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

FRED MEYER STORES, INC.

and Case 19-CA-31994

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 1439 affiliated with
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION

MOTIONS TO TRANSFER CASE TO BOARD AND FOR SUMMARY JUDGMENT

Counsel for the General Counsel, pursuant to §§ 102.24, 102.26, and 102.50 of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. § 151 *et seq.*, moves the National Labor Relations Board ("Board") to transfer Case 19-CA-31994 to the Board and to issue summary judgment against Fred Meyer Stores, Inc. ("Respondent"), as the pleadings in this case raise no material issues of fact or law that require a hearing, and seek, in substantial part, to relitigate issues previously decided by the Board in Case 19-RC-15068 and in other matters. In support, Counsel for General Counsel submits the following:

1. On July 6, 2009, the charge in Case 19-CA-31994 ("Charge") was filed with the Regional Director, Region 19, of the Board ("Regional Director") by United Food and Commercial Workers, Local 1439, affiliated with United Food and Commercial Workers International Union ("Union"), alleging in substance that Respondent has failed and refused to recognize the Union as the exclusive

collective-bargaining representative of certain disputed nutrition employees ("nutrition employees") employed at Respondent's Francis Ave., Spokane, Washington, retail store ("Francis Store"), in violation of §§ 8(a)(1) and (5) of the Act. A copy of the Charge was served on Respondent on or about July 7, 2009. Copies of the Charge and its affidavit of service are attached as Exhibit A.

2. On or about July 27, 2009, the Regional Director issued and served on Respondent by certified mail a Complaint in the instant matter, alleging in substance that Respondent has refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the nutrition employees at the Francis Store. A copy of the Complaint and its affidavit of service are attached as Exhibit B.

3. At all material times, Respondent is and has been a State of Ohio corporation with an office and place of business in Spokane, Washington, engaged in the retail grocery business. During the past twelve months, which period is representative of all material times, in conducting its business operations, Respondent derived gross revenues in excess of $500,000 and purchased and received at its Francis Store goods valued in excess of $50,000 directly from points outside the State of Washington.

4. Respondent has been at all material times an employer engaged in commerce within the meaning of §§ 2(2), (6) and (7) of the Act.

5. The Union has been at all material times a labor organization within the meaning of § 2(5) of the Act.

6. The following employees of Respondent (the "Unit"), constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act:

> All grocery employees working for Respondent at its Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington; excluding all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

7. Since at least 1995, and at all material times, based on § 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the Unit and, since then, has been recognized as such by Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from January 2, 2005, to January 5, 2008, and extended thereafter by agreement of the parties.

8. Pursuant to a Petition filed in Case 19-RC-15068 on February 8, 2008, the Regional Director issued a Decision and Direction of Election on March 7, 2008, directing a self-determination election among the nutrition employees at the Francis Store to determine if they wished to be included in the above-described Unit. A copy of the Petition and Decision and Direction of Election are attached as Exhibits C and D, respectively.

9. On March 28, 2008, Respondent filed a Request for Review of the Regional Director's Decision and Direction of Election ("Request for Review") in Case 19-RC-15068. A copy of the Request for Review is attached as Exhibit D-2.

10. On April 4, 2008, a secret ballot self-determination election was conducted in Case 19-RC-15068 under the direction and supervision of the Regional Director

among Respondent's nutrition employees at its Francis Store in accordance with the Decision and Direction of Election described in paragraph 8. The ballots were impounded.

11. On April 21, 2009, the Board issued an 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 E.

12. On April 24, 2009, the Tally of Ballots issued showing there were two eligible voters with only one valid ballot cast. The valid ballot was cast for the Union.

13. On May 7, 2009, the Regional Director issued a Certification of Representative ("Certification") in Case 19-RC-15068 certifying the Union as the exclusive collective-bargaining representative of the nutrition department employees described above in paragraphs 8 and 10 to be part of the Unit ("Expanded Unit"). A copy of the Certification is attached as Exhibit F.

14. As a result of the Certification described above in paragraph 13, the Union was certified as the exclusive collective-bargaining representative of the Expanded Unit, which includes, *inter alia*, all regular full-time and part-time employees working in the nutrition department at the Francis Store.

15. The following employees of Respondent, the Expanded Unit, constitute a unit appropriate for the purposes of collective-bargaining within the meaning of § 9(b) of the Act:

> All grocery employees working for Respondent at its Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington, and all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave., Spokane, Washington, retail store; excluding the nutrition department manager

> of the Francis Ave., Spokane, Washington, retail store, all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

16. Since May 7, 2009, by virtue of § 9(a) of the Act, the Union has been and is the exclusive representative of the Expanded Unit for purposes of collective-bargaining with respect to pay, wages, hours of employment, and other terms and conditions of employment.

17. At all material times, Carl Wojciechowski has held the position of Group Vice President, Human Resources, and is and at all times material herein has been an agent of Respondent within the meaning of § 2(13) of the Act, acting on behalf of Respondent.

18. On or about May 28 and June 19, 2009, the Union requested in writing that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the nutrition employees referred to in paragraphs 8-16. These written requests are attached collectively as Exhibit G.

19. On or about June 26, 2009, Respondent, in writing by Wojciechowski, informed the Union that it would not bargain with it as the exclusive collective-bargaining representative of the nutrition employees referred to in paragraphs 8-16 and, thereafter, has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of that group of employees. This letter is attached as Exhibit H.

20. On August 10, 2009, Respondent filed its Answer and Affirmative Defenses ("Answer") to the Complaint, attached as Exhibit I, in which it admits the following allegations of the Complaint (Exhibit B):

(1):	Service
(2):	Incorporation, business operations, and jurisdiction
(3):	Labor Organization status
(4):	§ 2(13) status of Carl Wojciechowski
(5):	The Unit constitutes an appropriate § 9(a) unit for the purposes of collective-bargaining
(6)(a):	The Francis Store nutrition employees selected the Union as their collective-bargaining representative
(8):	Union's request to bargain regarding nutrition employees
(9) in part:	On about June 26, 2009, Respondent informed the Union it had no duty to bargain with the Union

21. In its Answer, Respondent denies the following allegations of the Complaint:

6(b)-(c):	The legal authority underpinning the Union's certification and inclusion of the nutrition employees in the Expanded Unit
7:	The legal authority to declare the expanded Unit as an appropriate § 9(a) unit for the purpose of collective-bargaining and the Union's status as the exclusive collective-bargaining representative of the Expanded Unit
9:	Failure and Refusal to Bargain
10 and 11:	Commission of Unfair Labor Practices

22. Respondent's Answer also raises the following affirmative defenses: (1) that the Complaint fails to state a claim; and (2) that the Board did not have the statutory authority to issue its Order denying Respondent's Request for Review which precluded the Regional Director from certifying the election results. Without a "lawful" certification, no obligation to bargain attached, and a question

concerning representation remains. In presenting its defense, Respondent states that it does not intend to waive its arguments and positions raised in its Request for Review in Case 19-RC-15068.

23. 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 in its Answer, nor can it assert, the existence of any newly discovered relevant evidence on these issues.

24. Further, the Board has addressed arguments regarding its statutory authority to issue Decisions and Orders stating that:

> 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.

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case	Date Filed
19-CA-31994	7/6/09

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Fred Meyer Stores

b. Tel. No. (503) 797-7781

c. Cell No.

f. Fax No. (503) 797-7772

d. Address *(Street, city, state, and ZIP code)*
3800 SE 22nd Ave.
Portland, OR 97202-2999

e. Employer Representative
Carl Wojciechowski

g. e-Mail

h. Number of workers employed
~100

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Store

j. Identify principal product or service
Grocery and Non-Grocery Products

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* 8(a)(5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
The Employer violated sections 8(a)(1) and 8(a)(5) by refusing to bargain with the Union in regards to the nutrition department employees located at the Employer's Francis street store in Spokane, WA.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
United Food and Commercial Worker's Union, Local 1469

4a. Address *(Street and number, city, state, and ZIP code)*
1719 N. Atlantic St.
Spokane, WA 99207

4b. Tel. No. (509) 328-6090

4c. Cell No.

4d. Fax No. (509) 326-2208

4e. e-Mail
Brittany@UFCW1439.org

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)* United Food and Commercial Workers Union, Local 1439

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Brittany Pitcher
(signature of representative or person making charge)

Brittany Pitcher, Grievance Officer
(Print/type name and title or office, if any)

Tel. No. (509) 328-6090 ext. 214

Office, if any, Cell No.

Fax No. (509) 326-2208

e-Mail
Brittany@UFCW1439.org

Address 1719 N. Atlantic St., Spokane, WA 99205

07/06/2009
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this Information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit A

United States Government
NATIONAL LABOR RELATIONS BOARD
Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174-1078

Telephone: (206) 220-6300
Toll Free: 1-866-667-6572
Facsimile: (206) 220-6305
Agency Web Site: *http://www.nlrb.gov*

July 7, 2009

Mr. Carl Wojciechowski
Fred Meyer Stores, Inc.
3800 SE 22nd Ave
Portland, OR 97202-2999

Re: Fred Meyer Stores
Case 19-CA-31994

This is to inform you that a charge, a true copy of which is enclosed, was filed in the above-entitled matter. Also enclosed is a copy of *Form NLRB-4541,* briefly setting forth our investigation and voluntary adjustment procedures.

I would appreciate receiving from you promptly, a full and complete written account of the facts and a statement of your position with respect to the allegations of the charge. Also, please complete and return one copy of the enclosed questionnaire regarding commerce information (*Form NLRB-5081*). Please state the case name and number on all correspondence.

FILING DOCUMENTS WITH REGIONAL OFFICES: The Agency is moving toward a fully electronic records system. To facilitate this important initiative, the Agency strongly urges all parties to submit documents and other materials (except unfair labor practice charges and representation petitions) to Regional Offices through the Agency's E-Filing system on its website: ***http://www.nlrb.gov***. (See Attachment to this letter for instructions). Of course, the Agency will continue to accept timely filed paper documents.

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the courts. In the event that you choose to have a representative appear on your behalf, please have your representative complete *Form NLRB-4701, Notice of Appearance*, and forward it promptly to this office.

This case has been assigned to the Board agent shown below. When the Board agent solicits relevant evidence from you or your counsel, I request and strongly urge you or your counsel to promptly present to the Board agent any and all evidence relevant to the investigation. It is my view that a refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily. Full and complete cooperation includes, where relevant, timely providing all material witnesses under your control to a Board agent so that witnesses' statements can be reduced to affidavit form, and providing all relevant documentary evidence requested by the Board agent. The submission of a position letter or memorandum, or the submission of affidavits not taken by a Board agent, does not constitute full and complete cooperation.

Please be advised that we cannot accept any limitations on the use of any evidence or position statements that are provided to the Agency. Thus any claim of confidentiality cannot be honored except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. In this regard, we are required by the Federal Records Act to keep copies of documents used in furtherance of our investigation for some period of years after a case closes. Further, we may be required by the Freedom of Information Act to disclose such records upon request, absent some applicable exemption such as those that protect confidential financial

information or personal privacy interests (e.g., Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4)). Accordingly, we will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the foregoing laws, regulations and policies.

You are advised that, under the Freedom of Information Act, unfair labor practice charges and representation petitions are subject to prompt disclosure to members of the public upon request. In this regard, you may have received a solicitation by organizations or persons who have obtained public information concerning this matter and who seek to represent you before our Agency. You may be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board; their information regarding this matter is only that which must be made available to any member of the public.

If you are a non-English speaker and need assistance, please inform the Board Agent assigned to this case.

Customer service standards concerning the processing of unfair labor practice cases have been published by the Agency and can be found on our Agency website at ***http://www.nlrb.gov***. Your cooperation in this matter is invited so that all facts of the case may be considered.

Sincerely,

Richard L. Ahearn

Richard L. Ahearn
Regional Director

Enclosures

Case assigned to: Dianne T. Todd
Telephone No.: (206) 220-6319
Email: Dianne.Todd@nlrb.gov

I certify that I served the above referred to charge on July 7, 2009 by post paid U. S. mail on the addressee named above, together with a transmittal letter of which this is a true copy.

Leila Uomoto

Subscribed and sworn to before me on July 7, 2009.

Dennis J. Enoch
Designated Agent

cc: Richard J. Alli, Jr., Attorney, BULLARD SMITH JERNSTEDT WILSON, 1000 SW Broadway, Suite 1900, Portland, OR 97205-3071

Cynthia Thornton, Vice President Employee Relations, Fred Meyer Stores, Inc., 3800 SE 22nd Ave., Portland, OR 97202-2999

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

FRED MEYER STORES, INC.

and Case 19-CA-31994

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 1439, affiliated with
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION

COMPLAINT

United Food and Commercial Workers, Local 1439, affiliated with United Food and Commercial Workers International Union ("Union"), has charged in Case 19-CA-31994, that Fred Meyer Stores, Inc. ("Respondent"), has been engaging in unfair labor practices as set forth in the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.*

Based thereon, the General Counsel of the National Labor Relations Board (the "Board"), by the undersigned, pursuant to § 10(b) of the Act and § 102.15 of the Board's Rules and Regulations, issues this Complaint and Notice of Hearing and alleges as follows:

1.

The Charge was filed by the Union on July 6, 2009, and was served on Respondent by regular mail on or about July 7, 2009.

2.

(a) Respondent, a State of Delaware corporation with an office and place of business in Spokane, Washington, is engaged in the retail grocery business.

Exhibit B

(b) Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described above in paragraph 2(a), derived gross revenues in excess of $500,000.

(c) Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described above in paragraph 2(a), purchased and received at the facility goods valued in excess of $50,000 directly from points outside the State of Washington.

(d) Respondent has been at all material times an employer engaged in commerce within the meaning of §§ 2(2), (6) and (7) of the Act.

3.

The Union is, and has been at all material times, a labor organization within the meaning of § 2(5) of the Act.

4.

At all material times, Carl Wojciechowski has held the position of Group Vice President, Human Resources, and is and has been an agent of Respondent within the meaning of § 2(13) of the Act, acting on behalf of Respondent.

5.

(a) The following employees of Respondent (the "Unit"), constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act:

> All grocery employees working for Respondent at its Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington; excluding all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

(b) Since at least 1995, and at all material times, based on § 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the Unit and, since then, has been recognized as such by Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from January 2, 2005, to January 5, 2008, and extended by agreement of the parties.

6.

(a) On or about April 24, 2009, in Case 19-RC-15068, a majority of all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave., Spokane, Washington, retail store, in a self-determination election, designated and selected the Union as their representative for the purposes of collective bargaining with Respondent, to be included in the Unit.

(b) On or about May 7, 2009, in Case 19-RC-15068, the Union was certified as the exclusive collective-bargaining representative of the voting group of nutrition department employees described above in paragraph 6(a).

(c) As a result of the certification described above in paragraph 6(b), the Union was certified as the exclusive collective bargaining representative of an expanded unit (herein, the Expanded Unit), which includes all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave., Spokane, Washington, retail store.

7.

(a) The following employees of Respondent, the Expanded Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act:

> All grocery employees working for Respondent at its Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington, and all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave., Spokane, Washington, retail store; excluding the nutrition department manager of the Francis Ave., Spokane, Washington, retail store, all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

(b) At all material times, based on § 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Expanded Unit, an appropriate unit of Respondent's employees.

8.

On or about May 28 and June 19, 2009, the Union requested in writing that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the nutrition department employees described above in paragraphs 6 and 7.

9.

On or about June 26, 2009, Respondent, in writing by Wojciechowski, informed the Union that it would not bargain with it as the bargaining representative of the nutrition department employees described above in paragraphs 6 and 7 and thereafter has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of that group of employees.

10.

By the conduct described above in paragraph 9, Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its nutrition department employees described above in paragraphs 6 and 7 in violation of §§ 8(a)(1) and (5) of the Act.

11.

The unfair labor practices of Respondent described above affect commerce within the meaning of §§ 2(6) and (7) of the Act.

ANSWER REQUIREMENT

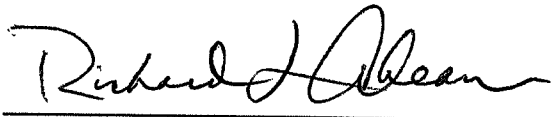
Respondent is notified that, pursuant to §§ 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before August 10, 2009, or postmarked on or before August 9, 2009**. Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at http://www.nlrb.gov, click on **E-Gov**, then click on the **E-Filing** link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a

continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. *See* § 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the document need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must be accomplished in conformance with the requirements of § 102.114 of the Board's Rules and Regulations. The answer may <u>not</u> be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to Motion for Default Judgment, that the allegations in the Complaint are true.

DATED at Seattle, Washington, this 27th day of July, 2009.



Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174-1078

Form NLRB-4338 (6/90)
(R19 -- 3/94)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE

FRED MEYER STORES, INC.
Case: 19-CA-31994

July 27, 2009

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 C.F.R. 102.16(a) or with the Division of Judges when appropriate under 29 C.F.R. 102.16(b).

(2) Grounds must be set forth in ***detail;***

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

CERTIFIED MAIL NO:
7006 2150 0000 7460 4624

Fred Meyer Stores, Inc.
Attn: Carl Wojciechowski
3800 SE 22nd Ave.
Portland, OR 97202-2999

BULLARD SMITH JERNSTEDT WILSON
Attn: Richard J. Alli, Jr., Attorney
1000 SW Broadway, Suite 1900
Portland, OR 97205-3071

REGULAR MAIL

Fred Meyer Stores, Inc.
Attn: Cynthia Thornton, Vice President
Employee Relations
3800 SE 22nd Ave.
Portland, OR 97202-2999

UFCW Local 1439
Attn: Brittany Pitcher, Grievance Officer
1719 N. Atlantic St.
Spokane, WA 99205-4804

Case file

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRED MEYER STORES, INC. and UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1439, affiliated with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION	Case 19-CA-31994 DATE OF MAILING: July 27, 2009.

AFFIDAVIT OF SERVICE OF COMPLAINT.
I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid first-class mail upon the following persons, addressed to them at the following addresses:

CERTIFIED MAIL NO.
7006 2150 0000 7460 4624

Fred Meyer Stores, Inc.
Attn: Carl Wojciechowski
3800 SE 22nd Ave.
Portland, OR 97202-2999

BULLARD SMITH JERNSTEDT WILSON
Attn: Richard J. Alli, Jr., Attorney
1000 SW Broadway, Suite 1900
Portland, OR 97205-3071

REGULAR MAIL

Fred Meyer Stores, Inc.
Attn: Cynthia Thornton, Vice President
Employee Relations
3800 SE 22nd Ave.
Portland, OR 97202-2999

UFCW Local 1439
Attn: Brittany Pitcher, Grievance Officer
1719 N. Atlantic St.
Spokane, WA 99205-4804

Kathlyn L. Mills, Secretary

Subscribed and sworn to before me on July 27, 2009.	DESIGNATED AGENT: **NATIONAL LABOR RELATIONS BOARD**

FORM EXEMPT UNDER 44 U.S.C.

