UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

BRADKEN, INC., Employer, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT W24, AFL-CIO Union and JONATHAN DAVID FULLER, Petitioner.	)	Case 19-RD-112390

BRIEF ON REVIEW OF AMICUS CURIAE COALITION FOR A DEMOCRATIC WORKPLACE IN SUPPORT OF EMPLOYER AND PETITIONER

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I. INTEREST OF AMICUS CURIAE

The Coalition for a Democratic Workplace (the "Coalition") is an amalgam of more than 600 employers and employer associations. The membership of the Coalition represents millions of businesses of all sizes from every industry sector in every region of the country. The diverse employers within the Coalition have substantive experience with collective bargaining agreements and unfair labor practice charge settlements entered into after the filing of decertification petitions with the National Labor Relations Board ("Board").

Moreover, as employers under the National Labor Relations Act ("Act"), members of the Coalition have a profound interest in national labor policy in general and interpretation of the Act specifically.

II. STATEMENT OF THE CASE

On October 10, 2014 the Board issued an order in the instant case granting review of the Regional Director's Decision and Direction of Election ("DDE"), stating that it raised substantial issues warranting review.

The DDE directed an election pursuant to a question concerning representation raised by an RD petition filed by Jonathan David Fuller ("Petitioner") to determine whether the incumbent union, International Association of Machinists and Aerospace Workers, District W24, AFL-CIO ("Union") had lost majority support, as a result, should be removed as the exclusive collective bargaining representative of a unit of Bradken, Inc. ("Employer") production and maintenance employees located at the Employer's Chehalis, Washington facility. The RD petition was filed two weeks after the Union had filed a charge under Section 8(a)(1) and 8(a)(5) of the Act alleging that the Employer had engaged in regressive and surface bargaining in negotiations toward an initial collective bargaining agreement. The petition was held in abeyance pending the Region's investigation of the charge. Following the investigation of the charges, the Regional

Director issued a Complaint and Notice of Hearing. The hearing on the Complaint was consolidated with a hearing to determine whether the alleged unfair labor practice, if it had occurred, bore a causal relationship to the employee disaffection reflected in the petition. The Union, however, subsequently requested that the charge be conditionally withdrawn because the Union and Employer had since negotiated a collective bargaining agreement. Throughout, the Employer never admitted to committing the unfair labor practice alleged in the charge. Upon withdrawal of the charge and execution of the collective bargaining agreement between the Union and Employer, the Region, consistent with *TruServ Corp.*, 349 NLRB 227 (2007), resumed processing the decertification petition held in abeyance during the pendency of the charge. The Regional Director issued the DDE on June 5, 2014 and an election was scheduled for July 1, 2014.

The Union requested review of the DDE asserting, *inter alia,* that *TruServ* was wrongly decided and the policy of reinstating representation proceedings blocked by unfair labor practice charges subsequently settled by agreement of the union and employer contravenes the purposes of the Act by discouraging peaceful settlements and undermining stable collective bargaining relationships.

III. ISSUE PRESENTED

The Coalition respectfully submits that the issue presented before the Board is whether there has been a substantial change in Union and/or business practices between *TruServ's* issuance in 2007 and the present that warrants modifying or overturning the Board's policy of processing decertification petitions held in abeyance by pending unfair labor practice charges, which charges are subsequently adjusted and withdrawn pursuant to an agreement between the employer and union (and reverting to the policy set forth in *Douglas-Randall*, 320 NLRB 431 (1995)).

IV. SUMMARY OF ARGUMENT

The undersigned Coalition respectfully submits that the policy of processing decertification petitions blocked by unfair labor practice charges subsequently withdrawn pursuant to an agreement between the employer and union, which policy is set forth in *TruServ*, must be maintained. The factual and legal rationales in support of the decision remain unchanged. No new circumstances whatsoever have arisen since *TruServ's* issuance that justify modifying or overturning the decision.

