

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MISSION PRODUCE, INC.

and

Case 10-CA-106374

**RETAIL WHOLESALE AND DEPARTMENT
STORE UNION SOUTHEAST COUNCIL/UFCW**

**MOTION TO TRANSFER CASE TO AND CONTINUE
PROCEEDINGS BEFORE THE BOARD
AND FOR SUMMARY JUDGMENT**

The above-captioned case involves a test of certification of representative issued by the National Labor Relations Board (Board) to Retail, Wholesale and Department Store Union Southeast Council/UFCW (the Union) as the exclusive collective-bargaining representative of a unit of certain employees employed by Mission Produce, Inc. (Respondent). Pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations, Series 8, as amended, and in order to effectuate the purposes of the Act and to avoid unnecessary costs and unwarranted delay, Counsel for the Acting General Counsel respectfully moves that the above-captioned case be transferred to and continued before the Board, and that the Board enter summary judgment in this matter.

In support of this motion, Counsel for Acting General Counsel avers as follows:

1.

On January 4, 2013, the Union filed a petition in Case 10-RC-087616 seeking to represent certain employees of Respondent. A copy of the Union's petition is attached as Exhibit 1.

2.

On January 11, 2013, the Regional Director approved a stipulated election agreement signed by the parties. A copy of the stipulated election agreement is attached as Exhibit 2.

3.

On February 13, 2013, an election was held in the following appropriate unit of employees of Respondent:

All full-time and regular part-time warehouse employees, including packers, stackers, shipping clerks, truck drivers, and QA technicians, employed by the Employer at 3550 Southside Industrial Parkway, Suite 200, Atlanta, Georgia, but excluding sales employees, office clerical employees, managers, professional employees, guards and supervisors as defined by the Act.

4.

On February 13, 2013, the ballots cast in the election were counted, and there were 5 votes cast for the Union and 1 vote cast against the Union, with no void or challenged ballots. A copy of the Tally of Ballots is attached as Exhibit 3.

5.

On February 19, 2013, Respondent timely filed objections to the conduct of the election asserting that processing of the petition was barred because that the Board lacked a quorum to act. A copy of Respondent's objections is attached as Exhibit 4.

6.

On February 25, 2013, the Regional Director issued a Report on Objections and Recommendation to the Board. A copy of the Report on Objections and the Affidavit of Service are attached as Exhibits 5 and 6, respectively.

7.

On April 29, 2013, the Board issued its Decision and Certification of Representative, certifying the Union as the exclusive collective-bargaining representative of the Unit. A copy of the Certification is attached as Exhibit 7.

8.

At all times since April 29, 2013, based on Section 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. Sec.159(a) (the Act), the Union has been the exclusive collective-bargaining representative of the Unit.

9.

On May 28, 2013, the Union, by letter, requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit. A copy of the request is attached as Exhibit 8.

10.

Since about May 29, 2013, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

11.

On June 3, 2013, the Union filed the charge in this case alleging that Respondent has engaged in unfair labor practices affecting commerce as defined in the Act. The charge was served by regular mail on Respondent on the same date. Copies of the Charge and the Affidavit of Service are attached as Exhibits 9 and 10, respectively.

12.

On June 14, 2013, the Regional Director issued a Complaint and Notice of Hearing, alleging that, since May 29, 2013, Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and to bargain with the Union as the exclusive collective-bargaining representative of its employees. A copy of the Complaint and Notice of Hearing was duly served by post-paid certified mail upon Respondent on June 14, 2013. Copies of the Complaint and Notice of Hearing and the Affidavit of Service are attached hereto as Exhibits 11 and 12, respectively. The return postal receipt for Exhibits 11 and 12 is attached as Exhibit 13.

13.

On June 25, 2013, Respondent filed an Answer to the Complaint and Notice of Hearing with the Regional Director. A copy of Respondent's Answer and Certificate of Service, dated June 25, 2013, is attached as Exhibit 14. In its Answer to Complaint,

Respondent admits to paragraphs 1 through 9. Respondent substantively denies only paragraphs 10 and 11. Specifically, Respondent denies that the Union has been the exclusive collective-bargaining representative of the Units under Section 9(a) of the Act since May 29, 2013; that Respondent's refusal to recognize and bargain with the Union violates Section 8(a)(1) and (5) of the Act; and that its unfair labor practices affect commerce under the Act.

14.

Respondent asserts, as affirmative defenses in its Answer, that the President's recess appointments to the Board are constitutionally invalid, that the Board therefore lacks a quorum, and as a result, the Board's agents and/or delegates lack the authority to act on behalf of the Board. Respondent argues that based thereon, the underlying petition in the 10-RC-095843 was improperly processed, and the Union was improperly certified.

Counsel for Acting General Counsel respectfully requests that the Board take official and/or administrative notice of all the documents described above in Case 10-RC-095843. Based on the foregoing, Counsel for Acting General Counsel, pursuant to Section 102.24 and 102.50 of the Board's Rules and Regulations, hereby moves to transfer this case to the Board and to continue proceedings before the Board and for summary judgment in this matter.

ARGUMENT

The Employer asserts that the Regional Director should have found that processing the petition was “barred” based on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (petition for certiorari filed April 25, 2013), arguing that under that decision, the President’s January 4, 2012, recess appointments to the Board were invalid. For the reasons below, this argument is without merit.

