

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POMPTONIAN FOOD SERVICE

Cases: 22-CA-086029
22-CA-104206

and

LOCAL 32 BJ, SERVICE EMPLOYEES
INTERNATIONAL UNION

ANSWERING BRIEF ON BEHALF OF THE GENERAL COUNSEL IN RESPONSE
TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF
ADMINISTRATIVE LAW JUDGE LAUREN ESPOSITO

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I. Summary of the Argument

The record evidence adduced at the hearing before Judge Lauren Esposito clearly supports the Administrative Law Judge’s findings that Respondent violated Section 8(a)(5) of the Act by refusing to bargain, and subsequently withdrawing recognition from the Union. Judge Esposito correctly concluded that Respondent failed to establish the Union’s actual loss of majority status and specifically, that the language of the June 12 petition, delivered to both the Union and Respondent, was inadequate to establish a loss of majority status. Judge Esposito also correctly determined that Maria Caggiano was an unreliable witness whose testimony does not support Respondent’s position that the June 12 petition was intended to convey that the unit employees no longer supported the Union. Finally, Judge Esposito also correctly ruled that Respondent Exhibit 3, a June 15, 2012 email from manager Anissa Detto to Respondent owner Candy Vidovich should be excluded from the record because it is inadmissible hearsay.

II. Statement of Facts¹:

Local 32 BJ, Service Employees International Union (the Union) represents a bargaining unit of seven food service workers employed by Pomptonian Food Service (the Respondent) at two schools in the Verona, New Jersey school district- HB Whitehorne Middle School and Verona High School. [GC 2, Tr. 15]. The parties' collective bargaining agreement ran from September 1, 2010 through August 25, 2012. Article XXXV of the collective bargaining agreement specifies that this contract "shall automatically renew from year to year after September 1, 2012 unless notice, in writing, is given sixty calendar days prior to the expiration date by either party that such party terminates the Agreement on the expiration date. Failure by either party to give such notice shall be deemed to be consent to a renewal of this Agreement for a period of one year from the termination date affixed herein." [GC 2].

On May 10, 2012, the Union, via business agent Vincenza Ramirez, notified Respondent's director of operations Howard Grinberg that the Union wished to set bargaining dates to negotiate a successor contract. Ramirez also requested necessary and relevant information from the Respondent in furtherance of its bargaining objective. The parties agreed that contract negotiations would begin on June 20, 2012. [GC 4, 5, Tr. 19].

On June 12, 2012, four bargaining unit employees signed an ambiguously worded petition that contained no title and was addressed "To whom it may concern." The petition said that "We, the staff of the Pomptonian Food Service of the Verona School district, HB Whitehorne has come to an agreement to cease the contract with SEIU Local

¹ The statement of facts relies upon the Transcript of the hearings before Administrative Law Judge Lauren Esposito, and the exhibits introduced at this hearing. General Counsel and Respondent exhibits are referred to, respectively, as "GC" and "R" followed by the exhibit number.

32 BJ upon expiration date of the August 25 2012, as per our contract from September 1st, 2010 to August 25, 2012: based on the Article XXXV- Duration. There are more the [sic] sixty (days) from the expiration date. The Pomptonian Food Service will be notified of our decisions in writing for the termination of the contract with our staff at HB Whitehorne. The following signatures will follow in agreement of our decision. We appreciate full professional cooperation. We thank you for the two years of representation.” [GC 6]. Unit employee Maria Caggiano testified that she drafted the petition, collected signatures, and mailed this document to both the Respondent and the Union. [Tr. 56-60].

Negotiations did not take place as scheduled on June 20 due to a scheduling conflict. [Tr. 20]. On June 21, 2012, Grinberg emailed Ramirez a letter indicating that the Respondent was suspending contract negotiations with the Union because it received a copy of the June 12 petition. The email reads in part that “...we have a good faith doubt that the SEIU has continued majority support and have filed a petition for an election with Region 22 of the NLRB. Because the letter was signed by a majority of the bargaining unit employees, we are formally notifying you that we are suspending the current negotiations. Of course, we will continue to recognize your organization as the Verona employees’ exclusive representative until the expiration of the contract. The outcome of the petition process will dictate how we will proceed otherwise in the future.” [GC 9]. Two days earlier, the Respondent filed an RM petition with Region 22 of the Board in Case 22-RM-083604. [GC 7].²

² In early July 2012, the parties signed a stipulated election agreement setting September 13, 2012 as the election date in Case 22-RM-083604. [GC 8].