The policy set forth in *TruServ* supports labor stability without sacrificing employee free choice. Indeed, not only is employee free choice the essence of the Act, it is the indispensable predicate to labor stability. *TruServ* protects employees' Section 7 rights to choose or not choose their collective bargaining representative while preserving fundamental principles of due process.

V. LAW AND ARGUMENT

A. Employer Section 7 Rights to Self-Organization As Well As Fundamental Due Process Require *TruServ* Be Upheld.

Employees' right to free choice and self-organization is the core of the Act and animates every provision thereof. Section 7 makes plain that

> Employees shall have the right to self-organization, to form, join or assist legal organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall the right to refrain from any or all such activities. . . .
>
> 29 U.S.C. § 157.

The Supreme Court, as well as circuit courts and the Board have repeatedly stressed the primacy of employee rights under Section 7 of the Act. *See e.g. Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985); *Phoenix Transit System,*

337 NLRB 510, 513 (2002) (The Board finds that the right of employees to organize for collective bargaining is a strong Section 7 right 'at the very core of the purpose for which the NLRA was enacted.'" citing *New Process Co.*, 290 NLRB 704, 705 (1988) ("The right of workers to organize freely for the purpose of collective bargaining is a very strong Section 7 right, one found by the Supreme Court to be at the very core of the purpose for which the NLRB was enacted," citing *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978); see *G.W. Gladders Towing Co.*, 287 NLRB No. 30 (1987); *SCNO Barge Lines*, 287 NLRB No. 29 (1987); *Emery Realty*, 286 NLRB No. 32 (1987)); *Florida Steel Corporation,* 223 NLRB 174, 175 (1976) (finding that infringement upon Section 7 rights goes to the "heart of the Act.").

TruServ protects employee rights to self-organization, the right to refrain from same, and fundamental rights of due process by holding that settlement of an unfair labor practice charge is not an admission, finding, or adjudication that an employer's actions constitute an unfair labor practice tainting a pending decertification petition and thereby requiring its dismissal. Thus, where, as in the present case, a decertification petition is blocked by an unfair labor practice charge and the charge is later withdrawn pursuant to an agreement between the union and employer, the petition may be processed. The key reason the petition may be processed is because the agreement does not, standing alone, constitute an admission, finding, or adjudication that the employer violated the Act. Put simply, it is not *evidence* that the Act has been violated. Without evidence that the employer's unfair labor practice undermined union majority support or caused employee disaffection, employees' Section 7 rights to self-organization or refrain from same may not be impaired or frustrated by holding a decertification petition in abeyance. Mere

presumption, allegation, or speculation is not superior to employee free choice, nor is it sufficient to thwart a decertification election.

TruServ faithfully upholds the requirement that there be *substantial evidence* that the employer unfair labor practice caused employee disaffection. *See Ovazite v. NLRB*, 87 F.3d 493 (D.C. Cir. 1996); *Avecor, Inc. v. NLRB*, 931 F.2d 924 (D.C. Cir. 1991), cert. denied 502 U.S. 1048 (1992). Giving determinative weight to simple *allegations* of employer misconduct is contrary to fundamental notions of due process and impermissibly elevates such allegations over the Section 7 rights of employees.

The D.C. Circuit Court of Appeals recognized the Red Queen quality of a rule that gives determinative weight to mere allegations:

> Here the Board's rule contravenes the Act because it allows the Board to routinely find a violation of the Act *in absence of substantial evidence*. The only evidence in which the Board based its finding that the Company's ULPs caused the loss of support for the Union is the agreement—an agreement that specifically provides that the Company *admitted no wrongdoing*. This falls short of satisfying the substantial evidence standard. (Emphasis added). *BPH & Co., Inc. v. NLRB*, 333 F. 3d 213, 222 (D.C. Cir. 2003).

