Volkswagen Group of America Chattanooga Operations, LLC *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Petitioner. Case 10–RC–239234

May 22, 2019

DECISION ON REVIEW AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

The Employer's request for review of the Regional Director's Order Deferring Ruling on Motion to Dismiss Petition is granted as it raises substantial issues warranting review.[1] On review, we direct the Regional Director to dismiss the petition.[2]

On December 14, 2015, the Board certified United Automobile Workers, Local 42 as the representative of a unit of the Employer's maintenance employees in Case 10–RC–162530. On April 9, 2019, the Petitioner filed a petition in this case, seeking an election in a unit of the Employer's production and maintenance employees. On April 17, 2019, the General Counsel and United Auto Workers, Local 42 filed a motion to dismiss the complaint in Case 10–CA–166500. The motion asserts that Local 42 notified all parties, on April 15, 2019, that it wished to withdraw the petition in Case 10–RC–162530 and that it disclaimed interest in representing the "employees of Volkswagen Group of America, Inc.," in the unit certified in that case. The Board granted the motion on May 3, and the Regional Director thereafter dismissed the complaint and revoked the certification in Case 10–RC–162530.

The Board's longstanding certification year policy precludes any challenge to a union's majority status for one year following its certification, except in unusual circumstances. *Van Dorn Plastic Machinery Co.,* 300 NLRB 278 (1990), enfd. 939 F.2d 402 (6th Cir. 1991). Thus, the Board will dismiss election petitions filed before the end of the certification year that seek to represent some or all of the employees in the certified unit, including petitions that seek to include employees in the certified unit as part of a broader, plant-wide unit. *Casey-Metcalf Machinery Co.,* 114 NLRB 1520, 1525 (1955). Where an employer exercises its right to pursue judicial review of a certification, the certification year will begin with the first bargaining session held following court enforcement of the Board's order. *Van Dorn Plastic Machinery Co.,* supra.

In *Ray Brooks v. NLRB,* 348 U.S. 96 (1954), the Supreme Court endorsed the Board's certification bar rule. The Court identified three exceptions: "(1) the certified union dissolved or became defunct; (2) as a result of a schism, substantially all the members of officers of the certified union transferred their affiliation to a new local or international; (3) the size of the bargaining unit fluctuated radically within a short time." Id. at 98. None of these exceptions applies here: Local 42 is not defunct, there has been no schism, and there has been no radical fluctuation in the size of the unit certified in Case 10–RC–162530.

Consistent with these principles, the petition in this case must be dismissed nunc pro tunc because it seeks employees within the unit that was then certified in Case 10–RC–162530. We thus agree with the Employer that the validity of the petition in this case must be determined without regard to the disclaimer of interest presented by Local 42 after the petition was filed. We also find that the Regional Director's May 6, 2019 Order Revoking the certification in Case 10–RC–162530 has no effect on whether the petition in this case was valid when filed, and we do not find it necessary to pass on whether the Regional Director erred in directing a hearing for the purpose of determining whether a certification bar existed when the petition at issue was filed.

Our dissenting colleague admits, as well she must, that this case presents "unusual circumstances." Remarkably, she goes on to boldly declare that the certification bar "has no application here" all the same. Instead, the dissent advocates for a newly-fashioned rule under which a certified union must be allowed to avoid the certification bar at its option whenever that union seeks a new election, premised on the notion that the certification bar only exists to serve the interests of the certified union. This contention is factually flawed, as it rests on the mistaken premise that the Petitioner is the same union that was certified in Case 10–RC–162530. In fact, Local 42 is one of the Petitioner's constituent locals.[3] The dissent's position is legally unsupportable as well.

Contrary to the dissent, the certification bar is supported by multiple justifications that protect the public interest

[1] Member Emanuel is recused and took no part in the consideration of this case.

[2] The Board's May 3, 2019 stay of proceedings is lifted as of today's decision. Accordingly, the May 9 motion filed by the Petitioner is denied as moot.

