

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

POMPTONIAN FOOD SERVICE,	X	
	:	
Employer-Petitioner,	:	
	:	
- against -	:	Case No. 22-RM-755
	:	
LOCAL 32BJ, SEIU,	:	
	:	
Intervenor-Union.	:	
	X	

**STATEMENT IN OPPOSITION OF POMPTONIAN FOOD SERVICE IN RESPONSE
TO LOCAL 32BJ SEIU'S REQUEST FOR REVIEW OF THE REGIONAL
DIRECTOR'S ORDER DENYING ITS MOTION TO DISMISS THE RM PETITION**

Pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board (the "Board"), Pomptonian Food Service ("Pomptonian"), by its attorneys Epstein, Becker & Green, P.C., submits this Statement in Opposition to Local 32BJ, SEIU's (the "Union") Request for Review of the January 13, 2011 Order Denying Union's Motion to Dismiss Petition issued by the Regional Director for Region 22 ("Order").

The Board should deny the Union's Request for Review because: (1) the Regional Director was correct in denying the Union's request that he dismiss the Petition in Case No. 22-RM-755 (the "Petition"), (2) the Order denying that request was in all material respects consistent with existing Board precedent, (3) there are no material facts in dispute, and (3) the Union has not, nor can it, point to any compelling reason that the Board should reexamine the Board's rule and/or policy. In denying the Union's motion to dismiss the Petition, the Regional Director correctly applied existing Board law under *Levitz Furniture*, 333 NLRB 717 (2001), and concluded that a valid question concerning representation ("QCR") existed among the unit of employees described in the Petition at the time Petition was filed (which QCR continues to exist

at this time) because, *inter alia*, Pomptonian's employees had presented it with a petition signed by a majority of Pomptonian's employees in the South Orange-Maplewood School District (the "District") covered by its contract with the Union, in which the employees clearly and unequivocally informed Pomptonian that they no longer wished to be represented by the Union for collective bargaining purposes, and because even after the Union subsequently presented Pomptonian with undated petitions signed by a majority of the employees in the Unit stating that they did want to be represented by the Union if the employees who had only signed the petition asking Pomptonian to withdraw recognition were considered, reasonable uncertainty arose and has continued to exist as to the Union's representative status, which under *Levitz* could only be resolved through a Board conducted secret ballot representation election.

The Regional Director also correctly decided that Pomptonian's subsequent settlement of an unfair labor practice charge filed by the Union did not require the dismissal of the Petition under *Truserv Corporation*, 349 NLRB 227 (2007), coupled with the following facts: (1) Pomptonian entered into and executed the Settlement Agreement in Case Nos. 22-CA-28046 in reliance upon and with the express understanding that the Region would resume the processing of the Petition at such time as Pomptonian had fully complied with the terms of the Settlement Agreement, (2) the Settlement Agreement contained a non-admissions clause, (3) the Settlement Agreement did not require withdrawal of the Petition, and (4) not only has there been no finding by the Board that Pomptonian violated the Act or that the Petition was tainted, but the Region investigated what was arguably the Union's most serious claim, which it raised in its Charge in Case No. 22-CA-28977, *i.e.* that the petition signed by a majority of the unit employees and presented to Pomptonian during March 2009, was tainted by employer support

and/or participation, and that Pomptonian discriminated against those employees who supported the Union, and found each of these allegations to be unsupported by the evidence.

Accordingly, Pomptonian submits that the Board should now deny the Union's Request for Review, affirm the Regional Director's Order, and direct the Regional Director to process the Petition and conduct an election forthwith so that the Unit employees may exercise their right under the Act to decide in a Board-conducted election whether they wish to continue to be represented by the Union.

BACKGROUND OF THE PETITION AND THE SETTLEMENT AGREEMENT

The Employees' Petitions

The Unit employees are employed by Pomptonian in connection with its contract to provide school meal services for the South Orange Maplewood School District (the "District"). Unit employees, who are employed on either a full-time or part-time basis, are generally employed from the start of the school year at the beginning of September through the conclusion of the school year in June, with employees laid off on a staggered basis at the end of the school year.

