Pinnacle Foods Group, LLC and Robert Gentry, Petitioner *and* Local 881 United Food and Commercial Workers Union. Case 14–RD–226626

October 21, 2019

DECISION ON REVIEW AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The question presented in this case is whether the Regional Director erred in dismissing a decertification petition on the basis of a settlement agreement resolving unfair labor practice charges that included a provision in which the Employer agreed to extend the certification year for a period of 7 months commencing with the approval of the settlement agreement. Contrary to the Regional Director, we find that the Board's decision in *Truserv Corp.*, 349 NLRB 227 (2007), precludes the dismissal of an election petition on the basis of settled unfair labor practice charges in the circumstances presented here. Accordingly, we grant the Petitioner's request for review, reverse the Regional Director's decision in this case, and remand the case for the purpose of processing the petition.

I. FACTS

On March 7, 2017, the Union was certified as the representative of a unit of production and maintenance employees at the Employer's St. Elmo, Illinois facility. The parties thereafter engaged in bargaining but did not reach agreement on a first contract. On August 31, 2018,[1] the Petitioner filed a decertification petition. One week later, on September 7, the Union filed an unfair labor practice charge in Case 14–CA–226922, alleging, among other things, that the Employer had bargained in bad faith in violation of Section 8(a)(5) of the Act.[2] That same day, the Acting Regional Director granted the Union's request to block further processing of the petition and ordered that it be held in abeyance pending resolution of the charge.[3] Thereafter, the Regional Director issued a complaint and amended complaint, on November 29 and February 22, 2019, respectively. The amended complaint alleged that, from about March 7 to October 24, the Employer had failed to bargain in good faith by failing to make itself available for bargaining on reasonable dates and by failing to provide sufficient time for bargaining during bargaining sessions held. The amended complaint also alleged that the Respondent violated Section 8(a)(5) on about September 17 by unilaterally changing the length of shifts and bidding procedures for those shifts.

The Employer and Union thereafter entered into a settlement agreement resolving the allegations in Cases 14–CA–226922 and 14–CA–228742, which was approved by the Regional Director on March 25, 2019. The agreement, which included a nonadmission clause, required the Employer to post an approved notice for 60 days and comply with its terms. Those terms relevantly included provisions stating that the Employer would not refuse to bargain in good faith by limiting the frequency and duration of bargaining meetings or by making changes to wages, hours, and working conditions, and that the Employer would bargain in good faith with the Union. The settlement agreement also included the following provision:

> EXTENSION OF THE CERTIFICATION YEAR—The Charged Party agrees that, pursuant to *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), the certification year in case 14–RC–183775 will be extended for a period of seven months, commencing upon approval of this settlement agreement. During this seven month period of time, the Charged Party agrees to bargain in good faith with the Charging Party for an initial collective-bargaining agreement and acknowledges that the Board will dismiss any representation petitions concerning this bargaining unit filed through the end of the extended certification year.

The Petitioner was not a party to the settlement agreement and did not consent to the dismissal of his petition.

II. THE REGIONAL DIRECTOR'S DECISION AND THE REQUEST FOR REVIEW

The Regional Director dismissed the petition by letter dated April 1, 2019, on the basis of the settlement agreement cited above. The Regional Director noted that the settlement agreement extended the certification year for 7 months, effective as of March 25, 2019. Citing *United Supermarkets*, 287 NLRB 119, 120 (1987), enfd. 862 F.2d 549 (5th Cir. 1989), and *Centr-O-Cast & Engineering Co.*, 100 NLRB 1507, 1508 (1952), the Regional Director stated that representation petitions filed during the certification year must be dismissed. The Regional Director then stated as follows: "The Employer's conduct subject to the settlement agreement noted above commenced on or about March 7, 2018. The instant petition, filed on August 31, 2018, was filed during the extended certification

[1] Unless otherwise noted, all dates hereafter are in 2018.

[2] Subsequently, the Union filed an unfair labor practice charge in Case 14–CA–228742, alleging that the Employer unilaterally changed terms and conditions of employment.

[3] On February 4, 2019, the Board denied the Petitioner's request for review of the abeyance order. *Pinnacle Foods Group, LLC*, Case 14–RD–226626, 2019 WL 656304 (unpublished order).

that 'embrace[s] that time in which the employer has engaged in its unlawful refusal to bargain,' and, by operation of law, must be dismissed." (quoting *Mammoth of California*, 253 NLRB 1168, 1169 (1981), enfd. 673 F.2d 1091 (9th Cir. 1982)).

Citing *Truserv*, 349 NLRB at 227, and *Cablevision Systems Corp.*, 367 NLRB No. 59 (2018), among other cases, the Petitioner's request for review contends that the Regional Director erred in dismissing the petition on the basis of a settlement agreement that contains a nonadmission clause. The Petitioner contends that the inclusion of a certification year extension in the settlement agreement does not require a different result because the Employer and Union cannot waive the Petitioner's right to have his petition processed. Citing the passage of time since the Union's certification, the Petitioner contends that an extension of the certification year is unwarranted in any event. The Union filed a statement in opposition to the Petitioner's request for review, urging the Board to adopt the Regional Director's dismissal of the petition.

III. ANALYSIS

In *Cablevision*, the Board recently reaffirmed that "when a decertification petition has been blocked by subsequently settled unfair labor practice charges, 'a timely filed decertification petition that has met all of the Board's requirements should be reinstated and processed at the petitioner's request following the parties' settlement and resolution of the unfair labor practice charge.'" 367 NLRB No. 59, slip op. at 3 (quoting *Truserv*, 349 NLRB at 228). As the Board explained in *Truserv*, "absent a finding of a violation of the Act, or an admission by the employer of such a violation, there is no basis for dismissing a petition based on a settlement of alleged but unproven unfair labor practices. To do so would unfairly give determinative weight to allegations of unlawful conduct and be in derogation of employee rights under Section 7 of the Act." 349 NLRB at 228.[4] Consistent with this precedent, which the Regional Director neither cited nor applied, the dismissal of the petition was plainly in error.