[3] See, e.g., *Service Employees Local 121RN (Pomona Valley Medical Center),* 355 NLRB 234, 242 (2010) (separate opinion of Member Becker, ruling on motions) ("the Federal courts and the NLRB have recognized that the locals and the internationals are separate labor organizations within the meaning of the National Labor Relations Act…", citing *U.S. v. Petroleum Workers,* 870 F.2d 1450, 1452 (9th Cir. 1989)) (internal quotations omitted)

and the interest of all parties, not just the union. As recognized in *Ray Brooks,* the certification bar: promotes "a sense of responsibility in the electorate and needed coherence in administration" by insuring that an election binds voters for a fixed time; affords the union ample time to carry out its mandate; removes incentives for employers to undermine union strength through delay; and minimizes the risk of "raiding and strife" by rival unions. *Ray Brooks,* supra, 248 U.S. at 99. It would be inconsistent with these principles to convert the certification bar into a one-way device waivable at the certified union's will, as the dissent appears to propose.

All of the exceptions to the certification bar identified in *Ray Brooks,* in turn, involved changed circumstances that arose before the petition was filed. This specifically includes *Public Service Electric & Gas Co.,* 59 NLRB 325 (1944), *Nashville Bridge Co.,* 49 NLRB 629 (1943), and *Rocky Mountain Phosphates, Inc.,* 138 NLRB 292 (1962), cases on which the dissent relies. In each of these cases, Board processed a petition filed after the certified union became defunct, i.e., ceased to exist, or at least ceased to function. Here, as stated above, Local 42 is not defunct. Moreover, its disclaimer of interest in representing the formerly certified unit came after the petition was filed, not before.

We cannot agree with the dissent's approach, which would effectively create an exception to the certification bar whenever a certified union files a disclaimer after the petition is filed. Entertaining such petitions, as the dissent advocates, would only encourage parties to file them in future cases, with the ensuing risk that a certified union's majority status would thereby be undermined.[4] For these reasons, our decision to dismiss the petition is entirely consistent with the purposes for which the certification bar was created.[5] It is therefore irrelevant that the Employer is the party arguing for application of the certification bar, or that it previously exercised its right to seek review of the Board's now-vacated order requiring it to bargain in the maintenance unit at issue in 10–RC–162530, and we reject the dissent's unsupported speculation that the Employer has raised the certification bar issue for the purpose of delay.

In this regard, we are confident that the interests of all parties, including the employees, would be ill-served by processing this petition in the face of the certification bar issues that have been raised, as our colleague would do. For the reasons stated above, we are firmly convinced that dismissing this petition best fulfills the purposes of the certification bar and the policies of the Act. Our dissenting colleague disagrees, but regardless of how our colleague perceives it, the Employer has asserted the certification bar challenge, and there is no reason to think that this issue will go away if the petition is processed. Rather than tee up a likely court challenge to an election that would unnecessarily tie up this representation matter in a court battle for years to come, we believe it is the wiser course to remove that ground for challenge now.

We also reject our dissenting colleague's baseless charge that we have abandoned our duty to protect the right of the employees to "full freedom of association, self-organization, and designation of representatives of their own choosing" specified in Section 1 of the National Labor Relations Act. To the contrary, our dismissal of the petition is without prejudice to the Petitioner's right to immediately file a new petition, and any delay is solely due to its having filed its petition during the certification year.

Accordingly, we direct the Regional Director to dismiss the petition filed in Case 10–RC–239234, without prejudice to the filing of a new petition, and we remand this case to the Regional Director for further proceedings consistent with this Decision on Review.

Dated, Washington, D.C. May 22, 2019

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John F. Ring, Chairman

[4] We do not share our colleague's optimism that the Board could confine a decision to process this petition to the specific facts of this case: "a once-certified union's own representation petition, where the employer has consistently refused to recognize the union, and the union has disclaimed interest in representing the original unit." Such a decision would become precedent and, like any precedent, tend to "expand itself to the limit of its logic." Benjamin Cardozo, The Nature of the Judicial Process at 51 (1921).

[5] See *United Supermarkets,* 287 NLRB 119, 120 (1987) (certification bar is applied strictly; regional office erred in retaining decertification petition filed 5 months into certification year: "the petition should have been dismissed and not permitted to remain on record as a continuing threat to the rightful representative status of the Union."), affd. 862 F.2d 549 (5th Cir. 1989); *Centr-O-Cast & Engineering Co.,* 100 NLRB 1507, 1508–1509 (1952) ("the mere retention on file of such petitions, although unprocessed, cannot but detract from the full import of a Board certification, which should be permitted to run its complete 1-year course before any question of the representative status of the certified union is given formal cognizance by the Board.").