Ramirez testified that she inquired with unit employees after receiving the petition. During these inquiries, some unit employees expressed support for the Union, others did not, and Ramirez did not believe that there was a majority consensus or opinion expressed regarding the employee petition and its meaning. [Tr. 49].

On July 17, 2012, the Union formally responded in writing to the Respondent's suspension of negotiations email. The Union's Director of NJ Schools, Phoebe Schell, emailed Grinberg indicating that the Union protested the Respondent's decision to suspend negotiations and the Union demanded that the Respondent resume bargaining and provide available bargaining dates as soon as possible. [GC 10].

About a week later, Grinberg responded via email to Schell. He referenced the employee petition in asserting that the Respondent had objective evidence that the Union had lost majority support amongst Respondent's employees. "Rather than notify you of an anticipatory withdrawal, we felt that the best course of action for all parties was to petition of [sic] an election to be held upon the employees' return. Under these circumstances, there is no duty to bargain a successor agreement. Our choice to file the RM petition...does not change our obligation and right to withdraw from bargaining at this time...Of course, we will continue to recognize your organization as the Verona employees' exclusive representative until the expiration of the contract. The outcome of the election or any relevant change in the current circumstances will dictate how we will proceed in the future." [GC 11].

In anticipation of the September 13 election³, Ramirez visited employees at the two Verona schools. She went to the schools to update the unit employees regarding bargaining as well as the upcoming election. Just like she did in March 2013, Ramirez notified Grinberg in advance of her visit to the schools. [GC 3, 12, Tr. 31-32].

Ramirez again requested in about December 2012 to visit unit employees at the Verona schools. In response to her inquiry, Grinberg, via a December 6 email, wrote that "...We can check with the School District to help to secure permission to enter the building. By no means does Pomptonian or the District, by granting permission to visit, indicate that we recognize your Union as the bargaining representatives for these individuals in Verona..." [GC 13, Tr. 33-34]. This was the first time, either in writing or verbally, that the Respondent informed the Union that it no longer recognized the Union as the employees' collective bargaining representative. Furthermore, at no time after June 20, 2012, did the Respondent meet and bargain with the Union towards a successor collective bargaining agreement.⁴ [Tr. 35].

III. ARGUMENT

Exceptions 1, 4, 8: The substantial record evidence supports ALJ Esposito's finding that Respondent failed to establish the Union's actual loss of majority status because the ambiguously worded June 12 employee petition did not, on its face, rebut the presumption of the Union's continued majority status.

The substantial record evidence supports ALJ Esposito's findings that Respondent unlawfully refused to bargain with the Union, and unlawfully withdrew recognition from

³ Ballots from the September 13 election were impounded due to the allegations of refusal to bargain raised by the Union in Case 22-CA-086029. The ballots remain impounded pending the disposition of the instant charges.

⁴ In May 2013, Ramirez again requested that the Respondent meet and bargain with the Union. Grinberg replied via email reminding Ramirez that the Respondent does not recognize the Union as the Verona employees' collective bargaining representative. [GC 14].

the Union, because the ambiguously worded June 12 employee petition did not, on its face, rebut the presumption of the Union's continued majority status.

Where an employer has a good-faith reasonable uncertainty regarding a union's majority status, the employer can file an RM petition and obtain an election. *Levitz Furniture Company of the Pacific*, 333 NLRB 717, 727-29 (2001). However, even if a petition to obtain a representation election has been filed, an employer is still required to bargain with the incumbent union. See *Dresser Industries, Inc.*, 264 NLRB 1088, 1089 (1982). In *Dresser Industries*, the Board found that an employer may not withdraw from bargaining solely because its employees have filed a decertification petition.⁵ The Board found that a rule allowing employers to withdraw from bargaining pending an election does not give appropriate weight to the incumbent union's presumption of majority status.⁶ Similarly, in *Hydro Conduit Corp.*, the Board found that the Regional Director's processing of an RM petition was not determinative of the employer's obligation to continue bargaining with an incumbent union.⁷ Where the employer otherwise lacked an objectively-based good-faith reasonable doubt of the union's continued majority status, the employer's refusal to bargain after filing the RM petition was a violation of Section 8(a)(1) and (5).⁸

