

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

MARLENE'S NATURAL FOODS AND DELI

Employer

and

Case 19-RC-359513

**UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 367, CHARTERED BY THE UNITED
FOOD AND COMMERCIAL WORKERS, AFL-
CIO**

Petitioner

Marlene's Natural Foods and Deli ("Employer") is engaged in the business of operating retail grocery stores. On January 31, 2025, United Food and Commercial Workers Local 367, chartered by the United Food and Commercial Workers, AFL-CIO ("Petitioner") filed a petition seeking to represent a bargaining unit of employees employed by the Employer at its Tacoma, Washington facility.

The appropriateness of the bargaining unit is not in dispute. Instead, the only issue in this case is the Employer's argument that I do not have the authority to process representation petitions when the Board lacks its statutorily mandated quorum of three members, as it does now. In lieu of a hearing the parties entered into a stipulation regarding the instant petition. Appended to the stipulation was the Employer's written argument.

As explained in more detail below, the National Labor Relations Board ("Board") has delegated its authority to me under Section 3(b) of the National Labor Relations Act ("Act"). The Supreme Court, various Circuit Courts of Appeal, and the Board have already rejected the Employer's argument regarding the purported impact the lack of a quorum has on previously delegated authority. I do so here as well and therefore direct an election in the matter.

I. FACTS

Section 3(a) of the Act establishes the Board, composed of five members appointed by the President by and with the advice and consent of the Senate. Ordinarily a vacancy in a Board seat "shall not impair the right of the remaining members to exercise all of the powers of the Board." Section 3(b). This provision, however, is subject to the caveat that "three members of the Board shall, at all times, constitute a quorum." *Id.* The Supreme Court in *New Process Steel, LP v. NLRB*, 560 US 674 (2010), determined that the statutory language requires the Board to have at least three members in order to act.

Sections 9(b) and (c) of the Act reserve to the Board the statutory authority to make bargaining unit determinations and resolve questions concerning representation. In 1959 Congress passed, and the President signed, the Landrum-Griffin amendments to the Act which, among other things, added Section 3(b) permitting the Board to delegate its authority over representation cases

to Regional Directors. The Board subsequently delegated this authority in 1961. See 26 Fed. Reg. 3889 (1961), which was upheld by the Supreme Court in *Magnesium Casting Co., v. NLRB*, 402 US 925 (1971). The delegated authority of Regional Directors to process representation cases has never been withdrawn. Later, in 2017 following the Court's decision in *New Process Steel*, the Board adopted regulations which, in part, clarify that "representation cases may continue to be processed, and the appropriate certification should be issued by the Regional Director notwithstanding the pendency of a request for review," during any time when the Board lacks a quorum. 29 CFR 102.182. This regulation did not modify the underlying 60-year-old delegation of authority.

On January 27, 2025, the President removed Board Member Gwynne Wilcox, thus reducing the number of Senate-confirmed Board Members from three to two. Under *New Process Steel*, the Board therefore no longer has a quorum and is unable to issue decisions until a quorum is restored.

II. ANALYSIS

The Employer's argument that Regional Directors lose the authority to process representation cases when the Board loses a quorum is not new. Indeed, in the wake of *New Process Steel* numerous parties claimed that Regional Directors lack the ability to exercise their delegated authority when the Board loses a quorum. This argument has been explicitly rejected by the Board. See *Brentwood Assisted Living Community*, 355 NLRB No. 149 (2010) enf'd. 675 F.3d 999 (6th Cir. 2012) (explaining the Regional Director "properly processed the underlying representation proceeding by virtue of the authority delegated to him" notwithstanding the fact that the Board lacked a quorum). The Board's conclusion that the ability of the Regional Directors, and the General Counsel, to exercise delegated authority does not cease when the Board lacks a quorum has been routinely upheld by the Circuit Courts of Appeal. *UC Health v. NLRB*, 803 F.3d 669 (DC Cir. 2015); *NLRB v. Bluefield Hospital Co., LLC*, 821 F.3d 534 (4th Cir. 2016); *Overstreet v. El Paso Disposal LP*, 625 F.3d 844, 853 (5th Cir. 2010); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011).¹ The Supreme Court's decision in *New Process Steel* compels a similar result. As the Court explained, "our conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel. The latter implicates a separate question that our decision does not address." *New Process Steel* at 402 US 925 at FN4.