FORM NLRB-502 (9-07)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

Self Determination PETITION

DO NOT WRITE IN THIS SPACE

Case No	Date Filed
19-RC-15068	2/8/08

INSTRUCTIONS: Submit an original and 4 copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

- [x] **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE)** - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- [ ] **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer [ ] a labor organization desire that such authority be rescinded
- [ ] **UC-UNIT CLARIFICATION**- A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees. *(Check one)* [ ] In unit not previously certified. [ ] In unit previously certified in Case No. _____
- [ ] **AC-AMENDMENT OF CERTIFICATION**- Petitioner seeks amendment of certification issued in Case No. _____. *Attach statement describing the specific amendment sought.*

2. Name of Employer	Employer Representative to contact	Telephone Number
Fred Meyer, Inc.	Allied Employers	425-576-1100

3. Address(es) of Establishment(s) involved *(Street and number, city, State, ZIP code)*	Telecopier Number (Fax)
525 E. Francis Ave., Spokane, WA 99207	425-822-1076

4a. Type of Establishment (Factory, mine, wholesaler, etc.)	4b. Identify principal product or service
Retail	Grocery & Drygoods

5. Unit involved *(In UC petition, describe present bargaining unit and attach description of proposed clarification.)*

Included: All employees employed in the Nutrition Dept /Natural Choices Dept. of the employers Francis Ave. store

Excluded: Confidential employees, managerial employees, guards and supervisors as defined by the Act

6a. Number of Employees in Unit: Present 2; Proposed *(By UC/AC)*

6b. Is this petition supported by 30% or more of the employees in the unit?* [x] Yes [ ] No
*Not applicable in RM, UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. [x] Request for recognition as Bargaining Representative was made on (Date) petition is demand / / and Employer declined recognition on or about (Date) / / (If no reply received, so state)

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent *(If none, so state.)*	Affiliation
United Food & Commercial Workers Union Local 1439	UFCW
Address, Telephone No. and Telecopier No. (Fax) 509-328-6090 509 326-2208	Date of Recognition or Certification
1719 N. Atlantic St., Spokane, WA 99205	/ /

9. Expiration Date of Current Contract, If any *(Month, Day, Year)* / /

10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop *(Month, Day and Year)* / /

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes [ ] No [x]

11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of *(Insert Name)* _____, a labor organization, of *(Insert Address)* _____ Since *(Month, Day, Year)* / /

12. Organizations or individuals other than Petitioner (and other than those named in Items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in Item 5 above (If none, so state)

Name	Affiliation	Address	Date of Claim
None			/ /
			Telecopier No. (Fax) ( ) -

13. Full name of party filing petition (If labor organization, give full name, including local name and number)
United Food & Commercial Workers Union Local 1439

14a. Address *(street and number, city, state, and ZIP code)*	14b. Telephone No. EXT
1719 N. Atlantic St., Spokane, WA 99205	509 328-6090
	14c. Telecopier No. (Fax) 509 326-2208

15. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
United Food & Commercial Workers International Union

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name *(Print)*	Signature	Title *(If any)*
Linda Gruen	Linda Gruen	Organizing Director
Address *(street and number, city, state, and ZIP code)*		Telephone No. 509 328-6090
1719 N. Atlantic St., Spokane, WA 99205		Telecopier No. 509 326-2208

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary, however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit C

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

FRED MEYER STORES, INC.

Employer

and

Case 19-RC-15068

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1439, affiliated with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

Petitioner

DECISION AND DIRECTION OF ELECTION

I. SUMMARY

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended ("the Act"), a hearing was held before a hearing officer of the National Labor Relations Board ("the Board"). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record[1] in this proceeding, I make the following findings and conclusions.[2]

Petitioner represents certain employees at four stores of Fred Meyer Stores, Inc. ("the Employer") in Spokane, Washington (herein either "Francis", "Sullivan", "Wandermere", "Thor", or collectively, "stores"). Petitioner in this case seeks a self-determination election for employees working in the nutrition department of the Francis store to decide whether they wish to be included in the existing multi-facility grocery unit.[3] There are two employees in the voting group sought.

The Employer opposes the petition on two main grounds. As a threshold matter, the Employer argues that Petitioner has waived its right to organize the petitioned-for nutrition employees by promising in January of 1995 not to organize the general merchandise employees at the Francis and Sullivan stores in exchange for a grant of access to the grocery department, CCK (checkers) department and meat department employees, and the Employer's agreement to recognize Petitioner based upon a majority card showing in each of these units.

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[1] The Employer and Petitioner timely submitted briefs, which I have carefully considered.

[2] The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 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. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

[3] No other labor organization seeks to represent the employees covered by the instant petition.

Exhibit D

The Employer next argues that the petitioned-for nutrition employees do not share a sufficient community of interest with the Petitioner-represented grocery employees. Rather, the Employer claims the nutrition employees share an overwhelming community of interest with the "residual unit" of unrepresented general merchandise employees. Accordingly, the Employer contends that because the Petitioner-represented employees in the four Spokane stores constitute a multi-facility unit, the appropriate unit for the petitioned-for nutrition employees is a four store-wide unit comprised of general merchandise employees totaling 270-280 employees.

In response to the Employer's waiver argument, Petitioner asserts that it did not "forever" waive its right to organize the petitioned-for Francis nutrition employees. With regard to the Employer's remaining arguments, Petitioner contends that the nutrition employees at the Francis store share a community of interest with the Petitioner-represented grocery employees, and that the bargaining history of the parties and industry practice establish a clear history of organizing individual locations by departments into the multi-store unit, and that therefore, a self-determination election is appropriate among the Francis nutrition employees. Finally, Petitioner alternatively argues that the Region should conduct an election among the Francis nutrition employees in a stand-alone unit.

Based on the record as a whole and the parties' respective briefs, I find that Petitioner has not waived its right to represent nutrition department employees. I further find, contrary to the Employer, that the petitioned-for nutrition department employees share a community of interest with the Petitioner-represented grocery employees at the Francis store. Therefore, a self-determination election among the nutrition employees at that store is appropriate.

Below, I have summarized the record evidence detailing the parties' bargaining history, and the Employer's operations. My analysis of the record evidence, application of Board law, and conclusion follow the summary of evidence. Given my conclusion that there is no basis to dismiss the petition, the final section sets forth the direction of election.

II. RECORD EVIDENCE

A. Relevant Bargaining History

1. General Background

The Employer is a State of Delaware corporation that operates 128 stores in Alaska, Washington, Oregon and Idaho, 120 of which are large one-stop retail stores over 100,000 square feet that sell a full line of products, including groceries and general merchandise. The remaining eight stores are "marketplace" stores which primarily sell grocery items and a more limited line of general merchandise. Petitioner currently respectively represents meat department, grocery department and the CCK department employees[4] in three separate units under three contracts covering Employers' four Spokane area stores.

2. Francis and Sullivan Stores

The Francis Store was remodeled and expanded as a full service store during the early 1990s after originally opening on September 28, 1975 as a non-food general merchandise

[4] The CCK department includes food and non-food checkout department employees consisting primarily of cashiers, customer service desk and teller employees.

store. Beginning in the mid 1970's, but prior to March 28, 1995, all Francis Store employees were represented by Petitioner. The Employer operated a non-food general merchandise store at a Spokane Sprague Street location that was opened in the 1980s and where employees were represented by Petitioner. The Sullivan store was opened on November 17, 1993, as a full service store, replacing the Sprague store. Between July 31, 1993 and March 28, 1995, Petitioner sought to negotiate a successor contract covering non-food employees, in the Francis and Sullivan stores, failed to do so, and believed it had lost majority support in the unit. Petitioner disclaimed interest in the general merchandise Sullivan/Francis unit on March 28, 1995.[5]

The record reveals that in late 1994 and early 1995, Employer's Group President of Human Resources, Carl Wojciechowski and then Petitioner President Jim Milsap discussed Petitioner representing grocery, CCK, and meat employees at the new Sullivan store and the newly remodeled Francis store. When Petitioner disclaimed interest in the non-food unit at the Sullivan and Francis stores, the Employer agreed to grant access to Petitioner to the Sullivan and Francis stores for the purpose of organizing grocery, CCK, and meat employees.

Specifically, the parties agreed that upon presentation to the Employer of a majority of cards signed in each department,[6] the Employer would grant recognition to Petitioner and adopt with limited exceptions the terms and conditions of the labor agreement between Petitioner and Safeway. A letter confirming the agreement between the parties regarding Union access to the Francis and Sullivan stores, recognition upon presentation of a majority of cards in each department, and the parameters of a collective bargaining agreement was signed by Wojciechowski and Milsap on January 18, 1995. The letter contains no mention of Petitioner waiving its right to organize the Employer's general merchandise employees, in exchange for the Employer allowing Petitioner access to its stores for the purpose of organizing grocery, CCK and meat employees. Nor does the letter contain any reference to the Employer allowing Petitioner access to its Sullivan and Francis stores to organize grocery, CCK and meat employees in exchange for disclaiming interest in the general merchandise employees at those two stores. A letter dated March 16, 1995, was sent from Petitioner's Milsap to the Commissioner of the Federal Mediation & Conciliation Service with a copy to Wojciechowski, advising the FMCS that Petitioner no longer represented a majority of employees in the general merchandise unit at the Spokane Sullivan and Francis locations.

With respect to the agreement reached by the parties in late 1994/early 1995 regarding Petitioner's organization of the grocery, CCK and meat employees at the Francis and Sullivan stores, Wojciechowski initially testified that he was of the understanding that Milsap agreed not to represent general merchandise employees at the Francis and Sullivan stores "forever" in exchange for Petitioner's right to freely organize the grocery, CCK and meat employees. However, later in his testimony, Wojciechhowski admitted that the parties never said "forever," and that Milsap never indicated how long Petitioner would refrain from organizing general merchandise employees.

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[5] The most recent collective bargaining agreement for the Francis and Sprague/Sullivan unit, prior to Petitioner's disclaimer of interest, had an effective period of July 29, 1990 through July 31, 1993, and covered employees in present and future stores of the Employer in the Spokane metropolitan area, specifically, employees employed in the shoe and automotive sales departments, general sales clerks, merchandise specialists in home improvement, nursery and photo departments, pharmacy A Assistants, registered pharmacists, intern pharmacists, and excluding (among other managers) Nutrition Center managers.

[6] Grocery, CCK and meat.

On March 3, 1995, Petitioner presented a majority of cards in each of the grocery, CCK, and meat units to the Employer, which granted recognition to the Petitioner on March 24, 1995. The first collective bargaining agreements (one for each of the three units) between Petitioner and the Employer were executed by the parties with effective dates of April 1, 1995 through January 2, 1999.[7] The contracts for the Sullivan/Francis grocery, CCK, and meat units have been extended several times by the parties. The most recent contracts in these units, effective by their terms from January 2, 2005 through January 5, 2008, also include employees in the Wandermere grocery, CCK and meat units.[8]

3. Wandermere Store

On February 9, 1998, Petitioner's Milsap signed a letter dated January 6, 1998, authored by Wojciechowski in which the Employer waived its right to insist on a secret ballot election and agreed to recognize the Petitioner as the representative of its Wandermere store grocery, meat and CCK department units based upon a showing of card majority in each of those units. The January 9, 1998 letter states that the non-food department employees at both the Francis and Sullivan stores are not represented by the Petitioner, therefore Petitioner agrees not to solicit or organize the non-food employees in the Wandermere store. The Wandermere Store opened on February 11, 1998.

On May 19, 1998, Petitioner provided bargaining cards evidencing majority status respectively in the grocery, meat and CCK departments of the Wandermere store. The Employer then recognized Petitioner as the collective bargaining representative of its employees in the three departments and agreed to append the Wandermere store into the existing grocery, meat and CCK labor agreements currently in effect between the Employer and Petitioner at its Francis and Sullivan store locations effective May 24, 1998. At no time have any employees in any other departments at the Wandermere location been represented by Petitioner.

4. Thor Store

On July 2, 2001, Petitioner signed a letter dated June 25, 2001, in which the Employer waived its right to insist on a secret ballot election and agreed to recognize the Petitioner as the representative of its Thor store grocery, meat and CCK department employees based upon a showing of card majority in each of those units. The July 2, 2001, letter states that the non-food department employees at the Francis, Sullivan and Wandermere stores are not represented by the Petitioner, therefore Petitioner agrees not to solicit or organize non-food employees in the Thor store. The Thor store opened on August 15, 2001.

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[7] The Recognition clause of the first grocery agreement covers employees working as journeypersons, helper clerks, and courtesy clerks in the grocery and produce departments, head journeyperson, journeyperson, and apprentices working in the bakery sales and bake-off classifications and journeyperson and apprentices working in the deli department at the Employer's Spokane Sullivan and Francis stores. There is no after-acquired store provision in this contract.

[8] Although the employees of the Thor store are not included in the Recognition clause of this agreement, a November 9, 2001, letter from Employer's Vice President of Employee Relations Cynthia Thornton to Petitioner's President Sue Bonnett, indicates that the same terms and conditions of the Francis/Sullivan/Wandermere labor agreements apply to the grocery, meat and CCK Thor store employees in those units.

On November 4, 2001, Petitioner provided bargaining cards evidencing a majority status in each of the grocery, meat and CCK departments of the Thor store. The Employer then recognized Petitioner as the collective bargaining representative of its employees in the three departments and agreed to apply to them the same terms and conditions of the grocery, meat, and CCK labor agreements in effect between the Employer and Fred Meyer at its Francis, Sullivan, and Wandermere store locations. At no time have any employees in any other departments at the Thor location been represented by a labor organization.[9]

5. Further Bargaining History between the Parties

Current Petitioner President Larry Hall worked with Jim Milsap for 15 years while Milsap was president of Petitioner's Local. Hall had discussions with Milsap in 1994 to 1995 over the Petitioner's agreement not to represent general merchandise employees at the Francis and Sullivan stores. According to Hall, Milsap told him that Milsap had agreed not to organize general merchandise employees at the Sullivan and Francis stores for a period of 3 years. Later, according to Hall, during Petitioner's organization of the Wandermere grocery, meat and CCK employees in 1998 or 1999, Milsap told Hall that Petitioner agreed it would not organize the general merchandise employees at the Wandermere store for a period of 5 years in exchange for access and a card check agreement.

In January 2005, Hall and Thornton exchanged a series of correspondence which began after Petitioner apparently began to organize general merchandise employees in Employer's Spokane stores. Hall initially told Thornton in a January 14, 2005, telephone conversation that he believed there was a 3 year limitation on Petitioner's agreement not to organize general merchandise employees in Spokane and requested copies of any agreements that Thornton had regarding this issue. Thornton provided a 1995 letter from Milsap to the Employer disclaiming interest in the general merchandise employees at the Spokane and Sullivan stores, the 1998 Wandermere store agreement and the 2001 Thor store agreement. In correspondence between the parties, Thornton admitted that there was no time limitation on any of the agreements. On January 26, 2005, Hall sent a letter to Thornton after reviewing the agreements Thornton had sent to him. Hall told Thornton that he had apparently been mistaken about his understanding about the (3 or 5 year) time limitation as none of the documents sent to him by Thornton indicated that Petitioner had given up the right to organize general merchandise employees "forever." Hall contrasted this with an agreement dated January 21, 2000 entered into between the parties regarding a Fred Meyer store in East Wenatchee, Washington in which Petitioner forever disclaimed its right to represent general merchandise employees in exchange for access to organize grocery, meat and CCK employees at the East Wenatchee location.

6. Local Industry Practices

Petitioner is party to several other collective bargaining agreements with other Spokane-area employers who sell similar nutrition products as does the Employer. Nutrition employees at these employers, which include Rosauers, Albertson's and Safeway, are covered by the area's grocery agreement. Certain fuel center employees are also covered under multi-facility grocery agreements between Petitioner and Albertson's (within Petitioner's jurisdictional area), and Safeway (within the Spokane area).

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[9] Petitioner also represents grocery, CCK, and meat department employees at two other Employer stores in Wenatchee and Yakima, Washington.

B. The Employer's Operations

1. Overview of the Francis Store

Within the operations of the Francis store as a whole, I will now set out the various departments that exist, the supervisory structure of the store, the freight processing function that all employees perform along with the functional integration of these products throughout the store, the customer service and/or selling functions performed by employees, and general terms and conditions of employment for store employees. Next, I will briefly discuss the similarities and differences between the Francis, Sullivan, Wandermere and Thor stores, and will also briefly discuss interchange of employees between each store. Finally, I will summarize the operations of the Francis nutrition department including its location within the store and the types of products carried, its supervisory structure, employee duties and responsibilities, skills and training of nutrition employees and contact and interchange of nutrition employees such that their community of interest vis-à-vis the Francis grocery unit may be analyzed.

The Francis store, which is approximately 138,000 square feet, is typical of the Employer's other one-stop stores. The Employer divides its one-stop stores into three general sections: Food, Home, and Apparel. Each section is run by a section manager, who reports to the Store Director. The Spokane Store Directors report to the Regional Director of Sales for Zone 6, which comprises the geographical area of Idaho and Eastern Washington.

(i) Departments and Supervision

Within each general section are discrete areas for particular products or classes of products. For example, the Food section is divided into areas for, among other products, produce, meat and seafood, bakery, service deli, frozen foods, general grocery, health and beauty aids (HABA), pharmacy, and nutrition items. The Home section includes the garden center, floral department, toy department, sporting goods, auto and hardware departments, home electronics, tool and housewares, domestics and stationery, and furniture and décor. The Apparel section is divided into various sub departments of clothing, as well as shoes, cosmetics, bridge jewelry and accessories.[10]

The following department managers report directly to the Store Director: Food Manager, Home Manager, Apparel Manager, Home Electronics Manager, Customer Service Manager, Loss Prevention Manager, and Human Resources Coordinator. The Meat, Bakery, Service Deli, Produce, Pharmacy, and Nutrition department manager report directly to the Food Manager and to his/her Assistant and Food Relief Manager.[11]

Each of these managers is responsible for and is actively involved in the operation of their respective section and/or department. For example, Food section managers have plenary

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[10] This list of subsections is not exhaustive; the record more fully describes the various departments and the products sold within each department.

[11] Reporting to the Home Manager are the Merchandising Assistant, Operations Assistant, and Relief Assistant. Reporting to these four managers are various section managers including the Garden Center Manager, Home Electronics Assistant Manager, and Home Electronics Relief Assistant Manager. Reporting to the Apparel Manager are the Apparel Assistant and the Apparel Third or Relief Assistant. Reporting to these four managers are various section heads such as the Shoe Department Manager, and the Jewelry Department Manager. Reporting to the Customer Service Manager are the Assistant and Relief Assistant managers.

authority over the produce, nutrition, meat and seafood, bakery, service deli, health and beauty, and pharmacy departments. Section managers also regularly circulate through their departments to ensure that they are operating properly, and meet with department managers to discuss matters relevant to their discrete department, as well as matters affecting the section as a whole. The Food section managers schedule employees in their section, and participate in interviewing and hiring employees in their section. Section managers' authority, however, is limited to their section; *e.g.*, the Food section manager has no authority over Home section or Apparel section employees.

(ii) Freight Processing Function

Employees in virtually every department storewide at the Francis location process freight. The work—known as "throwing freight"—involves department employees receiving freight specific to their area and moving it from the stockroom to their department where employees put it on shelves or racks.[12] Most freight is delivered in the evenings to the Francis store and most departments have a 24-hour window period, beginning from the time freight is delivered to the stockroom, to "throw" their freight. The only exception is the grocery department (defined by the Employer as employees working in the discrete area within the Food section where canned foods, dry goods and frozen foods are stocked), which is required to "throw" freight at a rate of 60 cases per hour per person.

Each Francis store department is responsible for processing its own freight and the frequency and size of freight deliveries varies from department to department. In short, larger departments receive more freight and, therefore, must dedicate more employee-hours to "throwing" it. The Employer estimates that the Francis grocery department receives 1500 pieces of freight every other day in the evening, with the closing PIC (Person in Charge) of the food division responsible for unloading the truck, and three to four grocery department clerks placing the freight in an appropriate area for each grocery department in the store stockroom. For example, nutrition department products are placed in or about an area of the stockroom dedicated to the nutrition department. If excess product is left over after stocking the shelves, grocery and nutrition clerks place their respective excess product in a U-boat,[13] and the following night or day, one to two food clerks and a nutrition clerk return their respective excess product via a U-boat back to their respective stockroom areas.[14] Moreover, nutrition clerks will re-stock nutrition products throughout the course of their shift, as is the case with grocery clerks.

(iii) Customer Interaction and Sales Function of Employees

The record establishes that employees in every department have some interaction with customers. Employees in the Home and Apparel sections (hereinafter referred to, collectively, as "general merchandise") are required to perform selling functions in their departments,[15] and

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[12] Each section has its own stockroom, which is divided into areas for each department in that section.

[13] A cart used for stocking fast moving freight. Fast moving freight consists of products that are on advertisement because of the seasonality of the product. For example, pumpkin pie mix during the holidays is a fast mover.

