Fred Meyer Stores, Inc. *and* United Food and Commercial Workers Local 367, affiliated with United Food and Commercial Workers International Union. Cases 19–CA–32311 and 19–RC–15194

August 26, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND BECKER

On May 7, 2010, the Board issued a Decision and Order in this proceeding, which is reported at 355 NLRB No. 30.[1] Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2625, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the Board issued an order setting aside the above-referenced decision and order, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has consolidated these proceedings and delegated its authority in both proceedings to a three-member panel.[2]

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. The Board's May 7, 2010 decision states that the Respondent is precluded from litigating any representation issues because, in relevant part, they were or could have been litigated in the prior representation proceeding. The prior proceeding, however, was a two-member decision and we do not give it preclusive effect.

We have considered the Respondent's request for review of the Regional Director's Decision and Direction of Election, and find that it raises no substantial issues warranting review. Accordingly, we affirm the decision to deny the request for review in the prior proceeding.[3]

Having resolved the representation issues raised by the Respondent in this proceeding, we next consider the question whether the Board can rely on the results of the election. For the reasons stated below, we find that the election was properly held and the tally of ballots is a reliable expression of the employee's free choice.

As an initial matter, had the Board decided not to issue decisions during the time that the delegee group consisted of two Board Members, the Regional Director would have conducted the election as scheduled and impounded the ballots. In this regard, Section 102.67(b) of the Board's Rules and Regulations states:

> The Regional Director shall schedule and conduct any election directed by the [Regional Director's] decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted[,] ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision. (Emphasis in original.)

See also Casehandling Manual (Representation) Secs. 11274, 11302.1(a) (same). In such a scenario, after resolving the representation issues, we would direct that the impounded ballots be opened and counted.

Thus, it is clear that the decision of the two sitting Board Members to continue to issue decisions did not affect the outcome of the election. With or without a

[1] On June 11, 2009, the two sitting members of the Board issued an Order denying the Respondent's request for review in Case 19–RC–15194. 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 powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

[2] Consistent with the Board's general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes the members who participated in the original decision. Furthermore, under the Board's standard procedures applicable to all cases assigned to a panel, the Board Members not assigned to the panel had the opportunity to participate in the adjudication of this case prior to the issuance of this decision.

[3] In agreeing with the Regional Director's finding that the three Playland attendants constitute an appropriate voting group, we particularly rely on his findings that both the University Place attendants and the existing University Place CCK unit employees share common supervision, fall within the same customer service organizational section, work close to one another inside the same store, and have regular contact with one another. We also note that there is no evidence that the University Place attendants and the attendants who work at the other Pierce County stores share common supervision or have frequent contact with one another, or that there is any significant interchange. Accordingly, we find without merit the Employer's assertion that the only appropriate unit must include the Playland attendants at all four stores.

Member Becker concurs, for the reasons set forth in the Regional Director's decision.

two-member decision on the original request for review, the election would have been conducted as scheduled. This result is required by Section 102.67(b) of the Board's rules, and, under *New Process Steel*, the two sitting Board Members did not have the authority to issue an order directing otherwise. Since the timing of the election was not affected by the issuance of a two-member decision on the request for review, we find that the decision of the Regional Director to open and count the ballots was, at worst, harmless error that did not affect the tally of ballots. Similarly, we find that the Regional Director's Certification of Representative based on that tally was valid.[4] Accordingly, inasmuch as there is no valid basis for challenging the results of the election or the Regional Director's Certification of Representative, we will rule on the Acting General Counsel's Motion for Summary Judgment.

Ruling on Motion for Summary Judgment

The Respondent admitted its refusal to bargain prior to the decision in *New Process Steel*, but contests the validity of the Union's certification. Having found no merit in the Respondent's challenges to the representation proceedings, we grant the Motion for Summary Judgment and, to the extent consistent herewith, adopt the findings of fact, conclusions of law, remedy, and order set forth in the decision and order reported at 355 NLRB No. 30, which has been set aside and which is incorporated herein by reference.[5]

Dated, Washington, D.C. August 26, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Craig Becker, Member

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[4] There is no question that a majority of valid ballots was cast for the Union. To the extent that the date of the Certification of Representative may be significant in future proceedings, we will deem the Certification of Representative to have been issued as of the date of this decision.

[5] The Respondent has refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeals. The complaint so alleges and the Respondent admitted that allegation. We presume that Respondent's legal position remains unchanged, and therefore conclude that the Respondent will continue to refuse to bargain for that purpose notwithstanding the Board's decision on the representation issues in this matter. We therefore find that further proceedings would serve no purpose other than to delay the enforcement of employees' rights under the Act. We further find that no party will be prejudiced by the disposition of the motion for summary judgment at this time. If the Respondent has or intends to commence bargaining at this time, it may file a motion for reconsideration so stating and the Board will issue an appropriate order.

In incorporating the prior decision, we note that we no longer rely on *Alta Vista Regional Hospital*, 352 NLRB 809 (2008).