Thus, the Region's processing of the RM petition in this case did not in itself

⁵ *Id.*

⁶ *Id.* A union is entitled to an irrebuttable presumption of majority status for the term of a collective-bargaining agreement up to three years, and a rebuttable presumption at the expiration of a collective-bargaining agreement. *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996) (citing *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 290 (1972)).

⁷ 278 NLRB 1124, 1124-25 (1986), *enf. denied*, 813 F.2d 1002 (9th Cir. 1987).

⁸ *Id.* at 1125. In *Levitz*, the Board changed the standard for rebutting a union's majority status from good-faith doubt to a showing of actual loss of majority status, and this is the standard required in the present case. 333 NLRB at 717.

relieve the Respondent of its obligation to bargain, absent other evidence sufficient to rebut the presumption of the Union's majority status. That presumption is rebutted only if the employer has evidence of actual loss of majority support.⁹

In the withdrawal of recognition context, an employer may unilaterally withdraw recognition from an incumbent union only on a showing that the union has actually lost majority support of the bargaining-unit employees. *Levitz*, 333 NLRB 717 (2001). The Board has emphasized that the burden is on the employer to demonstrate an actual loss of majority support. *Levitz*, 333 NLRB 717.

The Respondent here is relying on the ambiguously worded June 12 petition to show an actual loss of majority support and justify its withdrawal of recognition and refusal to bargain. To show actual loss of majority support based on an employee petition, the petition language must clearly indicate that the employees no longer desire union representation. If the language is unclear, the Board will look to extrinsic evidence to determine the employees' intent in signing the petition. Thus, in *Highlands Regional Medical Center*, petition language stating "Highlands Regional Medical Center Showing of Interest for Decertification of SEIU Union Registered Nurses" was held too ambiguous to indicate an actual loss of majority support, especially in light of extrinsic evidence that some employees signed the petition merely to obtain an election.¹⁰ If the Board lacks extrinsic evidence regarding a petition's meaning, the Board must make a determination solely on the basis of the petition language.¹¹

⁹ *Levitz*, 333 NLRB at 717.

¹⁰ 347 NLRB 1404, 1404-1406 (2006) (relying also on the alternative ground that one petition signer later joined the union, and the remaining number of signatures on the petition was fewer than 50 percent), *enforced*, 508 F.3d 28 (D.C. Cir. 2007).

¹¹ See *Wurtland Nursing & Rehabilitation Center*, 351 NLRB 817 (2007) (finding "We the employee's [sic] of Wurtland nursing and rehab wish for a vote to remove the Union S.E.I.U. 1199," without extrinsic

Here the petition language is ambiguous regarding the employees' intent and therefore, cannot be relied upon to rebut the presumption of continued majority support. The petition merely states that the petition signers are in "agreement to cease the contract," citing language from the duration clause (Article XXXV) of the parties' collective bargaining agreement. Nowhere on the face of the petition does it say the signatory employees wish to get rid of the Union, decertify the Union, or remove the Union. Nor does the petition make mention of the employees' lack of support for the Union or their desire for a withdrawal of recognition. Instead, the petition language merely indicates the employees' desire to terminate the collective-bargaining agreement. Without extrinsic evidence to assist in interpreting the petition's meaning, the language alone does not provide sufficient evidence that the employees wanted to remove the Union as their representative. Therefore, the substantial evidence supports Judge Esposito's findings that Respondent unlawfully refused to bargain and illegally withdrew recognition from the Union and Respondent Exceptions 1, 4, and 8 must be denied.

Exceptions 2, 3, 5, 6: Respondent's exceptions should be denied because the record in this case yielded no probative extrinsic evidence establishing employees' intent in signing the June 12 petition.

