**UNITED STATES OF AMERICA**

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| **FRED MEYER STORES, INC.,**<br><br>Respondent,<br><br>and<br><br>**UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1439, affiliated with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION,**<br><br>Charging Party. | Case No. CA-31994<br><br>**RESPONSE TO NOTICE TO SHOW CAUSE**<br><br>**Oral Argument Requested** |

Fred Meyer Stores, Inc. ("Employer") hereby asserts that the General Counsel's ("GC") Motion for Summary Judgment must be denied and the Employer is due a hearing before the Board because there are questions of law and of fact that have not been properly resolved in this case. The Complaint in this case alleges that United Food and Commercial Workers Local 1439 ("Union") was certified as the exclusive collective-bargaining representative of certain employees employed in the nutrition department at the Employer's Francis Street Store in Spokane, Washington ("Francis Store") in Case No. 19-RC-15068, and that the Employer violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("Act") by failing and refusing to bargain with the Union regarding the nutrition employees. (Ex. B, attached to General Counsel's Motion for Summary Judgment.)[1] The Employer has not violated the Act because it has no duty to bargain with the Union regarding the nutrition employees.

[1] Citations to Exhibits in this case are made to those Exhibits that are attached to the General Counsel's Motion for Summary Judgment filed in this case, and are hereinafter are referred to as (Ex. __.).

The Certification of Representative issued by the Regional Director in Case No. 19-RC-15068 is invalid because in issuing the Certification the Regional Director improperly relied on the Board's April 21, 2009, Order denying the Employer's March 28, 2009, Request for Review of the Regional Director's Decision and Direction of Election in Case No. 19-RC-15068. (Exs. F, D, D-2, E.) The Regional Director's reliance on the Board's Order was improper because the Order itself was invalid, since the two-member "Board" who issued the Order lacked statutory authority to do so.

As a result of these procedural irregularities, the Employer's Request for Review must be reinstated and held in abeyance until a properly constituted Board consisting of no less than the statutorily required three-member quorum has been appointed and confirmed. Until such a properly constituted Board issues a valid Order resolving the Employer's Request for Review, questions of law and of fact remain in this case, and the GC's Motion for Summary Judgment must be denied. Furthermore, the Employer should not be forced to prematurely litigate the representational issues raised by the GC's Motion; such issues should not be litigated until a valid Board decision in Case No. 19-RC-15068 is issued. The Employer respectfully requests that the parties be permitted to present oral argument before the Board in this case.

## I. PROCEDURAL BACKGROUND

This case arose out of a petition filed by the Union on February 8, 2008, seeking to represent the employees employed in the nutrition department of the Employer's Francis Street Store in Spokane, Washington. (Ex. C.) The Union contended that the nutrition employees should be granted a self-determination election to establish: (1) whether they wish to be included in the existing multi-store bargaining unit of grocery employees employed at the Francis store, which the Union currently represents; or (2) whether they wish to remain unrepresented. (Ex. C.) The Employer contested the appropriateness of the petitioned-for unit.

A hearing was held in Spokane, Washington, February 20 through 21, 2009. (Ex. D-2, p. 3.) The parties submitted briefs to the Regional Director, who issued a Decision and Direction of Election on March 7, 2009, directing a self-determination election in a unit limited to nutrition employees at the Employer's Francis Street Store to determine whether those employees wish to be added to the existing multi-store grocery unit. (Ex. D.)

On March 28, 2009, the Employer filed a Request for Review of the Regional Director's Decision and Direction of Election. (Ex. D-2.) The election was held on April 24, 2009, and the ballots were impounded pending the Board's resolution of the Employer's Request for Review. On April 21, 2009, Board members Wilma Liebman and Peter Schaumber, the only two remaining members of the current Board, purportedly issued an "Order" denying the Employer's Request for Review on the grounds that those two members agreed with the Regional Director that the Francis Street Store nutrition employees share a community of interest with multi-store grocery unit employees. (Ex. E.) The ballots were then opened and counted, and the Regional Director issued a Certification of Representative on May 7, 2009, which placed the nutrition employees in the multi-store grocery unit. (Ex. F.)

In a letter dated June 26, 2009, the Employer advised the Union of its position that the two-member Board did not have the statutory authority to issue the April 21, 2009 Order and that, therefore, there is no duty to bargain with the Union regarding the terms and conditions of employment of the nutrition employees working at the Francis Street Store. (Ex. H.) The Employer also notified the Union that it would not participate in bargaining about this subject. (Ex. H.) On or about July 6, 2009, the Union filed a charge alleging that the Employer's refusal to bargain violates Section 8(a)(5) of the Act. (Ex. A.)