It is not appropriate for the Board, or the Board’s appointed agents, to suspend its activities in response to a claim that Presidential appointments to the Board are not valid. On April 25, 2013, the Board filed a petition for certiorari with the United States Supreme Court seeking review of the D. C. Circuit’s decision. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus in *Belgrove*, the Board concluded that because the “question [of the validity of the recess appointments] remains in litigation,” until such time as it is ultimately resolved, “the Board is charged to fulfill its responsibilities under the Act.”¹

¹ The Third Circuit’s decision in *NLRB v. New Vista Nursing and Rehabilitation*, -- F.3d --, 2013 WL 2099742 (3d Cir. May 16, 2013), should not change this result. As noted

Moreover, even if the Board lacked a quorum, that would not affect the ability of the Board's delegates to act. See *STG Int'l Inc.*, Board Case 21-RC-097525, 2013 WL 1786666 (April 25, 2013).

Finally, there is a strong public interest in addressing representation disputes as soon as possible that are of concern to employees and employers alike. Most representation disputes have long been resolved administratively without the necessity of court litigation. And even where, as here, there is a challenge to the authority of the Board to act, our experience in continuing to process cases during the analogous dispute leading to *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), was that most of the cases decided during that time helped finally resolve labor disputes because the parties either accepted the Board's decision or settled the dispute.

WHEREFORE, because Respondent has failed to raise any issues of material fact requiring a hearing, it is respectfully requested that:

- (A) This case be transferred to and continued before the Board;
- (B) The allegations of the Complaint be found to be true;
- (C) This motion for summary judgment be granted; and

(D) The Board issue a Decision and Order containing findings of fact and conclusions of law in accordance with the allegations of the Complaint, and remedying Respondent's unfair labor practices by including a provision that, for the purpose of determining the effective date of the Union's certifications, the initial year of each

above, there still remains a split in the circuits regarding the validity of intrasession recess appointments.

certification shall be deemed to begin on the date that Respondent commences to bargain in good faith with the Union, and any other relief as is deemed just and proper.

Dated at Atlanta, Georgia, July 3, 2013.

Respectfully submitted,

Handwritten signature of Jeffrey D. Williams in black ink.

Jeffrey D. Williams
Counsel for Acting General Counsel
National Labor Relations Board
Region 10

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Transfer Cases and Continue Proceedings Before the Board and for Summary Judgment have this date been served electronically upon the following parties:

JONATHON J.SPITZ
ATTORNEY AT LAW
JACKSON LEWIS LLP
1155 PEACHTREE STREET, SUITE 1000
ATLANTA, GA 30309
spitzj@jacksonlewisl.com

ELOISA ALBARQUES
DIRECTOR OF HUMAN RESOURCES
MISSION PRODUCE, INC.
2500 EAST VINEYARD AVENUE
SUITE 300
OXNARD CA 93036
eabarques@missionpro.com

RICK WILSON
UNION REPRESENTAIVE
RETAIL, WHOLESALE AND
DEPARTMENT
STORE UNION, SOUTHEAST
COUNCIL.UFCW
1838 METROPOLITAN PKWY,
SW ATLANTA, GA 30315
rwdsusec@aol.com

Dated at Atlanta, Georgia, July 3, 2013.

Respectfully submitted,



Jeffrey D. Williams
Counsel for Acting General Counsel
National Labor Relations Board
Region 10

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

PETITION

DO NOT WRITE IN THIS SPACE

Case No
10-RC-095843

Date Filed
JANUARY 4, 2013

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1. PURPOSE OF THIS PETITION (if box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)
- RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
 - RM-REPRESENTATION (EMPLOYER PETITION) - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
 - RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE) - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
 - UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES) - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
 - UC-UNIT CLARIFICATION- A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees. (Check one) In unit not previously certified. In unit previously certified in Case No. _____
 - AC-AMENDMENT OF CERTIFICATION- Petitioner seeks amendment of certification issued in Case No. _____ Attach statement describing the specific amendment sought.

2 Name of Employer Mission Avocados		Employer Representative to contact Ray Tomlinson	Tel. No. 404-366-6221
3. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code) 3550 Southside Industrial Pkwy, SE, Suite 200, Atlanta, GA 30354			Fax No. 404-366-5379
4a. Type of Establishment (Factory, mine, wholesaler, etc.) Food Processing	4b. Identify principal product or service Avocados		Cell No 404-735-7782
			e-Mail rtomlinson@missionpro.com
5 Unit Involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.) Included All full time, regular part-time, production, warehouse, quality assurance, maintenance and truckdriver employees Excluded Sales employees, office clerical, professional, guards, and supervisors as defined by the act.			6a. Number of Employees in Unit: Present 6 Proposed (By UC/AC)
6b Is this petition supported by 30% or more of the employees in the unit? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No *Not applicable in RM, UC, and AC			

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. Request for recognition as Bargaining Representative was made on (Date) 01-04-13 and Employer declined recognition on or about (Date) _____ (If no reply received, so state).