Given this clear precedent, I reject the Employer's claim that Regional Directors lose the authority to process representation cases when the Board lacks a quorum. Instead, as the Board and the Courts have routinely explained, the authority delegated to them in 1961 by a Board acting

¹ To the extent the Employer cites *Loper Bright Enterprises v. Raimondo*, 603 US 369 (2024) as standing for the proposition that Courts' prior analysis is now suspect, *Loper Bright* is inapplicable here because it involves only a standard of review to be applied by the courts. I am bound by existing precedent.

with a quorum survives any subsequent loss of a quorum.² I am therefore directing an election in this matter.

III. CONCLUSION

Based upon the entire record in this matter and for the reasons stated above, I find and conclude as follows:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.³
2. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
4. The parties stipulated, and I find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time employees, including bakers, bulk managers, cashiers, deli front-end clerks, deli kitchen clerks, deli shift leads, lead cashiers, market clerks, produce clerks, receivers, scan coordinators, and wellness associates, employed by the Employer at its store located at 2951 South 38th Street, Tacoma, Washington.⁴

Excluded: All other employees, office clerical employees, confidential employees, managers, and guards and supervisors as defined in the Act.

There are approximately 45 employees in the unit.

² The Employer's criticism of the Board's 2017 regulations is misplaced. The provision at Section 102.182 making clear that Regional Directors will continue to process representation cases notwithstanding the lack of a Board quorum merely reiterates longstanding practice upheld by the Courts.

³ The parties stipulated to the following commerce facts: the Employer, Marlene's Natural Foods and Deli, within the ownership of Lassens Natural Foods & Vitamins, LLC, a State of California LLC with a place of business in Tacoma, Washington, is engaged in the business of grocery sales. During the past calendar year, a representative period, the Employer purchased and received at its Tacoma, Washington facility goods, products, and materials valued in excess of \$5,000 directly from points outside the State of Washington. The parties additionally stipulated that the Employer is engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

⁴ The parties could not agree on the eligibility of the manager on duty position. They stipulated, and I hereby direct, that the manager on duty may vote in the election subject to challenge as at this time, no decision has been made regarding whether the classification is included in, or excluded from, the bargaining unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Food and Commercial Workers Local 367, chartered by the United Food and Commercial Workers, AFL-CIO.

A. Election Details

The election will be held on Friday, February 21, 2024, from 10:00 a.m. to 12:00 noon and 2:00 p.m. to 4:00 p.m. at the Employer's facility located at 2951 South 38th Street, Tacoma, Washington.⁵

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **January 31, 2025**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the unit on both the payroll period ending date and on the date they mail in their ballots to the Board's designated office. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period, and, in a mail ballot election, before they mail in their ballots to the Board's designated office; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. **The Employer must also include in a separate section of that list the same information for those individuals who, according to this direction of election, will be permitted to vote subject to challenge, including the managers on duty.** To be timely filed and served, the list must be *received* by the regional director and the parties by **February 14, 2025**. The list must be

⁵ The Petitioner waived all of its 10-day period with the list prior to the election.

accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015. When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review. Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.



Dated: February 12, 2025

RONALD K. HOOKS
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2nd Ave Ste 2948
Seattle, WA 98174-1006



United States of America
National Labor Relations Board
NOTICE OF ELECTION



19-RC-359513

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to an NLRB agent. Your attention is called to Section 12 of the National Labor Relations Act which provides: ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE, OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN \$5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off, and also include employees in the military service of the United States who appear in person at the polls. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are *not* eligible to vote.

SPECIAL ASSISTANCE: Any employee or other participant in this election who has a handicap or needs special assistance such as a sign language interpreter to participate in this election should notify an NLRB Office as soon as possible and request the necessary assistance.

PROCESS OF VOTING: Upon arrival at the voting place, voters should proceed to the Board agent and identify themselves by stating their name. The Board agent will hand a ballot to each eligible voter. Voters will enter the voting booth and mark their ballot in secret. **DO NOT SIGN YOUR BALLOT.** Fold the ballot before leaving the voting booth, then personally deposit it in a ballot box under the supervision of the Board agent and leave the polling area.

CHALLENGE OF VOTERS: If your eligibility to vote is challenged, you will be allowed to vote a challenged ballot. Although you may believe you are eligible to vote, the polling area is not the place to resolve the issue. Give the Board agent your name and any other information you are asked to provide. After you receive a ballot, go to the voting booth, mark your ballot and fold it so as to keep the mark secret. **DO NOT SIGN YOUR BALLOT.** Return to the Board agent who will ask you to place your ballot in a challenge envelope, seal the envelope, place it in the ballot box, and leave the polling area. Your eligibility will be resolved later, if necessary.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the voting place and at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.