WTOP, Inc., 114 NLRB 1236 (1955), cited by the dissent, is not to the contrary. There the Board found no bar to a rival union's petition filed with 2 months remaining in the certification year, where the certified representative later disclaimed interest in the unit. Initially, we note that the retention on file of the petition in that case stands in considerable tension with the Board's decisions in *United Supermarkets,* supra and *Centr-O-Cast,* supra. Even assuming that *WTOP* remains good law, we find that it is readily distinguishable. There, the certified representative had failed to bargain on behalf of the unit and the Board found that it was essentially defunct by the time the second petition was filed. In contrast, the Petitioner here has assiduously sought to represent a unit of maintenance employees throughout the proceedings in Cases 10–RC–162530 and 10–CA–166500.

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Today's decision, directing the Regional Director to dismiss the Union's representation petition, is inconsistent with Board precedent, undermines the policies of the National Labor Relations Act, and defies common sense. For years, the Employer has refused to bargain with the Union in the unit certified by the Board. Faced with this delay, and with no end in sight, the Union filed a new petition, seeking to represent workers *in the bargaining unit that the Employer insisted all along was the only appropriate one.* (The Union also appropriately disclaimed interest in representing the certified unit.) Now, remarkably, the Employer has made an about-face, arguing that the certification of the original unit—the validity of which it has never accepted—creates a barrier that prevents workers from proceeding to an election in the newly-sought (and Employer-championed) unit. But the Board's "certification bar" doctrine has no application here, and the only possible purpose of the Employer's manipulation of Board processes is to delay a vote.[1] By giving credence to the Employer's baseless arguments, the majority abandons our duty (in the word of the statute) to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."[2]

That abdication is not excused by the majority's suggestion that dismissing the Union's petition (as the Employer has demanded) is somehow in the "interests of all the parties" because it removes a possible ground on which the Employer could challenge the ultimate certification of the Union, if the petition were processed and the Union won the election. If that rationale prevailed, of course, then the Board would always determine representation questions in line with the employer's wishes, in the name of protecting the result of a representation proceeding from the employer's challenge. It should be obvious, rather, that the Board must decide representation cases in accordance with the law. The irony here, of course, is that there is no apparent way to neutralize the Employer's objections in any case. When the Union effectively conceded victory to the Employer by petitioning for the unit that the Employer had demanded, the Employer sought to block the new petition. And the Employer now prevails. "Heads, the employer wins; tails, the union loses" cannot be the Board's new motto.

I.

The essential facts are straightforward. After the Union[3] won an election, the Board's Regional Director certified a bargaining-unit of maintenance employees at the Employer's Chattanooga, Tennessee facility—on December 14, 2015, more than 3 years ago.[4] The Employer challenged the certification, refusing to bargain with the Union and arguing that the maintenance unit was inappropriate, because it failed to include production employees as well. Ultimately, the Board found that the Employer's refusal to bargain in the maintenance unit violated the Act, the Employer sought judicial review of that decision, and (after a divided Board reversed precedent) the unfair labor practice issue was returned to the Board, where it sat.

In the meantime, the Union continued its organizing efforts in Chattanooga and filed a new representation petition with the Board, seeking a production-and-maintenance unit—the larger bargaining unit that the Employer had demanded all along. The Union formally disclaimed interest in representing the original, maintenance unit. And joined by the General Counsel, the Union sought to end the unfair labor practice case involving the original unit, which was still pending at the Board. The Board remanded that case, and it is now closed. Consistent with the dismissal of the unfair labor practice case, the

[1] While the majority suggests that it is "unsupported speculation" to conclude that delay was the Employer's goal here, it strains credulity to assume that the Employer is now rejecting the very bargaining unit it advocated for out of an altruistic desire to protect the integrity of the Board's certification bar doctrine.

[2] National Labor Relations Act, Sec. 1, 29 U.S.C. §1.

[3] There should be no question here that for statutory purposes, the Board has been dealing with the same collective-bargaining representative—the United Automobile Workers (UAW) international and an affiliated local union—throughout these tortured proceedings. It was UAW Local 42 that was originally certified, and the UAW international that filed the current petition, but the two unions are properly treated as the same because of their organizational affiliation and their legal alignment. Although the two unions are separate legal entities, their interests are identical: they are hardly rivals competing for the right to represent the same employees.