Shortly after Pomptonian began operations in the District in 2007, it voluntarily recognized the Union based upon the fact that it had hired a majority of the employees who had previously been employed by Sodexo, the District's previous vendor.¹ Pomptonian and the Union entered into an initial collective bargaining agreement (the "CBA") for the term September 1, 2007 through August 31, 2009, the expiration date of the Union's contract with

¹ The contract between Sodexo and the Union contract contained a union security clause.

Sodexo. That contract largely tracked the terms of the unexpired contract between Sodexo and the Union.

In late April 2009, employees in the Unit presented Pomptonian with petitions that had been signed and dated by more than 50% of the employees in the Unit. Those petitions, copies of which Pomptonian provided to Region 22 during its investigation of the ULP charges filed by the Union and when it filed the Petition, constituted clear and unambiguous evidence of the fact that the employees who had signed them no longer wished to be represented by the Union for purposes of collective bargaining. Once Pomptonian confirmed that the signatures on the petitions were authentic, and in reliance upon such objective evidence and in reliance upon the Board's decision in *Levitz Furniture*, Pomptonian notified the Union by letter dated May 11, 2009 that inasmuch as it had determined on the basis of objective evidence that a majority of the employees in the Unit no longer supported or wished to be represented by the Union, Pomptonian was prospectively withdrawing recognition from the Union, with such withdrawal to be effective upon the expiration of the CBA, that is on August 31, 2009. There is no dispute that Pomptonian continued to fully comply with all of the terms of the CBA for the remainder of its term.

The Union's Counter-Petitions

The Union subsequently mailed Pomptonian a number of counter-petitions (the "Counter-Petitions"), and told Pomptonian that the employees who had signed them had changed their minds and that a majority of the Unit employees once again wished to be represented by the Union. Neither the Counter-Petitions nor the signatures on them were dated. Based on those undated petitions, the Union demanded that Pomptonian restore recognition. At no time did the Union ever offer any evidence as to when the Counter-Petitions were actually signed.

A number of the employees whose signatures were on the Counter-Petitions had also signed the dated petitions that the Unit employees had previously presented to Pomptonian.. The Board concluded during its investigation of the Charges that the Union subsequently filed that more than 30% of the Unit employees signed only the petitions asking Pomptonian to withdraw recognition and did not sign the Counter-Petitions. Thus, it is clear under *Levitz*, that at the time that Pomptonian received the undated Counter-Petitions from the Union, Pomptonian could have filed an RM petition based upon the good faith uncertainty that existed as to the Union's continued majority status created by the conflicting petitions and that the Region would have processed an RM petition at that time.

Moreover, during the period that the Union was apparently collecting signatures in support of the Counter-Petitions, a number of Unit employees came forward and told Pomptonian that (a) representatives of the Union and co-workers had threatened them that they would lose their jobs if they did not sign the Union's Counter-Petition and (b) the only reason they had signed a Counter-Petition because of the Union's threats. Pomptonian provided the Region with detailed information as to the specifics of these reports from employees.

Based on all of the facts and circumstances, including its good faith doubt as to the Union's claim that it was supported by an uncoerced majority of the Unit employees, Pomptonian wrote to the Union that it would not restore recognition at that time and that the Union should, if it did in fact believe that it was supported by a majority of the Unit employees, file a representation petition with the NLRB so that the employees could resolve the question in a Board conducted election.

The Unfair Labor Practice Charges

Instead, on or about June 24, 2009, the Union filed Charge No. 22-CA-28977, in which it alleged that Pomptonian had violated Section 8(a)(1) of the Act by “unlawfully promoting decertification,” allowing employees to solicit signatures on anti-union petitions on Company time and by “prohibiting pro-union employees from even discussing the Union.” Pomptonian denied these allegations and presented evidence that it had neither supported or assisted the petitions seeking withdrawal of recognition nor prohibited any employees from discussing the Union.

