

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

DFWS, INC., dba THE GUILD SAN JOSE,

Employer,

and

Case 32-RC-248845

UNITED FOOD & COMMERCIAL  
WORKERS UNION, LOCAL 5

Petitioner.

**EMPLOYER'S MOTION TO STAY REGIONAL DIRECTOR'S  
CERTIFICATION OF REPRESENTATIVE, AND TO CONSOLIDATE AND  
CONSIDER EMPLOYER'S NOW-TWO PENDING REQUESTS FOR REVIEW  
TOGETHER**

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**Employer’s Motion to Stay Regional Director’s  
Certification of Representative, and to Consolidate and Consider  
Employer’s Now-Two Pending Requests for Review Together**

Pursuant to Section 102.67(j) of the Board’s Rules and Regulations (“R&R”), Employer DFWS, Inc., doing business as The Guild of San Jose (“The Guild” or “the Company”), respectfully moves the Board for a stay of the Regional Director’s Certification of Representative (“Certification”), along with any and all obligations that may stem from that Certification, in this pending case between The Guild and United Food & Commercial Workers Union, Local 5 (the “Union”). The Certification is the subject of The Guild’s Request for Review of Certification of Representative, filed simultaneously with this Motion to Stay. It also is related to The Guild’s pending Request for Review of Regional Director’s Decision Affirming the Hearing Officer’s Findings and Recommendations and Order to Open and Count Determinative Challenged Ballots, filed on January 30, 2020. That request is presently pending before the Board in this same case. In addition, given the relatedness of The Guild’s two pending Requests for Review, the Company respectfully requests that the Board consolidate and consider them together.

**A. Background**

These proceedings involve a RC Petition filed in Region 32 (within which The Guild is located) on September 25, 2019, and subsequent representation election conducted pursuant to a Stipulated Election Agreement in San Jose, California on October 18, 2019. The original Tally of Ballots was 7 for the Union and 4 against, with 6 challenged ballots – a determinative number.

The parties’ Stipulated Election Agreement, reached between them through their counsel and approved by the Regional Director on October 2, 2019, included an agreed upon unit description. It identified the eligible voters by category or their job classifications. Yet, despite the stipulated unit definition as including the position of Assistant Store Manager, in her Decision

On Challenges and Objections (“Decision”) issued on January 16, 2020, the later-assigned Regional Director of Region 20 erroneously sustained the Union’s challenge to the ballot of the employee in that job classification, rejected his ballot and, in so doing, improperly revised the parties’ stipulated unit definition to exclude the Assistant Store Manager position.

Additionally, the Decision of the Regional Director of Region 20 improperly overruled The Guild’s challenges to the ballots of three Floor Managers, despite their ineligibility to vote as “supervisors” under Section 2(11) of the National Labor Relations Act. (The parties had stipulated that the individual Floor Managers could vote, subject to challenge concerning their eligibility.) Finally, in her Decision, the Regional Director erroneously rejected The Guild’s several objections to clear improprieties surrounding the election and the manner in which the Board Agent conducted it.

**1. The Pending Request for Review Concerning Challenged Ballots and the Employer’s Election Objections.**

On November 18 and 19, 2020, in San Francisco, a Hearing Officer from Region 20 conducted a hearing on the parties’ respective ballot challenges and The Guild’s election objections. Before the hearing, the Board transferred the case from Region 32 to Region 20 for the hearing and for further action by the Regional Director there. On December 12, 2019, the Hearing Officer issued his Report and Recommendations on Challenges and Objections. The Guild filed its Exceptions and a Supporting Brief with the Regional Director in Region 20 on December 26, 2019.

On January 16, 2020, the Regional Director issued her Decision. It affirmed the Hearing Officer’s findings and recommendations in their entirety regarding the remaining determinative Challenged Ballots, eliminated the Assistant Store Manager job classification from the unit, completely overruled the Company’s Objections, and also issued an Order to open and count the

remaining 5 Challenged Ballots “consistent with the forthcoming Notice of Ballot Count.” *See* RD Decision 1/16/2020 at 2.

In her Decision, the Regional Director redefined the collective bargaining unit, without the Assistant Store Manager, as follows:

All full-time and regular part-time Front Desk, Inventory, Cultivation, Processing, Budtender, Distribution Manager, and Floor Manager employees; excluding the Operations Manager, Marketing Director, Store Manager, Assistant Store Manager, Confidential employees, Office Clerical employees, Guards, and Supervisors as defined in the National Labor Relations Act.

*Id.* at 3. The Regional Director then went on to state that, after the counting of the challenged ballots, “Thereafter, I shall issue the appropriate Certification” for the unit as redefined. *Id.*

The Guild timely challenged the Regional Director’s erroneous Decision. On January 30, 2020, within the 14 days allowed under Section 102.67(c), the Company filed with the Board its Request for Review of Regional Director’s Decision Affirming the Hearing Officer’s Findings and Recommendations and Order to Open and Count Determinative Challenged Ballots. The Board’s Executive Secretary accepted that Petition for Review as filed on January 30, 2020, according to the Board’s docket. *See* <https://www.nlr.gov/case/32-RC-248845> (visited on April 10, 2020). That Request for Review remains pending before the Board.