TruServ and its antecedents set forth the variety of circumstances, consistent with *BPH & Co., Inc.*, supra, in which decertification petitions will be reinstated where unfair labor practice charges have been resolved. In each case, the evidence of an unfair labor practice was insufficient to bar processing of decertification petition and deny employees their Section 7 rights. In each case, there was no admission, finding, or adjudication that the employer had committed an unfair labor practice.

For example, in *City Markets*, 273 NLRB 469 (1984), decertification petitions were conditionally dismissed due to unfair labor practice charges alleging that the employer had refused to bargain. The charges were withdrawn after the union and employer executed a

collective bargaining agreement. When the petitioners sought reinstatement of the decertification petition, the union maintained that the contract barred such petitions. The Board held the petitions could be processed since the charges, i.e., mere *allegations*, had been withdrawn.

Two years later, the Board returned to the issue of blocking charges in *Passavant Health Center*, 278 NLRB 483 (1986). As in *City Markets*, decertification petitions were dismissed in the face of charges that the employer had violated Sections 8(a)(1) and 8(a)(5) of the Act. Petitioners requested that the Region resume processing the petitions after the parties executed a new collective bargaining agreement and entered into a settlement agreement containing non-admission language, and the charges were subsequently withdrawn. Petitioners' request to reinstate the petitions was denied on the basis of contract bar. The Board reversed, finding that since the settlement agreement contained a non-admission clause, there was no evidence that the petitions had been unlawfully tainted. Without such evidence, there was no reason to block processing of the petitions.

Almost contemporaneously, in *Island Spring*, 278 NLRB 913 (1986), the Board found that the *absence* of non-admissions language in a settlement agreement also did not bar reinstatement of a decertification petition. Since the employer had not affirmatively admitted any violation of the Act, and since the settlement agreement resolved the unfair labor practice charges, there was no finding that the employer had violated the Act. Further, since the employer had not admitted a violation of the Act, there was no evidentiary basis upon which to block reinstatement of the petition. Petitioners could not be prevented from exercising their Section 7 rights where there was neither a finding nor admission that the employer had committed an unfair labor practice.

The Board also applied the reasoning of *City Markets*, *Passavant* and *Island Spring* to a *unilateral* settlement agreement to which the union had objected. In *Nu-Aimco, Inc.*, 306 NLRB 978 (1992), the union had insisted that the settlement agreement provide for dismissal of the decertification petition but such insistence was rejected. Once again, the Board noted that the absence of either a finding or admission that the employer had committed an unfair labor practice precluded dismissal of the petition. See also, *Jefferson Hotel*, 309 NLRB 705 (1992).

The plain, logical thrust of *TruServ* and its antecedents is that employees may not be deprived of core rights secured by the Act without an admission, finding or adjudication—i.e., substantial evidence—that would justify blocking a decertification petition because of possible taint. Neither may employees be deprived of such rights by a settlement to which decertification petitioners are *not even a party*. Rights so easily abrogated are not rights at all, but rather, privileges subordinate to the interests of an incumbent union.

Accordingly, a return to a *Douglas-Randall* standard would permit the fundamental right of employees to choose their collective bargaining representatives to be compromised by something far short of substantial evidence—something more closely approximating, rumor, possibility, innuendo, or assumption. Such an approach not only subordinates decertification petitioners' rights to the interests of incumbent unions, it is wholly without due process or evidentiary moorings—extending to employers once charged with an unfair labor practice a presumption of guilty until proven innocent.

While *Douglas-Randall* would operate to entrench unpopular incumbent unions *without* any evidence that the decertification petitions in question had been tainted, decertification petitioners *do* have evidence that a sizeable percentage of employees do not wish to be represented by the union.

B. *TruServ* Promotes Industrial Stability by Protecting Employees' Ability to Choose Their Representatives.

Industrial stability is a function of employees' ability "*to bargain collectively through representatives of their own choosing.*" 29 U.S.C. § 157 (emphasis added). National labor policy has long recognized that employees deprived of the right to self-organization and/or saddled with a representative not of their own choosing is a prescription for labor unrest. See e.g. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1986).