Analogous cases bring home the point. The Board has consistently found "continuity of representation" where employers have sought to justify a refusal to bargain by invoking the distinction between a local union and its parent international union. See, e.g., *Avante at Boca Raton, Inc.*, 334 NLRB 381, 381 & 388 (2001) (affiliation of local's parent union with international did not affect continuity); *Stardust Hotel & Casino*, 317 NLRB 926, 926 fn. 1 & 929–930 (1995) (trusteeship imposed by parent international over local union did not affect continuity).

[4] The statutory prohibition against directing a Board election within a 12-month period after a valid election has been held is *not* implicated here. National Labor Relations Act, Sec. 9(c)(3), 29 U.S.C. §159(c)(3). More than two years have passed since the maintenance-unit election was held.

Regional Director has also revoked the Union's certification in the maintenance unit. The Employer had consistently refused to recognize and bargain with the Union in that unit. The focus here, then, is entirely on the Union's recent effort to represent a larger production-and-maintenance unit. There is no conceivable reason why the Union should not be permitted to proceed with its petition.

Nevertheless, the majority orders the Regional Director to "dismiss the petition . . . without prejudice to the filing of a new petition." The Union is thus free to file a new petition, but that option necessarily means additional delay that should never have been necessary.

II.

The Board's "certification bar" doctrine is more than 70 years old.[5] It has never been applied in a situation like this one to block a once-certified union's own representation petition, where the employer has consistently refused to recognize the union, and the union has disclaimed interest in representing the original unit. The established purpose of the certification bar—insulating an incumbent union from an outside challenge to its status as bargaining representative, in order to promote collective bargaining—is simply not implicated here. The majority fails to plausibly explain how the doctrine as traditionally understood could possibly apply in this case, but it still endorses the Employer's position that the Union's petition must be dismissed.

In 1954, the Supreme Court endorsed the rationale for the certification bar in *Ray Brooks*,[6] where an employer had refused to bargain with a certified union, based on its contention that the union had lost majority support among employees. Prohibiting a challenge to the union's status during the certification year promotes orderly collective bargaining and thus "industrial peace," the "underlying purpose" of the Act.[7] Here, of course, the Union is not seeking to challenge its own status as the certified representative. It is seeking a way around the Employer's persistent refusal to recognize and bargain with the Union. Not the Union, but the Employer is invoking the certification bar—and not because it wants to bargain with the union, but because it wants to prevent the union from representing a larger bargaining unit (indeed, the unit that the Employer has consistently argued is the only appropriate unit). This ploy would turn the certification bar inside out and upside down.

Not surprisingly, the certification bar doctrine has never been applied when it makes no sense to do so. The *Ray Brooks* Court recognized there are "unusual circumstances" when applying the "certification bar" would *not* serve to vindicate an existing bargaining relationship, including where "the certified union dissolved or became defunct."[8] In those circumstances, there is no existing bargaining relationship to preserve. The same thing is true here. Of course, the Union is not technically "defunct" (as the majority points out), but it is not in a position to benefit from application of the certification bar—and that situation is a direct consequence of the Employer's refusal to honor the certification. The Employer has never recognized and bargained with the Union in the original, certified unit, and, crucially, the Union (the intended beneficiary of the certification bar) no longer seeks to represent that unit. There is no existing bargaining relationship to preserve, and no live prospect of one with respect to the original unit. Just as a union is free to disclaim interest in representing a bargaining unit, it surely is free to reject "benefit" of the certification bar when, as here, the bar would actually block employees from seeking the union's representation.

The Board has never applied the certification bar *against* a union that the Board had certified, at the urging of the employer that contested the union's certification and refused to recognize and bargain with it.[9] As the *Ray Brooks* Court observed, "[t]o allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [the] end [of industrial peace], it is inimical to it."[10] Id. Allowing an employer that has defied the Board's certification of a union to invoke the certification bar to block the union's new representation petition is every bit as "inimical" to the aim of the Act. The Board's decisions in the most analogous cases make that clear.