**2. The Regional Director’s Certification Two Months After Counting the Challenged Ballots Leads to the Employer’s Current Second Request for Review.**

On January 31, 2020, immediately after The Guild filed its Request for Review of her erroneous Decision regarding the determinative challenged ballots and its election objections, the Regional Director opened and counted the 5 remaining challenged ballots in accordance with the Order in her earlier decision. The Employer’s representatives were not present for the opening and counting of the ballots. The Regional Director’s Revised Tally of Ballots added 3 votes for

the Union and 2 votes against the Union to the totals in the Original Tally, making the revised total 10-6 in favor of the Union. (The four votes that the Employer still vigorously disputes – those of the three Floor Managers and the Assistant Store Manager – remain dispositive of the outcome.)

No further activity followed for two months, with The Guild's Request for Review still pending before the Board. On March 31, 2020, 60 days after the Regional Director's revised tally, the Regional Director of Region 20 issued the Certification of the Union as the collective bargaining representative for the unit, as she had previously redefined it.

Following issuance of the Certification, on April 2, 2020, by letter addressed directly to the Company's Manager, Dana Anderson, the Union's counsel demanded both information and immediate start in bargaining for a collective bargaining agreement. *See* Carrol Decl. iso Request for Review, Paragraph 8, page 4.<sup>1</sup> With the Certification clearly tainted and defective for the reasons set forth in The Guild's still-pending Request for Review, as well as the Regional Director's erroneous later decision to count the Challenged Ballots and commingle the ballots, the Company has simultaneously filed a separate Request for Review of the Regional Director's erroneous Certification of Representative.

**B. Motion to Stay Certification of Representative.**

For the reasons set forth below, The Guild respectfully requests that the Board immediately stay the Regional Director's improvidently-issued and premature Certification, including any and all obligations that may arise from it, while The Guild exercises its right to seek the Board's review and final ruling on the Company's now-two pending Requests for Review.

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<sup>1</sup> The supporting declaration of Robert K. Carrol is attached as Exhibit B to Employer's Request for Review of Regional Director's Certification of Representative, filed simultaneously with these motions.

A party's request for the Board's review of a Regional Director's decision does not stay the Regional Director's action "unless otherwise ordered by the Board." *See* R&R § 102.67(h). However, a Regional Director's action is not final if the Board grants a Request for Review. *See* R&R §102.67(g). Section 102.67(j)(1)(ii) authorizes a party to "move in writing to the Board" for a stay pending consideration of a Request for Review. The Board may stay a Regional Director's certification order pending its final determination of election-related challenges. *Maremont Corp.*, 239 NLRB 240 (1978).

Here, the Regional Director's premature Certification, including any and all obligations that may arise from it, should be stayed until after the Board makes final determinations on the Company's now-two pending Requests for Review. Simply put, it is highly prejudicial and inefficient for a Regional Director to issue a Certification of a bargaining representative – triggering demands and requirements for the parties to bargain and provide information – before the Board has fully and finally resolved all election-related issues concerning whether any representative, including this Union, actually should be certified.

The Board's position in this respect has evolved and now is settled. As the Board's former Chairman Miscimarra emphasized, "it is objectionable and ill-advised as a matter of policy for regional directors to issue a certification before the Board has had an opportunity to address issues raised by the parties regarding the election." *Republic Silver State Disposal, Inc.*, 365 NLRB No. 145, 2017 WL 5476777 (Oct. 30, 2017), at \*1 n. 1 (Miscimarra, dissenting). As he further explained, the Board's "primary function of fostering labor-management stability is necessarily frustrated if union certification precedes the Board's final resolution of election related issues." *Id.* *See also PCC Structural, Inc.*, 2017 WL 4232984 (Sept. 22, 2017), at \*1 n. 1 (urging stay

“because all parties – especially employees voting in the election – should have the benefit of the Board's resolution of election-related issues” before election or certification).

A majority of the current Board has recently criticized the practice of Regional Directors certifying a union as a bargaining representative before the Board could make a final determination on contested issues, or even before issues could be presented to the Board. *Didlake, Inc.*, 367 NLRB No. 125, 2019 WL 2099781 (May 10, 2019), at \*1 n. 2 (Ring and Kaplan, concurring). “In other words, the union may be certified, and the duty to bargain may attach, before the Board has made a final determination affecting the outcome of the election.” *Id.* The majority further observed that the Board’s 2014 Election Rule “greatly increased the number of requests for review pending before the Board after the regional director’s issuance of a certification . . . .” *Id.* It concluded that “this state of affairs warrants reconsideration in a future rulemaking.” *Id.*

