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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 RONALD K. HOOKS, Regional  
7 Director of the Nineteenth Region of the  
8 National Labor Relations Board, for and  
9 on behalf of NATIONAL LABOR  
10 RELATIONS BOARD,

11 Petitioner,

12 v.

13 AIM AEROSPACE SUMNER, INC.,

14 Respondent.

CASE NO. C17-6061 BHS

ORDER DENYING PETITION FOR  
PRELIMINARY INJUNCTION

15 This matter comes before the Court on the petition for preliminary injunctive relief  
16 of Petitioner Ronald K. Hooks, Regional Director of the Nineteenth Region of the  
17 National Labor Relations Board, for and on behalf of National Labor Relations Board  
18 (“NLRB”) (Dkt. 1). The Court has considered the pleadings filed in support of and in  
19 opposition to the petition and the remainder of the file and hereby denies the petition for  
20 the reasons stated herein.

21 **I. PROCEDURAL AND FACTUAL BACKGROUND**

22 On December 21, 2017, the NLRB filed the instant petition seeking preliminary  
relief. Dkt. 1. The NLRB alleges that Respondent AIM Aerospace Sumner, Inc.  
 (“AIM”) engaged in unfair labor practices leading to a decertification petition and

1 withdrawal of recognition of the International Association of Machinists, District 751  
2 (“Union”) as the exclusive bargaining agent for some of AIM’s employees. The NLRB  
3 submitted evidence in support of the allegations that AIM (1) blamed the union for the  
4 inability to provide union employees with a pay raise, (2) assisted the efforts of employee  
5 Lori Ann Downs-Haynes (“Downs-Haynes”) in her efforts to collect signatures on a  
6 decertification petition by transferring her to different work areas to contact other  
7 employees, (3) failed to reprimand or prevent Downs-Haynes from collecting signatures  
8 or promoting the decertification efforts during work hours, and (4) rewarding Downs-  
9 Haynes with a promotion and raise two days after submitting the petition to the company.  
10 *See* Dkt. 2 at 9–15. The alleged unlawful activities began in the spring of 2017. The  
11 signatures were gathered between June 28 and July 18, 2017. Dawn-Haynes submitted  
12 the petition to AIM on July 21, 2017. AIM determined that 142 employee signatures  
13 were valid, out of a bargaining unit of 272, and, on July 24, 2017, notified the Union that  
14 it was withdrawing recognition immediately based on 142 signatures, which was a  
15 majority of the employees.

16 On January 15, 2018, AIM responded to the petition. Dkt. 13. AIM contends that  
17 the NLRB conducted a flawed investigation into the alleged unfair labor practices and  
18 filed the administrative complaint based solely on affidavits obtained from Union  
19 stewards and supporters.

20 On January 19, 2018, NLRB replied. Dkt. 28. On February 7, 2018, the Court  
21 held a hearing on the petition.  
22

## II. DISCUSSION

Section 10(j) permits a district court to grant relief “it deems just and proper.” 29 U.S.C. § 160(j). “To decide whether granting a request for interim relief under Section 10(j) is ‘just and proper,’ district courts consider the traditional equitable criteria used in deciding whether to grant a preliminary injunction.” *McDermott v. Ampersand Publ’g, LLC*, 593 F.3d 950, 957 (9th Cir. 2010). Thus, when the NLRB seeks § 10(j) relief, it “must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). “[S]erious questions going to the merits’ and a balance of hardships that tips sharply towards the [NLRB] can support issuance of a preliminary injunction, so long as the [NLRB] also shows that there is a likelihood of irreparable harm and that the injunction is in the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

In all cases, however, the NLRB “must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction.” *Id.* at 1131. “[T]he court must evaluate the traditional equitable criteria through the prism of the underlying purpose of section 10(j), which is to protect the integrity of the collective bargaining process and to preserve the [NLRB’s] remedial power.” *Scott v. Stephen Dunn & Assocs.*, 241 F.3d 652, 661 (9th Cir. 2001) (internal quotation marks omitted), *abrogated on other grounds as recognized by McDermott*, 593 F.3d at 957.

