No. 10-72651

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

FRED MEYER STORES, INC.

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board for enforcement of its Order issued against Fred Meyer Stores, Inc. In its Order, the Board found that the Company refused to bargain with Local 367 of the United Food and Commercial Workers Union after the Company's nutrition employees voted for union representation in a Board-conducted election.

The Board's Decision and Order issued on August 26, 2010, and is reported at 355 NLRB No. 141.[1] The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Court has jurisdiction over this case under the same section of the Act because the unfair labor practice occurred in Washington.

As the Board's Order is based, in part, on findings made in the underlying representation proceeding (Board Case No. 19-RC-15036), the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d), however, does not give the Court general authority over the representation proceeding, but authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to "enforc[e], modify[] or set[] aside in whole or in part the [unfair labor practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to

[1] ER 17-18. "ER" references are to the excerpts of record. "SER" references are to the Board's supplemental excerpts of record. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

resume processing the representation case in a manner consistent with the rulings of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

The Board filed its application for enforcement on August 30, 2010. The application is timely; the Act places no limit on the time for filing actions to enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

Did the Board reasonably find that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the representative of a combined unit of grocery and nutrition employees?

RELEVANT STATUTORY PROVISIONS

The Addendum attached to this brief contains all applicable statutes, as well as the relevant sections of the Board's Rules and Regulations.

STATEMENT OF THE CASE

The Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with Local 367 of the United Food and Commercial Workers Union as the exclusive bargaining representative of an appropriate unit of its employees. (ER 17-18 & n.4.) Before the Board, the Company admitted that it did not bargain. The Company argued, however, that the bargaining unit was inappropriate and, because the Board had only two members when it denied the Company's request for review of the

Regional Director's Decision and Direction of Election, it had no duty to bargain. (ER 18 n.4; SER 10.) Below, we explain the procedural history of this case and the Regional Director's findings of fact concerning the appropriateness of the unit.

COURSE OF PROCEEDINGS

A. The Representation Proceeding: The Employees Choose Union Representation

The Company operates 120 "one-stop" retail stores in the Pacific Northwest, which sell both grocery items (such as produce, frozen foods, and dairy) and general merchandise (such as electronics, clothes, and house wares). (SER 29-31.) The Union represents a grocery unit and a cashier unit at the Company's two one-stop stores in Lacey and Tumwater, Washington. (SER 30.) On November 27, 2007, the Union filed a petition (Case No. 19-RC-15036) with the Board seeking a self-determination election in which the nutrition employees at those two stores would decide whether to join the existing grocery unit in the Lacey and Tumwater stores. (SER 49-50.) Nutrition employees work in the natural food aisles of the stores. (SER 32.)

Following a hearing, the Board's Regional Director issued a decision and direction of election, finding that the combined unit of grocery and nutrition employees was an appropriate unit for bargaining. (SER 46.) The Regional Director disagreed with the Company's argument that nutrition employees do not share a community of interest with the grocery employees and instead belong in a

unit with its non-unionized general merchandise employees. (SER 29.) Rather, the Regional Director determined that the nutrition employees share a community of interest with the grocery employees who, unlike general merchandise employees, work in the same section of the store, report to the Food Manager, perform similar work, and have regular, work-related contact. (SER 32-33, 39-42.) The Company filed a request for review of the Regional Director's decision with the Board and made a number of merits arguments, including the contention that the nutrition employees belong in a unit with the general merchandise employees.

On February 1, 2008, while the Company's request for review was pending, the Regional Office conducted the election and impounded the ballots. At that time, the Board was operating with only two members, and the two-member Board denied the request for review on April 21, 2009. (SER 27.) On April 24, the ballots were tallied. (SER 26.)

Six of the eight nutrition employees voted, and all six voted to be represented by the Union as part of the existing grocery unit. (SER 26.) The Company did not file any objections to the election. The Regional Director then certified the Union to represent a combined unit of grocery and nutrition employees. (SER 24.)

B. The Initial Unfair Labor Practice Proceeding: the Company Refuses to Bargain with the Union

By letter dated June 8, 2009, the Union requested that the Company recognize and bargain with it as the representative of the nutrition employees. (ER 4, SER 22-23.) The Company responded that it had no obligation to bargain regarding the nutrition employees because a two-member Board denied its request for review, and under the D.C. Circuit's decision in *Laurel Baye Healthcare of Lake Lanier v. NLRB*, 564 F.2d 469 (D.C. Cir. 2009), the Board had no authority to issue decisions. (ER 4-5, SER 21.)