7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent (If none, so state.) N/A		Affiliation	
Address		Tel. No.	Date of Recognition or Certification
		Cell No.	Fax No.
		e-Mail	

9. Expiration Date of Current Contract. If any (Month, Day, Year)
N/A

10 If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day and Year) N/A

11a. Is there now a strike or picketing at the Employer's establishment(s) Involved? Yes No

11b If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of (Insert Name) _____, a labor organization, of (Insert Address) _____ Since (Month, Day, Year) _____

12 Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state) N/A

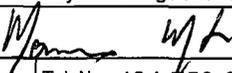
Name	Address	Tel. No.	Fax No.
		Cell No.	e-Mail

13 Full name of party filing petition (If labor organization, give full name, including local name and number)
Retail, Wholesale and Department Store Union Southeast Council

14a. Address (street and number, city, state, and ZIP code) 1838 Metropolitan Pkwy, SW Atlanta, GA 30315	14b Tel. No. EXT 404-758-0865	14c. Fax No. 404-758-5628
	14d. Cell No.	14e. e-Mail rwdsusec@aol.com

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (to be filled in when petition is filed by a labor organization)
Retail, Wholesale and Department Store Union/UFCW

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) Menandro Martinez	Signature 	Title (if any) Union Representative
Address (street and number, city, state, and ZIP code) 1838 Metropolitan Pkwy, SW Atlanta, GA 30315		Tel. No. 404-758-0865
		Fax No 404-758-5628
		eMail rwdsusec@aol.com

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
STIPULATED ELECTION AGREEMENT

MISSION PRODUCE, INC.

Case 10-RC-095843

The parties **AGREE AS FOLLOWS:**

1. PROCEDURAL MATTERS. The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

2. COMMERCE. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c).

The Employer, Mission Produce, Inc., a California corporation, is engaged in the packaging and distribution of asparagus and avocados from its facility in Atlanta, Georgia, the only location involved in these proceedings. During the past 12 months, a representative period, the Employer, in the course and conduct of its business operations described herein, has sold or shipped goods valued in excess of \$50,000 directly to customers located outside the state of Georgia.

3. LABOR ORGANIZATION. The Petitioner is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.

4. ELECTION. A secret-ballot election under the Board's Rules and Regulations shall be held under the supervision of the Regional Director on the date and at the hours and places specified below.

DATE: February 13, 2013 HOURS: 1:00 p.m. to 1:30 p.m.

PLACE: The employee break room at the Employer's facility located at 3550 Southside Industrial Parkway, Suite 200, Atlanta, Georgia 30354.

If the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.

5. UNIT AND ELIGIBLE VOTERS. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part-time warehouse employees, including packers, stackers, shipping clerks, truck drivers, and QA technicians, employed by the Employer at 3550 Southside Industrial Parkway, Suite 200, Atlanta, Georgia 30354; but excluding sales employees, office clerical employees, managers, professional employees, guards and supervisors as defined by the Act.

Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending on Saturday, January 5, 2013**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

6. ELECTION ELIGIBILITY LIST. Within seven (7) days after the Regional Director has approved this Agreement, the Employer shall provide to the Regional Director an election eligibility list containing the full names and addresses of all eligible voters. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *North Macon Health Care Facility*, 315 NLRB 359 (1994).

7. THE BALLOT. The Regional Director, in his or her discretion, will decide the language(s) to be used on the election ballot. All parties should notify the Region as soon as possible of any voters or potential voters who only read a language other than English.

The question on the ballot will be "Do you wish to be represented for purposes of collective bargaining by RETAIL, WHOLESALE, AND DEPARTMENT STORE UNION, SOUTHEAST COUNCIL/ UFCW? The choices on the ballot will be "Yes" or "No".

8. NOTICE OF ELECTION. The Regional Director, in his or her discretion, will decide the language(s) to be used on the Notice of Election. The Employer will post copies of the Notice of Election in conspicuous places and usual posting places easily accessible to the voters at least three (3) full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

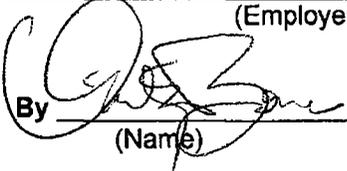
9. ACCOMMODATIONS REQUIRED. All parties should notify the Region as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, and request the necessary assistance.

10. OBSERVERS. Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

11. TALLY OF BALLOTS. Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

12. POSTELECTION AND RUNOFF PROCEDURES. All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

MISSION PRODUCE, INC.

(Employer)
By  1/11/13
(Name) (Date)

RETAIL, WHOLESALE, AND DEPARTMENT STORE UNION, SOUTHEAST COUNCIL/ UFCW

(Petitioner)

By /s/ MENANDRO MARTINEZ 1/11/13
(Name) (Date)

RETAIL, WHOLESALE, AND DEPARTMENT STORE UNION, SOUTHEAST COUNCIL/ UFCW

(Union)

Recommended: 
NICHOLAS ROWE, Board Agent (Date)

By _____
(Name) (Date)

Date approved: 01/11/13


Regional Director, Region 10
National Labor Relations Board

12. POSTELECTION AND RUNOFF PROCEDURES. All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

MISSION PRODUCE, INC.

(Employer)

By /s/ EMILY BORNA 1/11/13
(Name) (Date)

**RETAIL, WHOLESALE, AND DEPARTMENT
STORE UNION, SOUTHEAST COUNCIL/
UFCW**

(Petitioner)

By *[Signature]* 01/11/13
(Name) (Date)

Retail, Wholesale, and Department
Store Union, Southeast Council/UFCW
(Union)

Recommended: *[Signature]*
NICHOLAS ROWE, Board Agent (Date)

By _____
(Name) (Date)

Date approved: 01/11/13

[Signature]
Regional Director, Region 10
National Labor Relations Board

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Date Filed

Jan 4, 2013

Case No. 10-RC-095843

Date Issued 02/13/2013

City ATLANTA

State GA

Type of Election:
(Check one:)

(If applicable check either or both:)

- Stipulation
- Board Direction
- Consent Agreement
- RD Direction
Incumbent Union (Code)