[14] Generally, grocery clerks return excess product ("back-stocking") during the night and nutrition clerks perform the function during the day.

[15] Selling includes suggesting to customers that they consider a more expensive product, or buy additional merchandise. One example offered by the Employer would be an employee working in intimate apparel, who works closely with customers and has a loyal following. Another example offered by the Employer is an employee working in the photo department who sells a television to a customer and may offer to sell them a cable for the TV or offer a warranty program to go along with the TV.

are required to approach and offer to assist customers who come within seven feet of where the employees are working. Many Food section employees' contact with customers is limited to directing customers from one area of the store to another, or helping a customer find a particular product. Other Food section employees, particularly the service deli and bakery department[16] employees, have greater customer contact. Food section employees, with the exception of the hot bake bakery employee, are not expected to perform selling functions similar to what is expected of General Merchandise employees.

(iv) Additional Terms and Conditions of Employment of Francis Store Employees

With regard to pay and benefits, the vast majority of Food section employees are represented by Petitioner and their terms and conditions of employment are governed by the grocery, meat and CCK collective-bargaining agreements discussed herein. However, within the Food section, nutrition department and health and beauty department employees are not organized; like general merchandise employees, the unrepresented Food section employees' pay and benefits are covered by the Employer's non-union pay scale.

2. Operations at the Employer's Sullivan, Wandermere and Thor Stores

Store Directors for the Employer's Sullivan, Wandermere, and Thor stores testified with respect to the operation of their respective stores. The main differences between the four stores were size and volume driven, that is, the number of employee hours dedicated to a particular store is based upon the size and sales volume of each store. The number and types of departments, management and supervision, reporting hierarchy, products sold, product ordering, handling of freight, hours of operation, scheduling of employees, productivity standards, and general operations are the same as the Francis store The main differences between the stores with respect to the handling of freight is that while the Francis and the Thor stores each have two separate areas for receipt of General merchandise and Food department products, the Sullivan and Wandermere stores both have one centralized freight receiving area. Finally, each store is in relative close proximity to the other - the Wandermere store is 4 miles to the north of the Francis store. The Thor store is 4 miles south of the Francis store and the Sullivan store is 14 miles from the Francis store.

3. Intra-store Interchange and Transfers between the Four Spokane Stores

There is some general interchange and "borrowing" of employees between all of the Employer's four Spokane stores. With respect to permanent transfers, job openings are posted at all four Spokane stores. Any Spokane employee can apply for these openings, even if the openings are at another Spokane store. If an employee transfers from one store to another, their seniority travels. For example, the Francis full-time nutrition clerk was formerly an apparel employee at the Wandermere store and a Francis music market employee transferred from the Thor store. With respect to temporary transfers or borrowing of employees between the Spokane stores, this has occurred exclusively among the Petitioner represented unit employees. Additionally, all stores regularly exchange meat cutters, bakery employees and grocery clerks.

[16] Between 4:00 pm - 6:00 pm, a bakery department employee does a "hot bake" and provides samples to customers in an effort to actively sell products in the department.

4. The Francis Store Nutrition Department

Within the Food section at the Francis store is a nutrition department where the Employer stocks organic foods, vitamins, supplements, a small selection of dairy and frozen food products, other grocery items, and certain non-food items that the Employer markets as "natural choices." The nutrition department at the Francis store consists of approximately 2,000 square feet and 2 1/2 aisles, with weekly sales of $18,000 - $20,000. Nutrition department products are also cross-merchandised, and carried in other departments. The department is surrounded by the grocery, produce, deli, meat, bakery, and service deli departments.

The nutrition department includes a Nutrition Manager, and one full-time and one part-time clerk and is open from 7:00 am to 9:00 pm 7 days per week. Generally, the full-time clerk works three 12:00 pm to 9:00 pm shifts and two 7:00 am to 4:00 pm shifts. The part-time clerk works from either1:00 or 2:00 pm to 9:00 pm, 4 days per week. The Francis Nutrition Manager works 5 days per week from 7:00 am to 5:00 pm Monday - Thursday and 5:00 am to 3:00 pm on Sundays. The nutrition department is under the control of the Food Manager who utilizes input from the Nutrition Manager in scheduling the nutrition clerks for work, and who participates along with the Nutrition Manager in interviewing and hiring nutrition clerks.

The Francis nutrition clerks are not present when freight arrives at the store. However, they are responsible for breaking the freight down off the pallet in the stockroom, and dividing the freight up into dry, bulk, and dairy sections, placing it on dollies or U-boats, wheeling it out to the aisles, and stocking the freight onto shelves.[17] In addition to breaking the freight down, which arrives every other day, nutrition employees perform other tasks such as assisting customers, ordering product, filling coolers, performing back-stocks washing bins and sweeping the bin area.

Francis nutrition clerks are required to have the freight thrown within 24 hours, and throw about 165 - 300 pieces per day. On freight days, the full-time clerk spends 75% of her time throwing freight and the remainder of her time doing orders[18] and helping customers. On non-freight days, the full-time clerk spends 30-40% of her day doing back stocks, and the remainder of her time assisting customers and cleaning. However, time spent on each task is also dependent upon the day of the week, as weekends involve much more customer contact. The part-time clerk spends a similar amount of time as the full-time clerk interacting with customers.

Specifically, nutrition clerks have regular customer contact, usually helping customers find a particular product in the department, or helping customers find another department. Nutrition employees also assist customers using an Employer-maintained computer to obtain information regarding products that might assist customers in treating ailments or conditions. Approximately twice per week, clerks assist customers to special order a product using a catalog of products available to the Employer. Although the Employer argues on brief that Francis nutrition department clerks are expected to up-sell, similar to general merchandise employees, Francis store clerks denied being required to up-sell, and have not been evaluated or disciplined in this regard. Moreover, the Employer provided no documents to establish that

[17] Dairy products arrive with produce products. Frozen nutrition food items are retrieved by the nutrition clerks from a frozen food area where grocery products are also stored. However, nutrition products are separately stocked in this frozen grocery products area.

[18] Clerks order three types of products, dry products (which need to be ordered by 3:00 pm), dairy and then frozen products.

discipline or evaluation of this nature has taken place within the nutrition department at the Francis store.

While nutrition clerks are expected to become familiar with the products in their department, they gain that knowledge over time through experience in their department, particularly with input from their department manager. Nutrition department employees are not required to have, and do not receive any specialized knowledge or training.[19] Aside from the Pharmacy department employees, there is no evidence that any Francis store employee is required to possess any technical knowledge or receive special training prior to their employment.

Francis nutrition department employees share a desk, located in the middle of the produce section of the store, with produce employees. Schedules and sales data are kept at the desk. This area also has sinks, a garbage disposal, mops, brooms, dust cloths, and feather dusters. Nutrition employees share this equipment with the produce employees. This shared space leads to occasional interaction between nutrition and produce employees. When nutrition employees and produce employees take breaks, they cover the nutrition and produce areas for each other.

Because many nutrition department products are cross-merchandised in other departments (for example, pet food, Martinelli's sparkling cider, Celestial Seasonings products, peas, and peanuts are carried in both the nutrition and grocery departments), Francis nutrition department employees have regular,[20] work-related contact with other Food employees. Nutrition employees will take products to other departments to stock them, or clerks from other departments will stock products in the nutrition departments. After nutrition employees fully stock the shelves in their department, they return any overstock to the Food stockroom, but return as necessary to retrieve freight for re-stocking.

Produce clerk Vance Rose frequently substitutes in the Francis nutrition department. When the Francis store full-time nutrition clerk began working in the nutrition department, produce clerk Rose worked alongside her for her first 40 hour shift. Rose performed nutrition freight and back stock functions and assisted customers. Rose testified that over the course of the last year, he has worked intermittently approximately 30-60 days, or a month and a half to 2 months, in the nutrition department, including 2 consecutive weeks during the Nutrition Manager's vacation. While working in the nutrition department, Rose performed the functions of regular nutrition clerks, including assisting customers with questions. In addition to working in the nutrition department, Rose has also filled in a few shifts in the dairy and grocery departments.[21] Further, a grocery employee named Corey worked a night shift when the part-

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[19] Although the Francis full-time clerk has a 2-year nutrition degree, neither party claims this is a job requirement. A couple of weeks after beginning work in the nutrition department, the Francis full-time clerk attended a 1 to 2 hour seminar about a particular line of products (Nature's Way), intended to show employees what the new products were. Her attendance at the seminar was not required. The part-time Francis nutrition clerk neither formally applied nor interviewed for the nutrition position, but rather, was moved permanently into the department after filling in temporarily while floating back and forth between the Nutrition and HABA departments.

[20] Although this contact is regular, the Full-time clerk agreed with the Employer's attorney on cross-examination, that time spent on cross-merchandise stocking amounted to perhaps 1 out of the approximate 112 employee hours scheduled per week in the nutrition department.

[21] In addition to Rose, evidence was adduced at the hearing that a grocery clerk filled in at least three times in the last 6 months due to absences and a grocery employee named Corey who worked a night shift when the part-time nutrition employee was out sick.

time nutrition clerk was out sick.

Francis store nutrition employees have not worked in any other Francis store departments, and the evidence does not indicate that any Francis general merchandise employees have worked in the Francis nutrition department.[22] Although the Francis Store Director testified and the Employer on brief states that the preference is to first look for substitutes for nutrition clerks in non-unionized departments such as health and beauty aids (HABA), home apparel and home electronics, in that order, employees in those departments have not substituted in the nutrition department at the Francis store.

III. ANALYSIS

A. The Union Has Not Waived Its Right to Represent Nutrition Department Employees

The Employer contends Petitioner expressly and forever waived its right to seek representation of the Employer's general merchandise employees, including nutrition employees, at each of its four stores in Spokane and that this express waiver was contained in a series of letters setting forth the parties' recognition agreements for each of the four stores. The Employer further contends that in exchange for this series of waivers, it agreed with Petitioner to enter into separate card check agreements for three units -- grocery, meat, and CCKs -- at each of the four Spokane stores. However, Petitioner contends that its waivers were not unlimited or "forever;" rather, they were for a limited time that has long since passed.

In Briggs Indiana, 63 NLRB 1270 (1945), the Board held that an agreement in which a union agrees not to seek representation of certain employees bars a petition by that union for the specified employees during the life of the agreement. See also Cessna Aircraft Co., 123 NLRB 855 (1959). In Lexington House, 328 NLRB 894 (1999), the Board held that the agreement does not have to be part of the collective-bargaining agreement. In Lexington House, the Board also stated the requirements of the "Board's rule in Briggs Indiana," by setting forth the requirements for an effective waiver or promise not to organize, "namely that the promise be express, for a reasonable period of time and the result of bargaining between equals . . . ." Id. at 897.

Waivers of statutory rights "are not to be lightly inferred, but instead must be 'clear and unmistakable.'" Greensburg Coca-Cola Bottling Co., 311 NLRB 1022, 1028 (1993); Georgia Power Co., 325 NLRB 420 (1988), enfd. mem. 176 F.3d 494 (11th Cir. 1999), citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).[23] Further, the party asserting such a waiver bears the burden of establishing all the requirements necessary to find such a waiver. See Roosevelt Memorial Park Inc., 187 NLRB 517 (1970). Here, that burden rests with the Employer.

In the instant case, there is no collective bargaining agreement in existence between Petitioner and the Employer whereby Petitioner has waived its right to organize nutrition

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[22] Francis nutrition employees have not substituted in any of Employer's other Spokane stores. Similarly, Sullivan, Wandermere and Thor nutrition employees have not worked in nutrition departments of other Employer Spokane stores.

[23] See Also Northern Pacific Sealcoating, Inc., 309 NLRB 759 (1992) (holding that parties to collective-bargaining agreements may waive certain of their rights, including some fundamental statutory rights, and that the Board will generally enforce such waivers when they are clear, knowing, and unmistakable).

employees in any of the Employer's Spokane stores.[24] Thus, I turn next to letters of agreement between the parties and specifically to the parties' letter dated January 19, 1995, covering the Francis and Sullivan stores. That letter confirms the agreement between the parties regarding Petitioner's access to those two stores; regarding recognition upon presentation of a majority of cards in the grocery, meat, and CCKs units; and regarding the parameters of a collective bargaining agreement. This letter is signed by Carl Wojciechowski for the Employer and by Jim Milsap for Petitioner. Most significant, that letter contains no mention of Petitioner waiving its right to organize the Employer's general merchandise and/or nutrition employees. The letter also does not contain any reference to the Employer allowing Petitioner access to its Francis and Sullivan stores to organize grocery, meat and CCK employees in exchange for disclaiming interest in the general merchandise employees working at the same stores. In sum, the January 16, 1995, letter between the parties fails to meet the Briggs Indiana requirements, as the letter does not evidence a waiver at all.

In conjunction with the January 16, 1995, letter, the Employer offered the testimony of its witness, Carl Wojciechowski, who testified that Petitioner President Milsap orally agreed to refrain from organizing the Employer's general merchandise employees at the Employer's Francis and Sullivan stores. Wojciechowski further testified that even though he understood that this waiver meant "forever," he admitted that there was never any statement by Milsap that Petitioner was "forever" waiving such a right.[25] However, the Board has held that that a waiver or promise not to seek to represent a particular group of employees may not be implied by way of an explicit exclusion from a contractual unit or on the basis of an "alleged understanding" between the parties during their negotiations.[26] Here, Wojciechowski's "alleged understanding" was neither express nor for a defined period of time. Thus, the Employer has failed to carry its burden of establishing all of the requirements necessary to find a waiver by Petitioner with respect to the Francis and Sullivan stores.

As for the Wandermere and Thor stores, the parties executed letters, respectively dated January 6, 1998, and June 25, 2001. Those two letters do contain waivers by Petitioner of its right to organize general merchandise employees employed at the Wandermere and Thor stores. However, the waivers in both letters do not contain a reasonable time period, or any time period for that matter. Consequently, the letters fail the Board's requirements for establishing a valid waiver.[27] In sum, none of the applicable contracts, written correspondence, or alleged understandings between the parties contains an express waiver by Petitioner to

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[24] The Board in UMass Memorial Medical Center, 349 NLRB No. 35 (February 20, 2007) reiterated its long-standing rule that a union is precluded from representing a specific group of employees during the term of a collective-bargaining agreement "only where the contract itself contains an express promise on the part of the union to refrain from seeking representation of the employees in question or to refrain from accepting them into membership." Id., slip op. at 2, citing Briggs Indiana Corp., 63 NLRB 1270 (1945).

[25] Current Petitioner President Larry Hall testified at the hearing that he recalled that Milsap told him at the time that Petitioner was agreeing not to organize general merchandise employees at the Francis and Sullivan stores for a period of 3 years.

[26] See UMass Memorial, above, quoting Cessna Aircraft Co., 123 NLRB 855, 857 (1959).

[27] Contrast the parties' letters for the Francis, Sullivan, Wandermere and Thor stores with their letter of recognition agreement dated January 21, 2000, wherein Petitioner agreed not organize or represent any general merchandise employees outside the grocery, meat, and CCK units and *forever* disclaimed its interest in and waived its right to represent such employees at the Employer's East Wenatchee, Washington store, whose employees are not the subject of this petition. While the January 21, 2000, letter was executed subsequent to the Francis, Sullivan and Wandermere letters and prior to the Thor letter, it does evidence the parties' ability to set forth definitive waivers in their agreements.

"forever" waive organizing and/or representing the Employer's general merchandise employees at the four Spokane area stores.

In light of the above and the record as a whole, I find that the Employer has failed to meet its burden of establishing all the requirements necessary to find a waiver by Petitioner.[28]

B. The Appropriateness of a Self-Determination Election for Nutrition Employees

A union may petition to add unrepresented employees to an existing bargaining unit by petitioning for a self-determination election. In a self-determination election, if the majority of employees votes against representation, they remain unrepresented, but if the majority of employees votes for representation, they become part of the existing unit.[29]

A union may petition for a self-determination election to represent a "residual" group of employees omitted from established bargaining units, or petition to represent a group of employees that does not belong to any existing bargaining unit but does not constitute a residual unit. When an incumbent union petitions to represent employees in a residual unit, the incumbent union may only represent the employees in the residual unit by adding them to the existing unit, usually by means of a self-determination election.[30] When the petitioned-for voting group does not constitute a residual unit, a self-determination election will be directed if the petitioned-for employees share a community of interest with the unit employees, and the employees to be added to the existing unit "constitute an identifiable, distinct segment so as to constitute an appropriate voting group."[31]

Neither party argues that Francis nutrition employees alone constitute a "residual" unit and I do not find those employees to be a residual unit in the circumstances of this case. Accordingly, I then must turn to the parties' contentions regarding whether the Francis nutrition employees share a community of interest with the grocery unit employees to warrant the self-determination election sought by Petitioner in this case.

The Employer asserts that nutrition employees do not share a community of interest with grocery unit employees and that to include nutrition employees in the multi-facility grocery unit would effectively create an inappropriate unit.[32] The Board has held that in order for a unit to be appropriate for purposes of collective-bargaining within the meaning of the Act, the unit need not be the only appropriate unit or the most appropriate unit; it need only be *an* appropriate unit.[33] Thus, in determining whether a unit is appropriate, the Board first examines the petitioned-for

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[28] The Employer cites Lexington House, supra, in support of his contentions regarding waiver. However, as noted above, that case supports finding no waiver in the circumstances of this case.
[29] Warner-Lambert Co., 298 NLRB 993 (1990).
[30] St. John's Hospital, 307 NLRB 767 (1992).
[31] Warner-Lambert, 298 NLRB at 995. See also University of Pittsburgh Medical Center, 313 NLRB 1341 (1994).
[32] While the Employer asserted on the record that if the Francis nutrition department employees were found to be an appropriate unit for a self-determination election, that an election should be held among all nutrition department employees of the Employer's four Spokane stores, based upon the parties' history of multi-facility bargaining units, and while Petitioner, on the record also asserted that it would proceed to an election of employees working in the Employer's four Spokane store nutrition departments, on brief, the parties changed their positions on these issues.
[33] Barron Heating and Air Conditioning, Inc., 343 NLRB No. 58, slip op. at 3 (2004), citing American Hosp. Ass'n v. NLRB, 499 U.S. 606, 610 (1991); Overnite Transportation Co., 322 NLRB 723 (1996).

voting group. If the petitioned-for unit is *an* appropriate unit, the inquiry ends.[34] If it is not an appropriate unit, the Board then examines whether an alternative unit suggested by the parties or another unit not suggested by the parties is appropriate.[35] To determine whether the petitioned-for unit of Francis nutrition employees should be allowed to vote in a self-determination election to become part of the multi-facility grocery unit, the Board evaluates the following community of interest factors: functional integration; employee contact and interchange; employees' skills and functions; common management and supervision; terms and conditions of employment; and bargaining history.[36]

Based upon a careful review of the record evidence and analysis of relevant Board principles, I find, contrary to the Employer, that the nutrition department employees share a sufficient community of interest with other Petitioner-represented grocery unit employees.

1. Functional Integration

The record establishes that the nutrition department at the Employer's Francis store is functionally integrated with the rest of the Employer's Food section. The nutrition department is identified as a food department, under the authority of the Food section Manager. Nutrition department products are stocked within the Food section with no discernible barrier between it and the rest of the Employer's grocery operation. Moreover, nutrition department products are received and stored in the Food stockroom, handled by Petitioner-represented grocery clerks, and cross-merchandised in many areas throughout the Food section. The fact that some of the food items sold in nutrition may be exclusive to nutrition does not diminish the record evidence regarding nutrition's identity as part of the food operation.

In its brief, the Employer claims that nutrition is not functionally integrated with the Employer's food operation because it is considered a "general merchandise department." Yet, the record evidence does not reveal how nutrition is functionally integrated with the Employer's general merchandise operation. Moreover, the Employer's assertions that nutrition "is not identified as a food department" and that nutrition is "surrounded by" non-food departments are belied by the record evidence. Thus, the functional integration factor supports finding that the nutrition employees share a community of interest with the grocery unit.

