

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

FRED MEYER STORES, INC.

and

Case 19-CA-32311

UNITED FOOD AND COMMERCIAL  
WORKERS LOCAL 367, affiliated with  
UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION

**MOTIONS TO TRANSFER CASE TO THE 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-32311 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 Respondent seeks, in substantial part, to relitigate issues previously decided by the Board in Case 19-RC-15194 and in other matters. In support, Counsel for General Counsel submits the following:

1. On January 14, 2010, the charge in Case 19-CA-32311 (“Charge”) was filed with the Regional Director, Region 19, of the Board (“Regional Director”) by United Food and Commercial Workers, Local 367, affiliated with United Food and Commercial Workers International Union (“Union”). It alleges in substance that Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of certain disputed

Playland Department employees ("Playland employees") employed at Respondent's University Place retail store located in Tacoma, Washington ("University Place Store"), in violation of §§ 8(a)(1) and (5) of the Act. A copy of the Charge was served on Respondent on or about January 14, 2010. Copies of the Charge and its affidavit of service are attached as Exhibit A.

2. On or about February 1, 2010, 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 Playland employees at the University Place Store, in violation of §§ 8(a) (1) and (5) of the Act. 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 a place of business in Tacoma, Washington, where it is 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 University Place 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's Pierce County common check unit (the "Unit"), constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act:

All employees employed in [Respondent's] Combination Food/Non-Food Checkstand Departments in Pierce County and all future Combination Food/Non-Food Checkstand Departments in Pierce County . . . excluding the Department Manager and two Assistant Department Managers.

7. Since at least 1990, 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 is effective from May 6, 2007, to May 1, 2010.
8. Pursuant to a Petition filed in Case 19-RC-15194 on March 23, 2009, the Regional Director issued a Decision and Direction of Election on April 24, 2009, directing a self-determination election among all full-time and regular part-time employees employed in the Playland Department of Respondent's University Place 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 May 11, 2009, Respondent filed a Request for Review of the Regional Director's Decision and Direction of Election ("Request for Review") in Case 19-RC-15194. A copy of the Request for Review is attached as Exhibit E.

10. On June 11, 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 F.
11. On June 17, 2009, the ballots from a secret mail ballot self-determination election among Respondent's Playland employees at its University Place Store were counted in Case 19-RC-15194 under the direction and supervision of the Regional Director in accordance with the Decision and Direction of Election described above in paragraph 8. The Tally of Ballots issued showing there were three eligible voters with three valid ballots cast. The three valid ballots were cast for the Union. A copy of the Tally of Ballots is attached as Exhibit G.
12. On June 24, 2009, the Regional Director issued a Certification of Representative ("Certification") in Case 19-RC-15194 certifying the Union as the exclusive collective-bargaining representative of the voting group of Playland employees described above in paragraphs 8 and 11. A copy of the Certification is attached as Exhibit H.
13. On December 8, 2009, the Regional Director issued a Corrected Certification of Representative ("Corrected Certification") in Case 19-RC-15194 certifying that the Union, as the exclusive collective-bargaining representative of the voting group of Playland employees described above in paragraphs 8 and 11, may bargain on their behalf as part of the Unit described above in paragraph 6. A copy of the Corrected Certification is attached as Exhibit I.
14. Since June 24, 2009, and as set forth in both the Certification and Corrected Certification, by virtue of § 9(a) of the Act, the Union has been and is the exclusive

representative of the voting group of Playland employees at the University Place Store and may bargain on their behalf as part of the Unit already represented by the Union for purposes of collective-bargaining with respect to pay, wages, hours of employment, and other terms and conditions of employment.

15. At all material times, Carl Wojciechowski has held the position of Group Vice President, Human Resources, and is and has been at all material times herein an agent of Respondent within the meaning of § 2(13) of the Act, acting on behalf of Respondent.
16. On or about October 26, December 3, and December 8, 2009, the Union requested in writing that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the voting group of Playland employees referred to above in paragraphs 8 and 11. These written requests are attached as Exhibits J, K, and L, respectively.
17. On or about November 5, 2009, and January 7, 2010, Respondent, in writing by Wojciechowski, informed the Union that, until the two-member Board issue is resolved, it would not bargain with the Union as the exclusive collective-bargaining representative of the voting group of Playland employees referred to above in paragraphs 8 and 11 and, thereafter, has sought to postpone bargaining indefinitely and has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of that group of employees. These letters are attached as Exhibits M and N, respectively.