- 8(b) (7)
- Mail Ballot

MISSION PRODUCE, INC.
Employer

and

RETAIL, WHOLESALE, AND DEPARTMENT STORE UNION,
SOUTHEAST COUNCIL/UFCW
Petitioner

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots case in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters _____ 6
2. Number of Void ballots _____ 0
3. Number of Votes cast for RETAIL, WHOLESALE, AND DEPARTMENT STORE UNION, SOUTHEAST COUNCIL/UFCW _____ 5
4. Number of Votes cast for _____
5. Number of Votes cast for _____
6. Number of Votes cast against participating labor organization(s) _____ 1
7. Number of Valid votes counted (sum 3, 4, 5, and 6) _____ 6
8. Number of challenged ballots _____ 0
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) _____ 6
10. Challenges are (not) sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (Item 9) has ~~(not)~~ been cast for RETAIL, WHOLESALE, AND DEPARTMENT STORE UNION, SOUTHEAST COUNCIL/UFCW

For the Regional Director _____

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For MISSION PRODUCE, INC. _____

For RETAIL, WHOLESALE, AND DEPARTMENT STORE UNION, SOUTHEAST COUNCIL/UFCW _____

For _____

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

MISSION PRODUCE, INC.

Employer,

and

RETAIL, WHOSALE AND DEPARTMENT
STORE UNION / UFCW,

Petitioner.

Case No. 10-RC-095843

EMPLOYER'S OBJECTION TO ELECTION

Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, the Employer, Mission Produce, Inc. (the "Company" or "Employer"), by and through its undersigned counsel, hereby objects to the Election held on February 13, 2013, for the following reason:

1. The processing of the Petition is barred because the National Labor Relations Board ("Board") lacks a quorum. Under the National Labor Relations Act ("NLRA"), all authority is vested in the Board, and while others may act on the Board's behalf by statute or delegation, the Board lacks a quorum and is, and has been, functioning illegally because the President's recess appointments are constitutionally invalid. Therefore, the Board's agents and/or delegees lack authority to act on behalf of the Board. As such, the Petition in this matter was improperly processed, the election improperly held and the results should not be certified and should be dismissed. See Noel Canning v. NLRB et. al., Nos. 112-

1115 and 12-1153 (D.C. Cir. Jan. 25, 2013), Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009).

Accordingly, for the foregoing reasons, the Employer respectfully requests that the results of the election be set aside.

Respectfully submitted this 19th day of February 2013.

JACKSON LEWIS LLP
1155 Peachtree Street, Suite 1000
Atlanta, Georgia 30309
Direct: 404/586-1835
Facsimile: 404/525-1173
E-mail: spitzj@jacksonlewis.com

By:


Jonathan J. Spitz

ATTORNEYS FOR EMPLOYER

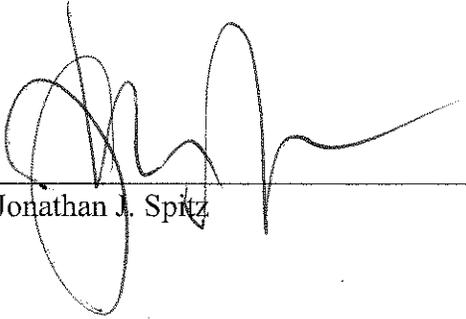
CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2013, I caused the foregoing *Employer's Objection to Election* to be filed with the Regional Director, National Labor Relations Board, using the CM/ECF system.

I further certify that I caused a copy to be served via electronic mail upon the following:

Mr. Nicholas Rowe
Board Agent
nicholas.rowe@nlrb.gov
National Labor Relations Board, Region 10
233 Peachtree Center Avenue, NE
Suite 1000
Atlanta, GA 30303-1531

Mr. Menandro Martinez
Union Representative
rwdsusec@aol.com
RWDSU Southeast Council
1838 Metropolitan Pkwy, SE
Atlanta, GA 30315



Jonathan J. Spitz

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MISSION PRODUCE, INC.

Employer

and

Case 10-RC-095843

RETAIL WHOLESALE AND DEPARTMENT
STORE UNION SOUTHEAST COUNCIL/UFCW

Petitioner

REPORT ON OBJECTION
AND
RECOMMENDATIONS TO THE BOARD

Pursuant to a Stipulated Election Agreement executed by the parties and approved by the undersigned on January 11, 2013, an election by secret ballot was conducted on February 13, 2013, to determine whether unit¹ employees desired to be represented by the Petitioner for purposes of collective bargaining. Upon conclusion of the election, a tally of ballots was made available to all parties showing the following results:

¹ The appropriate unit as set forth in the Stipulated Election Agreement is: "All full time and regular part-time warehouse employees, including packers, stackers, shipping clerks, truck drivers, and QA technicians, employed by the Employer at 3550 Southside Industrial Parkway, Suite 200, Atlanta, Georgia; but excluding sales employees, office clerical employees, managers, professional employees, guards and supervisors as defined by the Act."

Approximate number of eligible voters.....	6
Void Ballots.....	0
Votes cast for Petitioner.....	5
Votes cast against participating labor organization... ..	1
Valid votes counted.....	6
Challenged ballots.....	0
Valid votes counted plus challenged ballots.....	6

There were no challenged ballots.

On February 19, 2013, the Employer timely filed an objection to the conduct of the election.

Pursuant to Section 102.69 of the Board’s Rules and Regulations, Series 8, as amended, an investigation of the issues raised by the Objection was conducted under my direction. After due consideration of the matter, I recommend that the Objection be overruled and that a Certification of Representative be issued.