The Regional Director's finding that the parties' extension of the certification year warrants dismissal of the petition is also erroneous, as a matter of both fact and law. Factually, the Regional Director erred in finding that the petition was filed during the extended certification year. To the contrary, the petition was filed on August 31, nearly 6 months after the end of the original certification year on March 7. Although the settlement agreement did subsequently provide for an extension of the certification year, that extension by its terms only commenced upon approval of the settlement agreement, that is, on March 25, 2019—long after the instant petition was filed. The settlement agreement did not even purport to extend the certification year backwards in time, to encompass the date on which the petition was filed. Accordingly, there is no basis upon which to find that the petition was filed during either the original or the extended certification year.[5]

The Regional Director's reliance on the settlement agreement's certification year extension also fails in any event as a matter of law. As the Board has repeatedly held, a decertification petitioner cannot "be bound to a settlement by others that has the effect of waiving the petitioner's right under the Act to have the decertification petition processed." *Jefferson Hotel*, 309 NLRB 705, 706 (1992) (reversing Regional Director's dismissal of petition based on settlement agreement provision stating that approval of the agreement precluded the processing of any RD petition filed prior to fulfillment of the agreement's provisions, where the petitioner did not consent); see also *Truserv*, 349 NLRB at 232 fn. 14 ("Without the petitioner's agreement, . . . we do not intend that the petitioner be bound to a settlement by others that purports to waive the petitioner's right under the Act to have the decertification petition processed."). The Regional Director's dismissal of the petition, which was not subject to any election bar when filed, based on the subsequent agreement of the Employer and the Union to an extension of the certification year, without the Petitioner's consent and in the absence of a finding of an unfair labor practice or an admission thereof, cannot be reconciled with these principles.[6]

[4] A decertification petition will not be reinstated if "(a) the execution of the settlement of the unfair labor practice charge comes before the filing of the petition; (b) the Regional Director finds that the petition was instigated by the employer or that the employees' showing of interest in support of the petition was solicited by the employer; or (c) the settlement of the unfair labor practice charge includes an agreement by the decertification petitioner to withdraw the petition." *Truserv*, 349 NLRB at 227. None of these exceptions applies here.

[5] As noted above, the Regional Director stated that "[t]he instant petition, filed on August 31, 2018, was filed during the extended certification that 'embrace[s] that time in which the employer has engaged in its unlawful refusal to bargain,' and, by operation of law, must be dismissed." We reject any implication that any extension of the certification year, by operation of law or otherwise, is warranted on the basis that the Employer has engaged in an "unlawful refusal to bargain." There has been no finding that the Employer has engaged in unfair labor practices, and the settlement agreement includes a nonadmission clause, as noted above.

[6] The Board has held that an employer's agreement to settle allegations that it unlawfully withdrew recognition or refused to bargain during the certification year "automatically triggered an extension of the certification year regardless of whether the express language of the agreement mentioned such an extension." *Americare-New Lexington Health Care Center*, 316 NLRB 1226, 1227 (1995), enfd. 124 F.3d 753 (6th Cir. 1997). But the issue in that case was whether the employer had lawfully withdrawn recognition during the extended certification year, not, as here, whether the extended certification year affected the substantive rights of a decertification petitioner.

We therefore reverse the Regional Director's administrative dismissal of the petition. Consistent with *Truserv*, "the decertification petition can be processed and an election can be held after the completion of the remedial period associated with the settlement of the unfair labor practice charge." *Truserv*, 349 NLRB at 227.[7] The remedial period contemplated by *Truserv* includes the completion by the Employer of the actions required of it by the agreement. But, as *Truserv* is properly understood, that remedial period does not include the expiration of the certification year extension provided for in the settlement agreement, to which the Petitioner did not consent. In *Truserv*, the Board stated that "[h]aving agreed to bargain, the employer has a duty to honor that agreement *notwithstanding the processing of the decertification petition*." 349 NLRB at 232 (emphasis added). The *Truserv* Board therefore contemplated that a decertification petition would be processed while the parties bargained pursuant to a settlement agreement, and not be held in abeyance until the employer had bargained for any particular period of time.[8] Accordingly, the processing of the petition in this case may not properly be held in abeyance simply because the Employer and the Union have agreed to an extension of the certification year. Allowing them to delay the processing of the petition, via a settlement agreement to which the Petitioner did not consent, would be contrary to the principle, described above, that a decertification petitioner cannot "be bound to a settlement by others that has the effect of waiving the petitioner's right under the Act to have the decertification petition processed." *Jefferson Hotel*, 309 NLRB at 706; accord: *Truserv*, 349 NLRB at 232 fn. 14.[9] Because the Petitioner did not consent to the settlement agreement, we find that the settlement agreement can neither waive the Petitioner's right to have his decertification petition processed nor delay the effectuation of that right for an extended period of time. In sum, the agreement by the Employer and the Union to extend the certification year—embodied in the settlement agreement—does not prevent the Regional Director from processing the Petitioner's decertification petition once the relevant remedial period comes to an end.[10]

Our dissenting colleague agrees that, consistent with *Truserv,* the Regional Director erred in dismissing the petition. She contends, however, that the petition should not

Americare thus stands for the proposition that an employer must refrain from withdrawing recognition during the period of time specified in a settlement agreement, either explicitly or by operation of law, to which it has agreed. Nothing in our decision today questions that principle. But the issue in this case is whether the Board should process a petition filed by the decertification petitioner, who is not a party to the settlement agreement; that issue is controlled by *Truserv*, as discussed above.

