UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRED MEYER STORES, INC.

and

Case 19-CA-32311

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 March 8, 2010, Respondent filed its Response to the Board's February 22, 2010, 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. Respondent also argues that it has been bargaining with the Union in good faith, as evidenced by an exchange of substantive proposals, including the Employer's last proposal to delay bargaining, and that the question concerning whether it has engaged in good faith bargaining is a question of fact that can only be resolved by an administrative law judge after a hearing. As such, Respondent contends that summary judgment is inappropriate. Respondent further contends that oral argument is necessary to address its assertions. Respondent is mistaken regarding its contentions.

1.) As for the issue concerning whether there remains a question concerning representation to be resolved by a full complement of the Board before deciding the merits of the alleged unfair labor practices, the Board has recently re-affirmed in *Chenega Integrated Systems*, 354 NLRB No. 56, n 1 (July 29, 2009), that it is not:

> 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 *Teamsters Local 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *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), *cert. granted,* 130 S.Ct. 488 (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. 127, n1, 2 (January 4, 2010); *Fred Meyer Stores, Inc.,* 354 NLRB No. 88, n1, 2 (September 30, 2009). Thus, the Board clearly was acting within its statutory authority on June 11, 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 establishing the Union as the exclusive collective-bargaining representative of the voting group of Playland Department employees of Respondent's

University Place retail store located in Tacoma, Washington. 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.

2.) Moreover, Respondent's assertion as an affirmative defense that it has been bargaining with the Union in good faith must fail. Respondent attempts to characterize its November 5, 2009, and January 7, 2010, letters as demonstrating that it is bargaining in good faith about the time, date and place of bargaining and exchanging proposals regarding the substantive terms and conditions of employment of the Playland Department employees. Copies of the letters are attached as Exhibits M and N, respectively, to the Motion. However, Respondent ignores the fact that its November 5, 2009, letter to the Union expressly states that Respondent does not believe that it has a duty to start bargaining with the Union regarding the Playland Department employees, and that it will not have a duty to start bargaining until its Request for

Review is resolved. Respondent concludes its November 5, 2009, letter by asking the Union to state a position regarding whether it will agree to either postpone its demand to bargain until there is an ultimate resolution of Respondent's Request for Review, or until expiration of its extant Pierce County common check unit collective-bargaining agreement (nearly 6 months later and nearly a year after Certification issued). While on the surface, this may appear that Respondent was proposing to commence bargaining in 6 months, on or after May 1, 2010, Respondent's overriding contention remained the same: certification of the Playland Department employees as part of the common check unit employees is inappropriate and any bargaining would be provisional on the Supreme Court determining that a two-member Board had authority to issue Orders denying a Request for Review and/or a fully constituted Board reissuing such an Order.

Similarly, in its January 7, 2010, letter Respondent continues to contend that it does not have a duty to bargain with the Union until the two-member Board issue is resolved. Consistent with this position, Respondent states that the Union's information request will be held in abeyance until the Union is properly certified as the exclusive representative of the Playland Department employees. Respondent then proceeds to reject the Union's proposal to apply the extant Pierce County common check unit collective bargaining agreement to the Playland Department employees until such time as the Union's status as exclusive representative of the Playland Department employees has been resolved. Accordingly, Respondent's "substantive proposal" two months later was to again postpone bargaining until ultimate resolution of Respondent's Request for Review or until the expiration of the common check unit collective bargaining agreement. As before, Respondent's offer to bargain beginning May 1,

2010, was not a bona fide offer to commence bargaining; it was not even willing to honor the Union's request for information pending final resolution of the two-member Board issue.

Respondent's solicitation of proposals is equally unavailing. As set forth in the letter, Respondent's "solicitation" is paired with its reiteration that there will be no movement until some ultimate resolution by the Supreme Court and a fully-constituted Board. Thus, in both of Respondent's letters, consistent with its position in the two other matters decided by this Board within the past 7 months,[1] Respondent continues to assert that it has no duty to bargain until the two-member Board issue is resolved by the Supreme Court and a fully constituted Board. Such position conditions bargaining on a provisional event and does not constitute good faith bargaining. *See, e.g., Henry M. Hald High School Ass'n.*, 213 NLRB 463 (1974), *enf'd.*, 559 F.2d 1204 (2nd Cir. 1977) (failure to bargain in good faith found in part due to postponement requests premised on pending state court decision). As such, summary judgment is appropriate.