1 **A. Likelihood of Success on the Merits**

2 In the Ninth Circuit, the NLRB “in a § 10(j) proceeding ‘can make a threshold  
3 showing of likelihood of success by producing some evidence to support the unfair labor  
4 practice charge, together with an arguable legal theory.’” *Frankl v. HTH Corp.*, 650 F.3d  
5 1334, 1356 (9th Cir. 2011) (quoting *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th  
6 Cir.1994) (en banc)).

7 In this case, the NLRB’s legal theory is that the Union’s loss of support was  
8 caused by AIM’s unfair labor practices. A union generally “enjoys a presumption that its  
9 majority representative status continues.” *Bryan Mem’l Hosp. v. NLRB*, 814 F.2d 1259,  
10 1262 (8th Cir. 1987). This “presumption can only be rebutted by a good faith belief of  
11 the employer, based on objective factors, that the union has lost its majority status.”  
12 *NLRB v. Am. Linen Supply Co.*, 945 F.2d 1428, 1433 (8th Cir. 1991). The “employer is  
13 not permitted, however, to rely on a union’s loss of majority support caused by the  
14 employer’s own unfair labor practices.” *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d  
15 1376, 1383 (8th Cir. 1993). To determine “whether a causal relationship exists between  
16 the unremedied unfair labor practices and the subsequent expression of employee  
17 disaffection with an incumbent union,” the Board considers factors including:

- 18 (1) the length of time between the unfair labor practices and the withdrawal  
19 of recognition; (2) the nature of the violations, including the possibility of a  
20 detrimental or lasting effect on employees; (3) the tendency of the  
21 violations to cause employee disaffection; and (4) the effect of the unlawful  
22 conduct on employees’ morale, organizational activities, and membership  
in the union.

1 *In Re Miller Waste Mills, Inc.*, 334 N.L.R.B. 466, 468 (2001), *enforced*, 315 F.3d 951  
2 (8th Cir. 2003).

3 Even under the Ninth Circuit’s low bar on this element, the Court finds the  
4 NLRB’s position is not a strong one. One factor slightly in the NLRB’s favor is the  
5 temporal connection between the alleged unfair practices and the withdrawal of  
6 recognition. The alleged transferring of Downs-Haynes to different work areas in an  
7 effort to contact more employees and the alleged failures of AIM to shut down employees  
8 discussing the petition while working occurred in the months leading up to the  
9 withdrawal. On the other hand, the NLRB has failed to show that the alleged violations  
10 had any unduly coercive effect on any employee, that any alleged violation caused  
11 employee disaffection, or that any alleged violation would result in an adverse effect on  
12 any employee’s morale, organizational activities, and membership in the Union.<sup>1</sup> The  
13 only possible allegation in the NLRB’s favor is that AIM’s managers informed some  
14 employees that they could not receive raises because they were members of the Union.  
15 AIM responds that the collective bargaining agreement included a set pay scale, which is  
16 a legitimate explanation for the inability to give a raise because of Union membership.  
17 Under these circumstances, the Court finds that the NLRB has presented a very weak

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19 <sup>1</sup> Regarding coercion, there is evidence that Downs-Haynes promised raises if the  
20 withdrawal of recognition succeeded. *See, e.g.*, Dkt. 2-1 at 68 (“Lori Ann [Downs-Haynes] is  
21 promising employees raises and perks if they sign the petition.”). But, in the declarant’s very  
22 next sentence, his manager told him “we can’t promise anything” and that Downs-Haynes’s  
promises were “an outright lie.” *Id.* Therefore, even if Downs-Haynes used coercive statements,  
managers informed those who asked that the statements were incorrect. The Court assumes that,  
if the NLRB has evidence of any coercion by AIM or its managers, the evidence would have  
been cited in its brief.

1 case on the causal relationship between the alleged unfair labor practices and the  
2 withdrawal of recognition. The Court, however, recognizes the binding low bar on this  
3 element and the presumption of continuing Union representation. Therefore, the Court  
4 finds that NLRB has just barely shown a likelihood of success on the merits as to some  
5 finding of at least one unfair labor practice.

6 **B. Likelihood of Irreparable Harm**

7 “[I]rreparable injury is established if a likely unfair labor practice is shown along  
8 with a present or impending deleterious effect of the likely unfair labor practice that  
9 would likely not be cured by later relief.” *Frankl*, 650 F.3d at 1362. Violations are more  
10 likely to “have detrimental and lasting effects” if they involve “coercive conduct such as  
11 discharge, withholding benefits, and threats to shutdown the company operation.”  
12 *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 650 (D.C. Cir. 2013).

