

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRED MEYER STORES, INC.,

Respondent,

and

**UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 1439, affiliated with
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,**

Charging Party.

Case No. 19-CA-32311

**RESPONSE TO NOTICE TO SHOW
CAUSE**

Oral Argument Requested

Fred Meyer Stores, Inc. (“Employer”) hereby asserts that the General Counsel’s (“GC”) Motion for Summary Judgment must be denied and the Employer is due a hearing before an administrative law judge because there are questions of law and of fact that have not been properly resolved in this case. The Complaint in this case alleges that United Food and Commercial Workers Local 367 (“Union”) was certified as the exclusive collective-bargaining representative of certain employees employed in the playland department at the Employer’s University Place store in Tacoma, Washington (“University Place Store”) in Case No. 19-RC-15194, and that the Employer violated Sections 8(a)(1) and (5) of the National Labor Relations Act (“Act”) by failing and refusing to bargain with the Union regarding the playland employees. (Ex. B, attached to General Counsel’s Motion for Summary Judgment.)¹ The Employer has not

¹ Citations to Exhibits in this case are made to those Exhibits attached to the General Counsel’s Motion for Summary Judgment filed in this case, and are hereinafter are referred to as (Ex. ____).

violated the Act because it has no duty to bargain with the Union regarding the playland employees.

The Certification of Representative issued by the Regional Director in Case No. 19-RC-15194 is invalid because in issuing the Certification the Regional Director improperly relied on the Board's June 11, 2009, Order denying the Employer's May 8, 2009, Request for Review of the Regional Director's Decision and Direction of Election in Case No. 19-RC-15194. (Exs. H, F, E, D.) The Regional Director's reliance on the Board's Order was improper because the Order itself was invalid, since the two-member "Board" who issued the Order lacked statutory authority to do so.

As a result of these procedural irregularities, the Employer's Request for Review must be reinstated and held in abeyance until a properly constituted Board consisting of no less than the statutorily required three-member quorum has been appointed and confirmed. Until such a properly constituted Board issues a valid Order resolving the Employer's Request for Review, questions of law and of fact remain in this case and the GC's Motion for Summary Judgment must be denied. Furthermore, the Employer should not be forced to prematurely litigate the representational issues raised by the GC's Motion; such issues should not be litigated until a valid Board decision in Case No. 19-RC-15194 is issued.

Even if the Board determines that it had authority to issue its Order denying the Employer's Request for Review, summary judgment remains inappropriate in this case since there are material issues of fact and law yet to be resolved. The GC incorrectly asserts that the Employer has failed and refused to bargain with the Union. Without waiving its argument that it does not have a duty to bargain in this case, the Employer asserts that it has, in fact, been bargaining with the Union regarding the terms and conditions of employment of the playland

employees and that it has been doing so in good faith. The parties have exchanged proposals regarding the time, date and place of bargaining, and proposals regarding the substantive terms and conditions of employment of the playland employees. The Union, however, has not responded to the Employer's most recent proposals.

Thus, there are issues of fact and law to be resolved, and the Employer is entitled to present evidence to that effect at a hearing before an administrative law judge who can determine whether the Employer has actually been bargaining with the Union and whether that bargaining has been in good faith. Contrary to the GC's contention, this case does not present a simple technical challenge to the Union's alleged certification. Evidence of actual bargaining exists here and the Board should not ignore that evidence in a rush to issue summary judgment. The Employer respectfully requests that the parties be permitted to present oral argument before the Board in this case.

I. PROCEDURAL BACKGROUND

This case arose out of a petition filed by the Union on March 23, 2009, seeking to represent the employees employed in the playland department of the Employer's University Place Store in Tacoma, Washington. (Ex. C.) The Union contended that the playland employees should be granted a self-determination election to establish: (1) whether they wished to be included in the existing multi-store bargaining unit of Combined Checkout ("CCK") employees employed at the University Place store, which the Union already represented; or (2) whether they wished to remain unrepresented. (Ex. C.) The Employer contested the appropriateness of the petitioned-for unit. After a hearing on the matter, the Regional Director issued a Decision and Direction of Election on April 24, 2009, directing a self-determination election in a unit limited to playland employees at the University Place store to determine whether those employees wish to be added to the existing multi-store CCK unit. (Ex. D.)