THE OBJECTION

The Employer contends the processing of the petition is barred because the National Labor Relations Board “Board” lacks a quorum. It contends that under the National Labor Relations Act (“NLRA”), all authority is vested in the Board, and while others may act on the Board’s behalf by statute or delegation, the Board lacks a quorum and is, and has been functioning illegally because the President’s recess appointments are constitutionally invalid. Therefore, the Board’s agents and/or delegees lack authority to act on behalf of the Board. As such, the petition in this matter was improperly processed, the election improperly held and the results should not be certified and should be dismissed. The Employer cites the decisions in *Noel Canning v. NLRB et. al.*, Nos. 112-1115 and 12-1153 (D.C. Cir. Jan 25, 2013), and *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB* 564 F.3d 469 (D.C. Cir. 2009) as the basis for its Objection.

Although the Employer correctly points out that on January 25, 2013, the D.C. Circuit, held that some of the President's appointments to the Board were not legally made and that as a consequence the Board does not have a valid quorum, the Board disagrees with that decision. In this regard, Chairman Mark Gaston Pearce issued the following statement:

The Board respectfully disagrees with today's decision and believes that the President's position in the matter will ultimately be upheld. It should be noted that this order applies to only one specific case, Noel Canning, and that similar questions have been raised in more than a dozen cases pending in other courts of appeals.

In the meantime, the Board has important work to do. The parties who come to us seek and expect careful consideration and resolution of their cases, and for that reason, we will continue to perform our statutory duties and issue decisions.

News Release, Statement by Chairman Pearce on Recess Appointment Ruling, <http://www.nlr.gov/news/statement-chairman-pearce-recess-appointment-ruling> (Jan. 25, 2013).

In addition, in *Noel Canning*, the D.C. Circuit Court itself noted that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Even in the absence of a circuit conflict, it has been the Board's longstanding practice not to acquiesce in adverse decisions by individual courts of appeals in subsequent proceedings involving different parties. See Letter of Acting Solicitor, National Labor Relations Board, *Industrial Turnaround Corp. v. NLRB*, 118 F.3d 248 (4th Cir. 1997) (Nos. 96-1783 & 96-1926) (explaining that "the Board, for more than 50 years, has taken the position that it is not obliged to follow decisions of a particular court of appeals in

subsequent proceedings not involving the same parties,” and discussing the grounds for that position).

In light of the above, and given the strong public interest in promptly addressing representational issues that are of concern to employees and employers alike, I must reject the Employer’s assertions that none of the agency’s employees have legal authority to continue processing cases on behalf of the Board and that the election must be set aside. Most representation disputes have long been resolved administratively without the necessity of court litigation. And even where, as here, there is a challenge to the authority of the Board to act, our experience in continuing to process cases during the analogous dispute leading to *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2638 (2010), was that most of the cases decided during that time helped finally resolve labor disputes because the parties either accepted the Board’s decision or settled the dispute. Indeed, the great majority of cases were resolved before they ever reached the Board.

Accordingly, I find this Objection to be without merit and will recommend that it be overruled.

CONCLUSION

In accordance with my finding that this Objection is without merit, I recommend that it be overruled and that a Certification of Representative be issued.

RIGHT TO FILE EXCEPTIONS

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board’s Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-

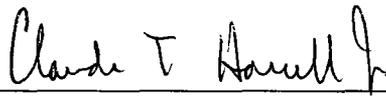
0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on March 11, 2013 at 5 p.m., (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.² A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations. The

² A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

request may be filed electronically through E-Gov on the Board's web site, www.nlr.gov,³ but may not be filed by facsimile. The responsibility for the receipt of exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed at Atlanta, Georgia, this 25th day of February 2013.



Claude T. Harrell, Jr., Regional Director
National Labor Relations Board
Region 10, Suite 1100
Harris Tower
233 Peachtree Street, NE
Atlanta, Georgia 30303

³ To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

MISSION PRODUCE, INC.

Employer

and

Case 10-RC-095843

**RETAIL WHOLESALE AND DEPARTMENT
STORE UNION SOUTHEAST COUNCIL/UFCW**

Petitioner

AFFIDAVIT OF SERVICE OF: Report on Objection and Recommendations to the Board, dated February 25, 2013.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **February 25, 2013**, I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

JONATHAN J.SPITZ, ATTORNEY
JACKSON LEWIS LLP
1155 PEACHTREE STREET, SUITE 1000
ATLANTA, GA 30309

RAY TOMLINSON, REPRESENTATIVE
MISSION PRODUCE, INC.
3550 SOUTHSIDE INDUSTRIAL PKWY SE
STE 200
ATLANTA, GA 30354-3202

MENANDRO MARTINEZ , UNION REPRESENTATIVE
RETAIL WHOLESALE AND DEPARTMENT STORE
UNION SOUTHEAST COUNCIL/UFCW
1838 METROPOLITAN PKWY SW
ATLANTA, GA 30315-5930

February 25, 2013

Date

JOSELLE CHATMAN, Designated Agent
of NLRB

Name



Signature

NOT INCLUDED
IN BOUND VOLUMES

PGB
Atlanta, GA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MISSION PRODUCE, INC.
Employer

and

Case 10-RC-095843

RETAIL WHOLESALE AND DEPARTMENT
STORE UNION SOUTHEAST COUNCIL/UFCW
Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has considered an objection to an election held February 13, 2013, and the Regional Director's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 5 for and 1 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief,¹ has adopted the Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

¹ The Employer contends that the Board lacks a quorum because the President's recess appointments are constitutionally invalid. We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn.1 (2013).

