

BEFORE THE
UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

POMPTONIAN FOOD SERVICE,]	
]	
Employer/Petitioner,]	
]	
and]	Case 22-RM-755
]	
LOCAL 32BJ, SERVICE EMPLOYEES]	
INTERNATIONAL UNION,]	
]	
Intervenor/Union.]	
_____]	

SEIU LOCAL 32BJ's OPPOSITION TO
POMPTONIAN FOOD SERVICE'S
REQUEST FOR REVIEW

Andrew L. Strom
Associate General Counsel
SEIU Local 32BJ
25 West 18th Street
New York, NY 10011-1991
(212) 388-3025

I. INTRODUCTION

Pomptonian Food Service (“Pomptonian” or “the Employer”) seeks review of the Regional Director’s decision dismissing its RM petition. In seeking review of the Regional Director’s decision, Pomptonian is attempting to reargue an issue the Board had previously decided in its August 24, 2011 Order Remanding the case. Pomptonian asserts that the Board is equitably estopped from dismissing its RM petition. Not only has the Board already rejected this argument, but Pomptonian makes no attempt to address the well-settled case law holding that the Board cannot be estopped by the actions of a Regional Director. Pomptonian’s additional claims of error by the Regional Director are meritless and they certainly do not provide the necessary “compelling” reasons for granting review.

II. STATEMENT OF FACTS

Pomptonian filed its RM petition on October 30, 2009. Two months earlier, on August 31, 2009, it had improperly withdrawn recognition from Local 32BJ, and implemented a series of unilateral changes – granting wage increases, providing additional sick days, and discontinuing pension fund contributions.

Local 32BJ filed unfair labor practices in Cases 22-CA-29046 and 22-CA-29315 regarding the withdrawal of recognition and the unilateral changes. Region 22 investigated those charges and found they both had merit. In finding that the charges were meritorious, the Region necessarily concluded that the Union had the support of a majority of the workforce on August 31, 2009. Pomptonian claims that some signatures on petitions the Union relied upon to demonstrate its majority

were procured by threats and coercion, including the illogical threat that this fiercely anti-union employer, which had already prospectively withdrawn recognition from the union, would fire workers unless they signed the pro-union petition.¹ Pomptonian admits that it presented its evidence in support of these allegations to the Regional Director in connection with the investigation of the Union's unfair labor practice charges. The Region obviously found no evidence of threats or coercion by the Union.²

III. ARGUMENT

A. The Board Has Already Rejected the Employer's Equitable Estoppel Argument.

Without citing any authority to support its argument, Pomptonian argues that the Board should be equitably estopped from dismissing its petition based upon representations the Regional Director made to the Employer. Not only is this equitable estoppel argument meritless as discussed below, but the Board has already rejected it.

¹ The Board has regularly overruled election objections making similar claims where, as here, there is no evidence to show that any employee would have reason to believe that the employer would be disposed to discharge an employee for opposing the union. *See, e.g., Janler Plastic Mold Corp.*, 186 NLRB 540, 540 (1970).

² While it is largely irrelevant, Pomptonian's assertion that the April 2009 anti-union petition was "untainted" and "organic" should be viewed with skepticism. Workers reported that one Pomptonian manager told workers that an employee would be coming around with "a paper about the union" that they had to sign. Anti-union workers were allowed to move freely from one school to another on work time to solicit signatures on the petition. While the Union was unable to provide the Region with sufficient evidence for the Region to issue a complaint, the Board ought to realize that employees are often unwilling to come forward and provide the Board with evidence about their employer's illegal acts.

In the Order remanding the case, Member Hayes wrote a separate footnote expressing his view that the Regional Director ought to decide whether he was equitably estopped from dismissing the petition. It is clear from the Order that the other two Members of the panel did not agree with Member Hayes on this point. Thus, the Employer's Request for Review amounts to an untimely motion for reconsideration.

B. Pomptonian's Equitable Estoppel Argument is Meritless.

Pomptonian argues that the Board should be equitably estopped from dismissing its petition, but it does not even address the elements of equitable estoppel or the Board's case law. Perhaps this is because the case law clearly holds that the Board cannot be equitably estopped by a mistake made by the Regional Director. It has long been settled that the principles of equitable estoppel cannot "be applied to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials." *NLRB v. Baltimore Transit Co.*, 140 F.2d 51, 55 (4th Cir. 1944). Thus, the Board cannot be bound by whatever mistaken assurance the Regional Director might have given about how the Board would handle the Employer's petition.

Moreover, the Employer has not acknowledged the full implications of its equitable estoppel argument. The argument rests primarily on the representations made by its attorney in a March 5, 2010 letter to the Region. In that letter, the Employer asserts that it is entering into the settlement agreement "in reliance upon the fact that ... upon conclusion of the Notice posting period provided for in the

Agreement [the RM] petition shall be processed by the Board.” Exh. C to Request for Review. But, the compliance period for the settlement agreement extended beyond the 60-day notice posting period and instead continued until there had been a reasonable period of time sufficient to allow good faith bargaining. If the Board were to accept Pomptonian’s logic, then simply by virtue of the Employer’s self-serving letter, the Board would have been required to process the RM petition even before there had been a reasonable period of time for bargaining.³

C. The Regional Director Properly Found that the Employer Lacked “Good Faith” at the Time it Filed the RM Petition.

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board set forth the standard for when an employer may file an RM petition. The Board held to file an RM petition, an employer must demonstrate “good-faith reasonable uncertainty as to the union’s continuing majority status.” *Id.* at 717. Here, the Regional Director properly found that Pomptonian’s illegal acts meant that it did not possess the requisite “good faith” at the time it filed the RM petition.