2. Contact and Interchange

Nutrition employees have some work-related contact with grocery unit employees when cross-merchandising products. However, at the Francis store nutrition employees' main contact occurs on a regular basis with grocery unit produce employees, with whom they share a common work area in the middle of the produce area, comprised of a desk and sink. Nutrition and produce employees at this store also share the same cleaning supplies and tools and have contact with each other when soliciting coverage of each others' work areas during breaks. Although the Employer argues on brief that general merchandise employees, including nutrition employees do not have regular contact or interchange with grocery unit employees, that argument ignores the evidence that such contact occurs while sharing a common work area in the produce area, sharing of tools and supplies, and while cross-merchandising products.

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[34] Bartlett Collins, Co., 334 NLRB 484, 484 (2001).
[35] Overnite Transportation Co., 331 NLRB 664, 663 (2000).
[36] See, *e.g.*, Bashas', Inc., 337 NLRB 710 (2002) and cases cited therein.

With respect to interchange, grocery employees are the only department employees substituting for absent nutrition employees at the Francis store. This includes one produce employee, Vance Rose, who estimated spending 1 1/2 to 2 months out of the last 12 months substituting for nutrition employees in the nutrition department, a grocery clerk filling in at least three times in the last 6 months due to absences and a grocery employee named Corey who worked a night shift when the part-time clerk was out sick. The Employer argues on brief that the evidence of interchange between nutrition employees and grocery employees is an anomaly due to a shortage of staff, resulting in "occasional" substitution of grocery employees. Again, the evidence suggests much more than occasional substitution between food and nutrition employees at the Francis store. On the other hand, contact and interchange between nutrition and general merchandise employees at the Francis store is limited or non-existent.

The record evidence as described above, establishes that nutrition employees' contact with grocery employees is substantial at the Francis store. Accordingly, Francis nutrition employees' contact and interchange with grocery employees support finding a community of interest between the nutrition and grocery employees.

3. Skills and Functions

Nutrition employees and grocery unit employees possess similar skills and perform similar functions. While it is true that the specific tasks in each department differ somewhat, all Food section employees, including nutrition employees, handle food, "work" freight, re-stock their departments and assist customers. Like grocery employees, nutrition employees do not require any specialized training as a condition of employment, and any knowledge they gain regarding products in their departments is obtained through on-the-job training. Moreover, in contrast to general merchandise employees and because of the demands of "working" freight in their departments, grocery and nutrition employees are expected to perform only a limited selling function. Despite the Employer's argument in its brief that the nutrition department is considered to be a selling department, the Francis nutrition employees testified that they have never been told that selling was a requirement of their job, neither have they been evaluated nor disciplined with respect to selling requirements.

Because the Employer places such an emphasis on sales in non-food departments, general merchandise employees must possess sales skills and perform sales functions which are significantly different from those required of grocery and nutrition employees. The record shows that general merchandise employees, like nutrition and grocery employees, "work" freight, engage in recovery, provide customer service, and perform a selling function. However, the primary focus for general merchandise employees is to encourage customers to buy as many products as possible. In stark contrast, nutrition employees and grocery unit employees may help customers find certain products or offer basic information or opinions regarding certain products, but they are not expected to actively sell. Thus, I find that in this regard, nutrition employees at the Francis store share a community of interest with grocery unit employees.

4. Common Management and Supervision

Nutrition employees, like grocery employees, are under the authority of the Food section Manager. The Food Manager has ultimate authority over Food section employees' schedules, and was involved in the interviewing and hiring of the full-time nutrition clerk at the Francis

store.[37] The record also shows that nutrition employees coordinate with the Food Manager or the Food PIC to obtain fill-ins when they need to go on breaks. Contrary to the Employer's assertions that the Food Manager "has little impact on the clerks in the nutrition department" I find that in this regard, nutrition employees share a community of interest with grocery unit employees.

5. Terms and Conditions of Employment

The Employer argues that nutrition employees are largely scheduled during the day to assist customers and perform a selling function which, the Employer asserts, suggests that nutrition department employees' terms and conditions of employment are more similar to general merchandise employees than grocery unit employees. The record, however, suggests that the nutrition employees' hours are not dissimilar from many other Food section employees, particularly those charged with engaging in stocking products throughout the day. Regardless, as discussed above, nutrition employees are required to approach and offer assistance to customers, but they are not actually required to perform the same "selling" functions that, for example, a photo department employee, or apparel salesperson might. Thus, the customer service function performed by nutrition employees is more akin to that performed by other grocery employees and would support finding a community of interest with grocery employees.

The record shows that the Employer's nutrition employees are paid according to the same pay scale and receive the same benefits as the Employer's general merchandise employees. The record further shows that the Employer's general merchandise employees' pay, benefits, and working conditions are significantly different from grocery unit employees' pay, benefits, and working conditions. However, those differences are the direct result of the parties' collective-bargaining agreement covering grocery unit employees throughout the Employer's four Spokane stores. As such, evidence regarding this community of interest factor is inconclusive.

The Employer expresses concern that if nutrition employees at the Francis store are permitted to vote in a self-determination election to become part of the existing multi-store unit, that this could result in an anomaly because the other nutrition employees at the Employer's other Spokane stores would remain unrepresented. As such, nutrition employees at Francis will not be able to transfer to other nutrition departments or substitute at another store. As an initial matter, the record evidence indicates however that nutrition employees do not currently substitute for each other at any of the Employer's Spokane stores. Therefore, the Employer's concern in this regard, is thus theoretical.

Moreover, with respect to permanent transfers of employees between stores, the testimony presented at the hearing indicates that transfer opportunities are open to all of Employer's store employees into all positions, irrespective of their representational status.

Lastly, as will be discussed more fully in the bargaining history section below, the bargaining history between the parties with respect to one-stop stores in Spokane, is that since 1995 these stores have been organized on a department by department, per store basis, with recognition being granted after Petitioner presents a majority card showing in each of the Employer's three main departments respectively; grocery, CCK and meat. Thus, the bargaining history between the parties contemplates that if the presentation of bargaining cards in any

[37] Contrary to the Employer's assertion on brief, the record is silent with respect to the Food Manager's authority to discipline employees.

department falls short of a majority, that department would not be represented by Petitioner, wherein the same department in another store might be represented. As such, the Employer's concern with respect to the Francis nutrition employees being represented by Petitioner if they so voted, while the nutrition employees in the Employer's other stores remain unrepresented, appears to have been already contemplated and addressed by the parties in bargaining.

6. Bargaining History

In determining the appropriateness of a bargaining unit, prior bargaining history is given substantial weight. As a general rule, the Board is reluctant to disturb a unit established by collective-bargaining if the unit is not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. See, e.g., Canal Carting, 339 NLRB 969 (2003); Ready Mix USA, Inc., 340 NLRB 946 (2003). A party challenging a historical unit as no longer appropriate has a heavy evidentiary burden. See Trident Seafoods, 318 NLRB 738 (1995); Canal Carting; Ready Mix.

Petitioner has not represented any general merchandise or non-food employees, including nutrition employees, at any of the Employer's four Spokane stores since the stores became full-service stores and after disclaiming interest in the Francis and Sullivan general merchandise unit in 1995. Since 1995, the nutrition department in the Employer's stores has however evolved. Where it once only sold vitamins and other supplements, it now sells a variety of grocery, dairy, frozen food, and bakery products. The nutrition department is now a part of the food department, the latter of which did not exist at the Sprague and pre-remodeled Francis stores.[38]

Moreover, the parties' Spokane bargaining history with respect to the recognition of the grocery, meat, and CCK units establishes that recognition of Petitioner by the Employer has occurred based on a majority card showing on a per department, per store basis. Thus, although the Francis and Sullivan stores were organized at about the same time, recognition occurred on store-by-store, department by department basis.[39] Accordingly, the bargaining history since 1995 has been for the Employer to agree to recognize Petitioner as the representative of its employees in each department in each store at its Spokane stores, **only** after Petitioner demonstrates a card majority in each of the departments that it has sought to organize.[40]

In light of the parties' bargaining history since 1995 of seeking majority status on a department by department and store by store basis, it would be inappropriate to direct an election in a Spokane four-store wide unit of nutrition employees. As such, I reject the Employer's argument that the bargaining history between the parties establishes a community

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[38] I do note that Petitioner represented nutrition employees in the general merchandise unit at the newly remodeled Francis and new Sullivan one stop stores. However, the parties were unable to negotiate a successor contract to the 1990 through 1993 contract for the general merchandise employees in that unit.

[39] Note that after-acquired store clause language does not exist in any of the collective-bargaining agreements negotiated between the parties since 1995. Such language was a significant factor in my decision in 19-RC-15057 involving this Employer. There, the after acquired store clauses laid out details regarding unit placement of employees. Thus, such bargaining history was a significant factor in finding against the petitioned-for unit of employees in 19-RC-15057. However, that particular bargaining history is not evident among the parties in the Employer's Spokane area stores.

[40] Within Petitioner's jurisdiction, there exist industry examples of multi-facility bargaining units that do not contain the same departments of represented employees at each facility. These include Safeway and Albertson's fuel centers. Some centers are part of the Petitioner's grocery unit, others are not.

of interest between the nutrition employees and the general merchandise employees, and I therefore reject the Employer's position that the appropriate unit in a self-determination election is one that includes nutrition employees and general merchandise employees in each of its Spokane stores.

In these circumstances, I find that the parties' bargaining history, including its practice of granting recognition on a department by department and store by store basis, supports finding that Francis nutrition employees share a sufficient community of interest with grocery unit employees. This bargaining history factor in conjunction with other community of interest factors noted above further supports my finding that the petitioned-for employees are an appropriate voting group. I do recognize that the nutrition department employees at the four Spokane stores may also share a community of interest with employees in the grocery unit and could be an appropriate voting group. However, neither party sought such a voting group either as primary or alternative position. Moreover, the parties did not fully develop the record with regard to the community of interest shared by nutrition department employees at all four stores with the unit of grocery employees. Accordingly, I find the petitioned-for employees constitute an appropriate voting group for the purposes of a self-determination election.

IV. CONCLUSION

I find, in light of the above and the record as a whole, that the Petitioner has not waived its right to petition to represent the nutrition department employees at the Employer's Spokane stores. Further, I find that the petitioned-for Francis nutrition employees share a sufficient community of interest with employees in the grocery unit. Evidence regarding functional integration, work-related contact, common management and supervision, similarity of skills, interchange and contact among Francis nutrition employees and grocery employees, and bargaining history supports a finding that those groups of employees share a community of interest. Thus, I shall direct a self-determination election among the Francis nutrition employees to determine whether this voting group wishes to be represented by Petitioner in the collective-bargaining unit of all grocery employees working for the Employer at its Francis, Sullivan, Wandermere and Thor stores located in Spokane, Washington.

Accordingly, I shall direct an election in the following appropriate voting group:

> All regular full-time and part-time employees working in the nutrition department at the Employer's retail store located at 525 E. Francis Avenue, Spokane, Washington; excluding the Nutrition Department Manager, managerial employees, confidential employees, guards and supervisors as defined in the Act.[41]

There are approximately two (2) employees in the voting group found appropriate.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting group who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during

[41] Because I find the petitioned-for unit to be appropriate, I will not address Petitioner's alternative stand-alone Francis nutrition department unit argument.

Case file

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 19

Fred Meyer Stores, Inc., Employer, And United Food and Commercial Workers Union, Local 1439, AFL-CIO, Petitioner.	Case No. 19-RC-15068

EMPLOYER'S REQUEST FOR REVIEW OF

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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Exhibit D-2

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I. REQUEST FOR REVIEW

Pursuant to Section 102.67(b) of the Board's Rules and Regulations, Fred Meyer Stores, Inc. ("Fred Meyer" or "the Employer"), respectfully requests that the National Labor Relations Board review the March 7, 2008, Decision and Direction of Election ("D&DE") by Region 19 Regional Director ("RD") Richard L. Ahearn, which directed a self-determination election in a unit limited to nutrition employees at the Employer's Francis store in Spokane, Washington, to determine whether those nutrition employees wish to be added to the existing multi-store grocery unit, as petitioned for by United Food and Commercial Workers Union, Local 1439 (hereinafter the "Union" or "Local 1439"). (A copy of the D&DE is attached hereto as Exhibit "A" and is cited herein as "D&DE __.") The Employer seeks review of the D&DE for the following compelling reasons:

1. The RD's D&DE raises a substantial question of law or policy, because the RD departed from officially reported Board precedent to find that the Union did not waive its right to represent the general merchandise employees, including the nutrition employees, at Fred Meyer's Spokane stores, including the Francis store at issue in this case. (D&DE 11-13.) See Board's Rules and Regulations, Section 102.67(c)(1).

2. The RD erroneously concluded that a self-determination election among only the two nutrition employees at the Francis store is appropriate in this case, because the Francis nutrition employees share a community of interest with the employees in the existing multi-store grocery unit sufficient to be included in that unit. (D&DE 18.) The RD reached this conclusion by making several decisions on substantial factual issues that are clearly erroneous on the record, and which prejudicially affected the Employer's rights, and mandating review under Section 102.67(c)(2).

II. SUMMARY OF EMPLOYER'S POSITION

This case arose out of a petition filed by the Union on February 8, 2008, by which the Union sought to represent the employees employed in the nutrition department of Fred Meyer's store located on Francis Avenue in Spokane, Washington. (Bd. Ex. 1a.) 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. At the hearing, the Union indicated that it would only proceed with an election directed in a unit consisting only of the two nutrition employees employed at the Francis store, or in a unit consisting of nutrition employees employed at all four Fred Meyer stores in Spokane. (Tr. 358.) The Union stated that it would not proceed with an election directed in any unit that includes general merchandise employees. (Id.)[1]

Fred Meyer contested the appropriateness of the petitioned-for unit for the following reasons. First, in exchange for a card check agreement in the grocery, meat/seafood, and CCK units in every Fred Meyer store in Spokane, the Union waived its right to represent the general merchandise employees, including the nutrition employees. The parties have abided by this agreement every time a new store opened in Spokane, but the Union is now seeking to avoid its waiver by filing this self-determination petition seeking to include the nutrition employees in the existing multi-store grocery unit, despite the fact that the nutrition employees are general merchandise employees, who were previously represented by the Union as part of a general

[1] Should the Board determine that the petitioned-for unit is inappropriate under the facts of this case, and instead directs an election in an expanded unit of nutrition employees, or in an expanded general merchandise unit, including nutrition employees, the Employer requests that an administrative determination of the adequacy of the Union's showing of interest in any such expanded unit be conducted before an election is held in such unit.

merchandise unit. Second, the nutrition employees do not share a community of interest with the employees in the existing multi-store grocery unit sufficient to be included in that unit. The nutrition department is one of several general merchandise departments of the Employer's stores, and the employees working in that department were previously represented by the Union as part of a single multi-store general merchandise unit, until the Union disclaimed interest in that unit. If an election is to be directed in this case, it should be directed in an appropriate unit of general merchandise employees at the Francis store, including the nutrition employees. Lastly, the petitioned-for unit limited to the two nutrition employees at the Francis store is inappropriate, inasmuch as it an arbitrary grouping of employees because it does not include the general merchandise employees, including the nutrition employees, at all four Spokane stores.

A hearing was held in Spokane, Washington, February 20 through 21, before Hearing Officer Janet Little. Both parties submitted briefs to the RD on March 4, and the RD issued his decision on March 7.

III. STATEMENT OF FACTS

A. The Parties Have A Long History of Collective Bargaining.

Fred Meyer operates 128 retail stores in Oregon, Washington, Idaho and Alaska. (Tr. 26.) 120 of these Fred Meyer stores are considered to be one-stop shopping stores which sell a full line of merchandise including grocery and general merchandise items. (Tr. 26, 110) All of these 120 one-stop stores are all in excess of 100,000 square feet in size. (Tr. 26.) There are four one-stop stores in Spokane, Washington: Sullivan, Wandermere, Thor, and the Francis store, which is at issue in this case. (Jt. Ex. 19.)

The parties' bargaining relationship began in 1975, when the Francis store was opened. (Jt. Exs. 1, 19.) At that time, the Francis store was only a general merchandise store and did not carry grocery products. (Tr. 30-31, 74.) With a few exceptions, the Union

represented the Francis employees in a wall-to-wall general merchandise unit. (Jt. Ex. 1; Tr. 80-81.) The Sullivan store was opened in 1993, and was also a non-foods store. (Tr. 30-32.) The Francis general merchandise contract was applied to the employees in the Sullivan store. (Jt. Ex. 19; Tr. 30-32, 77.)

After the creation of the nutrition departments, the nutrition employees at both the Francis and Sullivan stores were included in the general merchandise unit.[2] (Jt. Ex. 4: p.1.) This placement of the nutrition employees in the general merchandise unit is consistent with the organizational structure of Fred Meyer's one-stop stores. In each of the one-stop stores in which general merchandise employees are represented by a union, the nutrition employees are included in the general merchandise unit. (Tr. 68.) In each one-stop store where grocery employees are represented by a union, nutrition employees are not included in the grocery bargaining unit. (Tr. 28); see also, Case Nos. 19-RC-15057, 19-RC-15036.

Several things occurred between the parties in 1995. Fred Meyer just completing the conversion of the Francis and Sullivan[3] stores from non-foods stores into one-stop stores, so that in addition to the general merchandise departments, they would also have grocery, meat/seafood and CCK departments. (Tr. 30-32.) The Union approached Fred Meyer and expressed interest in representing the employees in the new Francis and Sullivan grocery, meat/seafood, and CCK departments. (Tr. 32.) The parties struck a deal: Fred Meyer would enter into a card check agreement with the Union for grocery, meat/seafood, and CCK units at

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[2] The first reference to the nutrition departments in the general merchandise contracts between the parties was in the 1984 to 1987 general merchandise contract applicable to the Francis store. (Jt. Ex. 4.)

[3] The original Sullivan store, then referred to as the Sprague store, was closed and a new one was built nearby. (Tr. 31.)

the Francis and Sullivan stores,[4] and in exchange the Union would not attempt to organize the general merchandise employees in the stores. (Tr. 32, 78; E. Ex. 3.) The Union disclaimed interest in the Francis and Sullivan general merchandise units effective March 28. (Tr. 93-94; E. Exs. 1, 4.) The Union was able to demonstrate a sufficient showing of interest in the grocery, meat/seafood and CCK units at both stores, and has been representing the employees in these units since April 1, 1995. (Jt. Exs. 19, 7-18: p.1.)

As Larry Hall, President of Local 1439, testified, this agreement between the parties was the same type of agreement that had been in place for years between Fred Meyer and UFCW Local 555 in East Wenatchee, Washington. (Tr. 78.) It was Fred Meyer's understanding that, just as Local 555 had done, Local 1439 was forever disclaiming interest in representing the general merchandise units at Fred Meyer's Spokane stores. (Tr. 32, 65, 67; E. Exs 9-11; P. Ex. 2.) In exchange, Fred Meyer was agreeing to forever recognize, and to enter into card check agreements, with Local 1439 at its Spokane stores. (Tr. 34, 58, 65.)

In accordance with this agreement between the parties, every time a new store opened in Spokane, Fred Meyer entered into a card check agreement with the Union in the grocery, meat/seafood, and CCK units, and the Union agreed in writing not to organize the general merchandise employees. (Tr. 39-40.) When the Wandermere store opened in 1998, the parties entered into an identical card check agreement for its grocery, meat/seafood, and CCK units. (Tr. 40; E. Ex. 5.) This agreement specifically stated: "The Non-Food Department

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[4] This was consistent with the organization of Fred Meyer's 120 one-stop stores, which, historically, have been organized into grocery, general merchandise, meat/seafood and CCK units. (Tr. 27.) Fred Meyer operates a number of one-stop full line stores where: grocery employees are not represented by any union; meat/seafood employees are not represented by any union; CCK employees are not represented by any union; general merchandise employees are not represented by any union; a union may represent employees in only one of the four, two of the four, or three of the four, above described bargaining units; a union represents employees in all four of the above-described bargaining units, and where its employees are not represented by a union in any fashion. (Tr. 27-28.)

employees at both the Francis and Sullivan stores are not represented by UFCW Local 1439 and therefore, the Union agrees it will not solicit or organize the Non-Food employees (which includes the [Customer Information] Desk employees) in the Wandermere store." (E. Ex. 5.) Upon demonstrating the required showing of interest in the Wandermere meat/seafood, and CCK units, these units were added to the existing contracts between the parties. (Jt. Exs. 19, 8-10: p.1, 12-14: p.1, 16-18, p.1; E. Ex. 6.) The very same agreement was also entered into when the Thor store was opened in 2001, and upon demonstrating the required showing of interest in the Thor grocery, meat/seafood, and CCK units, these units were also added the existing contracts between the parties. (Tr. 43; Jt. Ex. 19; E. Ex. 7.)