Thereafter, the Union filed an unfair labor practice charge, and the Board's General Counsel issued an unfair labor practice complaint, alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (ER 13.) In its answer, the Company denied that its refusal to bargain was unlawful, contending that it had no duty to bargain because the two-member Board that dismissed its request for review had no authority to do so. (ER 10.)

On November 17, 2009, the General Counsel filed a motion for summary judgment. (ER 13.) The Board issued an order transferring the case to the Board and directed the Company to show cause why the motion should not be granted. (ER 13.) In its response, the Company repeated its contentions that the Board had no authority to deny its request for review. (SER 10-11.)

On January 4, 2010, the only two sitting members of the Board issued a Decision and Order, granting the General Counsel's motion for summary judgment and finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. (ER 13-16.)

C. The Prior Appeal

The Company filed a petition for review of the Board's Order, and the Board cross-applied for enforcement, in the United States Court of Appeals for the District of Columbia Circuit. On February 3, 2010, the Court, on its own motion, placed the case in abeyance before the Board had filed the record with the Court.

On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, holding that under Section 3(b) of the Act (29 U.S.C. § 153(b)), a delegee group of at least three Board members had to be maintained in order to exercise the delegated authority of the Board. Shortly thereafter, the D.C. Circuit granted the Board's motion to dismiss based on *New Process Steel*.

In the meantime, two additional Board members were sworn in. On August 17, 2010, the Board issued an order setting aside the January 4, 2010 Decision and Order of the two-member Board, and retaining the case on its docket for further action as appropriate. (SER 8-9.) The three-member panel acted in light of the Supreme Court's decision in *New Process Steel*, and pursuant to Section 10(d) of

the Act (29 U.S.C. § 160(d)), which provides that "until the record in a case shall have been filed in a court, . . . the Board may at any time . . . modify or set aside, in whole or in part, any finding or order issued by it."

Thereafter, the Board filed a motion with the D.C. Circuit seeking dismissal of the case because the Board, as allowed under Section 10(d) of the Act, had vacated the Decision and Order that was the subject of the Company's petition for review. The Court granted the Board's motion to dismiss on August 19, 2010.

D. The Board's August 26, 2010 Decision and Order

On August 26, 2010, a three-member panel of the Board issued the Decision and Order that is the subject of this proceeding. (ER 17-18.) In its Decision and Order, the Board explained that because the pre-election proceeding had resulted in a decision by the two-member Board, it would not give preclusive effect to the two-member Board's rulings. Accordingly, the Board considered the pre-election issues raised by the Company but found them to be without merit. On that basis, the Board "affirm[ed] the decision to deny the [Company's] request for review." [2] (ER 17.)

[2] In its August 26, 2010 Decision and Order, the Board also considered whether the Board could rely on the election results. The Board concluded that the Regional Director, acting under Section 102.67(b) of the Board's Rules and Regulations (29 C.F.R. § 102.67(b)), properly conducted the election as scheduled, and, therefore, the tally of ballots was a reliable expression of employee free choice. The Board explained that with or without a two-member decision on the original request for review, the election would have been conducted as scheduled;

Additionally, in its Decision and Order, the Board ruled on and granted the General Counsel's motion for summary judgment in the unfair labor practice case. (ER 18.) The Board noted that the Company had admitted its refusal to bargain in its answer to the General Counsel's complaint in the refusal-to-bargain case. The Board added that, while it presumed that the Company's position on bargaining remained unchanged, if the Company had or intended to commence bargaining, it could "file a motion for reconsideration so stating, and the Board would issue an appropriate order." (ER 18 n.4.)

Finally, in its Decision and Order, the Board considered and decided to adopt the findings of fact, conclusions of law, remedy, and order set forth in its prior Decision and Order, which it incorporated by reference. (ER 18.) In so doing, the Board concluded that all issues pertaining to the validity of the Union's certification had been, or could have been, litigated in the underlying representation case proceeding and thus could not be re-litigated in the unfair labor practice proceeding. Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to recognize and bargain with the Union. (ER 18.)

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accordingly, the Regional Director's Certification of Representative, which was based on the tally of ballots, was valid. (ER 17-18.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (ER 15.) Affirmatively, the Board's Order requires the Company to bargain with the Union upon request, to embody any understanding that is reached in a signed agreement, and to post a remedial notice. (ER 15.)