[7] The Union suggests that *Truserv* does not apply because in that case, unlike here, the union had withdrawn the unfair labor practice charges that assertedly tainted the petition. We disagree. Again, *Truserv* held that a settlement agreement containing a nonadmission clause, as here, eliminates any basis for finding that the alleged unfair labor practices tainted the petition. To be sure, a union's withdrawal of relevant unfair labor practice charges is a condition, together with a no-admission settlement, that is sufficient to process the petition. See *Cablevision*, 367 NLRB No. 59, slip op. at 4–5 & fn. 12 (finding "no valid basis" for refusing to reinstate a petition based on unfair labor practices charges that were withdrawn.). However, the withdrawal of charges is not a condition necessary to process the petition. See, e.g., *Nu-Aimco, Inc.*, 306 NLRB 978, 980 (1992) (affirming the Regional Director's decision to process a petition and direct an election where the Regional Director and employer executed a unilateral settlement agreement to which the union objected).

[8] Indeed, the Board held that even if the parties reach a collective-bargaining agreement during bargaining pursuant to a settlement agreement, the contract does not preclude processing a petition filed prior to the agreement. *Truserv*, 349 NLRB at 232–233.

Passavant Health Center, 278 NLRB 483 (1986), cited by the dissent, is not to the contrary. There, the Board held that the regional director erred in dismissing, on contract bar grounds, petitions filed prior to the execution of a strike settlement agreement that included an agreement to execute a new collective-bargaining agreement. After finding no contract bar, the Board further stated: "insofar as all complaint allegations have been withdrawn, and the terms of the settlement agreement satisfied, we find that the petitions should be reinstated." Id. at 484. Nothing in that statement suggests that the employer and union could have forestalled the processing of the petitions simply by agreeing to a certification year extension as part of their settlement agreement, which is the issue presented here.

[9] We reiterate, as the Board has previously stated, that we "encourage the inclusion of the petitioner in settlement discussions to allow for the possibility that the petitioner could agree to a settlement that provides for the dismissal of the petition." *Truserv*, 349 NLRB at 232 fn. 14; see also *Jefferson Hotel*, 309 NLRB at 706; *Nu-Aimco*, 306 NLRB at 980. There is no indication that the Regional Director or the parties sought the involvement of the Petitioner in the settlement discussions here.

[10] Our conclusion that the remedial period contemplated in *Truserv* does not include the certification year extension is further supported by NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11734, which specifically contemplates that the processing of a petition blocked by a settled allegation may resume, even before the end of the notice posting period, "[w]here the charged party or respondent in the unfair labor practice proceeding has taken all action required by a settlement agreement, administrative law judge's decision, Board Order, or court judgment, except that the full period for posting any required notice has not passed." Authorization to resume processing even before the employer has completed its notice posting obligation strongly suggests that the processing of a petition may not be delayed while the parties bargain pursuant to a settlement agreement, including bargaining pursuant to an extended certification year to which the employer and union have agreed, as in this case.

In light of our disposition of this case, we find it unnecessary to address the Petitioner's alternate contention that the 7-month extension of the certification year is unwarranted in the circumstances of this case. We observe, however, that the original certification year expired on March 7, which is the same date on which the complaint alleges that the Employer's failure to bargain commenced. Neither the Regional Director nor any party has explained why a 7-month certification year extension is warranted when the Employer is alleged to have failed to bargain in good faith with the Union for, at most, 1 day of the original certification year.

be processed until the 7-month extension of the certification year agreed to by the parties has expired. Citing the statutory goal of promoting industrial stability and the policy of promoting the peaceful settlement of labor disputes, the dissent argues that the petition should remain "on hold." For the reasons stated above and those that follow, we disagree.

We recognize and support the Act's policy of promoting industrial stability and the peaceful settlement of labor disputes. These are not, however, the only policies established by the Act. To the contrary, "the Board is required to balance the statutory goal of promoting labor relations stability against its statutory responsibility to give effect to employees' wishes concerning representation." *Silvan Industries, a Division of SPVG,* 367 NLRB No. 28, slip op. at 3 (2018). Here, the petition was filed on August 31, 2018, and has been "on hold" for more than a year to date. There is no justification for imposing further delays in the circumstances presented here.

We reject the dissent's puzzling claim that the parties' agreement to extend the certification year "must necessarily be understood to relate back to the date on which the petition was filed," such that "the certification year had, in effect, never expired." If that were true, then the petition should have been dismissed outright when filed, as filed during the certification year, a position the dissent properly disavows. Moreover, if the certification year had never expired, then a certification bar would have been in effect for this unit from March 7, 2017, until at least October 25, 2019–a period of more than 2 years. No policy of the Act warrants insulating the Union's majority status from challenge for so lengthy a period of time.[11]

Our dissenting colleague also errs in likening this case to *Volkswagen Group of America Chattanooga Operations, LLC,* 367 NLRB No. 138 (2019), where the Board dismissed a petition that was filed during the certification year. First, the petition in that case was, in fact, filed during the original certification year, which by its terms had not terminated at the time the petition was filed. As shown, that is not the case here. Second, unlike this case, the employer in *Volkswagen* had never agreed to recognize the union, and the parties had never engaged in any bargaining.[12] Third, the certification year in that case was imposed by the Board after a finding that the employer had unlawfully refused to bargain, as part of the remedy for that violation of the Act. Here, there has been no finding that the Employer has violated the Act, and the settlement agreement on which the dissent relies includes a nonadmission clause. According a certification-year extension included in such a settlement the same standing as one imposed by the Board after a finding that the respondent violated the Act would be contrary to the teaching of *Truserv,* for the reasons stated above.[13]

Finally, we reject the dissent's charge that our decision today will undermine the policy of promoting voluntary settlements of labor disputes. Nothing in today's decision disturbs the duty of each party to carry out the obligations they have assumed under their settlement agreement.[14]

[11] Indeed, even if the Board had found a refusal to bargain during the original certification year, a remedial extension of the certification year would be no longer than 1 year, less any period of time during which the employer had bargained in good faith during the certification year. See *Mar-Jac Poultry Co.,* 136 NLRB 785, 787 fn. 6 (1962). There is no valid basis for a longer extension, imposed by the parties themselves on the decertification petitioner, particularly where, as here, there has been no finding and no admission of an unfair labor practice. In *Mar-Jac Poultry,* in contrast, the Board dismissed a petition filed by the employer where the employer had only bargained with the union for 6 months following its certification.