The *TruServ* doctrine promotes industrial stability by protecting the ability of employees to vote on whether they wish to be represented by an incumbent union. Where a substantial percentage of employees has expressed, by means of a decertification petition, dissatisfaction with the incumbent union, preventing the entire bargaining unit from voting on their continued representation by such union is not a formula for labor peace. This is especially so when the employees were prevented from voting based on charges of unfair labor practices that were not found, proven or admitted to, and which charges were actually withdrawn.

Reversion to the *Douglas-Randall* approach that attaches the functional equivalent of an irrebuttable presumption of taint to any and all decertification petitions filed within temporal proximity of an unfair labor practice charge is all but fatal to a decertification petitioner's exercise of Section 7 rights. In some cases, the bar will be up to three years, effectively killing any decertification efforts and entrenching unrepresentative, unsatisfactory, or unpopular unions.

In stark contrast, the *TruServ* approach is not immediately or inexorably fatal to an incumbent union. It does not necessarily result in the rejection of the union. All that *TruServ* requires is for the decertification petition to be reinstated and processed. In most cases, a campaign will then ensue. The incumbent union will have a full opportunity to make its case to the employees. It can tout all of the benefits it has secured, or will secure, for the bargaining

unit. It can remind the employees of the reasons the union was certified in the first place. It can bring all of its resources to bear on preserving its status as the employees' collective bargaining representative.

Most important, under *TruServ* the incumbent union still has the opportunity for a secret ballot vote—the practical equivalent of an evidentiary finding or adjudication that the union enjoys majority support. The testing of such majority support is a cornerstone of labor stability.

Conversely, under *Douglas-Randall*, decertification petitioners are *deprived* of a vote. And that deprivation is *not* based on an evidentiary finding or adjudication that an unfair labor practice tainted the decertification petition. In fact, decertification petitioners are deprived of a vote notwithstanding the fact that the unfair labor practice charges have been dismissed or withdrawn.

Imposing on a bargaining unit a union demonstrably unpopular with at least a substantial percentage of employees without affording the employees an opportunity to vindicate their Section 7 rights increases the likelihood of labor instability. It also increases the likelihood that unrepresentative, unpopular or sweetheart unions will proliferate. This is an absurd result inconsistent with the framework and purposes of the Act.

C. By Not Requiring a Finding or Admission of Taint, *Douglas-Randall* Improperly Derogates Employee Section 7 Rights.

The Union in the present case urges the Board to return to the *Douglas-Randall* approach whereby a decertification petition will be dismissed or held in abeyance without a finding, adjudication, or admission that employer conduct tainted the petition. As shown above, such approach is inimical to employees Section 7 rights, is not based on basic evidentiary and due process standards, and encourages labor instability.

Just as significantly, *Douglas-Randall* is based on a faulty premise and suffers from an irremediably flawed analysis. *Douglas-Randall's* faulty premise is its reliance on *Poole Foundry & Machine Co. v. NLRB*, 192 F. 2d 740 (4th Cir. 1951). Not only was such reliance misplaced, but the *Douglas-Randall* Board applied the pivotal, factual timeline of *Poole* backwards.

The key in *Poole* was that the decertification petition was filed *after* the union and employer entered into a settlement agreement. When the decertification petition was filed, the employer ceased bargaining. The Board dismissed the decertification petition because the employer, by refusing to bargain, was then in violation of the settlement agreement.