Pursuant to its bargain with Fred Meyer, the Union has not attempted to organize the general merchandise employees at the Francis, Sullivan, Wandermere, and Thor stores – until the filing of its petition in this case. (Tr. 100, 101, 102, 104, 105; Jt Ex. 19; Bd. Ex. 1a.) In the bargaining each successor grocery contract, the Union never proposed that the nutrition employees be included in the grocery unit. (Tr. 105.)

B. The Nutrition Employees Do Not Share a Community of Interest with the Employees in the Existing Grocery Unit Sufficient to be Included in that Unit.

There are sound labor relations reasons for the nutrition employees to have been historically included in the general merchandise units in the Employer's stores. When the general merchandise employees were represented by the Union, the parties agreed that the nutrition employees should be included in the general merchandise unit (and bargained their contracts accordingly until the Union disclaimed interest in that unit). The nutrition employees were properly included in the general merchandise unit because they share a community of interest with the employees in the general merchandise departments, and do not share a

community of interest with the employees in the existing multi-store grocery unit sufficient to be included in that unit.

The Store Directors of the Francis, Sullivan, Wandermere, and Thor stores each testified at the hearing. Important differences between the stores are noted below, but for the most part the following facts apply equally to the Francis, Sullivan, Wandermere, and Thor stores. (Tr. 218, 234, 253-54.)

1. Organizational Structure.

Each Fred Meyer store is run by a Store Director, who has ultimate responsibility for the day-to-day operation and execution of corporate expectations at his store. (Tr. 108, 199, 223, 249.) Mark McKee has been the Store Director of the Francis store for a little over three years.[5] (Tr. 109.) The Store Directors report to Rick Heffner, Regional Director of Sales Idaho and Eastern Washington. (Tr. 109.) Reporting directly to the Store Directors are the department managers, including: the apparel department manager, the home department manager, the photo electronics department manager, the CCK department manager (who is called an Operations Manager), the loss prevention manager, and the food department manager. (Tr. 113.) These departmental managers have several managers reporting to them in turn. (Tr. 113-14.) In particular, the food manager's direct reports are: the meat/seafood manager, the produce manager, the service deli manager, the bakery manager, the pharmacy manager, and the nutrition manager. (Tr. 114.)

The employees working in the CCK departments are subject to the CCK labor agreement between the parties. (Tr. 112-13; Jt. Ex. 18.) The following employees working in

[5] Steve Valentine has been Store Director at the Sullivan store for a little over three years. (Tr. 199.) Cheryl Albright has been Store Director at the Wandermere store for almost ten years. (Tr. 232.) Steve Wissink has been Store Director of the Thor store for a little over four years. (Tr. 249.)

the food departments are subject the grocery labor agreement between the parties: produce, bakery, grocery, and service deli. (Tr. 111-12; Jt. Ex. 14.) The employees working in the meat/seafood departments are subject to the meat/seafood contract between the parties. (Tr. 113; Jt. Ex. 10.) The remaining employees in the stores work in departments that are referred to as the general merchandise departments. (Tr. 28.) Specifically, the general merchandise departments are: apparel, home, photo electronics, pharmacy, jewelry, health and beauty aides ("HBA"), and nutrition. (Tr. 27.)

2. Physical Layout of the Stores.

The Wandermere store is four miles north of the Francis store, the Thor store is five miles south of the Francis store, and the Sullivan store is only 14 miles from the Francis store. (Tr. 185.) The Francis store is roughly 138,000 square feet in size. (Tr. 114.) The Sullivan store is 180, 000 square feet in size, the Wandermere store is 158,000 square feet, and the Thor store is 144, 000 square feet. (Tr. 200, 233, 250.) The Francis store averages $650,000 a week in sales, (Tr. 115); the Wandermere store averages $700,000, (Tr. 233); and the Thor store averages $950,000 (Tr. 250). Although the exact volume of sales at the Sullivan store was not deduced at the hearing, it is similar in size to the Wandermere store, and its sales volume is slightly more than the Wandermere store. (Tr. 233, 234.) The stores are open to customers from 7:00 a.m. to 11:00 p.m. (Tr. 115.)

The nutrition department in the Francis store is roughly 2,000 to 3,000 square feet in size and is comprised of two and one-half aisles. (Tr. 152.) The nutrition departments at the Sullivan, Wandermere and Thor stores are all comprised of three aisles. (Tr. 200, 233, 251.) The nutrition aisles are not identified to customers as being part of the grocery aisles: the grocery aisles are numbered, whereas the nutrition aisles are identified by the "Natural Choices" logo that hangs above the aisles. (Tr. 235, 250.)

3. Employee Classifications at the Stores.

Approximately 164 employees are employed at the Francis store, (E. Ex. 12), 177 at the Sullivan store (E. Ex. 22), 166 at the Wandermere store, (E. Ex. 25), and 168 at the Thor store (E. Ex. 28). The classifications in which these employees are employed, and the number of employees in each of those classifications, are provided in Employer Exhibits 12, 22, 25, and 28.

4. Employee Terms and Conditions of Employment.

The employees employed by the Employer in the following general merchandise departments of the four Spokane stores, home, apparel, photo, pharmacy, jewelry, and HBA, health beauty aids, share a community of interest in that they share similar wage scales, benefits, types of work, types of duties, types of training and skill, education, and experience. (Tr. 46-48, 163-65; E. Ex 20.)

The unrepresented employees who work in the general merchandise departments of the four Spokane stores, including those employees who work in the nutrition departments, are all paid on the same wage scale, all receive the same health and welfare and pension benefits, all receive additional compensation and benefits on the same basis, and all have the same working conditions. (Tr. 46-48, 163-65.) The wage scales, health and welfare benefits, other benefits and working conditions of the represented employees in the grocery departments at the Spokane stores are paid on a different wage scale, receive different health and welfare benefits, and have significantly different working conditions when compared to those same conditions applicable to the general merchandise employees at the Spokane stores. (Tr. 46-48, 164.)

5. Selling Versus Non-Selling Departments.

As outlined below, the general merchandise departments, including the nutrition department, are considered to be the selling departments in the Spokane stores, and the grocery department does not have the same selling function. (Tr. 148, 206, 239, 254.)

a. Apparel Department.

The apparel department sells clothing, accessories, jewelry and shoes. (Tr. 153-54.) The apparel department is budgeted to have employees working in the department for roughly 650 hours a week. (Tr. 141.) Most of these hours are scheduled during the day, when the store is open, so the apparel clerks can assist customers. (E. Ex. 17.) The apparel clerks are expected to sell apparel products to customers, and spend approximately 50% of their eight-hour shifts interacting with customers. (Tr. 153-154, 155.)

b. Home Department.

There are several smaller departments within the home department, including furniture, home décor, paint and hardware, toys, garden center, automotive, and sporting goods. (Tr. 156.) The home department is budgeted to have employees working in the department for roughly 750 hours a week. (Tr. 142.) Like the apparel clerks, the home clerks are expected to sell home products to customers, so they receive on-the-job training regarding the products that are sold in their department. (Tr. 152.) Home clerks spend most of their shifts interacting with customers. (Tr. 155-57.)

c. Photo Electronics Department.

The Photo Electronics department sells electronic items, such as televisions, DVDs, and video game systems. (Tr. 152.) The clerks in the photo electronics department process photo electronics freight, and actively sell photo electronics products to customers. (Id.) The photo electronics department is budgeted to have employees working in the department for roughly 256 hours a week. (Tr. 142.) Most of these hours are scheduled during the day, when the store is open, so the photo electronics clerks can assist customers. (E. Ex. 18.) Like the apparel and home clerks, the photo electronics clerks are expected to sell their department's products to customers, so they receive on-the-job training regarding the products that are sold in

their department. (Tr. 152.) Photo electronics clerks spend up to 50% of their eight-hour shifts interacting with customers. (Tr. 153.)

d. Nutrition Department.

The nutrition department carries many specialized products, including all-natural, organic products, dietary supplements and vitamins. (Tr.111.) There are two clerks employed in the nutrition department at the Francis store, four at the Sullivan store, two at the Wandermere store, and three at the Thor store. (Tr. 146, 201, 233, 252; E. Exs. 19, 23, 26, 29.) Like the rest of the general merchandise clerks, they are expected to sell their department's products to customers, and that is their primary responsibility. (Tr. 148-49.) In order to be able to sell these products, they are encouraged to be knowledgeable about the products, and receive specialized on-the-job training regarding the products that are sold in their department from the Nutrition Manager. (Tr. 149, 223, 280.) One of the clerks working at the Francis store has a two year degree in nutrition. (Tr. 278, 308.) When there is a computer in the nutrition department, the clerks are familiarized with its use, and use it to access information about the various products sold in the nutrition department. (Tr. 210-11.) Nutrition clerks also have access to Fred Meyer Television ("FMTV") broadcasts which are shown once a quarter, and contain information about the nutrition products. (Tr. 150.) Nutrition employees are encouraged to attend vendor seminars to learn about the products provided by those vendors. (Tr. 279.)

The nutrition department is budgeted roughly 112 hours of labor per week. (Tr. 142.) Almost all of these hours are scheduled during the day, when the store is open, and the nutrition clerks can assist customers.[6] (E. Ex. 14.) Nutrition clerks are required to be on the

[6] If there is only one employee working in the nutrition department, that employee will notify the Food Manager or the Food Person in Charge when he goes on a break, so that one of these managers can cover the nutrition department in case a customer has a question. (Tr. 229, 248, 257.) This does not constitute interchange

[Footnote continued on next page]

sales floor from 5:00 p.m. to 7:00 p.m. in order to assist customers in purchasing products. (Tr. 151-52.) One nutrition clerk testified that she spends up to 50% of her eight-hour shifts actively engaging with and selling nutrition products to customers. (Tr. 344-45.) On busy days, such as Saturdays, they may spend their entire shifts interacting with customers. (Tr. 282, 337.) Often, this interaction with customers requires nutrition employees to assist a customer in choosing a certain product, prompting the nutrition clerk to ask a series of questions to determine what product will best suit the customer. (Tr. 210.) The nutrition employees also place special orders for customers from a catalogue of products that are not carried in the store, but are available from vendors. (Tr. 151, 211, 284.) They will call the customer to notify that the product has arrived in the store. (Tr. 317.) There is no evidence that any employees other than the nutrition employees perform this special order function. The nutrition clerks also use the computer located in the nutrition department to answer customer's questions. (Tr. 211.)

e. Grocery Department.

Grocery clerks do not perform the same selling functions performed by the general merchandise clerks. (Tr. 130, 176.) The clerks working in that department are not expected to possess any specialized knowledge about the products in their department, and do not receive on-the-job training regarding those products; the only training they receive is on how to process freight and use a box cutter. (Tr. 193.) The grocery clerks' primary function is to process grocery freight. (Tr. 175.)

The grocery department is budgeted to have employees working in the department for roughly 600 hours a week. (Tr. 142.) Employees are mostly scheduled to work these hours

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between nutrition employees and Petitioner-represented employees, since these managers are not bargaining unit members.

overnight when the store is closed, during the graveyard shift. (E. Ex. 15.) Three clerks are scheduled to process freight during the graveyard shift, and only two clerks are scheduled to continue processing freight during day shifts, by refilling shelves with backstock as the shelves are emptied of product. (Tr. 127-28.) These two clerks spend less than 5% of their shifts interacting with customers. (Tr. 129.) This interaction is generally limited to greeting customers and directing them to the location of items within the grocery department. (Tr. 126-27.)

f. Other Food Departments.

Like the grocery clerks, the primary function of the produce clerks is to stock freight. (Tr. 182.) Their interaction with customers is limited to offering customers samples of products carried in the produce department. (Tr. 349.) They are not expected to have knowledge about the produce products. (Tr. 183.) They are budgeted to have employees working in the department for roughly 168 hours a week. (Tr. 142.)

The bakery clerks have no direct interaction with customers, and only announce over the intercom when fresh baked bread is available. (Tr. 182, 244-45.)

The service deli clerks are essentially "order takers," filling customers' orders for sliced deli meat, or prepared foods. (Tr. 181, 207.) Although the Union introduced some testimony at the hearing that service deli clerks could "upsell" products, this testimony was entirely speculative and no witness testified that service deli clerks actually do upsell service deli products. (Tr. 181, 228, 243.)

6. Nutrition Employees Do Not Have Regular Contact With, or Interchange With, Grocery Employees.

Almost every single witness at the hearing, including the Union's witnesses, testified that general merchandise employees, including the nutrition employees, do not have regular contact or interchange with grocery unit employees. (Tr. 189, 230, 247, 259, 345-46.)

a. Freight Processing.

Fred Meyer products are delivered to the Spokane stores from three distribution centers in Oregon and Washington: Clackamas, Chehalis, and Puyallup. (Tr. 117.) The products are delivered to the stores in the evenings on a truck. (Tr. 119, 120.) At the Francis and Thor stores, freight for the food departments and for the nutrition department are received at the food receiving area, and are housed in the food stockroom, although the nutrition freight is housed in its own segregated area within the stockroom. (Tr. 119-120, 130, 255; E. Exs. 12, 27.) There is a central freezer in the food stockroom, and products from grocery and nutrition are kept there. (Tr. 226, 275; E. Ex. 26.) At the Sullivan and Wandermere stores, freight is received at the store at a central receiving area. (Tr. 202, 234; E. Exs. 21, 24.) *All* of the freight that is delivered to these stores, no matter which department it is for, is received at the central receiving area. (Tr. 202, 234.) At all four Spokane stores, each department's freight is delivered on pallets separated by department. (Tr. 138.) The products themselves arrive shrink-wrapped on 4 foot by 4 foot pallets. (Tr. 134, 138, 139, 205.) The nutrition department also receives freight in totes, which are plastic containers holding loose products, such as vitamins (Tr. 134.)

Once the nutrition freight arrives, it is simply left in the nutrition area of the stock room until nutrition employees start work at 6:00 a.m. or 7:00 a.m. (Tr. 120, 130.) Nutrition freight is processed during the day, out on the sales floor. (Tr. 268.) The pallets of nutrition freight are not taken onto the sales floor, as the grocery pallets are. (Tr. 130, 268, 269.) The

nutrition department receives two pallets dry freight every other day, and one pallet of perishable freight on alternating days. (Tr. 132, 134, 135.)

When they report for work, the nutrition employees begin processing their freight by taking the shrink wrap off the pallets, and then place the product onto dollies or "U-Boats," and wheel the product out onto the sales floor to be stocked onto the shelves. (Tr. 268, 269.)

The home department receives 20-30 pallets of freight, four times a week. (Tr. 137, 139.) Like nutrition freight, Home department freight is broken down in the Home department's stockroom, put onto U-boats, and then wheeled onto the sales floor to be stocked onto the shelves. (Tr. 137-38.) The photo electronics department receives two pallets of freight three times a week. (Tr. 139.) Apparel receives six pallets of freight three times a week, depending on the season. (Tr. 137.)

In contrast to the general merchandise departments, grocery freight is processed overnight, when the store is closed. (Tr. 124, 174.) Also unlike the general merchandise freight, grocery freight is not broken down in the stockroom before being taken onto the sales floor; instead, the grocery pallets themselves are taken out onto the sales floor. (Tr. 123.) When the grocery department receives dry freight, it receives roughly 15 to 20 pallets of freight per delivery, every other day. (Tr. 132.) When the grocery department receives perishable products, such as items for the hanging deli (prepackaged meats, and cheeses), milk, and frozen foods, it receives roughly eleven pallets. (Tr. 133.)

The general merchandise clerks, including the nutrition clerks, process freight according to standards different from those applicable to the grocery clerks. (Tr. 140-41.) The general merchandise clerks try to process their freight within 24 hours after the clerks report for work. (Id.) In contrast, each grocery clerk must process a minimum of 60 cases of grocery

freight per hour per employee. (Tr. 123.) It is expected that the grocery clerks will be finished processing their freight by 7:30 a.m. (Tr. 124, 125, 173.)

b. Cross-Merchandised Products.

There are nutrition products that are cross-merchandised in the store, meaning that they are stocked in departments other than the nutrition departments. (Tr. 161.) Only half a dozen of the products sold in the nutrition department are cross-merchandised in other departments. (Tr. 162.) These products are not treated as if they are grocery products; only the nutrition employees can restock these cross-merchandised products. (Tr. 162, 295.) Nutrition clerks working on a closing shift will check on whether these products needs restocking and will restock them if need be. (Tr. 296.) Nutrition clerks spend only an hour each week restocking these cross-merchandised items. (Tr. 317.) Occasionally, the Food Manager will notify the nutrition department that some of these products need restocking. (Tr. 296.) Items from other departments are cross-merchandised in the nutrition department, including peanuts from the produce department and tea from the grocery department. (Tr. 295.)

c. Inter-Departmental Substitutions and Transfers.

Given the various collective-bargaining agreements covering the various units at the Spokane stores, Fred Meyer goes to great lengths to avoid assigning employees from one unit to work in another. (Tr. 159.) If, due to an unanticipated emergency, the nutrition department is short staffed, the following process for filling the hole in the schedule is followed: the nutrition manager tries to find another nutrition employee who can work the shift; if another employee is not available, the manager contacts the nutrition department at another store to see if a nutrition employee from that store is available to work the shift; if no nutrition employees are available, the manager will try to find a non-represented employee to work the shift. (Tr. 191, 214-15.) If no employee can be found by this method, the manager will have to resort to having a food

employee substitute in the department. (Id.) Nutrition employees have never substituted in any other department. (Tr. 157.)

At the Sullivan, Wandermere, and Thor stores, only general merchandise employees have substituted in the nutrition department. (Tr. 230, 237, 246-47, 258.) At the Francis store, which has suffered continuing staffing issues in the nutrition department, food employees have occasionally substituted in the nutrition department. (Tr. 353.) Produce clerk Vance Rose substituted in the department for a total of 30 to 60 days over the last year. (Id.) He mainly processed freight; in order to perform some of the more specialized functions of the nutrition clerks, such as ordering product, he had to be trained by the Nutrition Manager. (Tr. 352, 354-55.) Nutrition clerk Lisa Davis testified that, since August 2007, Rose has substituted in the department for only a week. (Tr. 289, 327.) She also testified that another food employee substituted in the nutrition department "sometime" in the last year, for a five hour shift. (Tr. 328:4.)

There have only been five employee transfers between departments at the Francis store: an apparel clerk transferred to the CCK department, a photo electronics Assistant Manager became the grocery order clerk, a CCK cashier transferred to grocery, and another CCK cashier transferred to apparel, and then to grocery, and then to the meat department. (Tr. 166.) At the Sullivan store, there have been three employee transfers: an apparel clerk to photo electronics, a CCK cashier to grocery, and a service deli clerk to the seafood department. (Tr. 216.) At the Wandermere store, two CCK cashiers have transferred to photo electronics, a service deli clerk transferred to the seafood department, and a seafood employee transferred to the nutrition department. (Tr. 239.) There was no evidence as to transfers between departments at Thor store.

d. Inter-Store Substitutions and Transfers.