[5] See, e.g., *Kimberly-Clark Corp.*, 61 NLRB 90, 92 & fn. 4 (1945) (collecting cases). In *Kimberly Clark*, the Board dismissed a representation petition filed by a rival union, where the incumbent union had been certified only 6 months before. The Board described the "certification bar" doctrine as "serv[ing] the dual purpose of encouraging the execution of collective bargaining contracts and of discouraging 'raiding' and too frequent elections." Id. at 92. Where, as here, an employer has never recognized the certified union, applying the bar to block the union's new petition obviously would not encourage the execution of a contract. Nor does this case involve either one union's raid on another (the UAW and Local 42 are not rivals) or the specter of "too frequent elections" (as noted, the original election was conducted years ago, long past the statutory 1-year bar period).

[6] *Ray Brooks v. NLRB*, 348 U.S. 96 (1954).

[7] Id. at 103.

[8] Id. at 98 (footnote collecting cases omitted).

[9] The majority points out that UAW Local 42 is the certified unit and that its parent union, the UAW international, has filed the current petition, but as already explained (see fn. 3, supra), this distinction is immaterial here.

[10] Id. at 103.

Take the Board's 1944 decision in *Public Service* for example.[11] There, employees voted to be represented by one union. The employer bargained with the union, without reaching an agreement. Employees then dissolved their union and affiliated with another. The second union filed a representation petition with the Board, which the employer opposed, citing the recently conducted election. The Board rejected that argument, observing that "[a]lthough our usual rule is that a certification following a[n] . . . election must be effective for a period of 1 year, *it is obvious that such a rule if applied in the instant case would defeat the very purpose of the Act inasmuch as the certified bargaining representative is no longer in existence*."[12] Had the employer's position prevailed, employees would have had no present path to representation: the certified union was gone, yet its successor could not file a petition. This case is at least as strong for finding no bar. Although the Union remains in existence, its certification does not, and it has disclaimed interest in representing the original unit. The parallel with the dissolution and affiliation in *Public Service* is clear. And unlike the employer in *Public Service*, the Employer here never recognized and bargained with the Union, so it has no legitimate interest to avoiding an election.

Rocky Mountain Phosphates,[13] decided in 1962, makes the same point: the certification bar does not apply when it would not serve to protect an existing collective-bargaining agreement, but instead would interfere with employees' statutory right to seek union representation. There, an independent union was certified by the Board. It bargained to impasse with the employer. At that point, employees voted among themselves to dissolve the independent union and to support a new, affiliated union, transferring the original union's treasury to it. The employer refused to recognize the affiliated union, invoking the certification bar. Citing *Ray Brooks* and the certification-bar exceptions recognized by the Supreme Court, the Board rejected the employer's position. "[W]here the certified union becomes defunct," the certification bar does not apply, the Board explained:

> The reason for this exception is obvious. An employer can hardly be obligated to deal with a labor organization which has ceased to function. Hence, where an unusual circumstance such as defunctness arises during the certification year, *the rule must yield to permit employees to realize the full exercise of their rights under Section 7* to reject a labor organization or select a new one.

138 NLRB at 293–294 (emphasis added). Here, the Union's disclaimer of interest and the revocation of its certification is the equivalent of becoming defunct for purposes of the certification bar. The bar obviously "must yield to permit employees to realize the full exercise of their rights" under the Act.

Indeed, the Board has refused to apply the certification bar where a union has disclaimed interest in representing the certified unit. A case closely on point here is *WTOP*.[14] There, the Board certified a union. Shortly afterwards, employees—"with the consent of the certified" union—informed the employer that they were repudiating the union, which "had not bargained for the employees" following the certification.[15] A new union then filed a petition with the Board. In turn, the original union "disclaimed interest in the unit covered."[16] The Board rejected application of the certification bar, explaining that because the certified union "ha[d] to all intents and purposes become defunct as to representing [unit] employees, it would not effectuate the policies of the Act to apply" the certification bar.[17] Here, too, the Union is effectively "defunct as to representing" the original, maintenance unit.