The *Douglas-Randall* Board, however, applied *Poole* to bar processing of a decertification petition filed *before* the parties had settled any unfair labor practice charges, which settlement contained no finding, adjudication, or admission that the employer had tainted the petition. The *Douglas-Randall* Board's critical misapplication of the *Poole* sequence of events rendered the *Douglas-Randall* rationale nonsensical: under *Douglas-Randall*, then, once a charge is filed against an employer, the fundamental rules of due process are thrown out the window and the employer is irrefutably presumed to have tainted any petition, despite the fact that (1) the charge has been resolved; (2) the employer has not admitted to the allegations underlying the charge; and (3) there has been no finding or adjudication of unlawful conduct. In effect, the *employer* is considered tainted, for there is no substantial evidence of *unlawful conduct,* and such taint prevents such bargaining unit employees from exercising their Section 7 rights. Only Lewis Carroll would approve.

To make matters worse, as pointed out by Member Hurtgen in his dissent in *Super Shuttle*, 330 NLRB 1016 (2000), the Board perpetuated the flaws in *Douglas-Randall* by applying it to non-Board as well as Board settlements, thereby expanding the universe of

employees whose Section 7 rights could be stripped without even a modicum of due process. See *Liberty Fabrics,* 327 NLRB 38 (1998). To Member Hurtgen's dismay, the backwards rationale of *Douglas-Randall* also infected the *Super Shuttle* fact pattern, *viz.*, a decertification petition would be dismissed simply because outstanding unfair labor practice charges were resolved when the employer and union entered into a collective bargaining agreement. Once again, in *Super Shuttle*, as in the other cases cited herein, there was no finding, admission or adjudication of unlawful employer conduct. And again, as in the other cases cited herein, the Section 7 rights of decertification petitioners were stripped pursuant to an agreement to which they were not even parties.

D. The *TruServ* Standard Promotes Settlement Agreements and Protects the Interests of Employers, Employees, and Unions.

Contrary to the Union's assertion in its Request for Review that *TruServ* discourages peaceful resolution of unfair labor practice charges, there exists absolutely no evidence that such resolutions have been negatively affected since *TruServ's* issuance in 2007. Furthermore, there exists absolutely no evidence that settlements increased during the 12-year term of the *Douglas-Randall* standard.

The Union's assertions are not founded on the practical considerations entertained by parties contemplating adjusting unfair labor practices. As with all forms of settlement and compromise, myriad factors are at play. Employers settle matters for a host of reasons wholly unrelated to the facts in controversy or the employer's potential liability. Perhaps the most important factors driving settlements are financial considerations. Employers often make a business decision to settle a matter to limit exposure. The time and cost associated with litigating an unfair labor practice charge and matters attendant thereto often outweigh the benefits associated with prevailing on the merits. In addition, the certainty afforded by a

settlement agreement, even if relatively costly, is often preferable to the uncertainty of litigation that may, in fact, eventually result in a victory.

As noted by the *TruServ* majority, the *TruServ* standard is unlikely to deter union settlement incentives. And, as noted above, the settlement of an unfair labor practice charge during the pendency of a decertification petition is not irretrievably fatal to the union's status as the unit's collective bargaining representative. The union still has all the rights afforded by the representation election process.

In addition, the resolution of an unfair labor practice charge need not (and rarely) occurs in a vacuum that does not include the Regional Director or decertification petitioners. See *Jefferson Hotel,* supra. See also *Nu-Aimco,* supra. The employer and union have the option of including the decertification petitioners in any settlement, which inclusion could diminish the likelihood of a decertification petition resulting in an election. In fact, by including decertification petitioners in the resolution process, the Union's claimed goal of ensuring industrial stability is actually enhanced. There are myriad settlement options available to the employer, union, and decertification petitioners that have the potential to benefit all parties involved. The process might even result in petitioners withdrawing the decertification petition. But where, as in *Douglas-Randall*, taint attaches regardless of any substantial evidence of unlawful conduct by the employer, the calculus of all potential parties to the agreement changes radically, and in many respects, negatively.