Employees frequently substitute in the departments of other stores, and transfer between stores. About once a month, the Francis store will "borrow" an employee from another store. (Tr. 191-92.) Recently, the Francis store has borrowed a grocery clerk from the Thor store, and loaned a grocery clerk to the Sullivan store. (Tr. 159-60.) Once or twice a month the Sullivan store will loan employees to other stores. (Tr. 215.) The Wandermere store has loaned a meat employee to the Sullivan store, a Bakery Manger to the Thor store, and has borrowed a bakery employee from the Thor store. (Tr. 238.) At the time of the hearing in this case, the Thor store had been borrowing a bakery employee for the last two weeks. (Tr. 253.)

IV. ARGUMENT

A. The RD'S Conclusion that the Union Did Not Waive its Right to Represent the General Merchandise Employees, Including the Nutrition Employees, Raises a Substantial Question of Law Because it Departs from Officially Reported Board Precedent.

The RD erroneously found that the Union did not waive its right to represent general merchandise employees, including nutrition employees, at Fred Meyer's Spokane stores, because neither the collective bargaining nor the recognition agreements between the parties contain an "express" waiver by the Union of its right to organize these employees. (D&DE 11-13.) In reaching this conclusion, the RD departed from officially reported Board precedent, namely Lexington House, 328 NLRB 894 (1999). In that case, the Board held that, while a union's agreement to refrain from organizing certain employees must be express and for a reasonable time, it does not necessarily have to be included in a collective-bargaining agreement. Id. at 896. "It is sufficient that there be an express promise. If there is such promise," the Board said, "we will enforce it, for a party ought to be bound by its promise." Id.

The RD declined to find that the Union's waiver in this case was "express," apparently because it was not for a "reasonable" period of time. (D&DE 12.) This confuses the requirements of Lexington House, however, as that case clearly says that a waiver must be both express and for a reasonable period of time. The requirement that a waiver be for a reasonable period of time, then, is clearly distinct from the requirement that it be express. Contrary to the RD's finding, the Union's waiver in this case was express. The RD himself acknowledged that the parties orally agreed that the Union would waive its right to represent the general merchandise employees, including the nutrition employees, at the Francis and Sullivan stores. (D&DE 12.) Indeed, the existence of this agreement was confirmed by current Union President Larry Hall. (D&DE 12 n. 26; Tr. 79.) The RD further acknowledged that this waiver was also expressly embodied in the recognition agreements executed by the parties when both the Wandermere and Thor stores were opened. (D&DE 12.) Thus, the RD's finding that the waiver was not express is erroneous, and clearly departs from the Board's holding in Lexington House.

The RD's finding that the waiver was not for a reasonable period of time is also erroneous, and further departs from Lexington House. Carl Wojciechowski testified that he understood the waiver would be in effect forever, and that Fred Meyer was forever committing to enter into card check agreements with the Union for the food, meat/seafood, and CCK units in each new store opened in the Union's jurisdiction in Spokane. (Tr. 34.) Wojciechowski was the only witness to testify regarding the waiver who was actually a party to the original agreement and its negotiation, and the Union did not present any witness who directly contradicted Wojciechowski's testimony. Hall's testimony as to the length of the waiver is inherently unreliable, since he received his information from another party; in fact, Hall did not seem to know how long the waiver was in place for, since he first testified it was a three-year waiver, and

then later testified that it was a five-year waiver. The Union's actions belie Hall's testimony: the Union continued to act in accordance with its waiver by entering into recognition agreements with Fred Meyer expressly reaffirming the Union's waiver each time a new store was opened in Spokane, including the Thor store, which was opened more than five years after the Union made its waiver. Pursuant to its waiver, the Union has not attempted to organize the general merchandise employees at the four Spokane stores since agreeing to waive its right to do so, until it filed the instant petition seeking to represent the nutrition employees. Most notably, the Union has not attempted to represent the nutrition employees outside the general merchandise unit, until it filed the instant petition.

Contrary to the RD's finding, the Union's perpetual waiver must be for a reasonable time period, since the Union has previously agreed to forever waive its right to organize the general merchandise employees at Fred Meyer's East Wenatchee store. (D&DE 12 n. 27.) If the Union believes that a perpetual waiver is reasonable, the Board should not disagree.[7]

If the Board does not enforce the Union's express promise here, it will "permit the Petitioner to take advantage of the benefits accruing from its valid contract while avoiding its commitment by petitioning to the Board for an election." Lexington House, 328 NLRB at 897. Fred Meyer has abided by its agreement with the Union by entering into the recognition agreement and allowing the Union access to its employees in the grocery, meat/seafood and CCK departments each time a new store is opened in Spokane. The Union should likewise be

[7] Although the RD did not address it in his D&DE, this case is distinguishable from Walt Disney World Co., 215 NLRB 421 (1974). In that case, the Board found that the union's waiver, which was contained in a singular recognition agreement, was later superseded by a collective bargaining agreement containing a recognition clause that did not include the waiver. Here, the union's waiver has been renewed with each new store opened in Spokane. The recognition agreements entered into upon each store opening are not superseded by a subsequently negotiated labor agreement; the units in the new store are simply added to the existing applicable labor agreements.

bound by its agreement with Fred Meyer. The policies underlying the Board's enforcement of such waivers are vindicated in this case, since the general merchandise employees, including the nutrition employees, will not be "completely disenfranchised" by enforcing the parties' agreement; the agreement "merely decreases [their] options as to union representation by one union for the * * * duration of the promise." Id.

B. The RD Erroneously Concluded that a Self-Determination Election in a Unit Comprised of Only the Two Nutrition Employees at the Francis Store is Appropriate, Prejudicially Affecting the Employer's Rights.

The Union sought a self-determination election among the nutrition employees at the Francis store only, to establish whether they wish to be included in the Employer's multi-store grocery unit currently represented by the Union or to remain unrepresented. The Board recently explained that an Armour-Globe self-determination election permits employees sharing a community of interest with an already-represented unit of employees to vote on whether to join the existing unit. UMass Memorial Medical Center, 349 NLRB No. 35, slip op. at 35 (Feb. 20, 2007) (citing NLRB v. Raytheon Co., 918 F.2d 249, 251 (1st Cir. 1990)).

1. The RD Erroneously Concluded that the Nutrition Employees Share a Community of Interest with the Employees in the Existing Multi-Store Grocery Unit Sufficient to be Included in that Unit.

The RD's conclusion that the Francis nutrition employees share a community of interest with the employees in the existing multi-store grocery unit, sufficient to be included in that unit, is based on his findings on several substantial factual issues, which are clearly erroneous and prejudicially affect the Employer's rights. To determine whether a petitioned-for multi-facility unit is appropriate, the Board evaluates the following factors: functional integration, employees contact and interchange, employees' skills and functions, common

management and supervision, terms and conditions of employment, and bargaining history. See, e.g., Bashas', Inc., 337 NLRB 710 (2002) and cases cited therein.

a. Functional Integration.

The RD erroneously found that the "nutrition department at the Employer's Francis store is functionally integrated with the rest of the Employer's Food section." (D&DE 14.) The RD relied on the following findings in reaching his conclusion: the nutrition department is identified as a food department; the nutrition department is under the authority of the food section manager; nutrition products are stocked within the food section with no discernible barrier between it and the rest of the Employer's grocery operation; nutrition department products are received in the food stockroom, handled by Petitioner-represented grocery clerks, and cross-merchandised in many areas throughout the food section. (Id.)

The nutrition departments at the four Spokane stores are not functionally integrated with the rest of the Employer's food departments. The nutrition departments at these stores, and at every Fred Meyer one-stop store, are one of the general merchandise departments, and have been since the nutrition department was created in the 1980s, as evidenced by the inclusion of nutrition employees in the general merchandise unit in every Fred Meyer one-stop store in which there is a represented general merchandise unit. The nutrition aisles are not numbered, as the grocery aisles are; instead, they are identified by the "Natural Choices" logo that hangs overhead. Although nutrition products at the Francis and Thor stores are received in the Food stockrooms, they arrive on their own pallets and are stored in their own areas within the stockrooms. At the Sullivan and Wandermere stores, all products, including nutrition products, are received at a central receiving area, and nutrition products at these stores are similarly housed within their own areas in the food stockrooms. Of the roughly 3,000 products sold by the nutrition department, only a half-dozen of them are cross-merchandised in other areas of the

store. These products are not treated as grocery products: no matter where they are sold in the store, only the nutrition employees stock them on the shelves. They are handled by grocery clerks only in cases of emergency, as discussed below.

b. Interchange and Contact.

Despite the fact that every single witness, including the union's witnesses, answered no when asked by the Hearing Officer whether nutrition employees have work-related contact or interchange with Petitioner-represented employees, the RD erroneously concluded that the factor of interchange and contact weighed in favor of the petitioned-for unit. The RD's conclusion is based on his findings that: "nutrition employees have some work-related contact with grocery unit employees when cross-merchandising products," and that their "main contact occurs on a regular basis with grocery unit produce employees, with whom they share a common work area in the middle of the produce area, comprised of a desk and sink." (D&D 14.) It is unclear what evidence the RD relied upon in making these findings, since no witness testified that either the cross-merchandising of nutrition products or the sharing of a desk and a mop required any contact at all between nutrition and Petitioner-represented employees. In fact, nutrition clerk Davis testified that the cross-merchandising of nutrition products in other departments does not result in any contact with Petitioner-represented employees. (Tr. 296.) Davis further testified that her use of the sinks in the produce department does not result in any contact with Petitioner-represented employees. (Tr. 293, 300.) Although the RD also found that nutrition employees and Petitioner-represented produce employees have contact with each other when soliciting coverage of each others' work areas during breaks, (D&DE 14), finding ignores the fact that this contact seems to have occurred with only one produce employee – Vance Rose. Such contact limited to only one produce employee cannot be considered "substantial," as the RD called it. (D&DE 15.)

Instead, the record evidence establishes that the primary function of the general merchandise employees, including the nutrition employees, is to sell products to customers. Since the primary function of the nutrition employees is to sell product to customers, they – like other general merchandise employees – are scheduled to work when the store is open. This means that there is very little opportunity for them to interact with Petitioner-represented employees, who are primarily scheduled to work when the store is closed. Only two grocery clerks are scheduled to work during the day to keep shelves stocked. Although employees in the produce and bakery departments work during the day, the record evidence shows that nutrition employees have almost no interaction with these employees.

The secondary function of the general merchandise employees, including the nutrition employees, is to process their department's freight. Even when they perform this task, there is very little opportunity for them to interact with the grocery employees. The nutrition employees handle only nutrition freight, no matter where it is located in the store. They do not handle grocery freight. The nutrition department's freight is delivered on pallets separate from those of the food departments, and is housed in an area within the Employer's stock room that is separate from those of the food departments. The general merchandise employees, including nutrition employees, process their freight during the day when the store is open. The food departments' freight is processed overnight, during the graveyard shift, and only a few grocery employees work to keep shelves stocked during the day.

Although there was evidence of interchange between the nutrition department and the food departments at the Francis store, the RD's characterization of this interchange as "substantial" is erroneous. (D&DE 15.) This interchange is an aberration among the Spokane stores and was the result of the severe labor shortages the Francis nutrition department was

experiencing. The Sullivan, Wandermere and Thor stores represent the normal situation in the stores, in which Petitioner-represented employees never substitute in the nutrition department. In these stores (and at the Francis store, when conditions permit), any holes in the nutrition schedule are filled either by another nutrition employee from the same store or from another store, or an employee from an unrepresented department.

c. Similar Skills and Functions.

The RD erroneously concluded that "[n]utrition employees and grocery unit employees possess similar skills and perform similar functions." (D&DE 15.) In reaching this conclusion, the Rd relied on his erroneous finding that "grocery and nutrition employees are expected to perform only a limited selling function," and that they are "not expected to actively sell." (Id.) These findings are contrary to the record, which establishes that the nutrition department, like the other general merchandise departments, is considered to be a selling department, and the food departments do not perform the same selling function. The grocery department, including the produce department, is considered to be a freight-processing department in which the employees primarily spend their shifts stocking shelves. Like the rest of the general merchandise departments, the nutrition department carries specialized products, which are different from the products carried by the food department. Like the rest of the general merchandise clerks, the nutrition clerks receive training regarding the specialized on-the-job training about the particular products sold in their department, so that they may fulfill their primary function of selling these products to customers. The RD ignored the fact that when produce clerk Vance Rose substituted in the nutrition department he had to receive specialized training from the Nutrition Manager to be able to perform the functions of a nutrition clerk. There is no evidence that grocery employees receive the same kind of training with regard to

their products, thus their interactions with customers are limited to greeting them and directing them to the location of grocery products within the store.

In erroneously concluding that the nutrition department is not a selling department, the RD ignored the testimony of the Store Directors, all of whom testified that the nutrition department is a selling department. He also ignored the testimony of nutrition clerk Rachel Bachmeier, who testified that she spends up to 50% of he shift interacting with customers, and that of nutrition clerk Lisa Davis, who testified that on busy days, such as Saturdays, she spends her entire shift assisting customers. (Tr. 344-45, 282, 337.) There is no testimony in the record that Petitioner-represented employees spend similar amounts of time interacting with customers. In particular, there was no testimony in the record to show that the grocery clerks perform any tasks beyond stocking shelves and directing customers to products.

d. Terms and Conditions of Employment.

The RD erroneously found that "nutrition employees' hours are not dissimilar from many other Food section employees, particularly those charged with engaging in stocking products throughout the day." (D&DE 16.) Nutrition employees work different hours from the majority of the Petitioner-represented employees. The grocery clerks are the largest number of Petitioner-represented employees working in the food department. (E. Ex. 13.) Only two of these grocery clerks stock products throughout the day; the majority of them work process freight at night, when the store is closed, and must be finished by 7:30 in the morning, before most of the nutrition employees begin work. Nutrition employees, like the rest of the general merchandise employees, work during the day when the store is open so that they can sell products to customers.

The RD brushed aside evidence that nutrition employees have terms and conditions of employment that are the same as those of the other general merchandise

employees, and which are completely different from those of the employees in the existing grocery unit, saying "[t]hose differences * * * are the direct result of the parties' collective-bargaining agreement covering grocery unit employees throughout the Employer's four Spokane stores," and as such, "evidence regarding this factor is of little material value." (D&DE 15.) The RD is correct in saying that these differences are the result of collective bargaining between the parties, but that fact does not diminish their importance. To the contrary, they are important *because* they are the result of collective bargaining between the parties. During the parties thirty years' of bargaining history in Spokane, they have always agreed that the nutrition employees should be included in the general merchandise unit, not in the grocery unit, and bargained for the terms and conditions of both the nutrition employees and the grocery employees.

Should the nutrition employees at the Francis store be permitted to vote in a self-determination election, and vote to be included in the existing multi-store grocery unit, their terms and conditions of employment will be different from those of the nutrition employees at the remaining three stores in Spokane. In this case, the grocery unit at the Francis store will become an aberration in the multi-store grocery unit, since it will be the only store to have nutrition employees included in the grocery unit. In addition, as discussed above, the Francis nutrition employees will not be able to transfer into or substitute in the nutrition departments at the remaining three Spokane stores. The RD dismisses this concern as "theoretical," saying that nutrition employees do not currently substitute for each other at any of the Spokane stores, (D&DE 16), but this is only because of the staff shortages being experienced by the Spokane stores – there simply aren't enough nutrition employees between the four stores to substitute for one another.

The RD also claims that the parties have addressed this concern in bargaining, and that since the Employer's stores in Spokane are organized on a store by store and department by department basis, the parties contemplated that one department may be unrepresented while the that same department at other may be represented. (D&DE 17.) As discussed at length above, and again in the "Bargaining History" section below, the RD's claim is without merit, since this is not what the parties contemplated in bargaining, and the Employer's Spokane stores are not organized on a store by store, department by department basis.

e. Common Management and Supervision.

The RD erroneously found that the nutrition employees and Petitioner-represented employees share a community of interest because the food manager has some supervisory authority over both departments. (D&DE 16.) Each of the food and general merchandise departments (including the nutrition department), have their own managers. Although it is true that the nutrition manager reports to the food manager, this fact is of little consequence, as other general merchandise managers also report the to the food manager, including the pharmacy manager, and the HCC section head (who oversees the HBA department). The common supervision of the food manager has little impact on the clerks in the nutrition department, as they are supervised directly by the nutrition manager, who has ultimate authority for the day-to-day operation of the department. There is no evidence that the nutrition manager supervises any grocery employees, or that the grocery managers supervise the nutrition employees.

f. Bargaining History.

The RD acknowledged that the nearly thirty years of bargaining history between the parties regarding the nutrition employees must be given substantial weight in determining the appropriateness of the petitioned-for unit. (D&DE 17); see also NLRB Outline of Law and Procedure in R Cases, Community of Interest, 12-210 (in determining the appropriateness of a

bargaining unit, prior bargaining history is given substantial weight), and cases cited therein He further acknowledged that, as a general rule, the Board is reluctant to disturb a unit established by collective bargaining, which is not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. (D&DE 17); see also Canal Carting, Inc., 339 NRLB 969 (2003).

Yet, the RD went on to completely misconstrue the parties' bargaining history in this case. He begins by claiming that the Union "has represented any general merchandise or non-food employees, including nutrition employees, at any of the Employer's four Spokane stores since the stores became full-service stores and after disclaiming interest in the Francis and Sullivan general merchandise unit in 1995." (D&DE 17.) He contradicts himself, however, by noting that: "* * * Petitioner represented nutrition employees in the general merchandise unit at the newly remodeled Francis and new Sullivan one stop stores." (D&DE 17 n. 38.) He dismisses this very important fact by saying the parties were unable to negotiate a successor contract for the general merchandise employees in that unit. (Id.) He ignores the fact that there was no successor contract because the Union disclaimed interest in the general merchandise unit. The disclaimer does not change the fact that the Union actually did represent the nutrition employees as part of the general merchandise unit.

The RD erroneously found that the parties' Spokane bargaining history establishes that "recognition of Petitioner by the Employer has occurred on a majority card showing on a per department, per store basis," and that "[i]n light of the parties' bargaining history since 1995 of seeking majority status on a department by department and store by store basis, it would be inappropriate to direct an election in a Spokane four-store wide unit of nutrition employees." (D&DE 17.) In particular, the RD seems to be relying on the fact that

recognition is granted "**only**" after the Union demonstrates a card majority in each unit. (D&DE 17, emphasis in original.) The RD findings in this regard are utterly baffling.

The Employer's Spokane stores are not organized on a "store by store" basis as the RD seems to be using that phrase. The RD seems to be suggesting that the parties go around from store to store in Spokane, organizing them. The Francis and Sullivan stores were organized at the same time, because they were the only stores existing in Spokane when the parties agreed to a card check arrangement for the food, meat/seafood, and CCK units in those stores. Pursuant to the parties' agreement, every time a new store opens in Spokane, the parties enter into the same card check arrangement for the same units in the new store. Upon a majority showing, each unit in the new store is, for all intents and purposes, accreted to its respective, existing, multi-store unit. This is simply not the same thing as organization on a store by store basis.

The Employer's Spokane stores are also not organized on a department by department basis. As explained above, the parties agreed to group the various departments in each store into four comprehensive units, based upon similarities between departments. Thus, the selling departments, such as the photo electronic and nutrition departments, are grouped into the general merchandise unit, and the non-selling, grocery oriented departments, such as the service deli and grocery departments, are grouped into the food unit. In Spokane, none of these various departments within the four overall units require their own majority showing of interest before recognition will be granted in that department. Instead, recognition is granted upon a majority showing in each unit, and once recognition is granted, each unit is – again – essentially accreted to the existing multi-store unit.

The RD's emphasis of the card check agreement between the parties is puzzling. Especially when it is footnoted with the mention that: "Within Petitioner's jurisdiction, there

exist industry examples of multi-facility bargaining units that do not contain the same departments of represented employees at each facility. These include Safeway and Albertson's fuel centers. Some centers are part of the Petitioner's grocery unit, others are not." (D&DE 17 n. 40.) It's unclear what this fact has to do with the parties' card check agreements, or with this case at all, since there is no evidence in the record that Safeway and Albertson's are in any way similar to the operations of Fred Meyer's stores in Spokane. If the Safeway and Albertson's agreed with the representative of their employees that fuel center employees should be included in their respective multi-store grocery unit, that fact has no bearing on the parties' agreement in this case, which is that the nutrition employees would be represented as part of the general merchandise unit. With his footnote, the RD seems to be admitting that by including the Francis nutrition employees in the multi-store food unit, he is actually putting a non-food department into a unit comprised of only food departments.