## II. DISCUSSION

### A. The GC's Motion for Summary Judgment Must be Denied because the Question of whether the Employer has a Duty to Bargain with the Union Regarding the Nutrition Employees at the Francis Street Store Raises Material Issues of Fact and Law that Require a Hearing Before an Administrative Law Judge.

#### 1. The Employer does not Have a Duty to Bargain with the Union Regarding the Nutrition Employees because the "Board's" Order and the Subsequent Certification of Representative in Case No. 19-RC-15068 are Invalid as a Matter of Law.

As a matter of law, three members "at all times" constitute a quorum of the Board. 29 USC § 153(b). *See also Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F3d 469, 474-75 (D.C. Cir. 2009) ("The Board does not have three members. It cannot act.").[2] The Board alone has the authority to rule on the Employer's Request for Review. 29 CFR § 102.67(e, f). The authority for such Board action "could be taken by no fewer than two members acting as a quorum of a three-member panel." *KFC Nat'l Management v. NLRB*, 497 F2d 298, 302, (2nd Cir 1974) (citing 29 USC § 153(b)).

In this case, however, the two remaining members of the Board were not acting as a quorum of a three-member panel; they were acting as <u>the only two members</u> of the Board. Thus, these two remaining members lacked the authority to issue an Order denying a Request for Review. *KFC National Management Corp.* 497 F2d at 303 (a denial of a Request for Review that is rendered by anything less than a duly authorized Board panel is invalid as a matter of law).

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[2] *But c.f. Northeastern Land Services, LTD v. NLRB*, 560 F3d 36 (1st Cir 2009); *New Process Steel*, 564 F3d 840 (7th Cir 2009); *Snell Island SNF LLC v. NLRB*, 568 F3d 410 (2nd Cir 2009). In *Snell Island*, however, the 2nd Circuit agreed with some of the holdings in *Laurel Baye*, and suggested that this issue will eventually need to be settled by the Supreme Court.

The Board's December 28, 2007 preemptive delegation of all of the Board's powers, including the power to decide cases that were not even pending at that time, to a three-member panel may have been intended to comply with the statutory requirement that "at all times" a quorum of the Board is three members, and that a quorum of two members is sufficient to a three-member panel. 29 USC § 153(b). However, once Member Kirsanow's term of appointment expired on December 31, 2007, the remaining Members Liebman and Schaumber no longer represented the two-member quorum of a three-member panel. *Laurel Baye,* 564 F3d at 471. Instead, they necessarily became a two-member panel, which by definition lacks the quorum required by 29 USC § 153(b).

Considered another way, the Board improperly delegated its authority, and in doing so exceeded the terms of its authorizing statute, the National Labor Relations Act ("the Act"). On May 1, 2009, the United States Court of Appeals for the District of Columbia Circuit ruled in *Laurel Baye,* that the Board's previously stated position that the Act allowed the Board to delegate all of its powers to a three-member panel, even though the term of one of those three members was about to expire, was "transparent," inappropriate and without authority. *Laurel BayeHealthcare of Lake Lanier, Inc.*, 564 F3d at 472. Although other circuits have upheld orders and actions of the current two-member Board,[3] the holding of the D.C. Circuit should be considered highly persuasive, since any review of the Board's decision in this matter will be filed with the D.C. Circuit.

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[3] *Northeastern Land Services, LTD v. NLRB*, 560 F3d 36 (1st Cir 2009); *New Process Steel*, 564 F3d 840 (7th Cir 2009); *Snell Island SNF LLC v. NLRB*, 568 F3d 410 (2nd Cir 2009).

In *Laurel Baye*, the D.C. Circuit held that the Board improperly delegated its power to a three-member panel that the Board recognized would consist of only two-members within three days of the effective date of delegation. *Id.* Although the Act gives the Board the authority to delegate any or all of its powers to "any group of three or more members," the Act does not authorize delegation of all of its power to a two-member panel. 29 USC § 153(b). The D.C. Circuit held that the Board's interpretation of the effective delegation of the Board's powers to a two-member group, as the purported quorum of a three-member group when there are not three members on the current Board, cannot be construed as a reasonable construction of the Act. *Laurel Baye Healthcare of Lake Lanier, Inc.*, 564 F3d at 473. Because the enabling statute unambiguously states that "three members of the Board shall, <u>at all times</u>, constitute a quorum of the Board," 29 USC § 153(b),

> [i]t therefore defies logic as well as the text of the statute to argue, as the Board does, that a Congress which explicitly imposed a requirement for a three-member quorum "at all times" would in the same sentence allow the Board to reduce its operative quorum to two without further congressional authorization.

*Laurel Baye Healthcare of Lake Lanier, Inc.*, 564 F3d at 472.