E. The Company's Motion for Reconsideration

The Board filed an application for enforcement in this Court and, prior to the Board's filing of the record with the Court, the Company filed a motion for reconsideration of the Board's Order. The Court granted the Board's motion to hold the case in abeyance while it considered the motion for reconsideration.

In its motion for reconsideration, the Company argued that the Board's decision did not comply with the Supreme Court's decision in *New Process Steel* because the Board vacated its January 4, 2010 Order and because the reviewing panel included the two members who issued the original decision. (SER 3-4.) The Company also argued that it never admitted its refusal to bargain but instead argued "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 . . . ." (SER 5.) The Company then demanded a hearing "before an

Administrative Law Judge so that [it] can be allowed to present evidence that it did bargain with the Union." (SER 5.)

On February 7, 2011, the Board denied the Company's motion. The Board found that the Company's "claim that it did not admit its refusal to bargain with the Union is not supported by the record" because its "answer to the complaint expressly admits that it sent a [ ] letter to the Union in which it refused to bargain." (SER 1 n.2.) Furthermore, the Company's claim that its letter "was not legally significant does not create a disputed issue of fact precluding summary judgment." (SER 1 n.2.) In addition, the Board concluded the Company's motion "does not describe the nature of the evidence it wishes to present, show how this alleged evidence is relevant to the instant matter, or suggest that it is currently bargaining with the Union." (SER 1 n.2.)

SUMMARY OF ARGUMENT

The Board properly found that the Company's refusal to bargain with the Union violated the Act. Following a self-determination election in which the nutrition employees at two stores voted to join the existing grocery unit, the Company refused to bargain, telling the Union that it had no duty to bargain because the Board had only two members when it denied the Company's request for review. Since its 2009 refusal to bargain, the Company never claimed to the Board that it began bargaining. So, when the Board issued its Order in August

2010, it invited the Company to file a motion for reconsideration and inform the Board if it had begun bargaining in the interim. The Company filed a motion, but it did not provide the Board with any evidence that it bargained. The Company's belated attempt to have this Court review evidence it did not provide to the Board is misguided. Under the Federal Rules of Appellate Procedure and Section 10(e) of the Act, any argument not made to the Board is waived, and this Court has no jurisdiction to review it.

STANDARD OF REVIEW

Congress has "delegated administration of the Act" to the Board. *Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977). The Board is "authorized to 'formulate general policy with respect to the administration of [the] Act'" and is "precisely the type of agency to which deference should presumptively be afforded." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 756 (1983) (quoting *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981)). This Court defers "to the Board's interpretation of the [Act] if it is 'reasonable and not precluded by Supreme Court precedent.'" *NLRB v. Advanced Stretchforming Int'l, Inc.*, 233 F.3d 1176, 1180 (9th Cir. 2000) (quoting *Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1134 (9th Cir. 1988) (en banc)).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT WHEN IT REFUSED TO BARGAIN WITH THE UNION

A. Introduction

Following a secret-ballot election in which the nutrition employees chose to be represented by the Union, the Company refused to bargain. At the time of its initial refusal to bargain, the Company claimed its refusal was not a violation of the Act because the bargaining unit was inappropriate and because the Board had only two members when it had denied the Company's request to review the appropriateness of the bargaining unit.

After the Supreme Court's decision in *New Process Steel*, a properly constituted three-member panel of the Board denied the Company's request for review and upheld the appropriateness of the bargaining unit. (ER 17-18.) In the new decision, the Board also stated that it presumed the Company's legal position remained unchanged, that the Company would continue to refuse to bargain, and that this continuing refusal to bargain violated the Act. (ER 18 n.4.) The Board's decision stated that, if the Company had changed its position and commenced bargaining, it could so inform the Board in a motion for reconsideration. (*Id*.)

The Company filed a motion for reconsideration. It first argued that the Board could not comply with *New Process Steel* by vacating its January 4, 2010

Order and reviewing it with a panel which included the two members who issued the original decision. (SER 3-4.) Next, the Company argued that it never admitted its refusal to bargain and the Board "depriv[ed] [it] of the right to a hearing . . . on the issue of whether [it] refused to bargain" with the Union. (SER 3.) The Company demanded that "a hearing on the issue must be held before an Administrative Law Judge so that [it] can be allowed to present evidence that it did bargain with the Union." (SER 5.)