The RD seeks to distinguish his holding in this case from the one he made in Case No. 19-RC-15057, wherein he found that the bargaining history between Fred Meyer and UFCW Local 367 weighed against a finding that the Petitioned-for unit was appropriate. (D&DE 17 n. 39.) He says that the distinguishing feature between these cases is that the parties' Spokane contracts do not contain the after-acquired stores clause language that existed in the contracts at issue in Case No. 19-RC-15057. (Id.) The after-acquired store clause language makes little difference here, since organization of the Spokane stores occurs in exactly the same way that organization of the stores in Case No. 19-RC-15057 occurred.

Contrary to the RD's erroneous findings, the record evidence establishes that the Union has represented the grocery employees in the Spokane stores since 1995, and during that time, the Union has never sought to include the nutrition employees in the multi-store grocery

unit. Indeed, their inclusion in that unit is inappropriate, as they do not share a community of interest with the employees in the existing multi-store grocery unit sufficient to be included in that unit. As a result, the appropriate unit for bargaining in this case is a multi-store unit of general merchandise employees, including the nutrition employees. This unit is available, so there is no concern that the nutrition employees will go unrepresented if the Union is not permitted to graft them onto the existing multi-store grocery unit.[8] Furthermore, the Union can make no objection to the appropriateness of a multi-store general merchandise unit, since it previously agreed to the appropriateness of such a unit, and represented general merchandise employees, including the nutrition employees, in such a unit.

2. The RD Erroneously Directed A Self-Determination Election in a Unit Limited to the Two Francis Nutrition Employees, Because It Did Not Include the General Merchandise Employees, Including the Nutrition Employees, At All Four Spokane Stores.

To determine whether a petitioned-for multi-facility unit is appropriate, the Board evaluates the following factors: geographic proximity; employee's skills and duties, terms and conditions of employment, employee interchange, functional integration; centralized control of management and supervision; and bargaining history. See, e.g., Bashas', Inc., 337 NLRB 710 (2002) and cases cited therein. A review of these factors, demonstrates that the petitioned-for unit of only the two Francis nutrition employees is "an arbitrary grouping of employees," inasmuch as the evidence fails to establish that the Francis nutrition employees share a community of interest distinct from the excluded general merchandise employees at the Sullivan,

[8] If the Union's petition is granted, however, the remainder of the general merchandise employees will be left unrepresented. This raises the issue of future efforts by the Union to carve out groups of general merchandise employees and add them to existing units on a piecemeal basis. Such efforts, although sanctioned by the Board, would be contrary to the parties' labor agreements. This result is also contrary to the long-established purpose of the self-determination election process, which is to add to established units all the employees who have been omitted from those units. Granting the Union's petition will in these circumstances will only serve to destabilize the bargaining relationship between the parties for years to come.

Wandermere and Thor stores. Id.; see also Alamo Rent-A Car, 330 NLRB 897, 898 (2000) (two of four facilities in San Francisco not appropriate absent evidence of administrative or functional grouping of the proposed unit, substantial interchange or significant functional integration between the two facilities, and common supervision between the two facilities).

The record evidence[9] establishes that: (1) the general merchandise employees at all four Spokane stores, including the nutrition employees, are subject to identical terms and conditions of employment; (2) the general merchandise employees, including the nutrition employees, at all four Spokane stores posses similar skills and perform similar functions; and, (3) employees in all departments regularly substitute and transfer between the four Spokane stores. Although the four Spokane stores are subject to independent management and are not functionally integrated, these factors are outweighed, in particular, by the geographic proximity of the stores to one another, the centralized control of labor relations, and the parties' lengthy bargaining history at the four Spokane stores.

The four Spokane stores are located very near to one another, the furthest being only 14 miles away from the rest. In similar circumstances, the Board has found inappropriate a petitioned-for multi-store unit that did not include all of an employer's stores that were in close geographic proximity to one another. See Bashas', Inc., supra, at 711. The petitioned-for unit

[9] The RD's statement that the record was not fully developed as to the Sullivan, Wandermere and Thor stores, this statement is both incorrect and misleading. Fred Meyer argued on brief that a unit that did not include the unrepresented employees at all four of the Spokane stores would be inappropriate, and it developed the record accordingly, to the extent the Hearing Officer would allow it to do so. The Employer was fully prepared to present extensive testimony, through the Store Directors of each store, regarding the lack of a community of interest between the nutrition employees and the Petitioner-represented employees at each of the four Spokane Stores, but Hearing Officer Little indicated that such testimony would not be necessary. Instead, and pursuant to the Hearing Officer's direction, each Store Director testified that his or her store operated similarly to the Francis store, and discussed any differences that might exist. (Tr. 218, 234, 253-54.) Exhibits related to each store were also entered into the record.

limited to the Francis nutrition employees is similarly inappropriate, since it does not include the remaining Spokane stores.

Labor relations among the four Spokane stores are centralized, since the bargaining units in each store are multi-store units, each subject to one overall contract. The nearly thirty years of bargaining history between the parties regarding the nutrition employees must be given substantial weight in determining the appropriateness of the petitioned-for unit. See NLRB Outline of Law and Procedure in R Cases, Community of Interest, 12-210 (in determining the appropriateness of a bargaining unit, prior bargaining history is given substantial weight), and cases cited therein. In the retail industry, the Board has expressed a preference for store-wide units, with the exception that it has excluded certain groups of skilled employees from the overall unit, on the basis that they do not share a sufficient community of interest with the rest of the employees in the store. See Ray's Sentry, 319 NLRB 724 (1995). Traditionally, these excluded groups have been the meat/seafood units, and occasionally, the bakery units. (Id.); see also Scolari's Warehouse Markets, 319 NLRB 153 (1995). The Board generally directs separate elections in these units.

Fred Meyer's stores are unique in this regard. Fred Meyer and the Union agreed to carve the Spokane stores into four units, which were consistent with the organization of all of Fred Meyer's one-stop stores: grocery, general merchandise, CCK and meat/seafood. The general merchandise departments are a separate part of the business; record evidence establishes that the general merchandise departments, including the nutrition department, are considered to

be the selling departments in the store, and the food departments do not perform the same selling function.[10]

If the nutrition employees at the Francis store are permitted to vote to be included in the existing multi-store grocery unit, the terms and conditions of their employment will be different from those of the rest of the nutrition employees at the three other one-stop stores in Spokane, since those nutrition employees will remain unrepresented, despite being in every way like the Francis nutrition employees. As a result, the nutrition employees at Francis will not be able to transfer to the nutrition department at another store, or to substitute at another store, and no nutrition employee from outside the Francis store will be able to transfer to the Francis nutrition department, or to substitute there.

The RD seems to misunderstand the importance of this factor, stating that:

> [T]he bargaining history between the parties with respect to one-stop stores in Spokane, is that since 1995 these stores have been organized on a department by department basis, with recognition being granted after Petitioner presents a majority card showing in each of the Employer's three main departments respectively; grocery, CCK and meat. Thus, the bargaining history between the parties contemplates that if the presentation of bargaining cards in any department falls short of a majority, that department would not be represented by Petitioner, wherein the same department in another store might be represented. As such, the Employer's concern with respect to the Francis nutrition employees

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[10] The petitioned-for self-determination election is inappropriate here, when the Board normally directs elections in separate units of selling and nonselling employees, if there has been a history of bargaining on that basis or, for that matter, where there has been agreement among the parties. In Bond Stores, 99 NLRB 1029 (1951), the petitioning union sought an overall unit. The Board rejected the petitioned-for unit and instead directed an election in two units: a selling unit, for which an intervening union had been bargaining, and a nonselling unit, saying that "either an over-all unit of both selling and nonselling employees or separate units of each may be appropriate." In Root Dry Goods Co., 126 NLRB 953 (1960), the Board directed a decertification election in a unit of selling employees that had been established by collective bargaining. In Supermercados Pueblo, 203 NLRB 629 (1973), the Board denied the petitioner's request to carve out a two-department group of meat and delicatessen employees from an established retail supermarket chain multi-store unit composed of all nonsupervisory employees. A major factor in this denial was a 15-year amicable bargaining history on an overall, or "wall-to-wall," basis. Also considered in arriving at the ultimate result were factors such as functional interrelation of the work and the common interests and supervision of all the employees, the centralized control of labor relations policies, and the stabilized pattern of interwoven seniority rights and privileges within the overall unit. See also Buckeye Village Market, 175 NLRB 271, 272 (1969) (a 22-month bargaining history regarded as "substantial").

> being represented by Petitioner if they so voted, while the nutrition employees in the Employers other stores remain unrepresented, appears to have already contemplated by the parties in bargaining.

(D&DE 17.)

First of all, what the parties contemplated in bargaining is not organization on a department by department basis, but on a unit by unit basis according to the four historical units present in every Fred Meyer one-stop store, whether represented or not: general merchandise, food, CCK and meat/seafood. There are various departments within each of these units, but the units themselves do not constitute "departments," as the RD seems to be using that term. In some jurisdictions, such as the one including Fred Meyer's Sumner store, departments within the food unit, such as the service deli, require a separate showing of interest before recognition will be granted to that department as part of the overall food unit. See Case No. 19-RC-15057. That is not the case in Spokane, where, upon a majority showing in each unit, recognition is granted to the food unit as a whole, the CCK unit as a whole, and the meat/seafood unit as a whole (but not the general merchandise unit, since the Union waived its right to represent these employees, including the nutrition employees). The mere fact that the Union may not be able to demonstrate majority status in one or more of these historically established units does not mean that the units as agreed-to by the parties do not remain intact. If, at some later date, the Union is able to demonstrate majority status in one of those units, recognition will be granted in that unit. The parties never contemplated that the agreed-upon units would be broken up into their separate departments. Even where the service deli department requires its own showing of interest, the department is included in the overall grocery unit once that showing is made. It is not represented as a separate stand-alone unit, or as part of another unit, such as the general merchandise unit.

By attempting to remove the nutrition department away from its historical place in the general merchandise unit, and move it into the food unit, the Union is attempting to organize Fred Meyer's stores on a department by department basis, just as it did with its self-determination petitions filed in Cases 19-RC-15036 and 19-RC-15057. This tactic is contrary to the parties agreement, and is expressly forbidden by Section 9(b) of the Act, which states that overall (wall-to-wall) units of all of an employer's employees, excluding only statutory and policy exclusions, are presumptively appropriate, and by the Board's expressed preference for store-wide units in the retail industry. The only reason that there are not store-wide units in Fred Meyer's stores is that the parties agreed there should not be store-wide units.

Secondly, the parties further contemplated in bargaining that the employees working in the nutrition department, which is classified by the Employer as a general merchandise department, would be included in the general merchandise units at each store. The Union has waived its right to represent these employees, so the nutrition employees will forever be able to transfer into and substitute between the general merchandise departments of the four Spokane stores. If there is no waiver in this case, then presumably the general merchandise units at the four stores can be organized. If a self-determination election is directed amongst only the Francis nutrition employees, and they vote to join the existing multi-store grocery unit, they will indeed be different from the nutrition employees at the remaining stores. This difference will be even more pronounced if the general merchandise employees at the four stores are organized, and the nutrition employees at the Sullivan, Wandermere and Thor stores are included in the general merchandise units or, worse, are left as the only unrepresented employees in each store. These kinds of illogical results demonstrate exactly why the Board should not disturb the units that have been historically agreed-upon by the parties.

Indeed, the Board has said that it will not disturb a unit established by collective bargaining that is not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. See NLRB Outline of Law and Procedure in R Cases, Community of Interest, 12-210, and cases cited therein; Canal Carting, Inc., 339 NRLB 969 (2003). The general merchandise unit, which the Union agreed to establish with the Employer nearly thirty years ago, is not repugnant to Board policy, nor does it hamper employees in fully exercising rights guaranteed by the Act. If the Union wishes to resume its representation of the Spokane nutrition employees, it should do so in the unit in which they previously represented them – the general merchandise unit.

Since the Union disclaimed interest in the general merchandise unit, it is now seeking to pluck the nutrition employees out of their previously agreed-upon place in the general merchandise unit, and add them to the multi-store grocery unit by means of a self-determination election. It should not be allowed to put the self-determination election process to this purpose. The Board's own Outline of Law and Procedure in Representation Cases states as follows: "When [an] incumbent union seeks to add a group of previously unrepresented employees to its existing unit, and no other labor organization is involved, the Board conducts [a self-determination election]." See NLRB Outline of Law and Procedure in R Cases, Self-Determination Elections, 21-500. The Francis nutrition employees were previously represented as part of the Spokane general merchandise unit.

The Union is seeking to upset the parties' long and stable bargaining relationship. By filing the instant self-determination petition, the Union is improperly seeking to circumvent its commitment to waive representation of the Spokane general merchandise employees altogether. The parties have negotiated several successor grocery contracts since the Union

disclaimed interest in the general merchandise unit, but not once during the negotiations of those contracts did the Union propose to move the nutrition employees out of their agreed-upon placement in the historical general merchandise unit into the grocery unit. Indeed, the parties are currently negotiating the most recent successor grocery contract, and the Union has not made any such proposals.

C. If a Self-Determination Election is Granted, it Should be Granted in a Residual Unit Comprised of All of the Unrepresented General Merchandise Employees Covered by the Petition.

Due to the nature of the self-determination election process, the Employer was forced to brief alternative legal arguments. It is the Employer's belief that if an election were to be directed, it should have been directed in the historical four-store general merchandise unit, including the nutrition employees. This unit is an appropriate unit, and the employees in that unit share a community of interest that is separate from that of the employees in the existing multi-store grocery unit.

The Employer also argued, however, that if the Regional Director erroneously concluded that the nutrition employees share a community of interest with the grocery employees sufficient to direct a self-determination election, as he did, the appropriate unit for such an election would be the residual unit of unrepresented employees covered by the petition. The residual unit in this case includes not just the nutrition employees at the four Spokane stores, but also the general merchandise employees at the four Spokane stores. With regard to residual units, "the Board has consistently held that groups of unrepresented employees omitted from established bargaining units constitute appropriate residual units, provided they include all the unrepresented employees of the type covered by the petition." Syracuse University, 325 NLRB 162, 167 (1997) (citing Fleming Foods, 313 NLRB 948 (1994)); see also Premiere Plastering, Inc., 342 NLRB 1072 (2004); G.L. Milliken Plastering, 340 NLRB 1169 (2003) Carl Buddig &

Co., 328 NLRB 939 (1999) "Thus, the Board requires that all unrepresented employees residual to an existing unit or units be included in an election to represent them on a residual basis." Id. (citing The Armstrong Rubber Co., 144 NLRB 1115, 1119 fn. 11 (1963); American Radiator & Standard Sanitary Corp., 114 NLRB 1151, 1154-1155 (1955)). The general merchandise employees at the four Spokane stores, including the nutrition employees, are all unrepresented employees of the type covered by the Union's petition and constitute an appropriate residual unit for a self-determination election. A store-wide unit of this type would be consistent with the Board's historic preference for such units in retail settings. See Ray's Sentry, 319 NLRB 724 (1995).

V. CONCLUSION

Based on the foregoing facts, arguments and authorities, the Employer respectfully requests that the Employer's Request for Review should be granted so that the Board may review and correct the RD's clearly erroneous conclusions that: (1) the Union did not waive its right to attempt to represent the general merchandise employees, including the nutrition employees, at Fred Meyer's stores in Spokane, Washington; (2) the nutrition employees share a community of interest with the employees in the existing multi-store grocery unit sufficient to be included in that unit; and, (3) the petitioned-for unit limited to the two nutrition employees at the Francis store only is appropriate, even though it does not include the general merchandise employees, including the nutrition employees, at all four stores in Spokane. The Employer further requests that the Board impound any ballots cast in the April 4, 2008 election pending its review of this Request.

DATED: March 28, 2008.

BULLARD SMITH JERNSTEDT WILSON

By /s/ Richard J. Alli, Jr.
Richard J. Alli, Jr.
Attorneys for Fred Meyer Stores, Inc.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRED MEYER STORES, INC.
Employer

Case 19-RC-15068

and

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1439, affiliated with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review. As we agree with the Regional Director that the Francis facility nutrition employees share a community of interest with Petitioner-represented grocery employees, we find it unnecessary to reach the Employer's contention that the appropriate unit is a combination of the nutrition employees and general merchandise employees at all four Spokane, Washington stores.[1]

WILMA B. LIEBMAN, CHAIRMAN

PETER C. SCHAUMBER, MEMBER

Dated, Washington, D.C., April 21, 2009.

[1] 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.
Member Schaumber dissented in UMass Medical Center, 349 NLRB No. 35 (2007). UMass is extant law and he applies it for the purposes of deciding this case.

Exhibit E

RECEIVED
RC RD RM
MAY 12 2009
UFCW LOCAL 1439

FORM NLRB-4279
(Revised R19 - 1/09)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 19

FRED MEYER STORES, INC.

Employer

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1439 AFFILIATED WITH UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

Petitioner

TYPE OF ELECTION
(CHECK ONE)

- ☐ CONSENT
- ☐ STIPULATED
- X RD DIRECTED
- ☐ BOARD DIRECTED

CASE 19-RC-15068

(ALSO CHECK BOX BELOW WHEN APPROPRIATE)

- ☐ 8(b)(7)

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations among the following employees of the Employer:

All regular full-time and part-time employees working in the nutrition department at the Employer's retail store located at 525 E. Francis Avenue, Spokane, Washington; excluding The Nutrition Department Manager, managerial employees, confidential employees, guards and supervisors as defined in the Act.

The Tally of Ballots shows that the Petitioner has been selected by these employees to represent them. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is hereby certified that

UNITED FOOD AND COMMERCIAL WORKERS Local 1439 affiliated with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

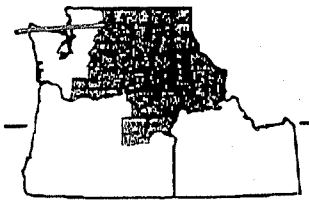
may bargain for the above employees as part of the group of employees that it currently represents.

SIGNED at Seattle, Washington on the 7th day of May, 2009.

Richard L. Ahearn Regional Director
National Labor Relations Board, Region 19

Exhibit F

H:\r19com\REGION 19 R CASES\Folders\Election\CRP 19-RC-15068 Certification of Representative.doc, cal, 5/7/2009



UFCW a VOICE for working America Local 1439

1719 N. Atlantic St. • Spokane, WA 99205 • (509) 328-6090 • FAX (509) 326-2208

LARRY HALL, President DEBBIE LANGTON, Secretary-Treasurer

May 28, 2009

Ms. Cynthia Thornton
Vice President, Employee Relations
Fred Meyer Stores
P.O. Box 42121
Portland, OR 97242

Dear Ms. Thornton:

We are requesting your first available dates to commence negotiations of all regular full-time and part-time employees working in the nutrition department at the Fred Meyer store located at 525 E. Francis Avenue, Spokane, Washington store.

If we do not receive dates in writing in a timely manner, we will take whatever action we deem necessary.

Sincerely,

Larry Hall

Larry Hall
President, UFCW Local 1439

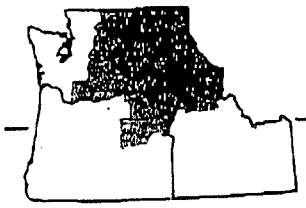
cc: Allied Employers

CERTIFIED MAIL NO: 7008 1140 0002 1009 0452

Chartered by United Food & Commercial Workers International Union, CLC

Exhibit G

PAPERMILL PRINTING



UFCW a VOICE for working America Local 1439
1719 N. Atlantic St. • Spokane, WA 99205 • (509) 328-6090 • FAX (509) 326-2208
LARRY HALL, President
DEBBIE LANGTON, Secretary-Treasurer

June 19, 2009

Carl Wojciechowski
Group Vice President
Human Resources
Fred Meyer
P. O. Box 42121
Portland, OR 97242-0121

Re: Negotiation Dates

Dear Carl:

This is in response to your letter to Larry Hall regarding dates to negotiate regarding Nutrition clerks at the Francis location in Spokane, Washington. The Union is available to negotiate on July 7th and 28th. As to a location, we are willing to negotiate at the site, host at our offices, and are open to suggestions if you believe neither location is satisfactory. Please contact me so that we can finalize the details.