On May 11, 2009, the Employer filed a Request for Review of the Regional Director's Decision and Direction of Election. (Ex. E.) On June 11, 2009, Board members Wilma Liebman and Peter Schaumber, the only two remaining members of the current Board, purportedly issued an "Order" denying the Employer's Request for Review on the grounds that those two members agreed with the Regional Director that the University Place store playland employees share a community of interest with the multi-store CCK unit employees. (Ex. F.) On June 17, 2009, the ballots from the secret mail ballot election were open and counted, and the Regional Director issued a Certification of Representative on June 24, 2009, which placed the playland employees in the multi-store CCK unit. (Exs. G, H.) On December 8, 2009, the Regional Director issued a Corrected Certification of Representative. (Ex. H.)

In a letter dated November 5, 2009, the Employer advised the Union of its position that the two-member Board did not have the statutory authority to issue the June 11, 2009 Order denying the Employer's Request for Review, and that, therefore, there is no duty to bargain with the Union regarding the terms and conditions of employment of the playland employees working at the University Place store. (Ex. M.) Without waiving this position, the Employer proposed that the parties postpone bargaining until either the current CCK contract expires or until the question of the Board's statutory authority to issue decisions is resolved by the United States Supreme Court. (Ex. M.) The Union submitted a counterproposal by letter dated December 3, 2009, in which it proposed that the parties apply the current CCK contract to the playland employees but maintain their current wages rates. (Ex. K.) By letter dated January 7, 2010, the Employer rejected the Union's counterproposal, proposed again that the parties postpone bargaining, and invited further proposals from the Union. (Ex. N.) Instead of the responding to the Employer's invitation for additional proposals, the Union filed an unfair labor

practice charge against the Employer on January 14, 2010, alleging that the Employer has refused to bargain in violation of Section 8(a)(1) and (5) of the Act. (Ex. A.)

II. DISCUSSION

A. **The GC's Motion for Summary Judgment Must be Denied because the Question of whether the Employer has a Duty to Bargain with the Union Regarding the Playland Employees at the University Place Store Raises Material Issues of Fact and Law that Require a Hearing Before an Administrative Law Judge.**

1. **The Employer does not Have a Duty to Bargain with the Union Regarding the Playland Employees because the "Board's" Order and the Subsequent Certification of Representative in Case No. 19-RC-15194 are Invalid as a Matter of Law.**

As a matter of law, three members "at all times" constitute a quorum of the Board. 29 USC § 153(b). *See also Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F3d 469, 474-75 (D.C. Cir. 2009) ("The Board does not have three members. It cannot act.").² The Board alone has the authority to rule on the Employer's Request for Review. 29 CFR § 102.67(e, f). The authority for such Board action "could be taken by no fewer than two members acting as a quorum of a three-member panel." *KFC Nat'l Management v. NLRB*, 497 F2d 298, 302, (2nd Cir 1974) (citing 29 USC § 153(b)).

In this case, however, the two remaining members of the Board were not acting as a quorum of a three-member panel; they were acting as the only two members of the Board. Thus, these two remaining members lacked the authority to issue an Order denying a Request for Review. *KFC National Management Corp.* 497 F2d at 303 (a denial of a Request for Review

² *But c.f. Northeastern Land Services, LTD v. NLRB*, 560 F3d 36 (1st Cir 2009); *New Process Steel*, 564 F3d 840 (7th Cir 2009); *Snell Island SNF LLC v. NLRB*, 568 F3d 410 (2nd Cir 2009). In *Snell Island*, however, the 2nd Circuit agreed with some of the holdings in *Laurel Baye*, and suggested that this issue will eventually need to be settled by the Supreme Court.

that is rendered by anything less than a duly authorized Board panel is invalid as a matter of law).