Respondent failed to adduce probative extrinsic evidence that clarified unit employees' intent in signing the June 12 petition. The only evidence Respondent presented was Maria Caggiano's testimony that she signed the petition to get rid of the Union. Yet this evidence sheds no light on the other unit employees' desires in signing the ambiguously worded petition. Respondent could have called each of the petition

evidence to interpret its meaning, was sufficient evidence of the employees' intent to remove union representation).

signers to testify as to his or her desires regarding union representation and whether the Respondent possessed this knowledge at the time it refused to bargain with (or withdrew recognition from) the Union. Respondent chose not to do so. Respondent also could have called its manager, Anissa Detto, to testify regarding any alleged conversations she had with Caggiano around the time Caggiano submitted the June 12 petition. Again, Respondent failed to do so.¹² Instead, Respondent presented a smattering of undeniably hearsay statements (elicited exclusively through leading questions) coupled with a feast of self-serving conclusory statements from Respondent's representative Mark Vidovich and agents (Carmel Vidovich and Lydia Veri) that yielded no probative evidence whatsoever. In so doing, the instant record is bereft of probative evidence regarding employees' intentions in signing the ambiguously worded petition. Therefore, it is without question that Respondent has failed to rebut the Union's presumption of continued majority support and has failed to present any evidence of the Union's actual loss of majority support. In short, Respondent has failed to present any lawful basis for its refusal to bargain with the Union and subsequent withdrawal of recognition.¹³

Furthermore, Maria Caggiano's trial testimony was so riddled with contradictions, both in her direct examination and cross-examination, as well as in her sworn affidavit,

¹² In Exception 7, Respondent attempts to explain why Detto was not called to testify. This Exception must be denied. There is no record evidence explaining why Detto did not appear as a witness. Tellingly, Respondent supplied no transcript cites in its Brief in Support of Exceptions to try to bolster its claim. ALJ Esposito was correct in failing to acknowledge that Detto was no longer an employee of Respondent or unavailable to testify because Respondent presented no evidence on the record supporting said assertions. Therefore, this Exception must be denied.

¹³ It appears from Respondent's emails to the Union, and its Answer to the Consolidated Complaint, that it desired the advantages of filing an RM petition without adhering to the legal duties the Act mandates in such a situation (essentially a "have its cake and eat it too" philosophy). In one breath, the Respondent told the Union that it was going to continue to recognize the Union through the expiration of the contract and then let the employees' vote decide its next move. In the next breath, the Respondent refused to bargain with the Union, thereby tainting the fair and free choice that an election was supposed to afford all involved parties. As the above case law indicates, Respondent's refusal to bargain was not privileged here because it did not possess sufficient evidence to rebut the Union's presumption of continued majority support.

that Judge Esposito correctly concluded that she was not a reliable witness regarding her alleged communications with Detto. [ALJD, page 6, line 45 through page 7, line 14]. In her direct testimony, Caggiano first insisted that she called manager Anissa Detto and told her that the employees signed the petition because employees wanted out of the Union. [Tr. 60-61]. In the next minute of testimony, Caggiano's story changed in that she testified that she told Detto that "she" (Caggiano) wanted out of the Union. [Tr. 62].

While under cross-examination, Caggiano was presented with her sworn confidential witness affidavit, dated October 3, 2012. [GC 15]. In clear contradiction to her trial testimony, Caggiano conceded that her affidavit reads "...I did not have any conversations with anyone from Pomptonian about the letter." Caggiano acknowledged that there was no reference to the alleged conversation with Detto in her affidavit. [Tr. 75]. Finally, on re-direct, Caggiano authored a fourth different accounting of events. In seeking to explain away the contradiction between her trial testimony and her affidavit, Caggiano said "I did call Anissa just to tell that I sent a letter and no other. That's it, that was the end...She didn't ask me any questions and I didn't say anything else. That's it." [Tr.78-79].