[12] We reject any suggestion that the parties' bargaining prior to March 7 may be questioned, when there has been no allegation that the Employer failed to bargain in good faith during that period. The dissent calls the March 7 date "an artifact of Sec. 10(b)'s 6-month limitations period" and attempts to impugn the Employer's prior conduct all the same. We believe that the statutory limit imposed by Congress on the Board's ability to consider conduct outside the 10(b) period warrants more respect than this. Further, it bears emphasis that the Union did not file a charge alleging a failure to bargain in good faith at any time during the certification year, or for nearly 6 months after the certification year ended. Instead, it filed a charge only after the decertification petition was filed. Questioning whether the parties bargained in good faith prior to March 7 during the certification year is wholly unjustified under these circumstances.

[13] Citing *Cablevision, AIM Aerospace,* 367 NLRB No. 148 (2019), *Silvan Industries,* and *Johnson Controls,* 368 NLRB No. 20 (2019), our dissenting colleague purports to discern a trend of undermining stable industrial relations and frustrating the rights of employees who have chosen union representation. We reject this characterization.

In *Cablevision* and *Silvan Industries,* the Board determined that, under existing precedent, decertification petitions should be processed under the particular circumstances of those cases. Our colleague dissented, contending that existing precedent should be extended to require the dismissal of the petitions at issue in those cases. We disagree with our colleague's views for the reasons fully explained in those decisions. Here, we add only that the import of those decisions was to resume the processing of petitions that had already been subjected to significant delays, ranging from 2 years in *Silvan Industries* to 4 years in *Cablevision,* at the time the Board issued its decisions. We cannot agree that the processing of petitions, after such lengthy delays, improperly undermined stable industrial relations.

AIM Industries and *Johnson Controls* are unfair labor practice cases and do not even address the issue of whether, and for how long, an election petition may be delayed based on a settlement agreement resolving unfair labor practice charges. We disagree with our colleague's criticism of those cases for the reasons stated in our decisions therein.

[14] The dissent advances hypothetical scenarios in which the Employer could be faced with conflicting obligations to both recognize and bargain with the Union under the settlement, and to withdraw recognition from the Union if employees vote to decertify it. The short answer to our colleague is that those scenarios are not before us. Plainly, however, no agreement of the parties can justify recognizing and bargaining with a union that does not represent an uncoerced majority of unit employees. *Ladies' Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB,* 366 U.S. 731 (1961). The question of whether the settlement agreement

Moreover, as the Board explained in *Truserv,* 349 NLRB at 232,

> [m]aintenance of stable collective-bargaining relationships is important, but only when employees have freely chosen whether, and by whom, to be represented. The peaceful settlement of disputes is also important—but not so important that it should be obtained at the expense of abrogating employees' Section 7 rights to reject or retain a union as their collective-bargaining representative.

Accordingly, the *Truserv* Board specifically rejected the view that limiting the petitioner's right to seek a decertification election may be "justified by the unfair labor practice allegations and the remedial steps that the employer agreed to take." Id. at 231. We do so as well.[15]

ORDER

The Regional Director's administrative dismissal of the petition is reversed, and the case is remanded to the Regional Director for further action consistent with this Decision.

Dated, Washington, D.C. October 21, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

After a union is certified by the Board as the representative of employees, the employer is required to bargain in good faith with the union for 1 year, without challenge to the union's status. This is the Board's "certification bar" doctrine.[1] Where the employer fails to bargain in good faith during the certification year, the Board will extend that period, to make sure that the union (and the workers who chose it) receives what is due: "at least a year of good-faith bargaining during which the bargaining representative need not fend off claims that it has lost its majority support."[2] Here, after the Board certified the Union, bargaining apparently went nowhere. Not surprisingly, after 17 months, an employee filed a decertification petition with the Board—a union's failure to produce results in collective bargaining predictably leads to dissatisfaction.[3] The Union promptly filed an unfair labor practice charge, alleging that the Employer had failed to bargain in good faith, and the Board's General Counsel issued a complaint based upon finding merit in the Union's charge. That finding prompted the Employer and the Union to settle the case, with the Employer agreeing both to bargain in good faith *and* to extend the certification year. Under well-established Board law, that agreement should have meant that the dissatisfied employee's decertification petition was put on hold until after the Employer had complied with the settlement.

Today, however, the majority holds that the decertification petition should have moved forward regardless, rejecting the view of the Regional Director. The majority's result permits the Employer to keep the benefit of the settlement (the General Counsel's complaint is withdrawn), but strips the Union of something important that it obtained: temporary insulation from a challenge to its status. This unfair outcome is not supported by existing law, it impermissibly ignores and undermines statutory policies designed to foster good-faith bargaining, ignores the rights of the workers who chose the union, and (again contrary

should be set aside on the theory that the Union has not received the benefit of its bargain is not before us, and we express no views concerning that matter. Contrary to the dissent, it would be inappropriate to address the merits of an unfair labor practice case in this representation proceeding. We observe, however, that any expectation that the petition would be dismissed outright rather than held in abeyance was contrary to settled law. See *Truserv,* above.

[15] As the Board noted in *Truserv,* 349 NLRB at 231, allowing a decertification petition to proceed despite a settlement agreement that includes an agreement to bargain will not affect an employer's incentives to settle, and while unions may feel a diminished incentive to settle, this concern can be obviated if the petitioner is involved in the settlement process and agrees to withdraw the petition. Even if the petitioner does not agree, a union may still choose to settle if the agreement is a good one overall from its perspective, and, if the union objects to the settlement, the Regional Director may choose not to approve it.

[1] See generally *Brooks v. NLRB*, 348 U.S. 96, 104 (1954); National Labor Relations Act, Sec. 9(c)(3), 29 U.S.C. § 159(c)(3) ("No 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.").