3.) While Respondent attempts to characterize its efforts as bargaining in good faith, it fails to mention that this is the third time Counsel for General Counsel moves the Board to transfer cases to the Board and issue summary judgment against Respondent in similar self-determination election matters. The Board granted summary judgment in the earlier cases. *Fred Meyer Stores, Inc.,* 354 NLRB No. 127 (January 4, 2010); *Fred Meyer Stores, Inc.,* 354 NLRB No. 88 (September 30, 2009). There, as here,

[1] *Fred Meyer Stores, Inc.,* 354 NLRB No. 127 (2010); *Fred Meyer Stores, Inc.,* 354 NLRB No. 88 (2009).

Respondent claimed that it had no duty to bargain until the two-member Board issue was resolved.

Rather than simply admit it is following its established pattern here, Respondent instead has proposed to postpone bargaining until resolution of the two-member Board issue or the expiration of the extant Pierce County common check unit collective bargaining agreement. Whatever Respondent terms its new tactic, its essence remains. As set forth above, proposing to postpone bargaining until an indefinite time in the future and/or over 6 months after a request to bargain (and nearly a year after Certification) constitutes a refusal to bargain.

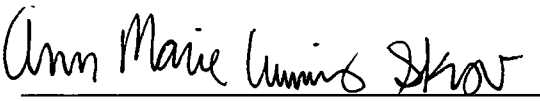
Moreover, Respondent's attempt to embarrass the Board by characterizing its prior decisions as a rush to summary judgment is also disingenuous, at best. Despite Respondent's mischaracterization of events, the fact that the parties executed an agreement resolving their dispute as to that unit on the very same day the Board issued its Order Granting Summary Judgment in that case, does not change the facts: Respondent had failed and refused to bargain, as found by this Board. A subsequent bargained for settlement does not constitute evidence that there had been issues of fact and law to be resolved at the time the case was decided. Parties are always encouraged to attempt to reach settlement of matters, even after the filing of motions for summary judgment.

4.) 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 June 11, 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 F.3d 840 (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 and Respondent's affirmative defense that the parties are, in fact, bargaining is a failed attempt to argue that a proposal to postpone bargaining indefinitely and/or over 6 months after a request to bargain (and nearly a year after Certification) constitutes bargaining, 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 10th day of March, 2010.



Ann Marie Cummins Skov
Counsel for the General Counsel
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2010, 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 regular mail:

E-File:

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 - 14th Street NW, Room 11602
Washington, D. C. 20570
Phone: (202) 273-1067

E-Mail & regular mail:

Richard J. Alli, Jr., Attorney
BULLARD SMITH JERNSTEDT WILSON
1000 SW Broadway, Suite 1900
Portland, OR 97205
Phone: (503) 248-1134
Facsimile: (503) 224-8851
ralli@bullardlaw.com

E-Mail & regular mail:

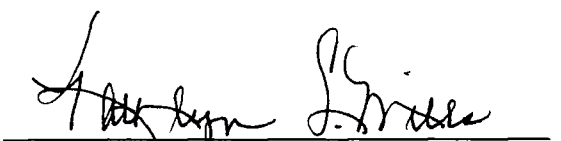
Fred Meyer Stores, Inc.
Attn: Cynthia Thornton, Vice-President
3800 SE 22nd Ave.
Portland, OR 97202-2999
Phone: (503) 797-7781
Facsimile: (503) 797-7772
Cynthia.thornton@fredmeyer.com

E-Mail & regular mail;

UFCW Local 367
Attn: Finley Young, Attorney
6403 Lakewood Dr W
Lakewood, WA 98467-3331
Phone: (253) 589-0367
Facsimile: (253) 589-1512
Finley@ufcw367.org

E-Mail & regular mail:

Fred Meyer Stores, Inc.
Attn: Carl Wojciechowski
3800 SE 22nd Ave.
Portland, OR 97202-2999
Phone: (503) 797-7781
Facsimile: (503) 797-7770
Carl.wojciechowski@fredmeyer.com



Kathlyn L. Mills, Secretary