

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

POMPTONIAN FOOD SERVICE

Employer-Petitioner

and

Case 22-RM-755

LOCAL 32BJ, SEIU

Intervenor/Union

**ORDER DENYING UNION'S MOTION
TO DISMISS PETITION**

The Petition in this matter was filed on October 30, 2009, but processing of the Petition was pended because of two related unfair labor practice charges filed by the Union which are discussed below. Upon resumption of processing of the Petition following settlement of those cases, counsel for the Union submitted a letter requesting that the instant Petition be dismissed. A copy of the letter is attached and I am considering the letter as a Motion to dismiss the Petition. On December 1, 2010, the undersigned issued a Notice to Show Cause to the parties soliciting their legal positions and arguments as to whether the instant Petition warrants continued processing. I have carefully considered the Union's Motion and the parties' respective responses to the Notice to Show Cause. For the reasons stated below, I have determined that the Union's Motion should be denied and that processing of the Petition should be resumed.

The relevant chronology of events leading up to the filing of the above petition is summarized as follows. In or about late April, 2009, the Employer was presented with an employee-signed petition indicating that a majority of the unit employees no longer wished to be represented by

the Union. The Employer sent a letter to the Union dated May 11, 2009 stating that it intended to withdraw recognition from the Union based on the petition, effective at the expiration of the contract on August 31, 2009. Sometime between May 11th and August 31st, the Union re-established its majority strength among the unit employees. The Employer asserted that the Union had coerced employees into supporting the Union and decided to withdraw recognition on August 31st. The Employer subsequently filed this RM Petition on October 9, 2009, based on the employee-signed petition it had received in late April, 2009.

The relevant unfair labor practice charges are summarized as follows. The Union filed a charge in case 22-CA-29046 on August 5, 2009, alleging that the Employer unlawfully failed and refused to bargain with the Union by refusing to negotiate a successor collective bargaining agreement and by unlawfully withdrawing recognition from the Union at a time when it could not be demonstrated that a majority of the unit employees no longer supported the Union as their bargaining representative in violation of Section 8(a)(1) and (5) of the Act. The Region found merit to this charge because the Union had re-established its majority strength at the time the Employer withdrew recognition and the Employer had not established that the Union coerced employees in doing so. The Region subsequently issued a Complaint in this case on January 29, 2010.

The Union filed a second charge in case 22-CA-29315 on February 9, 2010, alleging that the Employer unlawfully failed and refused to bargain with the Union by unilaterally (1) discontinuing to make pension fund contributions, (2) implementing wage increases and (3) granting sick days to employees. After a full investigation of these charges, the Region also found merit to these allegations. Subsequently, on March 9, 2010, the undersigned approved a settlement agreement entered into by the parties that provided a full remedy of the allegations in

both charges, including an affirmative bargaining obligation and the posting of a Notice to Employees. Thereafter, this office implemented the terms of the Settlement Agreement and the unfair labor practice cases were closed on compliance on November 5, 2010.

The Union contends that the settlement of the unfair labor practices requires dismissal of the instant Petition because it contains an affirmative bargaining order. The Union also contends that the instant Petition should be dismissed because the Employer's unlawful withdrawal of recognition precludes a finding that it acted in "good faith" when it filed the Petition and because the Union had re-established its majority strength at the time the Petition was filed.

The Employer contends that processing of the instant Petition should be resumed because (1) settlement of the unfair labor practice charges does not require dismissal of the Petition and the approved Informal Settlement Agreement expressly included a non-admissions clause specifying that the Employer did not admit to the conduct alleged in the charges, (2) the instant Petition was filed in a timely manner, and (3) the alleged recognition-related conduct by the Employer postdates the showing of interest and should not affect the filing of the Petition and does not warrant dismissal of the Petition.

Contrary to the Union's allegation that the instant Petition was tainted because the Employer unlawfully withdrew recognition of the Union before it filed the Petition, the investigation herein revealed that the Showing of Interest ("showing"), submitted in support of this Petition, predated the Employer's unlawful conduct that was the subject of the unfair labor practices. Thus, the recognition-related conduct by the Employer that postdates the showing of interest could not affect the filing of the Petition and does not warrant dismissal of the Petition.