[2] *Dominguez Valley Hospital*, 287 NLRB 149, 149 (1987), enfd. sub nom. *NLRB v. National Medical Hospital of Compton*, 907 F.2d 905 (9th Cir. 1990); *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

[3] As the Board has observed, lack of bargaining progress is "manifestly detrimental to the Union's preservation of employee support" because "[e]mployees select a union so that a collective-bargaining agreement may be negotiated." *J.P. Stevens & Co.*, 239 NLRB 738, 765 (1983) enfd. in relevant part 623 F.2d 322 (4th Cir. 1980), cert. denied 499 U.S. 1077 (1981).

to established policy) creates perverse incentives against the settlement of unfair labor practice charges. Today's decision continues the trend of recent decision in which the majority has made it easier for incumbent unions to be ousted, undermining stable industrial relations and frustrating the rights of employees who have chosen union representation.[4]

I.

"The object of the National Labor Relations Act," the Supreme Court has observed, "is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers."[5] The Court has explained that the certification bar doctrine—which "enable[s] a union to concentrate on obtaining . . . a collective-bargaining agreement without worrying that, unless it produces immediate results, it will be lose majority support and be decertified"—"further[s] this policy by promoting stability in collective-bargaining relationships, without impairing the free choice of employees."[6] Where an employer has interrupted the certification year by failing to bargain in good faith, the Board's long-established and court-approved policy has been to extend the certification year as necessary.[7]

Another cornerstone of industrial peace under the Act has been the Board's long-held policy of encouraging the settlement of labor disputes by employers and unions.[8] The Supreme Court has observed that the "Board has from the very beginning encouraged compromises and settlements . . . to end labor disputes, and so far as possible to extinguish all the elements giving rise to them."[9]

In cases like this one, these basic Board policies—protecting the integrity of the certification year, preserving employee free choice, and promoting the settlement of disputes—intersect. An employer and a union may seek to settle unfair labor practice charges that could otherwise result in a Board remedy—such as an affirmative bargaining order or a certification-year extension—that would temporarily preclude any challenge to the union's continuing majority status. Accordingly, in *Truserv*, the Board struck a balance between the statutory policies favoring industrial stability and employee free choice by holding that a decertification petition filed *prior to* such a settlement agreement "can be processed and an election can be held *after the completion of the remedial period* associated with the settlement of the unfair labor practice charge."[10]

[4] The disturbing run of recent decisions in this vein includes *Cablevision Systems Corp.*, 367 NLRB No. 59 (2018), where the current majority reinstated a previously dismissed decertification petition despite three administrative law judges' conclusions—based on substantial, credible evidence presented in multiple separate hearings—that the employer had engaged in serious and widespread misconduct in the weeks and months surrounding the filing of the petition.

In *AIM Aerospace Sumner, Inc.*, 367 NLRB No. 148 (2019), the majority found that the employer unlawfully rewarded an employee with a promotion and a raise for circulating a decertification petition, but inexplicably concluded that the employer's encouragement of the decertification effort somehow did not taint the resulting petition.

Similarly, in *Silvan Industries a Division of SPVG*, 367 NLRB No. 28 (2018), the current majority abandoned well-established principles designed to foster stable collective-bargaining relationships by permitting an *employer* to petition for an election based on a newly discovered doubt about the majority representative status of the union with which it had just entered into a collective-bargaining agreement.

In *Johnson Controls*, 368 NLRB No. 20 (2019), the majority overruled court-approved precedent to adopt, sua sponte, a novel apparatus of shifting presumptions that effectively permits an employer to oust an incumbent union *without* a Board election, based on evidence of employee disaffection that does not establish an actual loss of majority support.

Finally, members of the current majority have recently indicated their further willingness to dismantle established Board policies which foster stable labor relations in virtually every other context where such policies may sometimes operate to temporarily delay dissatisfied employees' ability to immediately oust the incumbent union. See, e.g., NLRB, Proposed Rule, *Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, 84 Fed. Reg. 39930–01 (Aug. 12, 2019) (proposed rule to change blocking charge and voluntary recognition election bars and construction-industry specific presumptions of majority support); *L&L Fabrication*, 16–RD–232491 (April 22, 2019) (noting willingness to revisit voluntary recognition bar policy); *Embassy Suites by Hilton, Seattle Downtown Pioneer Square*, 19–RD–223236 (Jan. 15, 2019) (same); *USF Holland, Inc.*, 18–RD–218994 (Aug. 8, 2018) (same); *Inwood Material Terminal, LLC*, 29–RD–206581 (Jan, 30, 2019) (proposing heightened contract-formation standard for purposes of establishing a contract bar); *Krise Transportation, Inc.*, 06–RD–219962 (Oct. 9, 2018) (noting willingness to revisit settlement bar doctrine); *Bay at North Ridge Health and Rehabilitation Center, LLC*, 18–RD–208565 (Feb. 14, 2018) (noting disagreement with successor bar doctrine); *Apple Bus Co.*, 19–RD–203378 (Dec. 14, 2017) (same).

[5] *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996);

[6] *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987). In *Brooks*, supra, the Court endorsed three policy considerations underlying the certification bar doctrine: First, binding elections promote "a sense of responsibility in the electorate and needed coherence in administration." Second, a union needs time to carry out its mandate on behalf of employees and "should not be under exigent pressure to produce hot-house results or be turned out." Finally, employers should not be rewarded for engaging in bargaining delays that predictably undermine the union's support among employees. 348 U.S. at 99–100.

[7] *Mar-Jac Poultry*, supra; see also *Veritas Health Services, Inc. v. NLRB*, 895 F.3d 69, 80 (D.C. Cir. 2018) (noting extensions of certification year "are a standard remedy.").

[8] See *Independent Stave Co.*, 287 NLRB 740, 741 (1987). See also *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112, 127–128 (1987) ("Congress was aware [in enacting the Taft-Hartley Act] that settlements constitute the 'lifeblood' of the administrative process, especially in labor relations.").

[9] *Wallace Corporation v. NLRB*, 323 U.S. 248, 253–254 (1944).