Furthermore, pursuant to *TruServ*, the Regional Director retains authority to approve an informal settlement. Such authority obviously carries the inherent ability to ensure that the purposes of the Act are satisfied by any such settlement. By retaining such authority, the Regional Director can spur settlements that protect the interests of all parties involved. One of

the more effective mechanisms by which to do so is to simply advise the parties as to the Region's position on the case. Where the Regional Director suggests that the Region will litigate charges should a settlement not be reached, parties will assess their respective positions, the probability of exposure, and conclude that a settlement consistent with the purposes of the Act is preferable to litigation. An otherwise recalcitrant employer, for example, might conclude that litigation may result in a finding resulting in dismissal of the decertification petition. Regardless, the continued involvement of the Regional Director will likely have a salutary effect on the process, increase the likelihood of settlement, protect the Section 7 rights of employees, and ensure industrial stability.

On the other hand, reverting to a *Douglas-Randall* standard, in which an employer's non-admission language in a settlement agreement is essentially meaningless, would decrease the incentive for employers to settle. The "benefit of the bargain" to the employer would depreciate, not to mention the fact that decertification petitioners' rights would be, for all practical purposes, eviscerated.

The Coalition respectfully submits that overruling *TruServ* would encourage the proliferation of blocking charges moreso than adherence to *TruServ* would discourage settlements. There would be no effective brake on the filing of blocking charges, and if such filing could now result in the ultimate dismissal of decertification petitions, charges would be filed as a matter of course. On the other hand, adherence to *TruServ* preserves adequate safeguards against employer misconduct. For example, *TruServ* itself noted the following exceptions to reinstatement of the decertification petition: (1) where the Regional Director determines that the decertification petition was instigated by the employer or the showing of interest was solicited by the employer; (2) the execution of the settlement agreement comes

before filing the decertification petition, as was the case in *Poole,* supra., the case upon which *Douglas-Randall* purports to be based; and (3) the settlement agreement includes decertification petitioners withdrawal of the petition. The foregoing framework incorporates sufficient protections to encourage settlement consistent with the purposes of the Act. And, although the *TruServ* majority recognized that the framework may not completely eliminate the possibility that some tainted petitions may be processed, it is certain that a return to *Douglas-Randall* requiring the dismissal of *all* petitions regardless of substantial evidence of taint will *necessarily* abridge the Section 7 rights of numerous employees because a number of non-tainted petitions will be dismissed. *TruServ*, therefore, provides an analytical regime better suited to protect the interests of all parties involved consistent with the purposes of the Act.

E. The Union's Assertion that *TruServ* Undermines Stable Collective Bargaining Relationships is Not Supported by Fact.

The Union asserts in its Request for Review that reinstatement of decertification petitions after unfair labor practice charges have been resolved without an admission, finding, or adjudication of employer misconduct undermines stable collective bargaining relationships.

There is no evidence for this assertion. Arguably, the best evidence of labor stability is strike and work stoppage data, but such data—even if it were somehow possible to disaggregate strikes generated by tainted decertification petitions—would be less than reliable empirical evidence of labor instability. Nonetheless, cumulative strike/work stoppage data from the issuance of *TruServ* through 2013 shows no increase over the comparable period preceding *TruServ*.

WORK STOPPAGES

2000-2006

Year	Total
2000	40
2001	30
2002	20
2003	15
2004	18
2005	24
2006	23
Total	170
Average Per Year	24.29

2007-2013

Year	Total
2007	23
2008	16
2009	5
2010	11
2011	19
2012	21
2013	15
Total	110
Average Per Year	15.71

Bureau of Labor Statics, Work Stoppages Database, http://www.bls.gov/wsp/ (2014).

Although there has been a steep decline in (sizeable) work stoppages, such decline is primarily attributable to economic and other factors related to post-*TruServ* decertification petitions. Nonetheless, the data clearly do not point to a post-*TruServ increase* in labor instability.

Similarly, there is no evidence of a post-*TruServ* increase in the gaming of tainted petitions or the filing of decertification petitions. Rather, the data reveal a steep decline in both the filing of decertification petitions and elections.