The longstanding Board policy is not to overrule credibility resolutions of an Administrative Law Judge unless the clear preponderance of all the relevant evidence demonstrates the findings to be incorrect. *Standard Dry Wall Products*, 91 NLRB 544 *enfd.* 188 F.2d 362 (3rd Cir. 1951). Caggiano's trial testimony demonstrated a clear aversion to the truth. By cycling through four different versions of one alleged conversation, Caggiano established only that she is an unreliable witness whose testimony touching on the salient aspects of this case cannot be credited, and Judge

Esposito correctly discredited her.¹⁴ In addition to discrediting the testimony Caggiano gave about her conversations with others, any hearsay statements Caggiano attributed to her co-workers and their states of mind in signing the June 12 petition must be similarly discredited and discarded as unreliable. This necessary result again leaves Respondent woefully short in establishing the proofs necessary to either rebut the Union's presumption of continued majority support or to establish actual loss of majority support. For all of the above reasons, Respondent's Exceptions 2-3 and 5-7 must be denied.

Additionally, in the body of Exceptions 2-3, 5, and 7, Respondent references Respondent Exhibit 3, a June 15 email between Detto and Respondent owner Candy Vidovich. Judge Esposito properly ruled this email inadmissible on hearsay grounds and any argument raised in Respondent's Exceptions that this exhibit should be admissible must be denied.

In this regard, Respondent argues that this exhibit is admissible either under the present sense impression hearsay exception, as a record of regularly conducted activity, or under the residual exception to the hearsay rule. All such arguments are unavailing here. Respondent Exhibit 3 is not admissible as a present sense impression under Federal Rule of Evidence 803(1). Judge Esposito correctly noted that Detto sent the email in question three days after her alleged telephone conversation with Caggiano. Therefore, this email lacks the "substantial contemporaneity of event and statement" necessary to

¹⁴ The most reliable version of events is the one contained in Caggiano's affidavit- that she had no conversations with Respondent officials regarding the June 12 petition. This was by far the most proximate in time to the events in question (October 2012 for the affidavit versus January 2014 for her trial testimony). On cross-examination, Caggiano admitted that she had an opportunity to review the affidavit before signing it, she did so and actually made changes to the document (adding a reference to her disability status), but did not change her statement that she had no conversations with Respondent officials about the June 12 petition.

“negate the likelihood of deliberate or conscious misrepresentation” as suggested by the Rule 803(1) Advisory Committee Notes.

Neither is Respondent Exhibit 3 admissible as a record of regularly conducted activity under Rule 803(6). Zero evidence was adduced at the hearing by Respondent as to its general record keeping practices, how email fits in to those practices, or that Respondent issued standing instructions to managers to document in writing communications regarding the Union (as alleged in its exceptions brief). Furthermore, the section of the Bench Book Respondent cited in its exceptions brief relates to documents from personnel files. No evidence was adduced at the hearing indicating that Respondent Exhibit 3 was pulled from an employee or manager’s personnel file, whose personnel file it was, or why said document was in the personnel file. Therefore, Judge Esposito correctly rejected Respondent’s argument that Respondent Exhibit 3 should be admitted as a record of regularly conducted activity under Rule 803(6).

Finally, Judge Esposito correctly ruled that Respondent Exhibit 3 is not admissible under the residual hearsay exception- Rule 807. No evidence was adduced at the hearing that Detto was unavailable to testify. She clearly would have been the most reliable, direct source of knowledge regarding this document. That Respondent chose not to call her does not now permit the admission of otherwise inadmissible evidence. Also, as Judge Esposito correctly noted (ALJD page 7, line 44 through page 8, line 3), Caggiano testified regarding the same events and therefore, the email in question is not more probative than other available evidence. Judge Esposito appropriately excluded Respondent Exhibit 3 from the record and any Exceptions arguing that this decision was in error must be denied.

IV. CONCLUSION:

The entire record, a preponderance of the credible evidence, and the applicable case law prove that Respondent violated Section 8(a)(5) of the Act as found by ALJ Esposito. Counsel for the General Counsel respectfully requests that the Board issue a broad remedial order requiring Respondent to cease and desist from engaging in the unlawful conduct alleged herein; recognize and upon request, bargain collectively with the Union as the exclusive representative of Respondent's bargaining unit employees, and for Respondent to comply with any other remedies deemed appropriate.

Dated at Newark, New Jersey, this 25th day of April 2014.

Respectfully submitted,



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CERTIFICATION OF SERVICE

This is to certify that the Answering Brief on Behalf of the General Counsel in Response to Respondent's Exceptions to the Decision of Administrative Law Judge Lauren Esposito has been served on this date as follows:

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