deal of employee animosity toward the union. These "no-vote" meetings, coupled with the union's boycott, led not only to verbal disaffection but the filing of two separate decertification petitions with the NLRB on March 15, 2004, Case Nos. 13-RD-2460 and 13-RD-2461.

Shortly thereafter, with an FMCS mediator present, Treasure Island declared an impasse and stated that it would implement its proposal. On Monday, March 29, 2004, before the employer could actually implement its proposal, employees presented it with signed and dated petitions from over **85%** of the bargaining unit employees stating that they no longer desired UFCW representation. These expressions of dissatisfaction were clearly based upon the following:

1) the union could not justify its bargaining position to the employees at its March 7, 2004 membership meeting;

2) the union would not allow the employees to vote on the contract offer at the March 14, 2004 membership meeting;

3) the union would not allow the employees to take a strike vote at the March 14, 2004 membership meeting; and

4) even though the union had verified that Treasure Island was losing money, it commenced picketing and a consumer boycott of all Treasure Island stores without any employee support, thereby jeopardizing the employees' jobs against their will. (Indeed, even today (two years later) the Petitioner and his fellow employees view this arrogant union conduct as the reason for their disaffection.)

Upon receiving the employees' petition, Treasure Island informed the union that it was withdrawing recognition. Treasure Island subsequently implemented all the terms of its final offer. In response, the union filed several ULP charges. Indeed, many ULP charged were filed on all sides. On or about May 3, 2005, a global settlement of all CA and CB charges was reached, and the union was "re-recognized."

On May 4, 2005, Treasure Island sent a "Letter and Q&A sheet" to employees to alert them to the ramifications of the global settlement. This "Letter and Q & A sheet" was rather factual and innocuous. Nevertheless, on July 15, 2005, the UFCW filed a ULP charge, Case No. 13-CA-42746, alleging that Treasure Island unilaterally changed access rules and encouraged decertification via its May 4, 2005 "Letter and Q&A sheet."

On September 29, 2005, the Regional Director dismissed the ULP charge in Case No. 13-CA-42764, finding that the "Letter and Q & A sheet" was lawful, and did not encourage employees to decertify. However, the union, on October 26, 2005, appealed from the Regional Director's dismissal of the charge in Case No. 13-CA-42764.

The dismissal of the union's ULP charge in Case No. 13-CA-42764 should have paved the way for employees to conduct a decertification election if they chose. Indeed, on or about November 4, 2005, Petitioner Dan Schalin filed the petition at issue in this case. While that Petition was pending, however, the General Counsel's Office of Appeals, on December 15, 2005, sustained the union's appeal, and ordered the ULP charge in Case No. 13-CA-42764 to be prosecuted. Moreover, it appears that Region 13 is now about to revoke the "global settlement" that was signed on or about May 3, 2005.

On December 29, 2005 the Acting Regional Director dismissed Mr. Schalin's petition, and the instant Requests for Review follow. In the meantime, Treasure Island has, on January 10, 2006, requested that the General Counsel and the Office of Appeals reconsider their decision sustaining the union's appeal in Case No. 13-CA-42764.

3) Legal Argument: Employees enjoy a statutory right to petition for a decertification election under § 9(c)(1)(A)(ii) of the National Labor Relations Act ("NLRA" or "Act"). That right should not be trampled by arbitrary rules or "bars" which prevent the expression of true employee free choice. Indeed, most of the Board's "bars" stem from discretionary Board policies (see, e.g., Section 11730 of the Casehandling Manual concerning "blocking charges"), which should be reevaluated when industrial conditions warrant. See e.g., IBM Corp., 341 NLRB No. 148 (2004); Dana Corp., 341 NLRB No. 150 (2004). It is time for the Board to drastically alter, if not end, its "blocking charge" rules.

Employee free choice under § 7 is the paramount interest of the NLRA. See Pattern Makers League v. NLRB, 473 U.S. 95 (1985); Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992); Lee Lumber & Bldg. Material Corp. v. NLRB, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (employee free choice is the "core principle of the Act") (citations omitted). An NLRB conducted secret-ballot election is the preferred forum for employees to exercise their right of free choice. See Levitz Furniture Co., 333 N.L.R.B. 717, 725 (2001) ("We agree with the General Counsel and the unions that Board elections are the preferred means of testing employees' support"). This right of

employee free choice is being sacrificed by the Regional Director on the alter of "industrial stability" simply because the employer is alleged to have committed one or more infractions of the law. This is especially true here since three separate petitions have been filed by the employees in the last two years, but not one election has ever been held.

The Regional Director's reflexive application of the "blocking charge" policies ignores the fact that the Petitioner and his fellow employees have longstanding and principled disagreements with the union, irrespective of any employer infractions. Yet, the employees are being treated like children who cannot possibly make up their own mind. This is wrong. As Member Hurtgen has cogently stated in reviewing a similar situation of union blocking charges:

> I would not deprive these employees of their statutory right to vote on the issue of union representation. The wrongs of the parent should not be visited on the children, and the violations of Overnite [the employer] should not be visited on these employees.