DECERTIFICATION PETITIONS

2000-2006

	Filed	Elections
2000	**915**	**380**
2001	**819**	**358**
2002	**899**	**421**
2003	**803**	**434**
2004	**844**	**421**
2005	**766**	**381**
2006	**759**	**365**
Total	**5805**	**2760**
Average Per Year	**829.29**	**394.29**

2007-2013

	Filed	Elections
2007	**662**	**360**
2008	**602**	**299**
2009	**568**	**270**
2010	**530**	**233**
2011	**500**	**271**
2012	**472**	**233**
2013	**472**	**202**
Total	**3806**	**1868**
Average Per Year	**543.71**	**266.86**

National Labor Relations Board, Graphs and Data: Decertification Petitions, http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/decertification-petitions-rd; National Labor Relations Board, Annual Reports, at *http://www.nlrb/gov/reports-guidance/reports/annual-reports* (2014).

Again, this is not to suggest that such data demonstrate in any respect that post-*TruServ* employer conduct is having a less-pronounced effect on the filing of decertification petitions and

decertification elections; but it certainly does not show that employer-instigated decertification petitions are increasing, and it certainly does not demonstrate a post-*TruServ* increase in decertification petitions—tainted or otherwise.

Regardless, even if the data did somehow show an uptick in work stoppages and/or decertification petitions post-*TruServ*, that would not justify abridgement of employee Section 7 rights or the negation of settlement agreements by returning to the *Douglas-Randall* model.

No new circumstances whatsoever have arisen since *TruServ's* issuance that justify modifying or overturning the decision. Accordingly, the policy evinced in *TruServ* should be maintained.

F. The Union's Insistence on an Evidentiary Hearing to Determine a Causal Nexus is Misplaced.

The Union's request that an evidentiary hearing be conducted pursuant to *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004) to consider the possibility of taint suffers a profound logical infirmity.

In the present case, the Union had filed charges of employer misconduct. The Union was aware a decertification petition had been filed when it entered into the collective bargaining agreement with the Employer. The Union nonetheless executed the agreement and withdrew the charges against the Employer. The Union did so with their eyes open. Under such circumstance a *Saint Gobain* hearing would render the withdrawal utterly meaningless. And to conduct a *Saint Gobain* hearing under such circumstances would permit unions to perform a Board-assisted bait and switch.

In similar cases, the settlement agreement between the employer and union often contains a non-admissions clause. The non-admissions clause is part of the consideration for execution of the agreement. A *Saint Gobain* hearing would render the non-admissions clause utterly

meaningless, extinguishing part of the consideration for the settlement agreement, and, thus, the settlement agreement itself. If anything would discourage the execution of settlement agreements, it is the substantive extinguishment thereof by conducting a *Saint Gobain* hearing.

Further, because the charges in the present case have been withdrawn and there has been no finding or adjudication of taint, there is no evidentiary predicate justifying a *Saint Gobain* hearing. Put simply, the very withdrawal (or, in other cases, existence of a settlement agreement) prevents there from being any causal nexus between *employer misconduct* and employee disaffection. No charges, blocking or otherwise, exist upon which to draw a causal nexus. Consequently, the only basis on which to have a *Saint Gobain* hearing would be to presume that once charges have been filed against an employer, such charges forever taint the employer, regardless of the ultimate resolution. This approach (in fact, a *Douglas-Randall* approach) would be the functional labor law equivalent of a Bill of Attainder. Such an approach is not only inconsistent with *TruServ* but also with fundamental due process.

VI. CONCLUSION

The Coalition respectfully submits that *TruServ* should be upheld because it preserves the Section 7 rights of employees to choose their representational status, protects labor stability, and protects the interests of employers, unions and decertification petitioners. Contrariwise, *Douglas-Randall* protects the interests of incumbent unions, derogates the Section 7 rights of employees, and renders the substantive terms of settlement agreements illusory. Accordingly, the DDE in the present case should be upheld and the impounded ballots counted.

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