Notably, the procedural sequence in this case is the equivalent of that in *WTOP*. There, the certified union disclaimed interest *after* the new union filed its petition. Here, the Union disclaimed interest in the original unit *after* it filed its new petition. As in *WTOP*, the new petition "was timely filed" even though it came before the certified union's disclaimer.[18] *WTOP* decisively refutes the

[11] *Public Service Electric & Gas Co.*, 59 NLRB 325 (1944). The *Ray Brooks* Court cited *Public Service* as illustrating one unusual circumstance—where "the certified union dissolved or became defunct"—in which the certification bar did not apply. 348 U.S. at 98 & fn. 3.

The *Ray Brooks* Court also cited *Nashville Bridge Co.*, 49 NLRB 629 (1943), involving the analogous "contract bar" doctrine, in which an existing collective-bargaining agreement is held to bar a challenge to the union's status, as a way to preserve an established bargaining relationship. See id. In *Nashville Bridge*, the employer had entered into a collective-bargaining agreement with a union. During the renewed term of the agreement, the union ceased functioning. 49 NLRB at 631. Other unions then filed a joint representation petition with the Board. The original union disclaimed interest in representing employees. Id. The Board accordingly rejected the employer's invocation of the "contract bar" doctrine, observing that the original union was "dormant" and that the case did "not involve a contest between rival labor organizations competing for the right to represent employees." Id. As here, there was no collective-bargaining relationship to protect from challenge and no reason to prevent employees from seeking representation.

[12] Id. at 327 (emphasis added).

[13] *Rocky Mountain Phosphates, Inc.*, 138 NLRB 292 (1962).

[14] *WTOP, Inc.*, 114 NLRB 1236 (1955).

[15] 114 NLRB at 1237.

[16] Id.

[17] Id.

[18] Id. *Nashville Bridge*, supra, which involved the contract-bar doctrine is similar. There, the original union effectively disclaimed interest at the Board's hearing on the new union's petition, i.e., after the petition was filed. 49 NLRB at 631.

majority's claim here that the "Board has not recognized any exceptions to the certification bar based on developments subsequent to the filing of a petition."

Public Service, *Rocky Mountain Phosphates*, and *WTOP* all illustrate why the certification bar has no application in the unusual circumstances of this case. It would serve no statutory purpose.[19] Applying the bar, rather, would set up an unwarranted obstacle for employees seeking representation, causing exactly the delay that Congress wanted the Board to avoid in resolving questions concerning representation.[20] As the Board has explained, "Section 9 [of the Act] is animated by the essential principle that representation cases should be resolved quickly and fairly."[21] The Board, in turn, "must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently, and speedily," in the words of the Supreme Court.[22]

The majority rejects the "notion that the certification bar only exists to serve the interests of the certified union." But the Supreme Court and the Board long ago made clear that protecting the status of the certified union—as a means of vindicating employee free choice and promoting collective bargaining—lies at the heart of the certification bar. Where that goal would not be served, the bar does not apply. As for the other "interests" invoked by the majority, none are implicated here. Dismissing the petition here does *not* promote "a sense of responsibility" in the employees who voted for the Union years ago, only to see the Employer refused to bargain. The message sent to employees is that *their employer* decides whether their vote will be meaningful. Dismissing the petition here does *not* give the Union "ample time to carry out its mandate." The Employer has frustrated the Union's mandate from the beginning. Finally, dismissing the petition here does *not* remove the Employer's incentive "to undermine union strength through delay." The Board's decision today positively rewards the Employer for causing delay.[23]

III.

No certification-bar decision cited by the majority today has any similarity at all to this case. Indeed, the majority's characterization of Board authority is misleading.[24] The Board has never applied the certification bar *against* a certified union to block its own representation petition, much less done so after the employer has refused to bargain in the certified unit and after the union has disclaimed interest in that unit. In those unusual circumstances, as Board precedent clearly demonstrates, applying the certification bar would violate the Act's policies.

The majority nevertheless expressly agrees with the Employer that the validity of the Union's current petition to represent a production-and-maintenance unit "must be determined without regard to any disclaimer of interest" as to the certified maintenance-only unit made "after the [new] petition was filed." As we have seen, the majority's assertion is flatly inconsistent with *WTOP*, where the certified union disclaimed interest *after* a second union filed a representation petition.[25] But in any event, the two cases relied upon by the majority—which both involved employer challenges to certified unions—have nothing to do with the situation presented here.