In re Overnite Transp. Co., 333 NLRB 1392, 1398 (2001) (Member Hurtgen dissenting).

Indeed, the Board's jurisprudence on blocking elections needs to be drastically overhauled. The Board has long operated under a system of "presumptions" which regularly prevent employees from exercising their statutory right under §§ 7 and 9(c)(1)(A)(ii) to hold a decertification whenever a union files so-called "blocking charges." Basically, the Board will refuse to conduct a decertification election while union unfair labor practice charges against the employer are pending. The rationale is

that the employer infractions, if true, destroy the “laboratory conditions” necessary to permit employees to cast their ballots freely and without restraint or coercion.

But it must be remembered that this “blocking charge” practice is not governed by statute or even by formal rules or regulations; rather, its creation and use lies within the Board’s discretion to effectuate the policies of the Act. American Metal Prods. Co., 139 N.L.R.B. 601 (1962); see also NLRB Casehandling Manual 11730 et seq., which sets forth the “blocking charge” procedures in detail. Moreover, it must be remembered that in every case the “blocking charge” rule stops employees from exercising their paramount § 7 rights to choose or reject representation.

For this reason, the Board’s “blocking charge” practice has faced severe judicial criticism. See, e.g., NLRB v. Gebhard-Vogel Tanning Co., 389 F.2d 71 (7th Cir. 1968); NLRB v. Minute Maid Corp., 283 F.2d 705 (5th Cir. 1960). In Lee Lumber and Bldg. Material Corp. v. NLRB, 117 F.3d 1454, 1458 (D.C. Cir 1997) (emphasis added), the court described one such set of NLRB “blocking charge” presumptions as follows:

> [T]he Board explicitly has adopted not a *per se* rule but a rebuttable presumption that there is a causal nexus between an employer's unlawful refusal to bargain and its subsequent repudiation of the union. In the decision under review, the Board first reaffirmed the general rule that in a case involving an unfair labor practice other than a refusal to bargain the union must show specific proof of a causal relationship between the unfair labor practice and the subsequent repudiation of the union; in cases involving an unlawful refusal to recognize and bargain, however, the Board held that "the causal relationship between unlawful act and subsequent loss of majority support may be presumed," Supplemental Decision at 3, **regardless of whether the employees were aware of the employer's unlawful behavior**. Therefore the Board would not hear evidence about what the employees knew or about "the actual impact of such refusals to bargain on the employees' morale, organizational activities, and union membership." Id. at 3 n. 23.

As shown by the highlighted text, the Board's policies often deny decertification elections even where the employees themselves are unaware of the alleged employer misconduct, and where their disaffection from the union springs from wholly independent sources. Such use of "presumptions" to halt decertification elections thus serves to entrench unpopular but incumbent unions, thereby forcing an unwanted representative onto employees. Judge Sentelle's concurring opinion in Lee Lumber, 117 F.3d at 1463-64, highlights the unfairness of the Board's policies:

> As the court today notes in discussing the imposition of the bargaining order, "employee 'free choice' ... is a core principle of the [National Labor Relations] Act." (citing Skyline Distribs. v. NLRB, 99 F.3d 403, 411 (D.C. Cir.1996)). However, in cases like the present one, the Board, in the face of that core principle, presumes that the employees are incapable of exercising their core right because they might have been deceived as to the union's strength by the employers' apparent willingness to challenge the union. If that is the case, and a union is worth having, then why couldn't the unions so inform the employees out of it? To presume that employees are such fools and sheep that they have lost all power of free choice based on the acts of their employer, bespeaks the same sort of elitist Big Brotherism that underlies the imposition of the invalid bargaining order in this case. Consider anew the facts before us. In 1990, 85.7 percent of the employees of the bargaining unit signed a petition asking for a chance to exercise their free choice. Seven years later, those employees still have not had the election they sought because the Board presumes that the employers' refusal for a few days to bargain with the Union thoroughly fooled those poor deluded employees to such a point that neither the Union nor anyone else could possibly educate them of the truth known only to their Big Brother, the Labor Board.

After waiting two long years since the first decertification petition was filed to oust the UFCW, Petitioner Schalin asks this Board to restore some sanity and democracy to our labor laws, and prove Judge Sentelle wrong. Region 13 should be ordered to proceed to an immediate election without further delay. The uncertainty in this

bargaining unit has dragged on for much too long, and it is time to hold the vote and let the chips fall where they may for all parties. Petitioner and his colleagues are not sheep, but responsible, free-thinking individuals who should be able to make their own choice about unionization. Id. Even in situations where employers commit an unfair labor practice, the Board's "blocking charge" rules are arbitrary and anti-democratic because they halt elections without regard to the desires of the employees, based upon "the sins" of the employer. Overnite Transp. Co., 333 NLRB 1392, 1398 (2001) (Member Hurtgen dissenting).