[10] *Truserv Corp.*, 349 NLRB 227, 227 (2007) (emphasis added).

II.

The facts here are straightforward. They demonstrate that contrary to majority, the Regional Director correctly decided not to process the decertification petition during the extended certification year agreed to by the Union and the Employer. The Regional Director erred, however, in dismissing the petition with no provision for its reinstatement *after* the Employer had fulfilled the conditions of the settlement agreement, including by bargaining in good faith until the expiration of the extended certification year.

A majority of the Employer's employees voted to be represented by the Union, which the Board certified as their collective-bargaining representative on March 7, 2017. After nearly 18 months of fruitless bargaining, the Petitioner filed the current decertification petition, and the Union filed a charge alleging that the Employer had failed to bargain in good faith. Pursuant to well-established Board policy and based on the Union's offer of proof in support of its charge, the Regional Director ordered the petition held in abeyance pending resolution of the charge.[11] The Region investigated, found merit in the bad-faith bargaining allegations, and issued a complaint seeking, inter alia, a remedial affirmative bargaining order.[12] Before a hearing was held on the complaint, the Union and the Employer entered into a settlement agreement, which the Regional Director subsequently approved.

By its terms, the Regional Director's approval of the settlement agreement withdrew the unfair labor practice complaint. In return, the Employer agreed that:

> pursuant to *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), the certification year [following the Union's March 7, 2017 certification] will be extended for a period of seven months, commencing upon approval of this settlement agreement. During this seven month period of time, the Charged Party [the Employer] agrees to bargain in good faith with the Charging Party [the Union] for an initial collective-bargaining agreement and acknowledges that the Board will dismiss any representation petitions concerning this bargaining unit filed through the end of the extended certification year.

Because the Regional Director approved the settlement on March 25, 2019, the Employer thus agreed to bargain in good faith until October 25, 2019.

The Regional Director dismissed the decertification petition based on the settlement agreement, and the Petitioner filed a request for review. As explained below, current Board law clearly requires the reinstatement of the petition *only after* the Employer's fulfilment of the conditions of the settlement agreement, including bargaining in good faith with the Union until October 25, 2019.

III.

Invoking *Truserv*, supra, and related cases, my colleagues reverse the Regional Director's dismissal of the decertification petition and remand the case for processing of the petition. In a crucial respect, the majority misapplies *Truserv*.[13] Under that precedent, final dismissal of the petition here is precluded. But *Truserv* also makes clear that the petition may *not* be reinstated and processed until after the Employer has completely fulfilled its obligations under the settlement agreement, which includes bargaining with the Union through the end of the extended certification year (assuming that a collective-bargaining agreement is not reached before then). My colleagues acknowledge that *Truserv* provides that a decertification petition in this context "can be processed and an election can be held *after the remedial period associated with the settlement of the unfair labor practice charge.*"[14] They go on, however, inexplicably to assert that "as *Truserv* is properly understood, that remedial period does *not* include the expiration of the certification year extension provided for in the settlement agreement" (emphasis added).[15] This cannot be right.

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[11] See Board's Rules and Regulations §103.20; NLRB Casehandling Manual (Part 2) Representation Proceedings, Sec. 11730.

[12] Under longstanding Board precedent, such a remedial order would temporarily preclude the raising of a question concerning representation under Sec. 9(c) of the Act, i.e., a decertification petition could not be processed. See, e.g., *Big Three Industries, Inc.*, 201 NLRB 197, 197 (1973).

[13] I did not participate in *Truserv*, and I express no opinion here on whether that case was correctly decided, but I acknowledge the decision as Board precedent.

[14] 349 NLRB at 227 (emphasis added).

[15] The majority also asserts that by its terms, the settlement agreement did not provide for dismissal of the decertification petition here, because the petition was filed before the agreed-upon extension of the certification year commencing March 25, 2019 (the date the settlement agreement was approved). According to the majority, the "settlement agreement did not even purport to extend the certification year backwards in time, to encompass the date on which the petition was filed." The majority's claim is incorrect. The settlement agreement resolved the claim that the Employer had unlawfully failed to bargain in good faith during the certification year—and thus that the certification year had, in effect, never expired. Thus, the agreed-upon extension of the certification year must necessarily be understood to relate back to the date on which the petition was filed. As stated above, extant law precludes the final dismissal of the petition on this basis alone. *Truserv*, supra; see also *Jefferson Hotel*, 309 NLRB 705 (1992). But the parties' agreement is explicit in requiring the Employer to bargain until the end of the extended certification year and that requirement, as I explain, precludes processing the petition during that period.

Contrary to the majority, there is nothing particularly unusual about the amount of time that will have passed between the Union's original certification in this case and the expiration of the extended certification year. Indeed, *Mar Jac Poultry* itself involved a similar period of time from the union's initial certification until the Board's dismissal of the petition, and for similar reasons. There, the parties settled the union's failure-to-bargain charges and then engaged in truncated bargaining

The Employer's *only* substantive obligation undertaken in exchange for withdrawal of the complaint here—other than posting a notice—was its agreement to bargain with the Union in good faith until October 25, 2019. If *Truserv*'s phrase "after the remedial period associated with the settlement" does not mean "after the Employer has complied with its obligations under the settlement agreement," what could it possibly mean? Indeed, cases underlying *Truserv* confirm this common-sense interpretation. For example, the Board held in *Passavant Health Center* that petitions should be reinstated in this context only "insofar as . . . the terms of the settlement agreement [have been] satisfied."[16] The majority decision cites no authority, and I am aware of none, that supports its novel conclusion that the "remedial period" associated with a settlement agreement means something other than the time it takes for the parties to comply with the agreement.