On or about August 6, 2009, The Union filed Charge No. 22-CA-29046, alleging that Pomptonian violated Sections 8(a)(1) and (5) of the Act by unlawfully refusing to bargain with the Union for a new agreement to succeed the parties’ CBA, which was due to expire on August 31, 2009. In response, Pomptonian presented evidence that it had prospectively withdrawn recognition from the Union based upon objective evidence that a majority of the employees in the Unit had presented it with clear and unambiguous evidence demonstrating that they no longer wished to be represented for bargaining by the Union. Pomptonian also informed the NLRB that it was not legally obligated to restore the Union’s recognition because, *inter alia*, the Counter-Petitions were the product of coercion and threats by the Union.

Upon the conclusion of its investigation, Region 22 informed Pomptonian that it had found the Union’s claims that Pomptonian had promoted and/or assisted the circulation of the petitions against further representation were not supported by the evidence and that this Charge would be dismissed if the Union did not withdraw it. The Region also informed Pomptonian that it was prepared to issue a complaint with respect to Pomptonian’s withdrawal of

recognition of the Union and its refusal to bargain following the expiration of the 2007-2009 CBA.

The RM Petition

While the Charges were under investigation, and based in part upon the suggestion of the Region, on October 31, 2009, Pomptonian filed a RM Petition in Case No. 22-RM-755. In support of the Petition, Pomptonian relied upon the petitions signed by a majority of Unit employees unequivocally stating that they no longer wanted to be represented by the Union for the purposes of collective bargaining. As Pomptonian advised the Region at the time, Pomptonian filed the Petition with the object of allowing for a resolution of the question of whether or not its employees in the District wanted to be represented by the Union. At the time that this Petition was filed, the Region was actively investigating Pomptonian's Charges No. 22-CA-28977 and 29046, and those Charges initially blocked the processing of the Petition. The Region's investigation included the allegation that employees in the Unit had come forward to managers and informed them that they had been threatened with loss of their employment if they did not sign the Union's Counter-Petition. Pomptonian supervisors and unit employees who were subpoenaed by Region 22 provided sworn statements describing threats that they had received and/or been told of by others who had been threatened to coerce them to sign the Union's Counter-Petition.

The Settlement Agreement

Following the completion of the Region's investigation of the Charges, the Regional Office informed Pomptonian that it was prepared, absent settlement, to issue a Complaint alleging violation of Sections 8(a) (1) and (5) of the Act, by withdrawing recognition at the conclusion of the CBA on August 31, 2009.

Pomptonian entered into settlement discussions with the Regional Office at that time. One of the issues that Pomptonian raised in those discussions was what impact the decision to issue a Complaint absent settlement and an agreement by Pomptonian to enter into a Settlement Agreement prior to the issuance of a Complaint would have on the pending Petition in Case No. 22-RM-755. Region 22 informed Pomptonian that if Pomptonian agreed to settle the allegations, the Region would continue to hold the RM Petition in abeyance. In reliance on that representation, Pomptonian informed the Region that it would be willing to enter into a pre-complaint Settlement Agreement containing a non-admissions clause, which would provide for a restoration of recognition and a notice posting. On March 9, 2010, the Regional Director approved the Settlement Agreement, a copy of which is attached as Exhibit A.²

Pomptonian confirmed at the time that it had agreed to enter into the Settlement Agreement in "reliance upon the fact that the National Labor Relations Board shall continue to hold in abeyance the Petition filed by Pomptonian in Case No. 22-RM-755, and that upon the conclusion of the Notice posting provided for in the Agreement said Petition shall be processed by the Board." See Steven M. Swirsky's letter dated March 5, 2010, attached as Exhibit B. The understanding and agreement that the Petition would be processed after the compliance period was a key element of Pomptonian's agreement to settle the unfair labor practice charges filed by the Union.

Pursuant to the terms of the Settlement Agreement, Pomptonian posted the Board's Notice and complied with all of the terms of the Settlement Agreement, including restoring recognition and entering into negotiations with the Union for a new contract. On

² The Non-Admissions Clause in the Settlement Agreement provides that "By executing this settlement agreement [Pomptonian] does not admit that it has violated the National Labor Relations Act, as amended."