The Board denied the motion for reconsideration. Specifically, with respect to the Company's claim that it did bargain with the Union, the Board stated that the Company's claim "is not supported by the record." (SER 1 & n.2.) The Board also properly rejected the Company's vague demand for a hearing, finding that the Company's "new claim that it has evidence that it did, in fact, bargain with the Union [ ] does not warrant granting reconsideration." The Board explained that the motion "does not describe the nature of the evidence it wishes to present, show how this alleged evidence is relevant to the instant matter, or suggest that it is currently bargaining with the Union." (SER 1 n.2.)

In these Court proceedings, the Company no longer contests the appropriateness of the bargaining unit. The Company also does not contest the resolution of the first issue that it raised to the Board in its motion for reconsideration: the Company now accepts the validity of the Board's post-*New*

Process Steel decision in this case. Instead, the Company claims that the Board erred in finding that the Company had continued to refuse to bargain and, to make its case, the Company asks this Court to supplement the record. It asks this Court to consider evidence of purported bargaining that was never brought to the Board's attention, even though that evidence was in existence at the time the Company submitted its motion for reconsideration to the Board and during the time that motion was pending before the Board.

B. The Company Waived Its Challenge to the Board's Decision by Failing To Raise It to the Board

The Board issues its decisions based on the record before it.[3] And on appeal of an agency decision, a court is required to review and examine the record that is made during the course of an administrative proceeding. The Federal Rules of Appellate Procedure make clear that the record on review of an agency order consists of the order involved, any findings or report on which it is based, and the pleadings, evidence, and other parts of the proceedings before the agency from which the review is requested. Fed. R. App. P. 16(a). There should be no distinction between the record compiled in the agency proceeding and the record on review. And absent unusual circumstances, the court's limited scope of review

[3] The Board's Rules and Regulations, in Section 102.68 (record in a representation case) and Section 102.45(b) (record in an unfair labor practice case), define what constitutes the record in Board cases. 29 C.F.R. § 102.68 and 29 C.F.R. § 102.45(b).

prevents it from examining materials that were not presented to the agency and restricts its review to the administrative record before it. *Reitz v. USDA*, 2010 WL 786586, *3 (D. Kan. 2010) (citation omitted); *see also Nickol v. United States*, 501 F.2d 1389, 1390 (10th Cir. 1974) (court review of agency decision is "confined to the agency record, or such portion of it which the parties may cite, and additional evidence is not to be admitted.").

In a similar vein, Section 10(e) of the National Labor Relations Act provides that, "[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). These restrictions are in place to ensure that the Board is given the opportunity to utilize its expertise and that the court will have the benefit of the Board's opinion in reviewing the matter. *See NLRB v. Sambo's Rest., Inc.*, 641 F.2d 794, 796 (9th Cir. 1981). Thus, if a particular objection has not been raised before the Board, a reviewing court, absent extraordinary circumstances, has no jurisdiction to consider the issue in a subsequent enforcement proceeding. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (holding that the court of appeals lacked jurisdiction to consider an issue not raised by either party in a motion for reconsideration before the Board); *see also generally United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[O]rderly procedure and good

administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts . . . . Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

The Company wants this Court to consider documents—attached as exhibits to its motion to supplement the record—that purport to show that the Company has bargained. But the Company never submitted these documents to the Board for the Board's consideration as part of the case. Two documents, dated March and April, 2010, existed well before the Company filed its motion for reconsideration on October 25, 2010, and could have been included with that motion. The final document (labeled Exhibit B, pages 1 and 2) is undated, but the Company asserts in its motion to supplement that the document is from December 2010. Thus, the December document existed while the motion for reconsideration was pending before the Board, and the Company could have submitted that to the Board for consideration as well. Any suggestion that the Company had no reason to present this evidence to the Board until the December document became available, not only cuts against any argument that the earlier documents illustrate bargaining, but

fails to explain why no effort was made in December to provide all the documents to the Board.

By failing to properly offer the evidence to the Board, the Company has waived its right to have the Court consider it now. This Court does not deny enforcement or remand to the Board for additional consideration where the evidence proffered to the Court "might have been but [was] not raised in the original proceedings before the Board." *Seattle First Nat'l Bank v. NLRB*, 892 F.2d 792, 796 (9th Cir. 1981) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 427 (1947)).