The majority makes much of the *Truserv* Board's recognition that the processing of a decertification petition does not relieve an employer of its duty to bargain under a settlement agreement. But, of course, the immediate processing of this petition might result in an election cutting short the period during which the Employer has agreed to bargain. Moreover, as the Supreme Court has recognized, the disruption of bargaining inevitably stemming from an election campaign in this context was one of the underlying problems leading to the Board's adoption of the certification bar doctrine in the first place: "[a] union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hot-house results or be turned out."[17] The majority's view means that the Union here will be under precisely such "exigent pressure" to reach a satisfactory collective-bargaining agreement before the decertification election is held. In sum, ordering an election here before the Employer has complied with the settlement agreement disregards important policy considerations underlying the Board's protection of bargaining between an employer and a newly-certified union.[18]

Nor, contrary to the majority, does the potential for a temporary delay in the Petitioner's ability to challenge the Union's majority status justify today's result. As the Supreme Court affirmed in *Brooks*, supra, Congress spoke to the appropriate balance between the stability interests underlying the certification bar and the interests of employee petitioners seeking to decertify a union freely chosen by employees in a Board election.[19] Sometimes, as here, that balance requires that petitioners' interests yield—

before the employer filed the election petition the Board ultimately dismissed. 136 NLRB at 786. The touchstone of the Board's decisions in this area has always been whether or not the parties engage in the period of good-faith bargaining necessary to effectuate the rights of the employees who selected the union, not the absolute amount of time it takes for that bargaining to eventuate. As the Board and the courts have long recognized the contrary rule simply encourages unlawful delay. See *Brooks*, supra, 348 U.S. at 99–100.

[16] 278 NLRB 483, 484 (1986). See also *Island Spring, Inc.*, 278 NLRB 913, 913 (1986) (reinstating petition where "the Employer has fully complied with the settlement agreement"); *Nu-Aimco, Inc.*, 306 NLRB 978, 980 (1992) (affirming Regional Director's decision to process petition and direct election where "[t]he Employer . . . fully satisfied the terms and conditions of the settlement agreement."); *Jefferson Hotel*, supra, at 706 ("[T]he Regional Director having accepted the settlement agreement, the decertification petition should be reinstated *on compliance with that agreement*.") (emphasis added). *Truserv* overruled an earlier Board decision, *Douglas-Randall, Inc.*, 320 NLRB 431 (1995), and expressly adopted former Member Cohen's dissenting reasoning in *Douglas-Randall*. *Truserv*, above, at 227–228. But Member Cohen's dissent reflected the same commonsense interpretation that today's majority discards: "The Union is not deprived of its remedy [by the processing of a decertification petition after a settlement]. The Employer will have to remedy its alleged violation, and *the election will not be held until the remedy has been effectuated* and the atmosphere cleansed." *Douglas-Randall*, above, at 436 (dissenting opinion) (emphasis added).

The majority fails even to acknowledge this clear line of precedent contradicting its interpretation of *Truserv*, beyond simply proclaiming that *Passavant* "is not to the contrary." But the majority's suggestion that these cases do not require delaying an election based on a certification year extension in a settlement agreement simply amounts to a tacit holding that the Board will no longer give effect to such remedial settlements.

[17] *Brooks*, supra, 348 U.S. at 100.

[18] The majority selectively cites non-binding Board procedural guidance, which, read in full, does not support its position. Contrary to the majority, the Board's Casehandling Manual clearly provides that an election *should not* be held in this context—absent written waiver by the charging party—until the employer "has taken all of the action required by a settlement agreement" *including* posting a notice for the requisite period. NLRB Casehandling Manual (Part 2) Representation Proceedings, Sec. 11734.

The majority also questions whether a certification year extension is warranted at all in this case given that the General Counsel's complaint alleged unlawful bad-faith bargaining beginning only on the last day of the original certification year. Of course, the Employer's current obligation stems not from a Board Order, but rather from its voluntary settlement agreement. In any case, the date given in the complaint is clearly an artifact of Sec. 10(b)'s 6-month limitations period, and warrants no inference that the Employer's prior conduct was any different from its conduct within the statutory period. To recognize as much is neither to conclude that the Employer has acted unlawfully, before or after the 10(b) period, nor to fail to accord the statutory limitations period all due respect. The point is that, in this context, the substance of the Employer's current remedial bargaining obligation is clearly inextricably intertwined with its original obligations stemming from the Board's certification of the Union, and is subject to the same policy considerations discussed above.

[19] *Brooks*, supra, 348 U.S. at 103 ("To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace], it is inimical to it. . . . In placing a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers, Congress has discarded common-law doctrines of agency."). In enacting Sec. 9(c)(3), Congress considered and rejected a draft provision that would have permitted decertification petitions during the insulated year. See 348 U.S. at 100 fn. 8; see also H.R. REP. NO. 80-510, at 49 (1947) (Conf. Rep.), *reprinted in*

temporarily—to the Act's overarching policy in favor of labor stability. But, as the Supreme Court has specifically recognized, this result is achieved "*without impairing the free choice of employees*."[20] This is because such bars are *temporary*—delaying, not defeating, employees' ability to change their representational status at an appropriate time. Thus, the Court has long held that a remedial affirmative bargaining order temporarily precluding challenges to a union's majority status "*does not involve any injustice to employees* who may wish to substitute for the particular union some other bargaining agent or arrangement. . . . [After] a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships."[21]

My colleagues recently relied upon these very principles to dismiss a petition for a *certification* election in the *Volkswagen* case.[22] There, they concluded that a substantial delay in effectuating employees' representational choices, resulting from the petition's dismissal, did *no harm* to employees' Section 7 rights because the petitioner could file a new petition.[23] The majority provides no explanation for apparently according a greater solicitude to the rights of the decertification petitioner here.

Now the majority ignores the Section 7 rights of the employees who recently voted *for* representation and abandons the Act's overriding policy of fostering industrial peace by encouraging stable bargaining relationships in order to elevate—above all else—the interests of individual employees seeking decertification, even though it is reasonable to infer that their dissatisfaction with the union could be ultimately attributable to the employer's unfair labor practices. On one view, then, employers who violate the Act, not employees, are the true beneficiaries of today's decision.