We likewise reject the Employer's related contention that the Regional Director would lack authority to process representation petitions if the Board lacked a quorum. The Board's delegation of its decisional authority in representation cases to Regional Directors dates back to 1961 and has never been withdrawn. See 26 Fed. Reg. 3889 (May 4, 1961). Consistent with the 1961 Delegation, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment. Furthermore, in *New Process Steel*, the Supreme Court expressly stated that such delegations were not affected by its decision, and, following that decision, no fewer than three courts of appeals have upheld the principle that Board delegations of authority to non-members remain valid during a loss of quorum by the Board. See *New Process Steel L.P. v. NLRB*, 130 S.Ct. 2635, 2643 n.4 (2010); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011); *Osthus*

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Retail Wholesale and Department Store Union Southeast Council/UFCW, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full time and regular part-time warehouse employees, including packers, stackers, shipping clerks, truck drivers, and QA technicians, employed by the Employer at 3550 Southside Industrial Parkway, Suite 200, Atlanta, Georgia 30354; but excluding sales employees, office clerical employees, managers, professional employees, guards and supervisors as defined by the Act.

Dated, Washington, D.C., April 29, 2013.

_____ Mark Gaston Pearce,	Chairman
_____ Richard F. Griffin, Jr.,	Member
_____ Sharon Block,	Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

v. Whitesell Corp., 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010).



RETAIL, WHOLESALE & DEPARTMENT STORE UNION
DISTRICT COUNCIL OF THE UFCW



Edgar E. Fields
SOUTHEAST COUNCIL PRESIDENT

SOUTHEAST COUNCIL OFFICE:
1838 METROPOLITAN PARKWAY, S.W. ATLANTA, GEORGIA 30315
PHONE: (404) 758-0865 * FAX: (404) 758-5628 * EMAIL: RWDSUSEC@AOL.COM

May 28, 2013

Eloisa Albarques
Director of Human Resources
Mission Produce, Inc.
2500 E Vineyard Ave, Ste 300
Oxnard, CA 93036

Dear Ms. Albarques:

This letter is to serve as demand for Mission Produce, Inc. to enter into bargaining with the Retail, Wholesale and Department Store Union for a Collective Bargaining Agreement. Therefore, I am requesting that you provide me with available dates you have to meet for that purpose.

Please feel free to call with any questions you may have. I can be reached at 404-758-0865 or 404-421-5062.

Respectfully,

Rick L. Wilson
International Representative, RWDSU

EEF/gk

Cc: Jonathan Spitz

STUART APPELBAUM, PRESIDENT
JACK WURM, SECRETARY/TREASURER

RWDSU
30 E. 29TH STREET
NEW YORK, N.Y. 10016

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER**DO NOT WRITE IN THIS SPACE**

Case

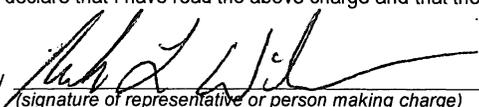
10-CA-106374

Date Filed

6-3-13

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer Mission Produce, Inc.	b. Tel. No. 404-366-6221
	c. Cell No.
	f. Fax No. 404-366-5379
d. Address (Street, city, state, and ZIP code) 3550 Southside Industrial Parkway, SE Suite 200 Atlanta, GA 30354	e. Employer Representative Eloisa Albarques, Dir. of HR 2500 E. Vineyard Ave., Ste 300 Oxnard, CA 93036
	g. e-Mail eabarques@missionpro.com
	h. Number of workers employed 6
i. Type of Establishment (factory, mine, wholesaler, etc.) food processing	j. Identify principal product or service avocados
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (5) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Since on or about May 29, 2013, the above-stated employer has refused to bargain with the Union.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Retail, Wholesale and Department Store Union	
4a. Address (Street and number, city, state, and ZIP code) Retail, Wholesale and Department Store Union, Southeast Council/UFCW 1838 Metropolitan Pkwy, SW Atlanta, GA 30315	4b. Tel. No. 404-758-0865
	4c. Cell No.
	4d. Fax No. 404-758-5628
	4e. e-Mail rwdseuc@aol.com
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)	
6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  (signature of representative or person making charge)	Tel. No. 404-758-0865
Rick Wilson, Union Representative (Print/type name and title or office, if any)	Office, if any, Cell No.
	Fax No. 404-758-5628
Address 1838 Metropolitan Pkwy, SW Atlanta GA 30315	e-Mail rwdseuc@aol.com
	6/3/2013 (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**PRIVACY ACT STATEMENT**Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MISSION PRODUCE, INC.

Charged Party

and

**RETAIL WHOLESALE AND DEPARTMENT
STORE UNION**

Charging Party

Case 10-CA-106374

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on June 3, 2013, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

ELOISA ALBARQUES, DIRECTOR OF
HUMAN RESOURCES
MISSION PRODUCE, INC.
2500 EAST VINEYARD AVENUE
SUITE 300
OXNARD, CA 93036

June 3, 2013

Date

Designated Agent of NLRB

Name

/s/ Paul E. Dorsey

Signature

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

MISSION PRODUCE, INC.

and

Case 10-CA-106374

**RETAIL WHOLESALE AND DEPARTMENT
STORE UNION SOUTHEAST COUNCIL/UFCW**

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by RETAIL WHOLESALE AND DEPARTMENT STORE UNION SOUTHEAST COUNCIL/UFCW (Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act), and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that MISSION PRODUCE, INC. (Respondent) has violated the Act as described below:

1. The charge in this proceeding was filed by the Charging Party on June 3, 2013, and a copy was served by regular mail on Respondent on the same date.
2. At all material times, Respondent has been a corporation with an office and place of business in Atlanta, Georgia (Respondent's facility), and has been engaged in the packaging and distribution of asparagus and avocados.
3. In conducting its operations annually, Respondent sold and shipped from its Atlanta, Georgia, facility, goods valued in excess of \$50,000 directly to points outside the State of Georgia.
4. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

6. The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time warehouse employees, including packers, stackers, shipping clerks, truck drivers, and QA technicians, employed by the Employer at 3550 Southside Industrial Parkway, Suite 200, Atlanta, Georgia, but excluding sales employees, office clerical employees, managers, professional employees, guards and supervisors as defined by the Act.