Nor has the Company cited any extraordinary circumstances, as required by Section 10(e), to excuse its failure to raise such information to the Board in its motion for reconsideration or its failure to file a motion to reopen the record. *See* 29 U.S.C. § 160(e). An extraordinary circumstance exists only if there has been some occurrence or decision that "prevented a matter which should have been presented to the Board from having been presented at the proper time." *See NLRB v. Allied Prods. Corp.*, 548 F.2d 644, 654 (6th Cir. 1977). Without a showing of extraordinary circumstances, or an "explanation for its failure" to present this argument to the Board, the Company is barred from raising it here. *See NLRB v. STR, Inc.*, 549 F.2d 641, 642 (9th Cir. 1977) (per curiam).

Furthermore, because the Company provided no evidence—or even a description of such evidence—to the Board that it had bargained with the Union, the Board was amply justified in denying the motion for reconsideration under Section 102.48(d)(1) of its own rules. 29 C.F.R. §102.48(d)(1). *Compare NLRB v. Lane Aviation Corp*., 615 F.2d 399 (6th Cir. 1980) (denying enforcement of a Board order where Board violated its own rules by reopening a record for hearing when no previously unexamined evidence in support of the motion to reopen had been adduced) *with NLRB v. Cutter Dodge, Inc.*, 825 F.2d 1375, 1380-81 (9th Cir. 1987) (enforcing Board's decision not to reopen the record under Sec. 102.48(d)(1) because additional evidence to be adduced was not newly discovered).

Moreover, the Company is incorrect in suggesting (Br. 14-15) that the Board had the evidence that the Company now attaches to its motion to supplement the record. Apparently, in an effort to argue that the Company had complied with the Board's Order, the Company gave this evidence to the Board's Regional Compliance Officer in December 2010, but not to the Board itself. More than a year earlier, on November 19, 2009, this case had been transferred from the Regional Office to the Board. The Board Order transferring the case, which was served on the Company, specifically stated that the case will be continued before the Board in Washington, D.C. (SER 20.) And the Company knew this, because it filed its motion for reconsideration with the Board in Washington, D.C. Any

evidence the Company wished the Board to consider in support of an argument that it had complied with the Board's August 26 Order should have been submitted to the Board in Washington, D.C.—as the Board's August 26 Order specifically invited the Company to do. (ER 18 n.4; *see* 29 C.F.R. 102.24 and 102.47.)

In any event, even if this evidence were properly before this Court and even if this evidence proved that the Company was bargaining, it would just put the Company in the position of arguing that the Board is not entitled to enforcement of its Order because the Company has already complied. But compliance with a Board order is not a valid defense to the Board's application for enforcement. "[A]n order of the character made by the Board, lawful when made, does not become moot because it is obeyed . . . ." *NLRB v. Pool Mfg. Co.*, 339 U.S. 577, 581-82 (1950) (quoting *NLRB v. Pa. Greyhound Lines, Inc.*, 303 U.S. 261, 271 (1938)). Rather, "a Board Order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair labor practice barred by an enforcement decree." *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950). *Accord NLRB v. Rippee*, 339 F.2d 315, 316 (9th Cir. 1964) (per curiam) (enforcing Board order to bargain where employer opposed enforcement "on the sole ground that they have duly given the required notice and stand ready, able and willing to bargain with the Union at any time upon the latter's request.").

CONCLUSION

For the foregoing reasons, the Board requests that this Court enter a judgment enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

NLRB v. Fred Meyer Stores, Inc., 10-72562, involves the same employer and union and similar issues. In both cases, the Company seeks to have this Court consider evidence that it bargained with the Union when the Company did not first provide that evidence to the Board.

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May 2011

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	**Case No. 10-72651**
Petitioner	)	
	)	**Board Case Nos.**
v.	)	**19-RC-15036, 19-CA-32171**
	)	
FRED MEYER STORES, INC.	)	
	)	
Respondent	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 4,896 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

/s/ Linda Dreeben
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Dated at Washington, DC
this 16th day of May, 2011

9th Circuit Case Number(s) 10-72651

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ADDENDUM

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ADDENDUM

STATUTES

Sec. 3(b) of the Act (29 U.S.C.§ 153(b)) provides in relevant part:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 [section 159 of this title] to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 [section 159 of this title] and certify the results thereof, except that upon the filling of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

Sec. 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

***

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 9 of the Act (29 U.S.C. § 159) provides in relevant part:

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A)by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

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(d) Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

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(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

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(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or

agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

BOARD RULES AND REGULATIONS

Motions

Sec. 102.24 *Motions; where to file; contents; service on other parties; promptness in filing and response; default judgment procedures; summary judgment procedures*.