November 5, 2010, Acting Regional Director Julie Kaufman issued a closing letter acknowledging that Pomptonian “has met its obligations with regard to all terms and provisions of the Settlement Agreement.” A copy of the Region’s November 5, 2010 closing letter is attached as Exhibit C.

The Union’s “Motion” to Dismiss the Petition

On December 1, 2010, the Regional Director issued a Notice to Show Cause (the “Notice”) which the Notice stated had been issued in response to an *ex parte* letter dated October 15, 2010 from the Union’s counsel to the Regional Director requesting dismissal of the RM Petition filed by Pomptonian on October 30, 2009. The Regional Director “...consider[ed] the [Union’s October 15, 2010] letter as a Motion to Dismiss the Petition....” The Notice solicited the parties’ legal positions as to whether the Region should continue to process the RM Petition filed by Pomptonian.

On December 20, 2010, Pomptonian submitted its Response to the Order to Show Cause, opposing the Union’s “motion” on substantive grounds based on the Board’s decisions in *Levitz* and *Truserv* and the facts as set forth above, as well as on procedural grounds including, *inter alia*, the fact that the Union had not served its “motion” on Pomptonian and therefore failed to comply with Section 102.65 of the Board’s Rules and Regulations.

The Regional Director’s Order Denying the Union’s Motion to Dismiss the Petition

By Order dated January 13, 2011, the Regional Director denied The Union’s motion to dismiss the Petition. The Regional Director applied Board law established under *Levitz* and *Truserv Corp.* and held: (1) the RM Petition was not “tainted;” (2) the Settlement Agreement executed by the parties and approved by the Regional Director contained an express “non-

admissions” clause and did not provide a basis to dismiss the RM Petition; (3) Pomptonian had established the requisite “good faith uncertainty” to justify the filing of an RM Petition, (4) the unfair labor practice allegations by the Union against Pomptonian have been fully remedied. The Regional Director ordered that the Union’s motion be denied and the processing of the Petition be resumed.³

ANALYSIS

The Board Should Deny The Union’s Request for Review Because the Regional Director Correctly Decided Under *Levitz* that a QCR Existed at the Time the Petition Was Filed

The Regional Director correctly decided that Pomptonian had a good-faith reasonable uncertainty as to the Union’s continued majority status under *Levitz Furniture Co.*, 333 NLRB 717 (2001) when it filed the RM Petition and that uncertainty still continues today. The petition was signed by a majority of the employees in the bargaining unit stating that they no longer wanted to be represented by the Union.

The Union, citing *Lee Lumber & Building Materials Corp.*, 322 NLRB 175 (1977), *HQM of Bayside*, 348 NLRB 758 (2006) and *Celanese Corp.*, 95 NLRB 664 (1951), argues that Pomptonian could not rely upon its “good faith uncertainty” to support the RM Petition because the Company withdrew recognition before it filed the RM Petition and therefore the Petition was tainted. The Union’s argument is plainly wrong for several reasons. First, the Union’s argument disregards the fact that the Region had thoroughly investigated the Union’s claim of unlawful “taint” and found it to be unsupported by the evidence. Indeed the Regional

³ The Regional Directors Order did not address the procedural issues raised by Pomptonian in its response to the Notice to Show Cause. Pomptonian submits that not only was the Regional Director’s denial of the Union’s request that he dismiss the Petition substantively correct, in fact the request for dismissal and the issuance of the Notice to Show Cause were in fact procedurally flawed and the Unions request should have been denied for that reason as well.

Director told the parties that this was the reason that he was not issuing a complaint on the Union's allegations in Charge No. 22-CA-28977 that Pomptonian had unlawfully supported or assisted the petition in which the majority had stated they no longer wanted the Union to represent them. For that reason there is no reference to these allegations in the Settlement Agreement or the Notice.