13 In this case, the NLRB has failed to show that the alleged irreparable injury, if any  
14 exists at all, is proportional to the relief requested. The alleged unfair labor practices do  
15 not involve discharging employees, withholding of benefits, or any threat to shut down  
16 the company if the employees unionize. Instead, the NLRB argues that the Union has  
17 lost majority support even though it continues to meet with AIM employees.<sup>2</sup> According  
18 to the decertification petition, the Union lost majority support by six votes.<sup>3</sup> At the  
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20 <sup>2</sup> “The union is still very active. They have a pizza meeting once a month at a local  
restaurant to discuss ‘the new contract.’” Dkt. 23, ¶ 19.

21 <sup>3</sup> 142 of 272 employees signed the petition, and it seems that AIM had to assume that  
22 employees who didn’t sign the petition supported the Union. In other words, if only 136  
employees signed the petition, then AIM would have had to assume the vote was 136-136.

1 hearing, the Court inquired whether the NLRB would agree to a lesser form of relief than  
2 that requested in its proposed order. The Court offered the possibility of working  
3 together to obtain a new independent vote to determine the status of Union representation  
4 pending review instead of Court-imposed Union representation pending review. At the  
5 very least, the Court could oversee an independent attempt to contact the employees who  
6 signed the petition, exclusive of Downs-Haynes, to assure the majority of signatures were  
7 voluntary. The NLRB, however, refused the Court's offer stating that its position was  
8 that there was no way to have a fair election that is not impacted by the alleged unfair  
9 labor practices.<sup>4</sup> As stated above, the Court finds as suspect the element of causation or  
10 the "impact" of the alleged unfair practices. The Court respects the NLRB's position, but  
11 finds that the NLRB has failed to show irreparable harm in the absence of reinstating the  
12 Union as the collective bargaining agent for the duration of this proceeding.

13 Furthermore, there exists a dispute as to the status quo and the timing of this  
14 petition. The status quo is withdrawal from the Union, which has been in existence since  
15 July 2017. Delay in filing a petition does not bar a finding of irreparable harm.  
16 *McKinney ex rel. N.L.R.B. v. S. Bakeries, LLC*, 786 F.3d 1119, 1125 (8th Cir. 2015) ("the  
17 delay between the July 2013 withdrawal of recognition and the Director's February 2014  
18 request for injunctive relief does not bar a finding of irreparable harm as complicated  
19 labor disputes like this one require time to investigate and litigate."). However, delay

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21 <sup>4</sup> Evidently, one of the NLRB's remedial powers is to schedule an election. *See*  
22 *McKinney ex rel. N.L.R.B. v. S. Bakeries, LLC*, 786 F.3d 1119, 1124 n.5 (8th Cir. 2015). The  
fact that it chose to file this petition instead implicitly shows that it may have decided against an  
election.

1 without evidence of majority support for the Union is evidence that no deleterious effects  
2 exist. The NLRB’s position on this point is mostly hypothetical based on other cases.  
3 Dkt. 2 at 21–25. The NLRB does state that, “as noted above, employee support for the  
4 Union has already dissipated.” *Id.* at 24. Without further explanation, the Court assumes  
5 that the NLRB is referring to the decertification petition showing that at least 141  
6 employees, excluding Downs-Haynes, voluntarily signed the petition without threat or  
7 coercion. The loss of support appears to be voluntary, and the NLRB has failed to submit  
8 evidence of any other unlawful acts encouraging dissipation.

