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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 20

DFWS, INC., dba THE GUILD SAN JOSE,

Employer,

and

UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL 5,

Union/Petitioner.

No. 32-RC-248845

**PETITIONER UFCW LOCAL 5'S
RESPONSE TO THE EMPLOYER'S
REQUEST FOR REVIEW OF
REGIONAL DIRECTOR'S
CERTIFICATION OF
REPRESENTATIVE AND TO THE
EMPLOYER'S MOTION TO STAY
THE REGIONAL DIRECTORS
CERTIFICATION OF
REPRESENTATIVE**

**I. THE BOARD SHOULD DENY THE EMPLOYERS REQUEST FOR REVIEW OF
THE REGIONAL DIRECTORS CERTIFICATION OF REPRESENTATIVE
BECAUSE THE REGIONAL DIRECTOR CORRECTLY ISSUED THE
CERTIFICATION AND THE EMPLOYER'S NEW REQUEST IS MERITLESS**

The DFWS, INC., dba THE GUILD SAN JOSE (“Guild” or “Employer”) incorrectly and in bad faith alleges that the Regional Director should not have opened and counted the challenged ballots. The Employer claims it was only a little tardy in filing its Request for Review of the Regional Director’s Decision Affirming the Hearing Officer’s Findings and Recommendations on Challenged Ballots and Objections (“Decision”), which issued on January 16, 2020. . However, according to Board’s Rules the Employer is incorrect for two reasons.

Since the Regional Director's Decision resolving the determinative challenged ballots constituted a "Final Disposition" under Section's 102.367(c) and 102.69(c)(2) of the Board's Rules, the Employer's tardy service and filing rendered its Request for Review of the Decision untimely. On January 16, 2020, the Regional Director issued her Decision along with an Order to open and count determinative challenge ballots. The Regional Director set January 30, 2020 as the deadline to properly file and serve a Request for Review. The next day, on January 17, 2020, the Regional Director issued a new Order specifying that the Region would open and count the challenged ballots on January 31, 2020, if the Employer did not file a timely request for review with the NLRB by January 30th.

Since the Employer did not serve the Regional Director with its Request for Review by January 31, 2020, pursuant to the above cited Board Rules, the Employers Request for Review of the Decision was untimely. The Employer had been clearly warned by the Regional Director and informed when the challenged ballots would be opened and counted, namely on January 31, 2020. Therefore, it was appropriate and within the Board's rules for the Regional Director to open and count the challenged ballots on a January 31, 2020, since the Employer failed to follow the Director's orders and the Board's rules concerning proper and timely filing.

The second reason the new Employer's new Request for Review of the Certification of Representative should be denied is because the Employer was even more untimely. The Employer did not file and serve a Request for Review within seven days of the Region's revised tally of ballots. The revised tally of ballots issued on January 31, 2020. The original tally had seven Guild employees voting for the Union and four against, and the revised tally had ten employees voting for the Union and six against. The Employer's deadline to challenge the revised tally of ballots was February 7, 2020. Board Rule Section 102.69(c)(3)(e) required the Employer to file objections to the revised tally by February 7, 2020, which the Employer failed to do. Thus, the Employer's current Request for Review of the Regional Director's Certification Decision is even more untimely and, therefore, less relevant than the Employer's first Request for Review.

A. THE BOARD SHOULD ALSO DENY THE EMPLOYER'S NEW REQUEST FOR REVIEW OF THE DIRECTOR'S CERTIFICATION OF REPRESENTATIVE BECAUSE THE EMPLOYER HAS SIMPLY RECYCLED THE SAME ARGUMENTS IT RAISED IN ITS INITIAL REQUEST FOR REVIEW

It is inappropriate and contrary to the Board rules for the Employer to resubmit the same arguments it submitted below as part of a new Request for Review. The Employer is wasting the Board's and parties resources by burdening the record with the same arguments it raised below. Clearly the Board did not rule on the Employer's January 31, 2020 Request for Review because it was untimely.

Arguendo, the Board chooses to diverge from its own Rules and considers on the merits the Employer's untimely January 31, 2020 Request for Review, then obviously the Board will also consider the Union's February 6, 2020 response to the Employer's Request for Review. Unlike the Employer, however, Petitioning Union will not burden the record by restating its original responses to the Employer's tardy request for review, but Petitioning Union fully incorporates its responses in this Opposition as though fully set forth herein.

To the extent the Board considers the Employer's untimely January 31, 2020 Request for Review, the Board should have little difficulty affirming the Regional Director's January 16, 2020 Decision. As set forth in the Regional Director's Decision, "I have carefully reviewed the Hearing Officer's report and employer's brief, the record evidence before me falls well short of meeting standards" to support the company's exceptions to the Hearing Officer's report. (*See* Decision, page 2, and footnote 1, *emphasis* added.) While the Employer feigns that its Exceptions to the Hearing Officer's Report and Request for Review of the Regional Director's Decision are based on close facts, the Decision clearly shows the Employer never had grounds for its challenges.¹

Accordingly, the Board should either deny the Employer's newest Request for Review of the Certification of Representative because the Employer has been twice been untimely twice or

¹ The Employer also never asserted in its Request for Review that it challenged the Director's Decision concerning the Employer's Objections to the Conduct of the Election, thus the Employer cannot ask the Board to consider what it failed to raise.

because neither of the Employer's Requests for Review have any merit. As the Employer's simultaneously filed Motion for Stay and Motion for Consolidation hinge on the Employer's failure to comprehend that it was twice untimely, the Board should easily deny these Employer motions as well.

II. CONCLUSION

For the foregoing reasons the Board should deny the Employer's Request for Review of Certification of Representative, Motion for Stay, and Motion for Consolidation.

Dated: April 20, 2020

WEINBERG, ROGER & ROSENFELD
A Professional Corporation



By:

ALAN CROWLEY

Attorneys for Union/Petitioner UNITED FOOD &
COMMERCIAL WORKERS UNION, LOCAL 5

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On the date below, I served upon the following parties in this action:

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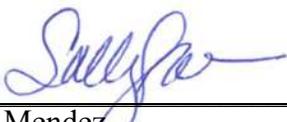
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copies of the document(s) described as:

PETITIONER UFCW LOCAL 5'S RESPONSE TO THE EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S CERTIFICATION OF REPRESENTATIVE AND TO THE EMPLOYER'S MOTION TO STAY THE REGIONAL DIRECTORS CERTIFICATION OF REPRESENTATIVE

[X] BY ELECTRONIC SERVICE I caused to be transmitted each document listed herein via electronic service.

I certify under penalty of perjury that the above is true and correct. Executed at Vallejo, California, on April 20, 2020.



S. Mendez