Member Hurtgen was correct in pointing out the major flaw of most election "blocks," to wit: that they visit the sins (or potential sins) of employers on the employees. But it must be remembered that it is the employees themselves whose paramount § 7 rights are at stake, and they should not be so cavalierly discarded simply because their employer committed a violation or made a mistake under the labor laws. Petitioner urges the Board to overhaul its "blocking charge" policies to protect the true touchstone of the Act – employees' paramount right of free choice under § 7. See Pattern Makers League v. NLRB, 473 U.S. 95 (1985) (paramount policy of the NLRA is "voluntary unionism"); Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA confers rights only on *employees,* not on unions or their nonemployee organizers. . . ."); International Ladies Garment Workers v. NLRB, 366 U.S. 731, 737 (1961) ("There could be no clearer abridgment of § 7 of the Act" than for a union and employer to enter a collective bargaining relationship when a majority of employees do not support union representation).

Procedural hurdles which deny employees their right to hold a decertification election are woven throughout the Board's rules. See Casehandling Manual 11730 et seq. These procedural hurdles also find voice in cases like Master Slack, 271 NLRB 78 (1984), and its progeny, which hold that various employer unfair labor practices are "presumed" to taint employee decertification petitions.

But in granting review in Saint-Gobain Abrasives, 342 NLRB No. 39 (2004) and overruling cases such as Priority One Services, 331 NLRB 1527 (2000), the Board has signaled its understanding that many of these "blocking charge" rules are arbitrary, unfair, and rely upon "speculat[ion] . . . to deny employees their fundamental Section 7 rights." As Member Hurtgen said in his dissent in Priority One Services, 331 NLRB at 1528:

> My colleagues respond that they are not establishing a conclusive presumption. They say that the conduct was "inherently likely" to cause employees to disaffect from the Union. The distinction escapes me. The bottom line is that the Employer is denied an opportunity to present counter-evidence on a critical issue.

Member Hurtgen should have also added that the employees (who have paramount § 7 rights at stake when they seek the decertification of a union that may well not represent a majority) are similarly denied their statutory rights under § 9(c)(1)(A)(ii).

Thus, the Board must create new standards that limit the use and abuse of blocking charges by NLRB Regional offices and incumbent unions bent on clinging to power. As Member Brame has stated, the Board must be mindful that "unions exist at the pleasure of the employees they represent. Unions **represent** employees; employees do not exist to

ensure the survival or success of unions." MGM Grand Hotel, Inc., 329 N.L.R.B. 464, 475 (1999) (emphasis added).

Since collective bargaining is predicated on employee free choice, the Act's policy of promoting stable collective bargaining relationships favors secret-ballot elections to determine the free choice of employees. Unless and until the NLRB holds an election to determine whether the Treasure Island employees truly support or oppose continued union representation, the interest of "encouraging the practice and procedure of collective bargaining" cannot be fulfilled.

Here, where employees signed multiple showings of interest supporting decertification since 2004, and provided their employer with an 85% showing of interest against further union representation, the Board should conduct a secret-ballot election to protect and facilitate the Act's paramount interest in employee free choice.

At the very least, the Board should order the regional Director to conduct a Saint-Gobain "causation hearing," at which the burden of proof will be upon the union, the party asserting the "blocking charge," to prove that the employer's infractions caused the employee disaffection. Petitioner is confident that the UFCW unions will never be able to meet this burden, given the fact that the union's own arrogance and malfeasance is what led these employees to file for decertification. As noted in the Statement of the Facts, supra, the union callously refused to allow employees to vote in a contract ratification, and then announced a consumer boycott of their employer, which all employees knew would be devastating to their employer's economic prospects – and their

own employment prospects. Thus, it was not employer infractions which caused the employees' disaffection, but union heavy-handedness.

CONCLUSION: The Board should grant the Requests for Review and order the Regional Director to reinstate and process this decertification petition, or, alternatively, order the Regional Director to hold a "causation hearing" under Saint-Gobain Abrasives, 342 NLRB No. 39 (2004), whereupon the UFCW unions will bear the burden of proof on the "causal nexus" issue.

Respectfully submitted,

____

Glenn M. Taubman, Esq.
c/o National Right to Work Legal Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA. 22160
(703) 321-8510
Attorney for Petitioner Dan Schalin

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Support of Request for Review was sent via first class mail, addressed to:

Lester A. Heltzer, Executive Secretary (8 copies)
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-0001

Roberto Chavarry, Regional Director
National Labor Relations Board
Region 13
203 S. LaSalle Street, 9th Floor
Chicago, IL 60604

Jeffrey K. Ross, Esq.
Seyfarth Shaw
5 East Monroe, Suite 4200
Chicago, IL 60603

Jonathan Karmel, Esq.
Karmel & Gilden
221 N. LaSalle Street, 1414
Chicago, IL 60601

Mr. Christ Kamberos, Employer Rep.
Treasure Island Foods
3460 N. Broadway
Chicago, IL 60657

Dan Dosenbach, Esq.
United Food & Commercial Workers
International Union Local 1546, AFL-CIO,
CLC
1649 W. Adams Street
Chicago, IL 60612

UFCW Local 881
10400 W. Higgins Road, Suite 500
Rosemont, IL 60018

UFCW Local #1546
1649 W. Adams Street
Chicago, IL 60612

this 18th day of January, 2006.

____

Glenn M. Taubman
Attorney for Petitioner Dan Schalin