7. On April 29, 2013, the Board certified the Charging Party as the exclusive collective-bargaining representative of the Unit.

8. About May 28, 2013, the Charging Party, by letter, requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Charging Party as the exclusive collective-bargaining representative of the Unit.

9. Since about May 29, 2013, Respondent has failed and refused to recognize and bargain with the Charging Party as the exclusive collective-bargaining representative of the Unit.

10. By the conduct described above in paragraph 9, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

11. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before June 28, 2013, or postmarked on or before June 27, 2013.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

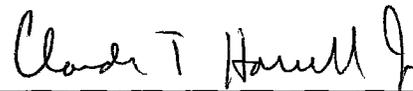
An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no

answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on a date to be determined at the Richard P. Prowell Hearing Room, 233 Peachtree Street, NE, Harris Tower, Suite 1000, Atlanta, Georgia, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: this 14th day of June, 2013
at Atlanta, GA



CLAUDE T. HARRELL JR.
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 10
233 PEACHTREE ST NE
HARRIS TOWER, SUITE 1000
ATLANTA, GA 30303-1531

Attachments

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

MISSION PRODUCE, INC.

and

Case 10-CA-106374

**RETAIL WHOLESALE AND DEPARTMENT
STORE UNION SOUTHEAST COUNCIL/UFCW**

AFFIDAVIT OF SERVICE OF: Complaint and Notice of Hearing (with forms NLRB-4338 and NLRB-4668 attached)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on , I served the above-entitled document(s) by **certified or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

ELOISA ALBARQUES , DIRECTOR OF
HUMAN RESOURCES
MISSION PRODUCE, INC.
2500 EAST VINEYARD AVENUE
SUITE 300
OXNARD, CA 93036

**CERTIFIED MAIL, RETURN RECEIPT
REQUESTED – 7004 2510 0003 7234 7834**

JONATHON J. SPITZ, Esq., Attorney
JACKSON LEWIS LLP
1155 Peachtree Street, Suite 1000
Atlanta, GA 30309

REGULAR MAIL

RICK L. WILSON , Union Representative
RETAIL, WHOLESALE AND
DEPARTMENT STORE UNION,
SOUTHEAST COUNCIL/UFCW
1838 METROPOLITAN PKWY SW
ATLANTA, GA 30315-5930

CERTIFIED MAIL – 7004 2510 0003 7234 7827

June 14, 2013

Date

Yvette Davis, Designated Agent of NLRB

Name



Signature

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 10-CA-106374

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

ELOISA ALBARQUES, DIRECTOR OF
HUMAN RESOURCES
MISSION PRODUCE, INC.
2500 EAST VINEYARD AVENUE
SUITE 300
OXNARD, CA 93036

JONATHON J. SPITZ, Esq., Attorney
JACKSON LEWIS LLP
1155 Peachtree Street, Suite 1000
Atlanta, GA 30309

RICK L. WILSON, Union Representative
RETAIL, WHOLESALE AND
DEPARTMENT STORE UNION,
SOUTHEAST COUNCIL/UFCW
1838 METROPOLITAN PKWY SW
ATLANTA, GA 30315-5930

**SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD
BEFORE THE NATIONAL LABOR RELATIONS BOARD
IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO
SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT**

The hearing will be conducted by an administrative law judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial finder of the facts and applicable law whose decision in due time will be served on the parties. The offices of the administrative law judges are located in Washington, DC; San Francisco, California; New York, N.Y.; and Atlanta, Georgia.

At the date, hour, and place for which the hearing is set, the administrative law judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to ensure that the issues are sharp and clearcut; or the administrative law judge may independently conduct such a conference. The administrative law judge will preside at such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the administrative law judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the administrative law judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the administrative law judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the administrative law judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The administrative law judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the administrative law judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the administrative law judge before the close of hearing. In the event such copy is not submitted, and the filing has not been waived by the administrative law judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. In the absence of a request, the administrative law judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

In the discretion of the administrative law judge, any party may, on request made before the close of the hearing, file a brief or proposed findings and conclusions, or both, with the administrative law judge who will fix the time for such filing. Any such filing submitted shall be double-spaced on 8 1/2 by 11 inch paper.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations, with respect to the procedure to be followed before the proceeding is transferred to the Board: No request for an extension of time within which to submit briefs or proposed findings to the administrative law judge will be considered unless received by the Chief Administrative Law Judge in Washington, DC (or, in cases under the branch offices in San Francisco, California; New York, New York; and Atlanta, Georgia, the Associate Chief Administrative Law Judge) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously on all other parties, and proof of such service furnished to the Chief Administrative Law Judge or the Associate Chief Administrative Law Judge, as the case may be. A quicker response is assured if the moving party secures the positions of the other parties and includes such in the request. All briefs or proposed findings filed with the administrative law judge must be submitted in triplicate, and may be printed or otherwise legibly duplicated with service on the other parties.