The Board's December 28, 2007 preemptive delegation of all of the Board's powers, including the power to decide cases that were not even pending at that time, to a three-member panel may have been intended to comply with the statutory requirement that "at all times" a quorum of the Board is three members, and that a quorum of two members is sufficient to a three-member panel. 29 USC § 153(b). However, once Member Kirsanow's term of appointment expired on December 31, 2007, the remaining Members Liebman and Schaumber no longer represented the two-member quorum of a three-member panel. *Laurel Baye*, 564 F3d at 471. Instead, they necessarily became a two-member panel, which by definition lacks the quorum required by 29 USC § 153(b).

Considered another way, the Board improperly delegated its authority, and in doing so exceeded the terms of its authorizing statute, the National Labor Relations Act ("the Act"). On May 1, 2009, the United States Court of Appeals for the District of Columbia Circuit ruled in *Laurel Baye*, that the Board's previously stated position that the Act allowed the Board to delegate all of its powers to a three-member panel, even though the term of one of those three members was about to expire, was "transparent," inappropriate and without authority. *Laurel Baye/Healthcare of Lake Lanier, Inc.*, 564 F3d at 472. Although other circuits have upheld orders and actions of the current two-member Board,³ the holding of the D.C. Circuit should be considered highly persuasive, since any review of the Board's decision in this matter will be filed

³ *Northeastern Land Services, LTD v. NLRB*, 560 F3d 36 (1st Cir 2009); *New Process Steel*, 564 F3d 840 (7th Cir 2009); *Snell Island SNF LLC v. NLRB*, 568 F3d 410 (2nd Cir 2009).

with the D.C. Circuit. *See*, for example, the Employer’s Notice of Appeal to the D.C. Circuit filed in *Fred Meyer Stores, Inc. and NLRB*, Case No. 10-1010 (D.C. Cir. 2010).

In *Laurel Baye*, the D.C. Circuit held that the Board improperly delegated its power to a three-member panel that the Board recognized would consist of only two-members within three days of the effective date of delegation. *Id.* Although the Act gives the Board the authority to delegate any or all of its powers to “any group of three or more members,” the Act does not authorize delegation of all of its power to a two-member panel. 29 USC § 153(b). The D.C. Circuit held that the Board’s interpretation of the effective delegation of the Board’s powers to a two-member group, as the purported quorum of a three-member group when there are not three members on the current Board, cannot be construed as a reasonable construction of the Act. *Laurel Baye Healthcare of Lake Lanier, Inc.*, 564 F3d at 473. Because the enabling statute unambiguously states that “three members of the Board shall, at all times, constitute a quorum of the Board,” 29 USC § 153(b),

[i]t therefore defies logic as well as the text of the statute to argue, as the Board does, that a Congress which explicitly imposed a requirement for a three-member quorum “at all times” would in the same sentence allow the Board to reduce its operative quorum to two without further congressional authorization.

Laurel Baye Healthcare of Lake Lanier, Inc., 564 F3d at 472.

Since the Board only had two members on April 21, 2009, the Order issued by only those two members was invalid as a matter of law. *KFC Nat’l Management*, 497 F2d at 303. Because the “Board’s” Order, issued by a two-member group therefore lacking the requisite three-member quorum, was without legal authority, the Regional Director’s Certification of Representative based upon that Order was also invalid as a matter of law. With no valid decision by a duly authorized panel of the Board, 29 CFR §102.67(b) required that “all ballots shall be impounded and remain unopened pending such a decision.” *See also* CHM §

11274 (“the regional director may **not** open and count any ballots that may be challenged until the **Board** has ruled on any request for review that may be filed.”) (emphasis added) Thus, the Regional Director’s Certification of Representative was also invalid and had no legal effect.

