

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

FRED MEYER STORES, INC.

and

Case 19-CA-32171

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

**REPLY TO RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE
WHY SUMMARY JUDGMENT SHOULD NOT BE GRANTED**

On December 2, 2009, Respondent filed its Response to the Board's November 19, 2009, Notice to Show Cause why Counsel for the General Counsel's Motion for Summary Judgment (the "Motion") should not be granted. In its Response, Respondent essentially asserts that, because there was an improper delegation of authority to the remaining Board members, as found in *Laurel Baye Healthcare of Lake Lanier, Inc.*, 564 F.3d 469 (D.C. Cir. 2009), there remains a question concerning representation to be resolved by a full complement of the Board that must precede any decision on the merits of the alleged unfair labor practices. This, it contends, is the reason why summary judgment is inappropriate. Respondent further contends that oral argument is necessary to address its assertions. Respondent is mistaken.

As the Board has recently re-affirmed in *Chenega Integrated Systems*, 354 NLRB No. 56, n 1 (July 29, 2009):

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), *petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009)* (No. 08-1457); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), *rehearing denied* No. 08-1878 (May 20, 2009). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), *petitions for rehearing denied* Nos. 08-1162, 08-1214 (July 1, 2009).

See also *Fred Meyer Stores, Inc.*, 354 NLRB No. 56 n 1, 2 (September 30, 2009).

Thus, the Board clearly was acting within its statutory authority on April 21, 2009, when it issued its Order denying Respondent's Request for Review, finding that it raised no substantial issues warranting review. A copy of the Order is attached as Exhibit F to the Motion.

As set forth in the Motion, the Regional Director's Corrected Certification of Representative issued subsequent to the Board's Order denying Respondent's Request for Review, thus established the Union as the exclusive collective-bargaining representative of the voting group of nutrition department employees of Respondent's Lacey and Tumwater stores. Accordingly, there remained no material issues of disputed fact regarding the Union's status as the exclusive collective-bargaining representative of these employees or of Respondent's obligation to recognize and bargain with the Union. *Concrete Form Walls, Inc.*, 347 NLRB 1299 (2006).

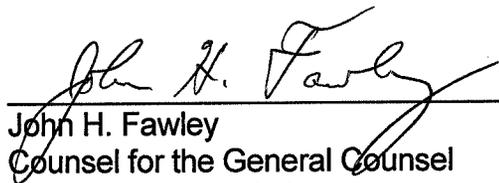
Where, as here, a party refuses to meet and bargain following certification by the Board, it is not the policy of the Board to allow that party to relitigate in an unfair labor practice proceeding those issues which that party has already litigated and that the Board decided in a prior representation proceeding, absent newly discovered, relevant evidence not available at the time of the litigation in the prior representation proceeding. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *Washington Beef, Inc.*, 322 NLRB 398 (1996); § 102.67(f) of the Board's Rules and Regulations. Respondent has not asserted, nor can it assert, the existence of any newly discovered relevant evidence on these issues. As such, summary judgment is appropriate.

Finally, Respondent's request for oral argument on this issue should be denied. As noted above, the Board has already considered and decided the issue of its statutory authority that Respondent raises in its response. The Board found that it was acting within its statutory authority on April 21, 2009, when it issued its Order denying Respondent's Request for Review. Moreover, the United States Supreme Court has already agreed to hear oral argument on this very issue. See *New Process Steel, L.P. v. NLRB*, 564 (7TH Cir. 2009), cert. granted, 130 S.Ct. 488 (2009) (No. 08-1457). Accordingly, there is no need for the Board to schedule oral argument to consider the same issue again.

Since the Board acted appropriately in deciding the representation case issue, the unfair labor practices are properly before it in the instant case as a matter ripe for disposition on summary judgment. Thus, it is respectfully requested that the Board grant

the Motion for Summary Judgment and make findings of fact and conclusions of law that Respondent's conduct violated §§ 8(a)(1) and (5) of the Act as alleged in the Complaint.

DATED at Seattle, Washington, this 8th day of December, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December 2009, I caused copies of Reply to Respondent's Response to Notice to Show Cause Why Summary Judgment Should Not Be Granted to be served upon each of the following via E-File, E-Mail, and Federal Express:

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Victoria L. Perkins, Secretary