(a) All motions under §§ 102.22 and 102.29 made prior to the hearing shall be filed in writing with the Regional Director issuing the complaint. All motions for default judgment, summary judgment, or dismissal made prior to the hearing shall be filed in writing with the Board pursuant to the provisions of § 102.50. All other motions made prior to the hearing, including motions to reschedule the hearing under circumstances other than those set forth in § 102.16(a), shall be filed in writing with the chief administrative law judge in Washington, DC, with the associate chief judge in San Francisco, California, with the associate chief judge in New York, New York, or with the associate chief judge in Atlanta, Georgia, as the case may be. All motions made at the hearing shall be made in writing to the administrative law judge or stated orally on the record. All motions filed subsequent to the hearing, but before the transfer of the case to the Board pursuant to § 102.45, shall be filed with the administrative law judge, care of the chief administrative law judge in Washington, DC, the deputy chief judge in San Francisco, California, the associate chief judge in New York, New York, or the associate chief judge in Atlanta, Georgia, as the case may be. Motions shall briefly state the order or relief applied for and the grounds therefore. All motions filed with a Regional Director or an administrative law judge as set forth in this paragraph shall be filed therewith by transmitting three copies thereof together with an affidavit of service on the parties. All motions filed with the Board, including motions for default judgment, summary judgment, or dismissal, shall be filed with the Executive Secretary of the Board in Washington, DC, by transmitting eight copies thereof together with an affidavit of service on the parties. Unless otherwise provided in 29 CFR part 102, motions and responses thereto shall be filed promptly and within such time as not to delay the proceeding.

(b) All motions for summary judgment or dismissal shall be filed with the Board no later than 28 days prior to the scheduled hearing. Where no hearing is scheduled, or where the hearing is scheduled less than 28 days after the date for filing an answer to the complaint or compliance specification, whichever is applicable, the motion shall be filed promptly. Upon receipt of a motion for default judgment, summary judgment, or dismissal, the Board may deny the motion or issue a notice to show cause why the motion should not be granted. If a notice to show cause is issued, the hearing, if scheduled, will normally be postponed

indefinitely. If a party desires to file an opposition to the motion prior to issuance of the notice to show cause in order to prevent postponement of the hearing, it may do so; Provided however, That any such opposition shall be filed no later than 21 days prior to the hearing. If a notice to show cause is issued, an opposing party may file a response thereto notwithstanding any opposition it may have filed prior to issuance of the notice. The time for filing the response shall be fixed in the notice to show cause. It is not required that either the opposition or the response be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing. The Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist. If the opposing party files no opposition or response, the Board may treat the motion as conceded, and default judgment, summary judgment, or dismissal, if appropriate, shall be entered.

Administrative Law Judge's Decision and Transfer of Case to the Board

Sec. 102.45 *Administrative law judge's decision; contents; service; transfer of case to the Board; contents of record in case*.—(b) The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in section 102.46, shall constitute the record in the case.

Sec. 102.47 *Filing of motion after transfer of case to Board*.—All motions filed after the case has been transferred to the Board pursuant to section 102.45 shall be filed with the Board in Washington, D.C., by transmitting eight copies thereof to the Board, together with an affidavit of service upon the parties. Such motions shall be printed or otherwise legibly duplicated: *Provided, however;* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

Procedure Before the Board

Sec. 102.48 *Action of the Board upon expiration of time to file exceptions to administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions*— (d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

Sec. 102.67 *Proceedings before the Regional Director; further hearing; briefs; action by the Regional Director; appeals from action by the Regional Director; statement in opposition to appeal; transfer of case to the Board; proceedings before the Board; Board action*.—(b) A decision by the Regional Director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the Regional Director shall be final: *Provided*, *however*, That within 14 days after service thereof any party may file a request for review with the Board in Washington, D.C. The Regional Director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.

Sec. 102.68 *Record; what constitutes; transmission to the Board*.—The record in a proceeding conducted pursuant to the foregoing section shall consist of: the petition, notice of hearing with affidavit of service thereof, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the Regional Director, stipulations, exhibits, affidavits of service, and any briefs or other legal memoranda submitted by the parties to the Regional Director or to the

Board, and the decision of the Regional Director, if any. Immediately upon issuance by the Regional Director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the Regional Director shall transmit the record to the Board.