Second, the Regional Director correctly found that the Union's Counter-Petition did not undermine Pomptonian's good-faith uncertainty to support the filing the Petition. To the contrary, the Union's Counter-Petition created a potential conflict with the earlier employee petitions, which under *Levitz* satisfies the good-faith uncertainty test concerning the Union's continued majority status. As the Board held in *Levitz*:

Another reason for adopting the "uncertainty" standard is that sometimes, as in this case, employers are presented with conflicting evidence concerning employees' support for unions. The Respondent was given a petition, apparently signed by a majority of the unit employees, stating that they no longer wanted to be represented by the Union. Two weeks later, the Union proffered evidence which, it claimed, showed majority support. It would be difficult to contend that the Respondent, faced with such conflicting evidence, believed in good faith that the Union had lost its majority status. But it would be just as hard to argue that the Respondent could not, under those circumstances, harbor uncertainty regarding the Union's majority status. We think it is justifiable for an employer in those circumstances to seek an RM election to resolve that uncertainty, yet under the good-faith belief standard, it would be unable to do so. Under the standard we adopt today, employers who are faced with such contradictory evidence will be able to obtain elections.

333 NLRB at 727 (emphasis added).

Moreover, Pomptonian made witnesses available to the Region in Charge No. 22-CA-28977 who provided affidavits in support of Pomptonian's reasonable belief that the Union

obtained employee signatures on its Counter-Petition by fraud, coercion and other improper means and therefore the initial petitions provided by the employees to Pomptonian were still valid. Accordingly, the Regional Director correctly found that a QCR existed and the Board should deny the Union's Request for Review.

The Regional Director Correctly Concluded that Settlement Agreement Did Not Bar the Holding of an Election under *Trusev* and the Facts of this Case

Despite the evidence supporting the RM Petition, the Union urges the Board to grant its Request for Review because it argues that the settlement in Charge No. 22-CA-29046 should have barred the election. The Union is wrong.

The Regional Director correctly applied existing Board precedent set forth in *Trusev* and considered the underlying facts in this case. The Settlement Agreement, which the Union entered into, contained a non-admissions clause and there was no finding of "taint" or any unlawful activity by Pomptonian. The Board concluded in its November 5, 2010 closing letter that Pomptonian had fully complied with the terms of the Settlement Agreement. Thus, any alleged unfair labor practice or "taint" has been remedied.

In *Truserv Corp.* 349 NLRB 227 (2007), the Board was faced with the issue of whether the settlement of a Section 8(a)(5) unfair labor practice charge, *which did not include a non-admissions clause*, required the dismissal of a decertification petition filed by employees after the alleged unlawful conduct by the employer but before execution of the Settlement Agreement. The Board reversed the Acting Regional Director's administrative dismissal of a decertification petition and ruled that the petition could be processed. In relevant part, the Board held that:

we hold that, after the unfair labor practice case has been settled, the decertification petition can be processed and an election can be held after the completion of the remedial period associated with the settlement of the unfair labor practice charge. We reach this result because the employer conduct in question is only alleged to be unlawful, and thus there is no basis on which to dismiss the petition. Further, we reach this result even if the post-petition settlement includes a contract reached between the employer and the union ... a settlement agreement is not an admission that the employer's actions, alleged but not found to be unlawful, constituted an unfair labor practice unless such an admission is an express part of the agreement. Consequently, the fact that the alleged actions occurred prior to the filing of the decertification petition provides no basis for a conclusion that the petition was tainted by unlawful conduct.

349 NLRB at 227-28. In contrast, the Board held that a petition may not be processed where (i) the execution of the settlement of an unfair labor practice comes before the filing of the petition, (ii) the RD finds that the petition was instigated by the employer, or (iii) the settlement of the unfair labor practice charge included an agreement to withdraw the petition. Not one of these circumstances is present in this case. To the contrary, here the Settlement Agreement was entered into by Pomptonian with the express understanding that the Petition would be held in abeyance while Pomptonian fulfilled its obligations under the Settlement Agreement and that at such time as the Regional Director concluded it had fully complied, the Petition would be processed.