The Board has long held that an essential prerequisite to finding good faith is that the “issue must not have been raised by the employer in a context of illegal antiunion activities or other conduct by the employer aimed at causing disaffection from the Union.” *Celanese Corp.*, 95 NLRB 664, 673 (1951); *accord Lee Lumber &*

³ Pomptonian incorrectly implies that at the time the Union entered into the settlement agreement it was aware that the Region intended to move forward with the RM petition after the terms of the settlement agreement were carried out. As the Union has previously explained in its April 21, 2011 letter to the Regional Director, the Union was not told what the Region’s intentions were regarding the RM petition prior to entering into the settlement agreement.

Building Material Corp., 322 NLRB 175, 177 (1996). Here, before Pomptonian filed its RM petition, it illegally withdrew recognition from the Union, and unlawfully implemented unilateral changes in employees' terms and conditions of employment. While Pomptonian never admitted the violations, it has essentially conceded that they occurred. Thus, while Pomptonian asserts that it had a "reasonable belief that the Union obtained at least some employee signatures on its Counter-Petitions by fraud, coercion, and other improper means," Request for Review at 18, Pomptonian also concedes that it has never been able to prove that the support its employees demonstrated for the Union was tainted.

In its Request for Review, Pomptonian continues to fail to acknowledge the significance of the lapse in time and the intervening events between the April 2009 employee petition and its October 30, 2009 RM petition. It may well be that the April 2009 petition would have supported the filing of an RM petition either during the open period before the August 31, 2009 contract expiration or upon the expiration of that agreement. But, Pomptonian chose not to take that path. Instead, with full knowledge of the pro-Union counter-petitions, Pomptonian nevertheless chose to unilaterally withdraw recognition.

Even in the absence of Pomptonian's illegal acts, the April 2009 employee petition was likely too stale to support the RM petition by the time it was filed at the end of October. In *Hospital Metropolitan*, 334 NLRB 555 (2001), the Board held that the employer had not established a good faith uncertainty about the union's majority status where the employer relied upon a seven-month old petition

and a five-month old demonstration. In particular, the Board held that the demonstration, which occurred on June 21 “was also too remote in time from the December 3 withdrawal of recognition.” *Id.* at 557.

Here, not only was the initial evidence of disaffection stale, but more importantly, the Employer’s unlawful acts prevented a true measure of employee sentiments at the time the RM was filed. These actions – illegal withdrawal of recognition and unilateral changes in terms and conditions – have an objective tendency to undermine support for the Union. *See HQM of Bayside, LLC*, 348 NLRB 758, 761 (2006) (finding that unlawful withdrawal of recognition “would tend to unfairly undermine continuing support for the union). Thus, as an objective matter, support for the Union in October 2009 would have been greater in the absence of Pomptonian’s unlawful conduct. As a result, the Regional Director properly found that the Employer did not possess the requisite good faith reasonable uncertainty at the time Pomptonian filed the RM petition.

D. Allowing the RM Petition to Go Forward Would Reward Pomptonian’s Unlawful Behavior.

In *Levitz*, the Board simultaneously made it easier for employers to file RM petitions and harder for employers to unilaterally withdraw recognition. The Board explained that it was liberalizing the standard for RM petitions in an effort to promote stability in collective-bargaining relationships since the relationship remains intact during the representation proceedings. *Levitz*, 333 NLRB at 727. It would turn *Levitz* on its head to allow an employer to improperly withdraw recognition and then file an RM petition.

Allowing the RM petition to go forward now would encourage employers to engage in unlawful self-help whenever they harbor any uncertainty about the Union's majority status. Employers could unlawfully withdraw recognition secure in the knowledge that even if they are caught, they can still file an RM petition, and thereby obtain a second bite at the apple. Here, instead of waiting to file a timely RM petition, Pomptonian jumped the gun and withdrew recognition while ignoring evidence that the Union still had the support of a majority of the workforce. There is simply no reason to give Pomptonian another chance at decertifying Local 32BJ after it chose to destabilize the collective-bargaining relationship by improperly withdrawing recognition.

E. The Regional Director's Decision is Consistent with Public Policy.

Contrary to the Employer's assertions, the dismissal of the RM petition does not infringe on the Section 7 rights of its employees. As the Supreme Court has observed, "[t]here is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996). The Board has long recognized that it is appropriate to treat employer petitions differently than employee petitions. In *Montgomery Ward & Co.*, 137 NLRB 346 (1962), the Board barred an employer petition during the term of a contract even though it would have processed a petition by employees. The Board explained that its restriction on employer petitions did "not constitute an encroachment on the proper exercise of the employees' freedom of choice." *Id.* at 348. In *Auciello*, the Court agreed that the

Board is “entitled to suspicion when faced with an employer’s benevolence as its workers’ champion against their certified union, which is subject to a decertification petition from the workers if they want to file one.” *Auciello*, 517 U.S. at 790.

Here, the best way to protect the Section 7 rights of the Pomptonian employees is by denying the Employer’s Request for Review.

CONCLUSION

The Request for Review should be denied.

Dated: November 21, 2011

Respectfully submitted,



Andrew L. Strom
SEIU Local 32BJ
25 West 18th Street
New York, NY 10011
Tel: (212) 388-3025
Fax: (212) 388-2062
Attorney for SEIU Local 32BJ

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document, entitled **SEIU LOCAL 32BJ's OPPOSITION TO POMPTONIAN FOOD SERVICE'S REQUEST FOR REVIEW**, was served on this 21st day of November 2011 via electronic mail on the following parties:

Steven M. Swirsky
Sswirsky@ebglaw.com
Attorney for Pomptonian Food Service

Michael Lightner
Michael.Lightner@nlrb.gov
Regional Director
NLRB Region 22



Andrew L. Strom