In *United Supermarkets*,[26] the issue was not whether to process a new representation petition filed by the certified union, but whether the employer had unlawfully withdrawn recognition from the certified union. The Board found the violation, explaining that because the union had

[19] The majority's effort to distinguish these cases fails completely to engage with the Board's rationale in these decisions and the statutory policies applied.

[20] See National Labor Relations Board, *Representation-Case Procedures; Final Rule*, 79 Fed. Reg. 74308, 74316 (Dec. 15, 2014) (examining Congressional policy against delay).

[21] Id. at 74316.

[22] *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946).

[23] The majority asserts that it would not "effectuate the policies of the Act to recognize an exception to the certification bar whenever a certified union files a disclaimer after the petition is filed," because this "would only encourage parties to file them in future cases, with the ensuing risk that a certified union's majority status would thereby be undermined." Of course, I do not take that position. My position here is that applying the certification bar in the circumstances of this case serves no statutory purpose—and, indeed, undermines the policies of the Act. The Union's disclaimer is obviously only one aspect of the case.

[24] The majority begins by citing *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 (1990), enfd. 939 F.2d 402 (6th Cir. 1991). That case provides no support for the majority's position. V*an Dorn* involved an employer's unlawful withdrawal of recognition from a certified union during the certification year. The certification bar was applied to protect the certified union and to require the employer to recognize and bargain with that union. *Van Dorn* does not speak to this case.

Nor does the second case cited by the majority, *Casey-Metcalf Machinery Co.*, 114 NLRB 1520 (1955). There, the Board dismissed an election petition *filed by the employer* (a so-called "RM" petition), challenging the union's majority status, because the union had been certified less than a year before. Id. at 1525. The majority says that the case stands for the proposition that the "Board will dismiss election petitions filed before the end of the certification year that seek to represent some or all of the employees in the certified unit, including petitions that seek to include employees in the certified unit as part of a broader, plant-wide unit." That assertion is simply incorrect. As explained, it was the employer—not the certified union—that filed the dismissed petition in *Casey-Metcalf*, which sought to terminate their representation by the certified union.

[25] The majority fails to distinguish *WTOP*, supra, in pointing out that there the certified union "had failed to bargain on behalf of the unit," but here the Union "has assiduously sought to represent" employees in the maintenance unit. What matters here is that the Union—in the face of the Employer's persistent refusal to bargain—has disclaimed interest in representing the maintenance unit.

[26] *United Supermarkets*, 287 NLRB 119 (1987), affd. 862 F.2d 549 (5th Cir. 1989).

only been certified for 5 months, the employer could not rely on a decertification petition signed by a majority of bargaining-unit employees to withdraw recognition.[27] It pointed out that none of the "unusual circumstances" recognized as exceptions to the certification bar in *Ray Brooks* (including "defunctness of the union") was present.[28]

Nor was the issue presented here addressed in *Centr-O-Cast*.[29] There, the *employer* filed an election petition challenging the certified union's status less than a year after certification. Not surprisingly, the Board dismissed the employer's petition. It described the "dual purpose" of the certification bar as "encouraging the execution of a collective-bargaining contract and enhancing the stability of industrial relations."[30] (Neither purpose would be served here by barring the Union's petition.) The Board specifically disapproved of the Regional Director's action in the case before it: instead of dismissing the employer's petition, as the certification bar required, he docketed the petition and "allowed [it] to remain on file[] unprocessed until the full [certification] year had expired."[31] The Board's disapproval of that step has no application at all here, where the certification bar does not apply in the first place.

IV.

There was no reason in this case to prevent the proceedings in the Region—including an election, if one were ordered by the Regional Director—from continuing uninterrupted. Instead, the majority has chosen to intervene and require the dismissal of the petition. But its rationale has no support in Board law or in the policies of the National Labor Relations Act. Requiring dismissal of the petition will only further delay these workers' longstanding quest for a bargaining representative, effectively rewarding the employer's strategic manipulation of the Board's process and preventing its workers from getting the opportunity to vote that they are entitled to and deserve. Accordingly, I dissent.

Dated, Washington, D.C. May 22, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[27] 287 NLRB at 120.
[28] Id.
[29] *Centr-O-Cast & Engineering Co.*, 100 NLRB 1507 (1951).
[30] Id. at 1508.
[31] Id.