“It is a fundamental rule of administrative law that the one who decides a case must hear it. A necessary corollary of this principle is that he who decides the case must have authority to do so.” *Flav-O-Rich, Inc. v. NLRB*, 531 F2d 358, 363 (6th Cir 1976) (quoting *US v. Morgan*, 298 US 468, 481 (1936), *internal citation omitted*). Here, the Board did not review the Regional Director’s ruling, because there was no properly authorized, acting Board. “If nothing else, [the Employer is] entitled to have its motion considered by those with legal authority to pass upon it.” *Id.* The Employer must be granted a legitimate Review by the Board or a properly composed delegee group that complies with the Act. 29 USC § 153(b).

2. Since Decision by a Duly Authorized Board has not been Rendered on the Employer’s Request for Review, the Questions of Representation raised by the GC’s Motion for Summary Judgment Cannot be Properly Adjudicated in this Case.

As shown above, until a valid decision by a duly authorized panel of the Board is issued, the Regional Director is precluded, as a matter of law, from certifying the results of the election. It is, therefore, axiomatic that the questions of representation raised by the Employer’s pending Request for Review cannot be properly adjudicated in the context of this refusal to bargain charge. Indeed, doing so would put the cart before the horse.

In other words, in the absence of a valid decision by a duly authorized panel of the Board, the Employer’s Request for Review remains pending and the Employer should not be forced to prematurely litigate the representational questions until a valid Board decision in Case No. 19-RC-15194 has been rendered. That is the only question before the Board in Case No.

19-CA-32311 and that is the only issue to be decided at this point. Only after a valid Order has been issued can the questions of representation be properly addressed.⁴

Since the questions of representation cannot be properly addressed until after a valid Order has been issued, this is not a “test of certification” case in which the Employer is testing the Union’s certification as bargaining representative in the underlying representation proceeding by refusing to bargain with the Union. In such test of certification cases, the Employer’s refusal to bargain is generally predicated on its objection to the appropriateness of the unit certified by the Regional Director, and the Board almost always grants summary judgment against the Employer because the “representation issues” raised by the Employer “were or could have been litigated in the prior representation proceeding,” *Rochelle Waste Disposal, LLC*, 354 NLRB No. 18, slip op at 1 (April 30, 2009), or because the Employer did not raise “any representation issue that is properly litigable in [the] unfair labor practice proceeding.” *Eagle Ray Electric Co.*, 354 NLRB No. 27, slip op. at 1 (May 29, 2009); *see also Hartzheim Dodge Hayward*, 354 NLRB No. 22, slip op. at 1 (May 29, 2009).

In the present case, the Employer could not have previously raised its objection to the Board’s authority to issue a decision on its Request for Review, and the Regional Director’s subsequent authority to certify the results of the election, in the underlying representation proceeding, and the issue of whether or not the Board had the authority to issue its decision on the Employer’s Request for Review is properly raised at this time and can be litigated in this unfair labor practice proceeding.⁵

⁴ *But c.f. KFC Nat’l Management Corp.* 214 NLRB 232, 234 (1974), *enf. w/o op.* 91 LRRM 2194 (2nd Cir 1975).

⁵The Employer does not intend to waive the arguments and positions raised by its pending Request for Review. Indeed, the Employer explicitly intends to preserve such
[Footnote continued on next page]

3. The Employer is Entitled to a Hearing in this Case to Present Evidence that the Union's Charge is Without Merit because the Parties have been Engaged in Bargaining.

Summary Judgment is further inappropriate here because the parties have been bargaining, over matters such as the time, date and place in which bargaining over the playland employees' terms and conditions of employment should take place. The parties' letters make this clear, as they are exchanging proposals related to these issues. This raises questions of both fact and law: is the Employer engaged in bargaining and if so, is the Employer bargaining in good faith? These questions preclude summary judgment, and can only be resolved after a hearing before an administrative law judge.

