

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 19**

**FRED MEYER STORES, INC.,**

Respondent,

and

**UNITED FOOD AND COMMERCIAL  
WORKERS LOCAL 367, affiliated with  
UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION,**

Charging Party.

Case No. CA-32311

**RESPONDENT'S MOTION FOR  
RECONSIDERATION**

Pursuant to Section 102.48(d)(1) of the Rules and Regulations of the National Labor Relations Board (“Board”) Respondent Fred Meyer Stores, Inc. (“Fred Meyer”) respectfully requests that the Board reconsider its August 26, 2010, Decision and Order, which denied Fred Meyer’s Request for Review of the Regional Director’s Decision and Direction of Election in case 19-RC-15194 (the representation case), and granted the General Counsel’s Motion for Summary Judgment in case 19-CA-32311 (the unfair labor practice case). *See Fred Meyer Stores, Inc.*, 355 NLRB No. 130 (Aug. 26, 2010). Fred Meyer respectfully requests that the Board reconsider its Decision on the following grounds: 1) the U.S. Supreme Court’s decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), rendered the Board’s May 7, 2010, decision invalid and the Board cannot comply with *New Process Steel* by first vacating

that decision and then reviewing it with a three-member panel composed of the two-members who issued the invalid decision; and 2) the Board made a material error in stating that Fred Meyer “admitted its refusal to bargain,” prior to the Supreme Court’s decision in *New Process Steel, supra*, and by consequently depriving Fred Meyer of the right to a hearing by failing to direct the Regional Director for Region to 19 to hold a hearing before an Administrative Law Judge on the issue of whether Fred Meyer refused to bargain with United Food and Commercial Workers Union, Local 367 (the “Union”) over the terms and conditions of employment of the nutrition employees working at Fred Meyer’s stores in Lacey and Tumwater, Washington. These grounds present extraordinary circumstances warranting reconsideration of the Board’s August 26 Decision. Rs. & Regs. of NLRB § 102.48(d)(1) (“A party to a proceeding before the Board may, because of extraordinary circumstances move for reconsideration \* \* \* after the Board’s decision and order.”)<sup>1</sup>

**1. The Board’s August 26 Decision does not Comply with the Requirements of *New Process Steel*.**

In its *New Process Steel* decision, the Supreme Court found that the decisions issued by the two-member panel violated the requirements of the Act and stated that the remedy was as follows: “The judgment is reversed, and the case is *remanded* for further proceedings consistent with this opinion.” *New Process Steel, L.P. v. NLRB*, 130 S. Ct. at 2645 (emphasis added). Instead of reviewing its May 7 decision on remand from the Court of Appeal for the District of Columbia, the Board vacated its May 7 decision and then claimed to have reviewed the case with an appropriately constituted three-member panel that included the two members

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<sup>1</sup> The Board’s August 26 Decision specifically invited Fred Meyer to file a motion for reconsideration. See *Fred Meyer Stores, Inc.*, 355 NLRB No. 130, slip op. at 2 n. 5.

who issued the invalid May 7 decision. The Board clearly failed to comply with the Supreme Court's directive that the Board's two-member decisions were to be reviewed on remand from the Circuit Courts. Also, reviewing, and more to the point "rubber stamping," the invalid decision with a three-member panel that includes the two members who issued the invalid decision is not the kind of review contemplated by the Supreme Court. It simply defies reason to argue that what the Supreme Court meant in *New Process Steel* was that the Board could just have a third member agree with two-member's invalid decision. Fred Meyer requests that the Board comply with the requirements of *New Process Steel* by first reinstating its May 7 decision before the Court of Appeals for the District of Columbia and by then reviewing that decision on remand from the Circuit Court with a three-member panel that does not include the two-members who issued the original invalid decision.

**2. Fred Meyer Never Admitted that it Refused to Bargain with the Union and the Board's August 26 Decision Deprives Fred Meyer of its Right to a Hearing on this Issue before an Administrative Law Judge.**

The Board's August 26 Decision resolved only one of the two flaws in its initial decision, which were the subject of Fred Meyer's Request for Review and its appeal of the Board's May 7 decision to the Court of Appeals for the District of Columbia. Although the August 26 Decision appears to be issued by a three-member Board, it did not cure the second flaw in the Board's initial decision -- the deprivation of Fred Meyer's right to a hearing on the allegation that it refused to bargain.

Fred Meyer's Response to the Board's Notice to Show Cause why summary judgment should not have been granted in this case specifically requested a hearing on the issues raised by the General Counsel's Motion for Summary Judgment. Yet the Board denied Fred Meyer such a hearing by incorrectly stating in its August 26 Decision that Fred Meyer admitted

it had refused to bargain with the Union, and that it was simply attempting to test the Union's certification as the exclusive bargaining representative of the nutrition employees. Fred Meyer never admitted that it refused to bargain with the Union. It always maintained that the issue of whether it had unlawfully refused to bargain with the Union could not be resolved until a properly constituted Board ruled on its Request for Review in Case 19-RC-15194, and in fact submitted evidence to the Board that the parties had been bargaining over the time, date and place of negotiations. Now that a three-member Board has denied Fred Meyer's Request for Review, the issue of whether Fred Meyer unlawfully refused to bargain with the Union can be resolved. In order to resolve that issue, however, a hearing on the issue must be held before an Administrative Law Judge so that Fred Meyer can be allowed to present evidence that it did bargain with the Union. The Board's actions in this case, however, have wrongfully deprived Fred Meyer of its right to defend itself. Fred Meyer therefore asks that the Board reconsider its Decision and instead direct that a hearing on this issue be held before an Administrative Law Judge.

### **3. Conclusion.**

This case presents extraordinary circumstances that warrant the Board's reconsideration of its August 26, 2010, Decision. The Board's August 26 Decision does not comply with the requirements of *New Process Steel, supra*, and it contains material errors in that the Board incorrectly stated that Fred Meyer admitted that it refused to bargain with the Union and then wrongfully denied Fred Meyer of the right to a hearing on that issue before an Administrative Law Judge. Fred Meyer respectfully requests that the Board, (1) grant this Motion for Reconsideration, (2) reinstate its May 7 Decision before the Court of Appeals for the District of Columbia, (3) review that decision on remand from the Circuit Court pursuant to the

requirements of *New Process Steel, supra*, (4) reverse its grant of summary judgment in that decision, and (5) direct that a hearing on the issue of whether Fred Meyer refused to bargain with the Union be held before an Administrative Law Judge.

DATED: October 21, 2010.

BULLARD SMITH JERNSTEDT WILSON

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## CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2010, I served true and correct copies of the foregoing RESPONDENT'S MOTION FOR RECONSIDERATION on the following persons via E-File and E-Mail:

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