

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POMPTONIAN FOOD SERVICE
Employer-Petitioner

and

Case 22-RM-000755

LOCAL 32BJ, SEIU
Union

ORDER REMANDING

On March 24, 2011, the Board issued an Order Remanding this case to the Regional Director requesting that the Regional Director and the Union address representations in the Employer's opposition to the Union's request for review of the Regional Director's Order Dismissing the petition. On May 2, 2011, the Regional Director issued a Supplemental Order on Remand addressing the Board's Order.

The peculiar and unique facts of this case present a situation in which no outcome is completely fair to all parties. The problem arises out of the dual role of the Board's regional directors who, on the one hand, act as agents of the General Counsel under Section 10 of the Act in investigating, prosecuting, and, most relevant for our purposes here, settling unfair labor practice charges and, on the other hand, act as agents of the Board under Section 9 of the Act in processing petitions and conducting elections. In this case, in the course of settling unfair labor practice charges as an agent of the General Counsel, the Regional Director made a representation about what action he would take in respect to a pending petition. The Employer stated that it was told by the Region that if the Employer agreed to settle the unfair labor practice allegations, the Region would continue to hold the petition in abeyance and that, upon the conclusion of the Notice posting and compliance period, the petition would be processed. The Region has confirmed this representation was made to the Employer. Neither the Board nor the incumbent and Charging Party Union had knowledge of the representation and it was not embodied in the informal settlement agreement that was not approved by the Board. Thus, the representation is not binding on either the Union or the Board. Nevertheless, the representation is likely to have been a factor in the Employer's decision to agree to the settlement of the unfair labor practice charges.

Absent the representation, we would reverse the Regional Director's decision and direct that he dismiss the petition based on the terms of the settlement agreement. We believe it is inconsistent for the Employer in the settlement agreement to agree to recognize the Union as the majority representative while simultaneously alleging in an employer petition that it has good-faith, reasonable uncertainty as to the Union's majority status. This is particularly true here where the showing of interest was submitted to the Employer and the petition was filed before the Employer agreed to recognize the Union

as the majority representative. In sum, in these circumstances, we would not have processed the Employer's petition where the Employer has agreed to recognize the Union in a settlement agreement but seeks to process the petition based on a claim of good-faith reasonable uncertainty that arose prior to the agreement to recognize the Union. The Regional Director appears to have treated the processing of the petition like a decertification petition, but the circumstances are different when the petitioner is the Employer who has agreed to recognize the Union and the showing of interest required is the Employer's good-faith, reasonable uncertainty as to the Union's majority status.

However, because the Regional Director represented to the Employer during settlement discussions and before the Employer entered into the settlement that "it was the Region's intention to resume processing of the petition at the end of the Notice posting period, after compliance with the terms of the settlement," we do not believe it would be equitable to grant the Union's motion to dismiss the petition on these grounds.

Nonetheless, there remain two questions concerning whether the petition is properly processed even absent the settlement agreement. First, the Union argues that the Employer lacked a good faith reasonable uncertainty of majority support at the time it filed the petition. Indeed, the Regional Director found in his Order Denying Union's Motion to Dismiss Petition that "Sometime between May 11th and August 31st [2009], the Union reestablished its majority strength among the unit employees." The petition was not filed until October 30, 2009. The Regional Director also states that "[t]he Employer asserted that the Union had coerced employees into supporting the Union," but makes no finding concerning this assertion. Rather, the Regional Director summarily concludes, "these circumstances establish the necessary 'good faith uncertainty' needed to justify an Employer's filing of an RM petition." Given that the petition relied on by the Employer was received in late April, 2009, that the Regional Director made an express finding that the Union reestablished majority support before August 31, 2009, that the Regional Director made no finding that that support was tainted in any way, and that the petition was not filed until October 30, we conclude that the Regional Director should reconsider whether the Employer possessed the requisite good faith reasonable uncertainty on October 30 when the petition was filed.

Second, the Union argues that the Employer's withdrawal of recognition on August 31 renders the filing of the petition on October 30 not in "good faith" as, according to the Union, is required by Levitz Furniture Co., 333 NLRB 717 (2001). The Regional Director misunderstood this argument in his Order denying the motion, finding simply that the alleged unlawful conduct post-dated the petition that the Employer relies on to support a finding of good faith reasonable uncertainty. But the Union's argument is not that the petition was tainted, but that the Employer did not proceed in good faith when it filed the petition given its prior, allegedly unlawful withdrawal of recognition. The Regional Director did not address this argument, which does not rest on the settlement agreement.

We therefore reverse the decision of the Regional Director denying the motion to dismiss and remand with instructions that he reconsider: (1) whether the Employer possessed the requisite good faith reasonable uncertainty on October 30 when the petition

was filed and (2) whether Levitz or other Board precedent requires any other form of good faith at the time the petition was filed and, if so, whether the requisite good faith was absent based on the earlier withdrawal of recognition. In considering these questions, we instruct the Regional Director not to rely on the settlement agreement for the reasons explained above.¹

Accordingly, we remand this case to the Regional Director for action consistent with this order.

WILMA B. LIEBMAN, CHAIRMAN

CRAIG BECKER, MEMBER

BRIAN E. HAYES, MEMBER

Dated, Washington, D.C. August 24, 2011.

¹ Member Hayes agrees with his colleagues to remand this case for additional factual findings. However, he does not agree that this concededly unique and peculiar matter can be properly decided without reference to the settlement agreement and the representations made with respect thereto. Thus, in his view, the Regional Director, regardless of his findings on the two questions posed, must additionally decide whether he is equitably estopped from acting in any manner contrary to the representations made to the Employer at the time of the settlement agreement and the holding in abeyance of the petition during the compliance period.