The Board should not repeat the mistakes it made in Case Nos. 19-CA-32244 and 19-CA-32171 (involving the nutrition employees at the Employer's Francis Street store in Spokane, Washington), wherein the Region was left with an Order Granting Summary Judgment that it could not enforce because the parties the Employer and UFCW Local 1439 had been bargaining regarding the nutrition employees and the Union ultimately waived its right to represent the nutrition employees. Shortly before the Board issues its Order Granting Summary Judgment in that case, the Employer and the union reached agreement on a recognition clause that specifically excluded the nutrition employees from representation under the contract. In agreeing to that recognition clause, the union voluntarily waived its right to represent the nutrition employees. The Employer, who is not obligated to provide evidence during the Region's investigation, could have presented this evidence at a hearing, but because it was

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arguments until they are ripe (i.e., until either a duly authorized decision is reached by the Board or it is conclusively determined that the Board's June 11, 2009 Order was valid)

denied the opportunity to do so, the situation was ultimately an embarrassing one for both the Union and the Board. That situation resulted from the Board's eagerness to rush to summary judgment without a full understanding of the facts.

That mistake should not be repeated here. It is the Employer's position that the parties are bargaining time, date and place of bargaining issues pending final resolution of the Union's status as exclusive representative of the University Place playland employees. Currently on the table are both the Employer's counter proposals to the Union's proposals and a proposal that the parties' hold the Union's information request in abeyance pending a decision by the United States Supreme Court. The Union requested dates for bargaining and the Employer has not refused to meet and confer; instead the Employer has made proposals that would postpone the need to meet and confer. In its last letter to the Union, the Employer specifically invited further proposals from the Union, saying: "If the Union still will not agree to postpone bargaining until Fred Meyer's Request for Review [is resolved], or until the current CCK contract expires, but can propose an alternative to applying the current CCK contract to the Playland employees, please put forth that alternative for my consideration." (Ex. N, p.2.) Despite the Employer's invitation to submit additional proposals, the Union has not yet submitted a response. To date, the Employer has met its duty to bargain in good faith.

The GC claims that "proposing to postpone bargaining until an unspecified time in the future does not constitute bargaining in good faith." (Memo. in Support of Summary Judgment, p. 9.) The Employer is not proposing to postpone bargaining until "an unspecified time," it is specifically proposing that the parties postpone bargaining until the current CCK contract expires in a few short months on May 1, 2010. (Ex. B., para. 6.) In addition, the Employer has done more than simply propose to postpone bargaining. It has also invited the

Union to make counterproposals for its consideration that are an alternative to the Union's proposals that the parties immediately apply the current CCK contract to the playland employees. (Ex. N.) This demonstrates a willingness to continue bargaining that directly contradicts the GC's claim that the Employer is simply attempting to "camouflage its [alleged] refusal to bargain." (Memo. In Support of Summary Judgment, p. 9.) The case *Henry M Hald High School Ass'n*, 213 NLRB 463 (1974), *enf'd*, 559 F.2d 1204 (2nd Cir. 1977), is therefore inapposite. Summary Judgment should be denied so that the parties can continue bargaining.

These facts make it clear that this is not a case in which the Employer is making a simple technical to the Union's alleged certification as the employees' exclusive representative. Without waiving its argument that the Union has not been properly certified, the Employer has engaged in bargaining that is appropriate in these circumstances, and the question of whether that bargaining is in good faith as required under the Act is one of fact and law, precluding summary judgment. Such questions must be resolved by an administrative law judge after a hearing.

III. CONCLUSION

WHEREFORE, having shown just cause why the General Counsel's Motion for Summary Judgment should not be granted, Fred Meyer Stores, Inc., respectfully requests that the Motion be dismissed in its entirety. Respondent further requests that a hearing on these issues be held before an Administrative Law Judge, and that the Regional Director's Corrected Certification of Representative be suspended, if not overturned, until a properly constituted Board hears and resolves the Employer's Request for Review in Case No. 19-RC-15194.

DATED: March 8, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2010, I served true and correct copies of the foregoing RESPONSE TO NOTICE TO SHOW CAUSE on the following person via E-File and E-Mail:

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