Regarding the Union's assertion that the presence of an affirmative bargaining order in the settlement requires dismissal of the Petition, in *Truserv Corp.*, 349 NLRB 227 (2007), the

Board under similar circumstances overturned the Acting Regional Director's administrative dismissal of a decertification petition in the face of a settlement of a Section 8(a)(5) unfair labor practice charge.

In the instant case, the Settlement Agreement executed by the parties and approved by the Regional Director contained an express nonadmissions clause and under *Truserve*, provides no basis for dismissal of the Petition.

In addition, although the Union had re-established its majority status at the time the Petition was filed, under the Board's reasoning in *Levitz Furniture Co.* 333 NLRB 717 (2001), these circumstances establish the necessary "good faith uncertainty" needed to justify an Employer's filing of an RM petition.

Under these circumstances and noting that the referenced unfair labor practice allegations by the Union against the Employer have been fully remedied, I issue the following:

IT IS HEREBY ORDERED that the Union's Motion to Dismiss the Petition is denied. Accordingly, processing of the instant Petition shall resume.¹

¹ **Right to Request Review:** Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on January 25, 2011, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab and then click on E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the

Issued at Newark, New Jersey, this 13th day of January, 2011.

/s/ J. Michael Lightner

J. Michael Lightner, Regional Director
National Labor Relations Board, Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102

sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POMPTONIAN FOOD SERVICE

EMPLOYER-PETITIONER

and

LOCAL 32-BJ, SEIU

INTERVENOR-UNION

ARD SECY
Frank Flores

Case No. 22-RM-755

DATE OF MAILING.....January 13, 2011

AFFIDAVIT OF SERVICE OF

**ORDER DENYING UNION'S MOTION
TO DISMISS PETITION**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid mail upon the following persons, addressed to them at the following addresses:

REGULAR MAIL

Mr. Mark Vidovich
Pomptonian Food Service
3 Edison Place
Fairfield, NJ 07004

Local 32-BJ, SEIU
One Washington Park
Newark, NJ 07102

Mr. Steven M. Swirsky
250 Park Avenue
New York, NY 07004

REGULAR MAIL

Jeffrey J. Corradino, Esq.
Jackson Lewis LLP
220 Headquarters Plaza
East Tower, 7th Floor
Morristown, NJ 07960

Mr. Andrew Strom
Local 32B-32J, Service Employees International
Union, AFL-CIO, CLC
101 Avenue of the America 19th Floor
New York, NY 10013

Subscribed and sworn to before me this 13th day

of January, 2011

DESIGNATED AGENT

NATIONAL LABOR RELATIONS BOARD

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

POMPTONIAN FOOD SERVICE

Employer

and

Case 22-RM-755

LOCAL 32BJ, SEIU

Petitioner

Erratum

On January 13, 2011, the undersigned issued an Order Denying Union's Motion to Dismiss Petition ("the Order") in the above matter. This Erratum corrects a mistake contained in Footnote 1 at the bottom of page 4 of the Order whereby the date for the receipt of any Request for Review of the Order by the Executive Secretary of the Board in Washington, DC was listed as "close of business on January 25, 2011, at 5 p.m. (ET)." The correct date for the receipt of any Request for Review is January 27, 2011, 14 days from the date of the Order. This confirms previous telephonic notification to the parties.

Issued at Newark, New Jersey this 19th day of January, 2011.

/s/ J. Michael Lightner
J. Michael Lightner, Regional Director
National Labor Relations Board, Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POMPTONIAN FOOD SERVICE

EMPLOYER

and

LOCAL 32-BJ, SEIU

PETITIONER

ARD SECY
Frank Flores

Case No. 22-RM-755

DATE OF MAILING.....January 19, 2011

AFFIDAVIT OF SERVICE OF ERRATUM

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid mail upon the following persons, addressed to them at the following addresses:

REGULAR MAIL

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International Union, AFL-CIO, CLC
101 Avenue of the America 19th Floor
New York, NY 10013

Subscribed and sworn to before me this 19th day

of January, 2011

DESIGNATED AGENT

NATIONAL LABOR RELATIONS BOARD