More recently, the Board changed its representation election rules to address the exact situation presented here: Premature certification of the Union as bargaining representative while a Request for Review remains pending before the Board. *See* 84 Fed. Reg. 69524 (Dec. 18, 2019). The Board modified Section 102.69(c)(1)(iii) to preclude such certifications. *See* 84 Fed. Reg. at 69526. The Board summarized that its amendments will require that “[t]he Regional Director will no longer certify the results of an election if a request for review is pending . . . .” *Id.* at 69526. Further, as the Board members addressed, the previous rule meant that “a certified union would often demand bargaining and file unfair labor practice charges alleging an unlawful refusal to bargain even as the Board considered a request for review that, if granted, could render the certification a nullity.” *Id.*<sup>2</sup>

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<sup>2</sup> The Regional Director also acted contrary to the NLRB’s Casehandling Manual, which prohibits opening and counting Overruled Challenged Ballots with a related Request for Review still pending. Even with the 2014 election rule, the Manual still has required: “To help protect voter

This case presents that **exact** scenario. Even with a Request for Review pending before the Board since January 30, 2020, the Regional Director – after inexplicably waiting for two months after issuing her revised tally – forged ahead with the Certification of the Union as the bargaining representative for a unit based on a unilaterally redefined and disputed unit.<sup>3</sup> If successful, The Guild’s Petition for Review concerning Challenged Ballots would result in a different election outcome, while its election objections could result in a new election. Either way, the Certification would become a nullity. However, in order to protect its rights, the Company must now file a separate, additional Request for Review challenging the Certification – even though it concerns issues overlapping with its already-pending Request for Review.

In the meantime, The Guild should not be placed in the untenable position of having potentially to commit resources to bargaining and responding to information requests – and facing the likelihood of unfair labor practice charges without compliance– while its Requests for Review remain pending. *See NLRB v. Louisville Chair Co.*, 385 F.2d 922, 928 (6th Cir. 1967)(employer’s failure to bargain while request for review pending, without a stay, held to be unfair labor practice). The determinative issues concerning whether the Union even should be certified and recognized remain unresolved. Simply put, it is manifestly inefficient and fundamentally unfair to put the cart before the horse and require bargaining or other obligations without a final determination of the election issues. As the Board recognized in adopting its recent amendments, limiting certifications until after resolution of the underlying election issues “eliminates confusion among the parties and

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secrecy, the region should not open and count until the time for filing a request for review has passed and no request was filed or the Board has ruled on the request for review.” NLRB Casehandling Manual (Part Two), Section 11378 (Jan. 2017)(emphasis added).

<sup>3</sup> The Regional Director may have pegged the timing in an effort to avoid the Board’s amended rules. With 14 days for The Guild to file a Request for Review, the Regional Director’s Certification on March 31, 2020 gave the Company until April 14, 2020 – just before the original April 16, 2020 effective date for the Board’s amended rules.

employees and promotes orderly litigation of both representation and consequent unfair labor practice cases.” 84 Fed. Reg. at 69526.

Accordingly, to achieve these goals, and to maintain the status quo to avoid unfairness and prejudice to The Guild and the potential waste of the scarce resources of both the Board and the parties, the Board is respectfully urged to stay the Regional Director’s improvidently-issued and premature Certification, along with any and all obligations that may stem from it, pending its final determination of the Company’s now-two Requests for Review.

**C. Motion to Consolidate and Consider Employer’s Two Pending Requests for Review Together.**

Finally, the Company respectfully requests the Board to consolidate its now-two pending Requests for Review so that it considers them together. The Board has favored consolidation of matters if they are “closely related” or “intertwined.” *Highland Yarn Mills, Inc.*, 310 NLRB 644, 644-645 (1993). Indeed, the Board has recognized that “the parties’ rights to procedural fair play are also important, as are concerns for the parties' rights to procedural fair play are also important, as are our concerns for efficiency and conservation of the Board's resources.” *Service Employees Union, Local 87*, 324 NLRB 774, 777 (1997).

Here, not only are the two Requests for Review filed under the same representation case number, but they have overlapping issues and are inextricably intertwined. The first Request for Review concerns determinative Challenged Ballots and the Company’s Election Objections. The second Request for Review concerns the subsequent Certification after counting of several challenged ballots, but ultimately turns upon the same underlying issues as the first Request for Review. Accordingly, the Company respectfully submits the each of its Requests for Review must be considered and determined together in order for the Board to make a fair, complete, and efficient

determination of the issues – a motion that would not be necessary under the Board’s recent rule amendments.

For each and all of these reasons, the Company respectfully urges the Board to consolidate its now-two Requests for Review and consider them simultaneously.

**D. Conclusion**

For each and all of the above and foregoing reasons, The Guild respectfully requests that the Board grant its Motion to Stay and order a stay of the Regional Director’s March 31, 2020 Certification, along with any and all obligations that may arise therefrom, pending its full and final resolution of all issues raised in the Company’s now-two Requests for Review in this case. Finally, the Company respectfully requests that the Board grant its Motion to Consolidate its two pending Requests for Review and consider them together.

Dated: April 10, 2020

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