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March 15, 2016

NATIONAL LABOR RELATIONS BOARD
Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570-0001

ELECTRONICALLY FILED

RE: REQUEST FOR RECONSIDERATION OF THE ORDER OF FEBRUARY 17, 2016 AFFIRMING DISMISSAL OF RM PETITION
Case 04-RM-145463 - Linwood Care Center
Our Matter No. 793-15

Dear Members of the Board:

Pursuant to 29 CFR § 102.48(d)(2), on behalf of the Petitioner, we are requesting that the Board reconsider its Order in this matter entered on February 17, 2016 to request the Board to deal with the anomaly raised in the Order involving Petitioner's right to reinstatement of the RM Petition after the final disposition of the related unfair labor practices.

In its Order (copy attached), the Board stated: "as the alleged conduct, if proven directly affects the petition, the Regional Director properly dismissed the petition." In his comments at FN2, Member Miscimarra noted that the RM Petition is "subject to reinstatement, if appropriate" after final disposition of the unfair labor practice." In the Order at FN1, the Board stated that it was not relying, as had the Regional Director, on *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16 (2011), *enfd.* 700 F.3d 1 (D.C. Cir. 2012) or the Regional Director's "finding" that the alleged information request violation tainted the employee disaffection for the Union. The Board stated that it was relying on Casehandling Manual, Part II, § 11733,2(a)(1) and *Ron Tirapelli Ford, Inc.*, 304 NLRB 576, 579-580 (1991), *enfd. in rel. part* 987 F.2d 433 (7th Cir. 1993) (affirming the judge's nullification of election results and dismissal of the RM petition where the judge determined that the RM Petition was tainted because of the employer's unlawful conduct and coercive role in its solicitation and support for the employee petition that was used to support its RM Petition).

The Board's rationale for affirming the Regional Director presents an anomaly between the Board's procedures in a case where the Regional Director has dismissed an RM Petition versus cases where the Regional Director has determined to hold an RD Petition in Abeyance pending the resolution of pending ULP's. The *Ron Tirapelli* case involved findings of fact after a hearing that employer conduct tainted the RM Petition. That case is analogous to the Board's revisions to the Casehandling Manual, Part II at § 11730.3(c), stating:

> In *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004), the Board concluded that a hearing should be held to resolve genuine factual issues as to whether there was a causal nexus between alleged unfair labor practices and the filing of a decertification petition before the dismissal of such a petition.
> Accordingly, in such circumstances the Regional Office should conduct a preliminary administrative investigation and proceed as follows:
> (a) If no evidence of causal nexus exists, e.g., the showing of interest was obtained prior to the alleged unlawful conduct or the disputed conduct was de minimus or isolated:
> ☐ No further consideration should be given to dismissal of the petition
> ☐ The decision to treat the charge as blocking the processing of the petition should be reconsidered
> (b) If evidence may support a finding of a causal nexus:
> ☐ Contact the Division of Operations-Management as to the appropriate action including a possible hearing on the causal nexus issue
> ☐ Advise the Office of Representation Appeals of the issue
> ☐ Continue to treat the charge as blocking the processing of the petition.

The Regional Director's Dismissal Notice of May 14, 2015 contains no notice of Petitioner's right to reinstatement of the Petition as required by Casehandling Manual, Part II, §§ 11102, 11733.2, 11733.2(b). Section 11733.2(b) (relating to the right of reinstatement after a dismissal) provides that: "A petition is subject to reinstatement only if the allegations in the unfair labor practice case, which caused the petition to be dismissed, are ultimately found to be without merit. An application for reinstatement under any other circumstances should be denied." The Manual Section does not provide for any findings of fact to determine whether the ULP's which caused the Regional Director to dismiss the RM Petition. The Regional Director's decision does not comport with the Board's requirement of a hearing to determine whether there is in fact a causal nexus between the alleged ULP's and the pending decertification petition. The Regional Director relied on *SFO Good Nite Inn* for his application of a presumption, while the Board now states that it is relying on a decision that was made after the same kind of hearing as the Board requires under *St. Gobain Abrasives, Inc.*

The parties had a hearing before Hon. Arthur J. Amchan on February 8-10, 2016, on the related ULP's. Briefs are due in that consolidated case on March 16, 2016. The parties have been advised that a subsequent hearing will be required to deal with questions of alleged taint related to the pending RD Petition held in abeyance by the Regional Director (Case No. 04-RD-157892), which abeyance order the Board affirmed

on February 10, 2016. This would conform with the Board's *St. Gobain Abrasives, Inc.* protocol in the Casehandling Manual.