Since the Board only had two members on April 21, 2009, the Order issued by only those two members was invalid as a matter of law. *KFC Nat'l Management*, 497 F2d at 303. Because the "Board's" Order, issued by a two-member group therefore lacking the requisite three-member quorum, was without legal authority, the Regional Director's Certification of Representative based upon that Order was also invalid as a matter of law. With no valid decision by a duly authorized panel of the Board, 29 CFR §102.67(b) required that "all ballots shall be impounded <u>and remain unopened pending such a decision</u>." *See also* CHM § 11274 ("the regional director <u>may **not** open and count any ballots that may be challenged until</u>

the **Board** has ruled on any request for review that may be filed.") (emphasis added) Thus, the Regional Director's Certification of Representative was also invalid and had no legal effect.

"It is a fundamental rule of administrative law that the one who decides a case must hear it. A necessary corollary of this principle is that he who decides the case must have authority to do so." *Flav-O-Rich, Inc. v. NLRB*, 531 F2d 358, 363 (6th Cir 1976) (quoting *US v. Morgan*, 298 US 468, 481 (1936), *internal citation omitted*). Here, the Board did not review the Regional Director's ruling, because there was no properly authorized, acting Board. "If nothing else, [the Employer is] entitled to have its motion considered by those with legal authority to pass upon it." *Id.* The Employer must be granted a legitimate Review by the Board or a properly composed delegee group that complies with the Act. 29 USC § 153(b).

**2. Since Decision by a Duly Authorized Board has not been Rendered on the Employer's Request for Review, the Questions of Representation raised by the GC's Motion for Summary Judgment Cannot be Properly Adjudicated in this Case.**

As shown above, until a valid decision by a duly authorized panel of the Board is issued, the Regional Director is precluded, as a matter of law, from certifying the results of the election. It is, therefore, axiomatic that the questions of representation raised by the Employer's pending Request for Review cannot be properly adjudicated in the context of this refusal to bargain charge. Indeed, doing so would put the cart before the horse.

In other words, in the absence of a valid decision by a duly authorized panel of the Board, the Employer's Request for Review remains pending and the Employer should not be forced to prematurely litigate the representational questions until a valid Board decision in Case No. 19-RC-15068 has been rendered. That is the only question before the Board in Case No.

19-CA-31994 and that is the only issue to be decided at this point. Only after a valid Order has been issued can the questions of representation be properly addressed.[4]

Since the questions of representation cannot be properly addressed until after a valid Order has been issued, this is not a "test of certification" case in which the Employer is testing the Union's certification as bargaining representative in the underlying representation proceeding by refusing to bargain with the Union. In such test of certification cases, the Employer's refusal to bargain is generally predicated on its objection to the appropriateness of the unit certified by the Regional Director, and the Board almost always grants summary judgment against the Employer because the "representation issues" raised by the Employer "were or could have been litigated in the prior representation proceeding," *Rochelle Waste Disposal, LLC*, 354 NLRB No. 18, slip op at 1 (April 30, 2009), or because the Employer did not raise "any representation issue that is properly litigable in [the] unfair labor practice proceeding." *Eagle Ray Electric Co.*, 354 NLRB No. 27, slip op. at 1 (May 29, 2009); *see also Hartzheim Dodge Hayward*, 354 NLRB No. 22, slip op. at 1 (May 29, 2009).

In the present case, the Employer could not have previously raised its objection to the Board's authority to issue a decision on its Request for Review, and the Regional Director's subsequent authority to certify the results of the election, in the underlying representation proceeding, and the issue of whether or not the Board had the authority to issue its decision on the Employer's Request for Review is properly raised at this time and can be litigated in this unfair labor practice proceeding.[5]

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[4] *But c.f. KFC Nat'l Management Corp.* 214 NLRB 232, 234 (1974), *enf. w/o op.* 91 LRRM 2194 (2nd Cir 1975).

[5]The Employer does not intend to waive the arguments and positions raised by its pending Request for Review. Indeed, the Employer explicitly intends to preserve such

[Footnote continued on next page]

## III. CONCLUSION

WHEREFORE, having shown just cause why the General Counsel's Motion for Summary Judgment should not be granted, Fred Meyer Stores, Inc., respectfully requests that the Motion be dismissed in its entirety. Respondent further requests that a hearing before on these issues be held before an Administrative Law Judge, and that the Regional Director's Certification of Representative be suspended, if not overturned, until a properly constituted Board hears and resolves the Employer's Request for Review in Case No. 19-RC-15068.

DATED: September 2, 2009.

BULLARD SMITH JERNSTEDT WILSON

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arguments until they are ripe (i.e., until either a duly authorized decision is reached by the Board or it is conclusively determined that the Board's April 21, 2009 Order was valid)

## CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2009, I served true and correct copies of the foregoing RESPONSE TO NOTICE TO SHOW CAUSE on the following person via E-File and E-Mail:

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