The facts in this case provide an even more compelling reason to resume processing the Petition herein. First, Pomptonian agreed to settle the unfair labor practice charges with the express understanding that the Petition would be processed following the expiration of the compliance period. Second, the Settlement Agreement contains an express non-admissions clause; thus there is no basis upon which to conclude that the Petition is tainted. Third, the Settlement Agreement did not include an agreement that the Petition would be

withdrawn notwithstanding the fact that the Region and the Union were fully aware of the pending Petition. Moreover, the Union itself was a party to the Settlement Agreement.

The Union's attempt to distinguish *Truserv* on the grounds that it involved an RD petition and the settlement agreement in that case did not include a an agreement to bargain order must fail. The factors upon which the Union argues that *Truserv* is inapplicable do not give rise to a material difference that would make it inapplicable here. The Board's underlying rationale applies equally to both types of proceedings. The Board held that the dismissal of a petition based on a settlement of unproven allegations would unfairly give determinative weight to the allegations of unlawful conduct and would be in derogation of employees' Section 7 rights. The Board's reasoning applies equally to all types of petitions regardless of who files the petition. Pomptonian entered into and executed the Settlement Agreement with the express understanding that the Region would resume processing of the Petition at the end of the compliance period. Having found that Pomptonian fully complied with the Settlement Agreement, the Region should resume processing the Petition. Moreover the Region investigated the Union's claim that the employee petition that Pomptonian relied upon was tainted and found that claim to be without support.

The Union's further argument at page 6 of its brief that the Board in *Truserv* was motivated by a concern that "the petitioner [not] be bound to a settlement by others that purports to waive the petitioner's rights under the Act to have the decertification petition processed" *Truserv*, 347 NLRB at 232, n.14, is misplaced. The Board in *Truserv* made the unremarkable observation that the Regional Director could have included the decertification petitioner in settlement discussions, and that without such inclusion, the petitioner's right to have the decertification petition processed cannot be waived. Here, the petitioner was a party to the

negotiation of the Settlement Agreement and the Agreement itself. Pomptonian had the ability and authority to withdraw its petition if that was its intention. It clearly was not the Petitioner's intention to withdraw the Petition as part of the Settlement. Pomptonian entered into and executed the Settlement Agreement with the express understanding that the Region would resume processing of the Petition at the end of the compliance period. Having found that Pomptonian fully complied with the Settlement Agreement, the Region should resume processing the Petition. In any case, regardless of who filed the petition for an election, it remains clear that it is for the employees to decide whether they wish to continue to be represented.

Finally, The Union's claim that allowing the RM Petition to go forward would "reward Pomptonian's unlawful behavior" distorts both the facts and the law. The parties settled *unproven allegations* made by the Union against Pomptonian with an express non-admissions clause and the express understanding that the processing of the RM Petition would resume. The Board in *Truserv* could not have been clearer that unproven allegations are not the same as proven facts. In fact, the Regional Director's Order found that there was no "taint" as alleged by the Union. The Board is thus not "rewarding" unlawful behavior because there was none. Rather, the Board is upholding a settlement agreement which was approved by the Regional Director and which contained a non-admissions clause and was entered into with the understanding that the election would go forward. Contrary to the Union's misstatement of facts and its reliance on unproven allegations and false rhetoric, this Request for Review and the Union's Motion are clearly nothing more than legal maneuvering intended to deprive the employees their right to an election in which to decide whether they wish to continue to be

represented by the Union. The Board should affirm the Regional Director's Order and allow the employees to vote in a Board conducted election.

Accordingly, the Region should deny the Union's Request for Review and resume processing the Petition in Case No. 22-RM-755.

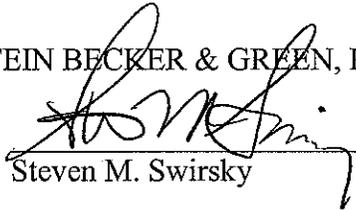
CONCLUSION

For all of the foregoing reasons, Pomptonian submits that the Board should deny the Union's Request for Review and direct the Regional Director to process the Petition in Case No. 22-RM-755 without further delay.

Dated: New York, New York
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