In due course the administrative law judge will prepare and file with the Board a decision in this proceeding, and will cause a copy thereof to be served on each of the parties. Upon filing of this decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, on all parties. At that point, the administrative law judge's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the administrative law judge's decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be served on the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations. If adjustment appears possible, the administrative law judge may suggest discussions between the parties or, on request, will afford reasonable opportunity during the hearing for such discussions.

UNITED STATES POSTAL SERVICE



First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

- Sender: Please print your name, address, and ZIP+4 in this box •

2013 JUN 21 AM 10:37

NATIONAL LABOR RELATIONS BOARD
233 PEACHTREE STREET NE
SUITE 1000 HARRIS TOWER
ATLANTA GA 30303



EXHIBIT 13

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece or on the front if space permits.

1. Article Addressed to:

ELOISA ALBARQUES, DIR. OF HR
MISSION PRODUCE INC.
OXNARD, CA 93036

CPT/NOH 10-CA-106374

MLB/YDD 6/14/2013

2. Article Number

(Transfer from service label)

7004 2510 0003 7234 7834

COMPLETE THIS SECTION ON DELIVERY**A. Signature**

X 

 Agent Addressee**B. Received by (Printed Name)****C. Date of Delivery**

6-17

D. Is delivery address different from Item 1? Yes

If YES, enter delivery address below:

 No**3. Service Type** Certified Mail Express Mail Registered Return Receipt for Merchandise Insured Mail C.O.D.**4. Restricted Delivery? (Extra Fee)** Yes

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

MISSION PRODUCE, INC.

and

Case 10-CA-106374

RETAIL WHOLESALE AND DEPARTMENT
STORE UNION SOUTHEAST COUNCIL/UFCW

ANSWER OF RESPONDENT TO COMPLAINT AND NOTICE OF HEARING

Respondent, Mission Produce, Inc. (“Mission Produce”), by and through its attorneys, Jackson Lewis LLP, and pursuant to §102.20 and §102.21 of the National Labor Relations Board’s Rules and Regulations, Series 8, as amended, respectfully answers the Complaint and Notice of Hearing as follows:

1. Respondent admits the allegation set forth in paragraph 1 of the Complaint.
2. Respondent admits the allegation set forth in paragraph 2 of the Complaint.
3. Respondent admits the allegation set forth in paragraph 3 of the Complaint.
4. Respondent admits the allegation set forth in paragraph 4 of the Complaint.
5. Respondent admits the allegation set forth in paragraph 5 of the Complaint.
6. Respondent admits the allegation set forth in paragraph 6 of the Complaint.
7. Respondent admits that on April 29, 2013, the Board certified the Charging Party as the exclusive collective bargaining representative of the bargaining unit, but denies the Board properly or lawfully did so.
8. Respondent admits the allegation set forth in paragraph 8 of the Complaint.
9. Respondent admits the allegation set forth in paragraph 9 of the Complaint.
10. Respondent denies each and every allegation contained in paragraph 10 of the Complaint.

11. Respondent denies each and every allegation contained in paragraph 11 of the Complaint.

AFFIRMATIVE AND OTHER DEFENSES

FIRST DEFENSE

To the extent any allegation in the Complaint involves events which occurred more than six (6) months before a charge was filed with the National Labor Relations Board, such allegation is barred by the limitations period set forth in Section 10(b) of the National Labor Relations Act.

SECOND DEFENSE

The processing of the underlying Petition is barred because the National Labor Relations Board (“Board”) lacks a quorum. Under the National Labor Relations Act (“NLRA”), all authority is vested in the Board, and while others may act on the Board’s behalf by statute or delegation, the Board lacks a quorum and is, and has been, functioning illegally because the President’s recess appointments are constitutionally invalid. Therefore, the Board’s agents and/or delegees lack authority to act on behalf of the Board. As such, the Petition in this matter was improperly processed, the election improperly held and the results should not be certified and should be dismissed. See Noel Canning v. NLRB et. al., Nos. 112-1115 and 12-1153 (D.C. Cir. Jan. 25, 2013), Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009).

To the extent there are any unanswered paragraphs, Respondent denies each and every allegation therein.

WHEREFORE, Respondent requests that the Complaint be, in all respects, dismissed.

Respectfully submitted this 25th day of June, 2013.

JACKSON LEWIS LLP
1155 Peachtree Street, Suite 1000
Atlanta, Georgia 30309
Telephone: (404) 525-8200
Facsimile: (404) 525-1173

By:



Jonathan J. Spitz

**Attorneys For Respondent, Mission
Produce, Inc.**

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

MISSION PRODUCE, INC.

and

Case 10-CA-106374

RETAIL WHOLESALE AND DEPARTMENT
STORE UNION SOUTHEAST COUNCIL/UFCW

CERTIFICATE OF SERVICE

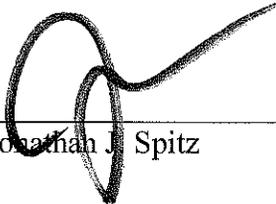
I hereby certify that on the 25th day of June, 2013, I served a true copy of **Answer of**

Respondent to Complaint and Notice of Hearing via U. S. postage-paid, addressed to:

Mr. Claude T. Harrell, Jr.
Regional Director
National Labor Relations Board – Region 10
233 Peachtree Street, N.E.
Atlanta, Georgia 30303

Rick L. Wilson, Union Representative
Retail, Wholesale and Department Store
Union, Southeast Council/UFCW
1838 Metropolitan Parkway SW
Atlanta, GA 30315-5930

By:



Jonathan J. Spitz

**Attorneys For Respondent, Mission
Produce, Inc.**