**United States of America
National Labor Relations Board
NOTICE OF ELECTION
VOTING UNIT**



EMPLOYEES ELIGIBLE TO VOTE:

Those eligible to vote are: All full-time and regular part-time employees, including bakers, bulk managers, cashiers, deli front-end clerks, deli kitchen clerks, deli shift leads, lead cashiers, market clerks, produce clerks, receivers, scan coordinators, and wellness associates, employed by the Employer at its store located at 2951 South 38th Street, Tacoma, Washington, who were employed by the Employer during the payroll period ending January 31, 2025.

OTHERS PERMITTED TO VOTE:

Managers on Duty may vote in the election but subject to challenge since their eligibility has not been resolved. No decision has been made regarding whether the individuals in this classification are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Those not eligible to vote are: All other employees, office clerical employees, confidential employees, managers, and guards and supervisors as defined in the Act.

DATE, TIME AND PLACE OF ELECTION

Friday, February 21, 2025	10:00 AM to 12:00 PM AND 2:00 PM to 4:00 PM	The Employer's facility located at 2951 S 38th St, Tacoma, WA
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EMPLOYEES ARE FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN.

**ALL BALLOTS WILL BE COMINGLED AND COUNTED IMMEDIATELY AFTER THE CONCLUSION OF THE LAST
VOTING SESSION.**



**United States of America
National Labor Relations Board
NOTICE OF ELECTION**



**UNITED STATES OF AMERICA
National Labor Relations Board
19-RC-359513**



OFFICIAL SECRET BALLOT

For certain employees of
MARLENE'S NATURAL FOODS AND DELI

Do you wish to be represented for purposes of collective bargaining by
**UNITED FOOD AND COMMERCIAL WORKERS LOCAL
367, CHARTERED BY THE UNITED FOOD AND
COMMERCIAL WORKERS, AFL-CIO?**

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES

☐

NO

☐

**DO NOT SIGN OR WRITE YOUR NAME OR INCLUDE OTHER MARKINGS THAT WOULD
REVEAL YOUR IDENTITY. MARK AN "X" IN THE SQUARE OF YOUR CHOICE ONLY.**

**If you make markings inside, or anywhere around, more than one square, return your
ballot to the Board Agent and ask for a new ballot. If you submit a ballot with markings
inside, or anywhere around, more than one square, your ballot will not be counted.**

The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any
sample ballot have not been put there by the National Labor Relations Board.



United States of America
National Labor Relations Board
NOTICE OF ELECTION



RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or the mail ballots are dispatched in a mail ballot election
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (206)220-6300 or visit the NLRB website www.nlr.gov for assistance.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
INSTRUCTIONS TO ELECTION OBSERVERS

The role of observers in an NLRB election is an important one. You are here to see that the election is conducted in a fair and impartial manner, so that each eligible voter has a fair and equal opportunity to express him or herself freely and in secret. As official representatives of the parties in this election, you should undertake your role with a fair and open mind. Conduct yourself so that no one can find fault with your actions during the election. The NLRB appreciates your assistance in this democratic process.

PRINCIPAL FUNCTIONS

- Monitor the election process.
- Help identify voters.
- Challenge voters and ballots.
- Assist Board Agent in the conduct of election.

DUTIES

- BE ON TIME: Observers should report one-half hour before the polls open.
- Identify voters.
- Check off the name of the person seeking to vote. One check before the voter's name is made by one party's observer. One check after the name is made by the other party's observer.
- See that only one voter occupies a booth at any one time.
- See that each voter deposits the ballot in the ballot box.
- See that each voter leaves the voting area immediately after depositing the ballot.
- Report any conflict regarding an individual's right to vote to the Board Agent at your table before the individual votes.
- Challenge of Voters: An observer has the right to challenge a voter for cause. A Board Agent may also question the eligibility of a voter. Any challenge must be made before the voter's ballot has been placed in the ballot box.
- Report any unusual activity to the Board Agent as soon as you notice it.
- Wear your observer badge at all times during the election.
- Remain in the voting place until all ballots are counted in order to check on the fairness of the count. If the ballots are not counted immediately after the polls close, you will be informed as to when and where the ballots will be counted.

DO NOT

- Keep any list of individuals who have or have not voted.
- Talk to any voter waiting in line to vote, except as instructed by the Board Agent. (Greeting voters as they approach to vote is acceptable.)

- Give any help to any voter. Only a Board Agent can assist the voter.
- Electioneer at any place during the hours of the election.
- Discuss or argue about the election.
- Leave the election area without the Board Agent's permission.
- Use any electronic device including cell phones, laptop computers, personal digital assistants (PDAs), mobile e-mail devices, wired or wireless data transmission and recording devices, etc. (Please turn off or disable these devices before entering the polling area).