Certainly, and as the majority acknowledges, one inevitable consequence of the decision is to discourage unions from settling cases like this one, involving bad-faith bargaining allegations where a decertification petition is pending. Assume here that there had been *no* settlement. Because the General Counsel found merit in an unfair labor practice charge which, if proven, could preclude the existence of a question concerning representation, the petition could not be processed under the Board's "blocking charge" policy.[24] And if the General Counsel had prevailed in the unfair labor practice proceeding, the Employer would have been ordered to bargain in good faith, and the decertification petition would have been finally dismissed, regardless of the Petitioner's consent.[25] The majority's rule ensures that, absent consent of the petitioner, no union can achieve by settlement the ordinary remedy for violations like those alleged here. Under these circumstances, unions have reduced incentives to settle and to avoid litigation. That result is at odds with the long-established Board policy favoring settlements.

Here, of course, the majority effectively sets aside the settlement agreement—though only in part.[26] The Employer continues to enjoy the key benefit of the agreement: the General Counsel's complaint remains withdrawn. But the Union does not get the full benefit of its bargain, because the decertification petition will be processed, regardless of the settlement. Even on the majority's view of the case, fairness would dictate that the agreement as a whole be set aside and the General Counsel's complaint reinstated. This would trigger the Board's "blocking charge" policy. The Employer and the Union would be

1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 553 (1959).

[20] *Fall River Dyeing*, supra, 482 U.S. at 38 (emphasis added; citations omitted).

[21] *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944) (emphasis added), affg. 137 F.2d 989 (1st Cir. 1943), enfg. 44 NLRB 898 (1942).

[22] *Volkswagen Group of America Chattanooga Operations, LLC*, 367 NLRB No. 138, slip op. at 1–2 (2019). As I explained in my dissenting opinion in *Volkswagen*, the special circumstances there were such that, contrary to the implication in the majority's current discussion, the statutory policies underlying the certification bar were *not* effectuated by the dismissal of the petition.

[23] Id., slip op. at 2. See also *Johnson Controls*, supra, 368 NLRB No. 20, slip op. at 12 fn. 55 (holding union was not prejudiced by retroactive application of policy requiring it to petition for election after a showing of loss of majority support during a contract term, because the "ill effect" of retroactivity was "limited to a matter of timing, i.e., *when* a petition may be filed, not *whether* a petition may be filed.").

[24] See NLRB Casehandling Manual (Part 2) Representation Proceedings, Secs. 11730.3(b), 11733.2(a)(2).

[25] See NLRB Casehandling Manual (Part 2) Representation Proceedings, Secs. 11733.2(a)(2) and (b).

[26] As a practical matter, the majority's failure to explicitly set aside the agreement in total risks imposing inconsistent legal obligations on the Employer. Thus, if an election held pursuant to today's order were to result in the decertification of the Union before October 25, 2019, Sec. 8(a)(2) of the Act would prohibit further bargaining. See, e.g., *Dairyland USA Corp.*, 347 NLRB 310, 311 (2006), enfd. 273 Fed.Appx. 40 (2d Cir. 2008) ("An employer violates Section 8(a)(2) of the Act when it extends recognition to a union that does not represent an uncoerced majority of its employees"). But, any *refusal* by the Employer to bargain in good faith prior to October 25 would breach the clear terms of its settlement agreement, triggering the Regional Director's mandatory reissuance of the underlying 8(a)(5) complaint allegations. Moreover, as the majority acknowledges, the Board has held that an employer may not withdraw recognition from a union during the period of time specified or implied by an agreement settling refusal-to-bargain allegations. *Americare-New Lexington Health Care Center*, 316 NLRB 1226, 1227 (1995), enfd. 124 F.3d 753 (6th Cir. 1997). The fact that the Employer here may become *legally required* to withdraw recognition during that period as a predictable consequence of today's decision clearly contradicts the majority's claim not to question the *Americare* rule. The majority's resolution of this case—insofar as it threatens to bind the Employer so that it violates the Act however it turns—falls far short of reasoned decisionmaking.

free to attempt a new settlement—and to secure the consent of the Petitioner to dismissal of the petition. Otherwise, the unfair labor practice case would proceed. The majority's approach leaves the Petitioner in a better position than he would have been in had there been no settlement agreement in the first place. That result is arbitrary.

If, alternatively, the majority purports to release the Employer from its obligation under the settlement agreement—a point not addressed in the majority decision—it deprives *unit employees* of the benefit of their Union's settlement agreement, while leaving the *Employer* in possession of its consideration—the withdrawal of the complaint. No principle of Board or contract law supports thus infringing upon employees' Section 7 rights by abrogating the express terms of their Union's bargain with their employer.[16]

IV.

The story of American labor law is in large part the story of the Board's continuous effort to promote stability in collective-bargaining relationships, without impairing the free choice of employees, in service to the industrial peace that the Supreme Court has described as the overriding policy goal of the NLRA.[17] Today's decision takes a step backwards by continuing the current Board majority's campaign to privilege the right of individual employees to *refrain* from collective bargaining over the rights of the majority of employees that chose the union and the longstanding Board policies designed to foster stable industrial relations and encourage peaceful settlement of disputes. The majority's failure to give effect to a Board-approved negotiated settlement agreement in this context can only erode the Board's credibility as a neutral arbiter, predictably increasing litigation and resounding to the detriment of employees, unions, *and* employers. Because I cannot countenance such outcomes, I dissent.

Dated, Washington, D.C. October 21, 2019

Lauren McFerran Member

NATIONAL LABOR RELATIONS BOARD

[16] The majority appears unwilling to proceed to the logical consequence of its abrogation of the settlement agreement by ordering the Regional Director to reissue the underlying complaint, although the majority's ambiguous remand order does not clearly preclude such an outcome. Of course, a reissued complaint would again serve as an independent basis for the Regional Director's dismissal of the instant petition. The majority's dismissal of the clear practical results of its decision as hypothetical scenarios that are not before us provides no guidance to the Regional Director or the parties going forward.

[17] *Fall River Dyeing*, supra, 482 U.S. at 38.