Petitioner submits that the Board must, in order to harmonize its rationale in the Order of February 17, 2016 with both *St. Gobain Abrasives, Inc.* and the case the Board did rely on in its Order, *Ron Tirapelli Ford, Inc.,* determine that the Regional Director did not properly dismiss the RM Petition because he could not do that based on a presumption of taint alone, following *SFO Good-Nite Inn*, but was required to hold a hearing to make a record, as in both *St. Gobain Abrasives, Inc.* and *Ron Tirapelli Ford, Inc.* and to provide Petitioner with notice of its related rights prior to any determination to dismiss the RM Petition or to proceed with the election pursuant to the parties' Stipulated Election Agreement. The decision of the Regional Director should therefore be vacated and the matter remanded to the Regional Director to conform to the requirements set out in the Board's *St. Gobain Abrasives, Inc.* protocol in the Casehandling Manual.

Respectfully submitted,

Bruce G. Baron, Esquire
[Petitioner's Legal Representative]

Attachment.
cc: CPL (Linwood), LLC (by email)
201 New Road Operations, LLC (by email)

Regional Director-Region 28
Louis Capozzi, Jr.,Esq.
Bruce G. Barron, Esq.
Diane Delaney, Admin.
CPL(Linwood)LLC dba Linwood Care
Jay Jaffe, Esq.
Katherine H. Hansen, Esq.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LINWOOD CARE CENTER
Employer/Petitioner

and

Case 04-RM-145463

1199 SEIU UNITED HEALTHCARE
WORKERS EAST
Union

ORDER

The Employer's Request for Review of the Regional Director's dismissal of the instant petition raises no substantial issues warranting reversal of the Regional Director's action.[1] In dismissing the petition, the Regional Director found that the Employer failed to establish objective considerations in support of its petition based on his administrative investigation and parallel unfair labor practice charges filed by the Union in Cases 04-CA-146362, 04-CA-146670, and 04-CA-148705. Thereafter, on July 31, 2015, the Regional Director issued a consolidated complaint on those charges. As the Regional Director has found merit to the charges that challenge the circumstances surrounding the petition, and as the alleged conduct, if proven, directly affects the petition, the Regional Director properly dismissed the petition. NLRB Casehandling Manual Part Two, Section 11730.3(a).[2]

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[1] In affirming the Regional Director, we find it unnecessary to rely on *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16 (2011), enfd. 700 F.3d 1 (D.C. Cir. 2012). Instead, we rely on the NLRB Casehandling Manual Part Two, Sec. 11733.2(a)(1) and *Ron Tirapelli Ford, Inc.*, 304 NLRB 576, 579-580 (1991), enfd. in rel. part 987 F.2d 433 (7th Cir. 1993) (affirming the judge's nullification of election results and dismissal of the RM petition where the judge determined that the RM petition was tainted because of the employer's "unlawful conduct and coercive role in its solicitation and support for the employee petition" that was used to support its RM petition). Additionally, we do not rely on the Regional Director's finding that the alleged information request violation tainted the employee disaffection with the Union.

[2] Member Miscimarra agrees with his colleagues that the Regional Director did not abuse his discretion by dismissing the petition in this case, and Member Miscimarra notes that the petition is subject to reinstatement, if appropriate, after final disposition of the unfair labor practice charges. Member Miscimarra favors a reconsideration of the Board's blocking charge doctrine for reasons expressed in the dissenting views that were contained within the Board's representation election rule, 79 Fed. Reg. 74308, at 74430-74460 (Dec. 15, 2014) (dissenting views of Members Miscimarra and Johnson), but he acknowledges that the Board has declined to materially change its blocking charge doctrine.

MARK GASTON PEARCE,	CHAIRMAN
PHILIP A. MISCIMARRA,	MEMBER
KENT Y. HIROZAWA,	MEMBER

Dated, Washington, D.C., February 17, 2016.

CERTIFICATE OF SERVICE

I hereby certified, pursuant to 29 CFR § 102.71(c) that a true and accurate copy of the Request for Reconsideration filed in this matter on March 15, 2016 has been served electronically upon the parties to this matter by emailing copies to their email addresses used by the Regional Office in the matter below, as follows:

Jay Jaffe, Senior Managing Counsel — Emailed to: jayj@1199.org
SEIU Local 1199
310 West 43rd Street
New York, New York 10036-6407
[Attorney for 1199 SEIU United Healthcare Workers East]
Served by email on May 29, 2015

Katherine Hanson — Emailed to: khansen@grmny.com
GLADSTEIN, REIF & MEGINNISS LLP
817 Broadway (6th floor)
New York, New York 10003
[Attorney for 1199 SEIU United Healthcare Workers East:
Served by email on May 30, 2015

Dennis P. Walsh, Regional Director
NLRB Region 4 — Emailed to: dennis.walsh@nrlb.gov
Served by email on May 30, 2015

A copy also was served on the Regional Director, Dennis P. Walsh (Region 4), by filing through the NLRB Electronic System concurrently with the electronic filing of the Request for Reconsideration.

Served on March 15, 2016.

Bruce G. Baron, Esquire
[Attorney for Linwood Care Center]