Sincerely,

Aaron Streepy
Secretary-Treasurer
UFCW Local 1439

Cc: Larry Hall
Ron Banka

Chartered by United Food & Commercial Workers International Union, CLC

What's on your list today? You'll find it at

FredMeyer

FRED MEYER STORES · P.O. Box 42121 · Portland, OR 97242-0121 · 3800 SE 22nd Ave. · Portland, OR 97202-2999 · 503 232-8844 · http://www.fredmeyer.com

Human Resources
PHONE: 503-797-7781
FAX: 503-797-7772

RECEIVED
JUN 29 2009
UFCW LOCAL 1439

June 26, 2009

Mr. Aaron Streepy
Secretary-Treasurer
UFCW Union Local 1439
1719 N. Atlantic Street
P.O. Box 5298
Spokane, WA 99205-0298

RE: Francis Street Store Nutrition Employees

Dear Mr. Streepy:

As you know, Fred Meyer filed a Request for Review with the Board in Washington, D.C., asking it to review and reverse the Regional Director's Decision and Direction of Election in Case No. 19-RC-15068, in which the Regional Director directed that a self-determination election be held in a unit comprised of nutrition employees at Fred Meyer's Francis Street store in Spokane, Washington to determine whether they wished to be included in the existing multi-facility grocery unit. The Board denied Fred Meyer's Request for Review.

On May 1, 2009, the United States Court of Appeals for the District of Columbia Circuit held that the two-member Board does not have authority under the National Labor Relations Act to issue decisions because it lacks the three-member quorum required by the Act. *See Laurel Baye Healthcare of Lake Lanier v. NLRB, 564 F.3d 469 (2009).*

Based on the D.C. Circuit's ruling, the Board did not have the authority to issue its decision denying Fred Meyer's Request for Review in this case. Fred Meyer therefore does not believe that it has a duty to bargain with Local 1439 regarding the terms and conditions of employment of the nutrition employees working at Fred Meyer's Francis Street store. Therefore, we will not be participating in bargaining meetings on this subject.

Respectfully,

Carl Wojciechowski
Group Vice President
Human Resources

Copies to: Cindy Thornton, VP Labor & Associate Relations
Fred Meyer Stores

Ric Alli, Attorney
Bullard Smith Wilson & Jernstedt

Exhibit H

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 19

FRED MEYER STORES, INC., Respondent, and **UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1439, affiliated with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION,** Charging Party.	Case No. CA-31994 **RESPONDENT'S ANSWER AND AFFIRMATIVE DEFENSES**

Pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondent Fred Meyer Stores, Inc. ("Respondent") hereby Answers the Complaint in this matter as follows:

1.

Respondent admits the allegations contained in Paragraph No. 1 of the Complaint

2.

Respondent denies the allegations contained in Paragraph No. 2(a) of the Complaint, but admits that it is a State of Ohio corporation. Respondent admits the remaining allegations of paragraph 2 of the Complaint.

3.

Respondent admits the allegations contained in Paragraph No. 3 of the Complaint.

4.

Respondent admits the allegations contained in Paragraph No. 4 of the Complaint.

Exhibit I

5.

Respondent admits the allegations contained in Paragraph No. 5 of the Complaint.

6.

Respondent admits the allegations contained in Paragraph No. 6(a) of the Complaint. In response to the allegations contained in Paragraph 6(b) of the Complaint, Respondent denies that the Regional Director possessed authority to certify the Union as the exclusive collective-bargaining representative of the voting group of nutrition employees described in paragraph 6(a) of the Complaint, and therefore denies the allegations contained in Paragraph 6(b) of the Complaint. In response to the allegations contained in Paragraph 6(c) of the Complaint, Respondent denies that the Union was properly certified as the exclusive collective-bargaining representative of the voting group of nutrition employees described in paragraph 6(a) of the Complaint, and therefore denies the allegations contained in Paragraph 6(c) of the Complaint.

7.

Respondent denies the allegations contained in Paragraph No. 7 of the Complaint.

8.

Respondent admits the allegations contained in Paragraph No. 8 of the Complaint.

9.

In response to the allegations contained in Paragraph No. 9 of the Complaint, Respondent admits that on or about June 26, 2009, it, in writing by Carl Wojciechowski, informed the Union that Respondent had no duty to bargain with the Union as the bargaining representative of the nutrition department employees described in Paragraph 6(a) of the Complaint. Since Respondent has no duty to bargain with the Union, it denies the remaining

allegations of Paragraph 9 of the Complaint that Respondent "failed and refused" to bargain with the Union as the exclusive collective-bargaining representative of that group of employees.

10.

Respondent denies the allegations contained in Paragraph No. 10.

11.

Respondent admits the allegations contained in Paragraph No. 11 of the Complaint.

12.

Respondent denies each and every allegation in the Complaint not specifically admitted above.

AFFIRMATIVE DEFENSES

Respondent hereby asserts the following Affirmative Defenses to the Complaint, without assuming any burden of proof properly belonging to the General Counsel:

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Respondent has no duty to bargain with the Union as the exclusive collective-bargaining representative of the nutrition department employees described in Paragraph 6(a) of the Complaint because the two-member Board that issued the Order dismissing Respondent's Request for Review filed in Case. No. 19-RC-15068 did not have statutory authority to do so. 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. 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. Only after a valid order has been issued can the questions of representation be properly addressed. In raising this defense, Respondent does not waive the arguments and positions raised by its pending Request for Review in Case No. 19-RC-15068. The Employer explicitly intends to preserve such 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). Thus, if and only if the questions of representation raised by Respondent's Request for Review are (improperly) combined in the litigation of this charge, should the questions of representation be addressed.

WHEREFORE, having fully answered all counts of this Complaint, Respondent Fred Meyer Stores, Inc., respectfully requests that it be dismissed in its entirety. Respondent further requests that a hearing before an Administrative Law Judge be held on the claims raised in the Complaint.

DATED: August 10, 2009.

BULLARD SMITH JERNSTEDT WILSON

By /s/ Richard J. Alli. Jr.
Richard J. Alli, Jr., OSB No. 801478
Attorneys for Respondent
Fred Meyer Stores, Inc.

1000 SW Broadway, Suite 1900
Portland, OR 97205
503-248-1134/Telephone
503-224-8851/Facsimile

ORDER

The National Labor Relations Board orders that the Respondent, Fred Meyer Stores, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Food and Commercial Workers, Local 1439, affiliated with United Food and Commercial Workers International Union, as the exclusive collective-bargaining representative of the Francis Store nutrition employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union as the exclusive collective-bargaining representative of the following Francis Store nutrition employees:

> All regular full-time and part-time employees working in the nutrition department at the Employer's retail store located at 525 E. Francis Avenue, Spokane, Washington; excluding the Nutrition Manager, managerial employees, confidential employees, guards and supervisors as defined in the Act.

(b) On request, bargain with the Union regarding the terms and conditions of employment for employees in the following appropriate unit:

> All grocery employees working for Respondent at its Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington, and all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave., Spokane, Washington, retail store; excluding the nutrition department manager of the Francis Ave., Spokane, Washington, retail store, all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

(c) If an understanding is reached, embody the understanding in a signed agreement.

(d) The initial certification year shall be deemed to begin on the date that Respondent commences to bargain in good faith with the Union as the certified collective-bargaining representative of the Francis Store nutrition employees.

(e) Within 14 days after service by the Region, post at its Francis Store in Spokane, Washington, copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 26, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Wilma B. Liebman
Chairman

Peter C. Schaumber
Member

---

[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with United Food and Commercial Workers, Local 1439, affiliated with United Food and Commercial Workers International Union ("Union"), as the exclusive collective-bargaining representative of the Francis Store nutrition employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize the Union as the exclusive collective-bargaining representative of the following Francis Store nutrition employees:

> All regular full-time and part-time employees working in the nutrition department at the Employer's retail store located at 525 E. Francis Avenue, Spokane, Washington; excluding the Nutrition Manager, managerial employees, confidential employees, guards and supervisors as defined in the Act.

WE WILL, on request, bargain with the Union regarding the terms and conditions of employment for employees in the following appropriate unit:

> All grocery employees working for Respondent at its Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington, and all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave., Spokane, Washington, retail store; excluding the nutrition department manager of the Francis Ave., Spokane, Washington, retail store, all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL put in writing and sign any agreement reached on terms and conditions of employment for our Francis Store nutrition employees.

Exhibit K

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

FRED MEYER STORES, INC.

and Case 19-CA-31994

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 1439 affiliated with
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION

MEMORANDUM IN SUPPORT OF MOTIONS TO TRANSFER CASE TO BOARD AND FOR SUMMARY JUDGMENT

Counsel for the General Counsel, pursuant to §§ 102.24, 102.26, and 102.50 of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. § 151 *et seq.*, files this brief in support of its Motions to Transfer Case to Board and for Summary Judgment ("Motion for Summary Judgment") against Fred Meyer Stores, Inc. ("Respondent"), based on the pleadings and related documents. In support of its Motion for Summary Judgment, Counsel for the General Counsel submits that the pleadings in Case 19-CA-31994 raise no material issues of fact or law that require a hearing before an administrative law judge, and states as follows:

I. Procedural History of the Case

The United Food and Commercial Workers, Local 1439, affiliated with United Food and Commercial Workers International Union ("Union") filed the instant charge on July 6, 2009 (the "Charge"), alleging that Respondent violated §§ 8(a)(1) and (5) of the Act by failing and refusing to recognize the Union as the exclusive collective-

bargaining representative of certain disputed nutrition employees ("nutrition employees") employed at Respondent's Francis Ave., Spokane, Washington, retail store ("Francis Store").[1] (Exhibit A). The Regional Director of Region 19 of the Board ("Regional Director") issued a Complaint on July 27, 2009, based on the allegations in the Charge. (Exhibit B). Respondent filed an Answer and Affirmative Defenses ("Answer") to the Complaint on August 10, 2009. (Exhibit I).

II. Statement of Facts

Pursuant to a Petition filed in Case 19-RC-15068 on February 8, 2008 (Exhibit C), the Regional Director issued a Decision and Direction of Election on March 7, 2008 ("Decision") (Exhibit D), directing a self-determination election among the nutrition employees at the Francis Store to determine if they wished to be included in the existing Unit described in paragraph 6 of the Motion for Summary Judgment. On March 28, 2008, Respondent filed a Request for Review of the Decision. (Exhibit D-2).

On April 4, 2008, in accordance with the Decision, a secret ballot self-determination election was conducted under the direction and supervision of the Regional Director among Respondent's Francis Store nutrition employees, and the ballots were impounded.

On April 21, 2009, the Board issued an Order denying Respondent's Request for Review. (Exhibit E).

On May 7, 2009, in Case 19-RC-15068, the Regional Director issued a Certification of Representative certifying the Union as the exclusive collective-

[1] All exhibits referred herein are attached to the accompanying Motion for Summary Judgment and are made a part thereof.

bargaining representative of the Francis Store nutrition employees as described in paragraphs 8-16 of the Motion for Summary Judgment. (Exhibit F).

On or about May 28 and June 19, 2009, the Union requested in writing that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Francis Store nutrition employees. (Exhibit G).

On or about June 26, 2009, Respondent, by admitted agent Carl Wojciechowski, informed the Union in writing that it would not bargain with it as the exclusive collective-bargaining representative of the Francis Store nutrition employees and, thereafter, has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of that group of employees. (Exhibit H).

III. The Pleadings Present No Disputed Material Issues of Fact or Law

A. The Complaint alleges and the Answer admits the following:

1. The Charge was filed by the Union on July 6, 2009, and was served on Respondent by regular mail on or about July 7, 2009. (Exhibit B, paragraph 1).

2. Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described in paragraph 2(a) of the Complaint with Ohio as the corrected State of Incorporation, derived gross revenues in excess of $500,000. In its Answer Respondent corrected Counsel for the General Counsel as to the State of incorporation, and admits that it is a State of Ohio Corporation. (Exhibit B, paragraph 2(a)).

3. Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described in paragraph 2(a) of the Complaint, as modified to reflect Ohio as the State of

incorporation, purchased and received at the Francis Store goods valued in excess of $50,000 directly from points outside the State of Washington. (Exhibit B, paragraph 2(c)).

4. Respondent has been at all material times an employer engaged in commerce within the meaning of §§ 2(2), (6) and (7) of the Act. (Exhibit B, paragraph 2(d)).

5. The Union is, and has been at all material times, a labor organization within the meaning of § 2(5) of the Act. (Exhibit B, paragraph 3).

6. At all material times, Carl Wojciechowski has held the position of Group Vice President, Human Resources, and is and has been an agent of Respondent within the meaning of § 2(13) of the Act, acting on behalf of Respondent. (Exhibit B, paragraph 4).

7. The following employees of Respondent (the "Unit"), constitute a unit appropriate for the purposes of collective-bargaining within the meaning of § 9(b) of the Act:

> All grocery employees working for Respondent at its Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington; excluding all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

(Exhibit B, paragraph 5(a)).

8. Since at least 1995, and at all material times, based on § 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the Unit and, since then, has been recognized as such by Respondent. This recognition has been embodied in successive collective-bargaining agreements, the

most recent of which was effective from January 2, 2005, to January 5, 2008, and extended by agreement of the parties. (Exhibit B, paragraph 5(b)).

9. On or about April 24, 2009, in Case 19-RC-15068, a majority of all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave., Spokane, Washington, retail store, in a self-determination election, designated and selected the Union as their representative for the purposes of collective-bargaining with Respondent, to be included in the Unit ("Expanded Unit") (Exhibit B, paragraph 6(a)).

10. On or about May 28 and June 19, 2009, the Union requested in writing that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the nutrition department employees described in paragraphs 6 and 7 of the Complaint. (Exhibit B, paragraph 8).

B. The Complaint alleges and the Answer denies the following:

1. The Complaint alleges that on or about May 7, 2009, in Case 19-RC-15068, the Union was certified as the exclusive collective-bargaining representative of the Francis Store nutrition department employees. In its Answer, Respondent denies this allegation as it argues the Regional Director did not have the authority to certify the Union as the exclusive collective-bargaining representative of the Francis Store nutrition department employees. (Exhibit B, paragraph 6(b)).

2. The Complaint alleges that as a result of the certification described in paragraph 6(b) of the Complaint, the Union was certified as the exclusive collective-bargaining representative of the Expanded Unit, which includes all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave.,

Spokane, Washington, retail store. In its Answer, Respondent denies that the Union was properly certified. (Exhibit B, paragraph 6(c)).

3. The Complaint alleges that the following employees of Respondent, the Expanded Unit, constitute a unit appropriate for the purposes of collective-bargaining within the meaning of § 9(b) of the Act:

> All grocery employees working for Respondent at its Francis, Sullivan, Wandermere, and Thor stores in Spokane, Washington, and all regular full-time and part-time employees working in the nutrition department at Respondent's Francis Ave., Spokane, Washington, retail store; excluding the nutrition department manager of the Francis Ave., Spokane, Washington, retail store, all other employees, managerial employees, office clerical employees, guards and supervisors as defined in the Act.

Respondent denies this allegation. (Exhibit B, paragraph 7(a)).

4. Respondent denies the allegation that, at all material times, based on § 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Expanded Unit, an appropriate unit of Respondent's employees. (Exhibit B, paragraph 7(b)).

5. The Complaint alleges that on or about June 26, 2009, Respondent, in writing by Wojciechowski, informed the Union that it would not bargain with it as the bargaining representative of the nutrition department employees described in paragraphs 6 and 7 of the Complaint and thereafter has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of that group of employees. Respondent admits only that Wojciechowski informed the Union on about June 26, 2009, that it had no duty to bargain with the Union as the exclusive collective-bargaining representative of the nutrition employees. (Exhibit B, paragraph 9).

6. The Complaint alleges that by the conduct described in paragraph 9 of the Complaint, Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its nutrition department employees described in paragraphs 6 and 7 of the Complaint in violation of §§ 8(a)(1) and (5) of the Act. In its Answer, Respondent denies this allegation. (Exhibit B, paragraph 10).

7. The Complaint alleges that the unfair labor practices of Respondent affect commerce within the meaning of §§ 2(6) and (7) of the Act. In its Answer, Respondent denies this allegation. (Exhibit B, paragraph 11).

IV. Argument

The Refusal to Recognize and Bargain with the Union Regarding Respondent's Francis Store Nutrition Employees Raises No Disputed Material Issues of Fact or Law

Respondent admits that, by letters dated May 28 and June 19, 2009, the Union asked it to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Francis Store nutrition employees. Respondent further admits that it sent a letter dated June 26, 2009, to the Union stating it "does not believe that it has a duty to bargain with [the Union] regarding the terms and conditions of employment of the nutrition employees working at [Respondent's] Francis Street store. Therefore, [Respondent] will not be participating in bargaining meetings on this subject." (Exhibit H). Thus, Respondent admits, and the evidence establishes, that it has refused to recognize and bargain with the Union with regard to its Francis Store nutrition employees.

Respondent denies, however, that the Union is the exclusive collective-bargaining representative of the nutrition employees, relying on *Laurel Baye Healthcare*

of Lake Lanier v. NLRB, 564 F.3d 469 (2009), for the proposition that the Board did not have the authority to issue its April 21, 2009, Order denying Respondent's March 28, 2008, Request for Review. Further, Respondent contends that, because of this lack of authority, no obligation to bargain has attached regarding the nutrition employees because the Union's status as the exclusive collective-bargaining representative has not been determined. Respondent's argument is misguided.

The Board has addressed arguments regarding its statutory authority to issue Decisions and Orders, stating that:

> 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).

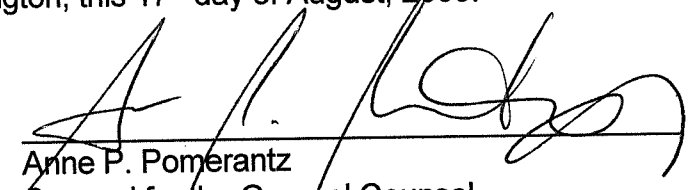
Chenega Integrated Systems, 354 NLRB No. 56, fn 1 (July 29, 2009). Thus, the Regional Director's issuance of the Certification of Representative subsequent to the Board's Order denying Respondent's Request for Review established the Union as the exclusive collective-bargaining representative of Respondent's Francis Store nutrition employees. Accordingly, there are 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).

V. CONCLUSION

Counsel for the General Counsel respectfully submits that the evidence establishes that Respondent has violated §§ 8(a)(1) and (5) of the Act since about June 26, 2009, by failing and refusing to bargain with the exclusive collective-bargaining representative of its Francis Store nutrition employees. Accordingly, Counsel for the General Counsel requests 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. Counsel for General Counsel further requests that the Board issue the attached proposed Order and Notice to Employees and/or that the Board issue any other order and/or remedy deemed appropriate. (Exhibits J and K).

DATED at Seattle, Washington, this 17th day of August, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2009, I caused copies of Motions to Transfer Case to Board and for Summary Judgment and Memorandum in Support of Motions to Transfer Case to Board and for Summary Judgment to be served upon each the following via E-File, E-Mail, and Federal Express:

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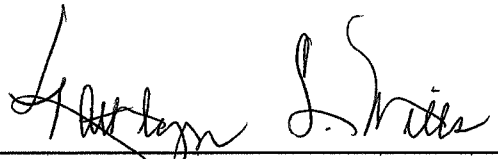

Kathlyn L. Mills, Secretary