9 Finally, the NLRB contends that, without preliminary relief, any remedy at the end  
10 of the proceeding will be too late to protect employee choice. The NLRB argues that the  
11 “employees predictably will shun the Union because their working conditions will have  
12 been virtually unaffected by collective bargaining for several years, and they will have  
13 little, if any, reason to support the Union.” Dkt. 2 at 24 (citing *Int’l Union of Elec., Radio*  
14 *& Mach. Workers, AFL-CIO v. N. L. R. B.*, 426 F.2d 1243, 1249 (D.C. Cir. 1970)). This  
15 hypothetical detriment arises in circumstances where the company delays or impedes  
16 *initially* bargaining with a union that holds majority support of the employees. The Court  
17 agrees that, under such circumstances, support for a union may dissipate to non-majority  
18 status if the union is unable to efficiently or timely bargain with an employer. This  
19 rationale, however, does not fit the facts of this case. Instead, the employees have  
20 experienced the benefits of collectively bargaining, and the majority of them voluntarily  
21 decided to withdraw support. If the working conditions deteriorate, then it would seem  
22 that the Union would gain support. On the other hand, if the working conditions remain



1 unaffected or improve, then support for the Union would naturally dissipate, and it would  
2 be the Union's burden to convince a majority of employees that it could bargain for even  
3 better conditions of employment. Thus, the Court finds that the NLRB has failed to show  
4 that immediate action is necessary to protect employee choice. The majority of  
5 employees, even excluding Downs-Haynes, have made a choice, and the Court finds no  
6 irreparable harm in failing to immediately overturn that vote with a two- to three-year  
7 mandate while this matter proceeds through the administrative process.

### 8 **C. Other Factors**

9 The Court finds that the balance of equities and the public interest factors are at  
10 best neutral but more likely tip in AIM's favor. "The task of the Board in devising a final  
11 remedy is 'to take measures designed to recreate the conditions and relationships that  
12 would have been had there been no unfair labor practice.'" *Frankl*, 650 F.3d at 1366  
13 (*Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976)). Based on the NLRB's  
14 evidence, the status quo is that one out of 142 employees may have been coerced or  
15 received beneficial treatment during the drive to obtain signatures on the decertification  
16 petition. It is unclear how the NLRB will devise a final remedy for these actions. At this  
17 point, however, the NLRB has failed to show that undermining the voluntary choice of  
18 141 employees is either in the public interest or tips the equities in favor of the Board.

19 Furthermore, the NLRB fails to show that an injunction on this evidence would  
20 "protect the integrity of the collective bargaining process." *Scott*, 241 F.3d at 661. The  
21 process includes the right to withdraw support. Denying that right on these allegations  
22 would undermine an important aspect of the entire process by setting a precedent that the

1 withdrawal process can be halted for years based on a company allegedly supporting the  
2 efforts of *one employee*. The better precedent is to determine the voluntariness and  
3 desires of the other 141 employees *and* fashion a sanction against AIM for its actions if  
4 the allegations are proven true. Granting the NLRB's injunction as requested does not  
5 coincide with that precedent.

#### 6 **D. Conclusion**

7 "A preliminary injunction is an extraordinary remedy never awarded as of right."  
8 *Winter*, 555 U.S. at 24 (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)). As the  
9 moving party, the NLRB bears the burden to establish that this extraordinary remedy is  
10 appropriate for these circumstances. The Court finds that the NLRB has failed to meet its  
11 burden because only the likelihood of success element tips slightly in its favor while the  
12 other three elements tip in favor of AIM. Even under the sliding scale approach, the  
13 NLRB has failed to establish serious questions going to the merits or that the balance of  
14 hardships tips sharply in its favor. *Cottrell*, 632 F.3d at 1135. The Court has found that,  
15 while the NLRB may ultimately succeed in showing some unfair labor practices, serious  
16 flaws exist in its theory that these practices *caused* the majority of AIM's employees to  
17 sign the decertification petition. Similarly, the NLRB has failed to show that the balance  
18 of hardships tips sharply in its favor. Although deterioration of support for the Union  
19 while the matter proceeds is possible, the evidence before the Court establishes that a  
20 majority of the employees voluntarily signed the decertification petition. It would be a  
21 greater hardship on these employees to force them to work under the rejected Union  
22 contract for the next few years than it is to force the Union to actively maintain and/or

1 increase employee support for its representation. In sum, the NLRB has failed to  
2 establish that preliminary injunctive relief is appropriate under either analysis.

3 **III. ORDER**

4 Therefore, it is hereby **ORDERED** that the NLRB's petition for preliminary  
5 injunctive relief (Dkt. 1) is **DENIED**.

6 The Clerk shall enter a JUDGMENT and close the case.

7 Dated this 13th day of February, 2018.

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10 BENJAMIN H. SETTLE  
United States District Judge