18. On February 12, 2010, Respondent filed its Answer and Affirmative Defenses (“Answer”) to the Complaint, attached as Exhibit O, 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 voting group of University Place Store Playland employees selected the Union as their collective-bargaining representative;
- (6)(b) in part: The Regional Director issued a Certification certifying the Union to bargain on behalf of the voting group of University Place Store Playland employees;
- (6)(c) in part: The Regional Director issued a Corrected Certification certifying that the Union may bargain on behalf of the voting group of University Place Store Playland employees as part of the Unit already represented by the Union; and
- (7): The Union’s requests on October 26, December 3, and December 8, 2009, to bargain regarding Playland employees.

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

- 6(b) in part: The Region’s legal authority to certify the Union as the exclusive collective bargaining representative of the voting group of University Place Store Playland employees;
- 6(c) in part: The Region’s legal authority to certify the Union to bargain on behalf of the voting group of University Place Store Playland

employees as the exclusive bargaining representative as part of the Unit already represented by the Union;

8: Failure and refusal to bargain concerning the Playland employees, asserting it had no legal obligation to bargain with the Union by letters dated November 5, 2009, and January 7, 2010; and

9 and 10: Commission of Unfair Labor Practices.

20. Respondent's Answer also raises the following affirmative defenses: (1) that the Complaint fails to state a claim; (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; and (3) that Respondent has been bargaining with the Union in good faith as evidenced by the exchange of substantive proposals, including the Employer's last proposal to which the Union has not responded. Accordingly, Respondent asserts that the issue of whether it has engaged in good faith bargaining with the Union is a question of fact that can only be resolved by an administrative law judge after a hearing. 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-15194.

21. 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. Moreover, while Respondent attempts to portray itself as bargaining in good faith by submitting substantive proposals, the so called "substantive proposals" are, in fact, requests to postpone bargaining until the Supreme Court and a fully-constituted Board resolves Respondent's request for review or until the Unit's collective bargaining agreement expires. Respondent is now attempting to cloak its refusal to bargain based on its argument that the Board did not have the statutory authority to issue its Order denying Respondent's Request for Review as good faith bargaining because it has proposed postponing bargaining. This it cannot do. See, e.g., *Henry M. Hald High School Ass'n.*, 213 NLRB 463 (1974), *enfd.*, 559 F.2d 1204 (2<sup>nd</sup> Cir. 1977) (failure to bargain in good faith found in part due to postponement requests premised on pending state court decision).

22. 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 *Teamsters Local 523 v. NLRB*, 590 F.3d 849 (10<sup>th</sup> Cir. 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4<sup>th</sup> Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *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, n1 (July 29, 2009). See also *Fred Meyer Stores, Inc.*, 354 NLRB No. 127, n1, 2 (January 4, 2010); *Fred Meyer Stores, Inc.*, 354 NLRB No. 88, n1, 2 (September 30, 2009). The Regional Director's Certification and Corrected Certification of Representative, which issued subsequent to the Board's Order denying Respondent's Request for Review, established the Union as the exclusive collective-bargaining representative of Respondent's Playland employees at the University Place Store. Accordingly, there are no material issues of disputed fact regarding the Union's status as the exclusive collective-bargaining representative of these employees or regarding Respondent's obligation to recognize and bargain with the Union. *Concrete Form Walls, Inc.*, 347 NLRB 1299 (2006).

On the basis of the foregoing and the attached exhibits, it is respectfully submitted that the pleadings in the instant case raise no material issues of fact not admitted or previously determined, that Respondent submitted no valid defense for the acts alleged in the Complaint, that no hearing is necessary in this matter, and that it is appropriate for the Board to issue a Decision and Order without further

proceedings. Thus, it is respectfully requested that the Board grant the Motions to Transfer Case to the Board and for Summary Judgment and make findings of fact and conclusions of law, finding that Respondent's conduct violated §§ 8(a)(1) and (5) of the Act as alleged in the Complaint.

**WHEREFORE**, as the remedy for Respondent's unfair labor practices as alleged in the Complaint, the General Counsel further requests that the Board issue the proposed Order and Notice to Employees, which are attached as Exhibits P and Q respectively, and/or that the Board issue any other order and/or remedy deemed appropriate.

**DATED** at Seattle, Washington, this 18<sup>th</sup> day of February, 2010.



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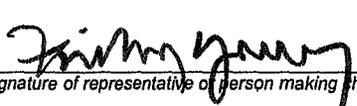
Ann Marie Cummins Skov  
Counsel for the General Counsel  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 19-CA-32311	Date Filed 1/14/10

**INSTRUCTIONS:**

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

<b>1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT</b>	
a. Name of Employer Fred Meyer, Inc.	b. Tel. No. 503-797-7781
	c. Cell No.
	f. Fax No. 503-797-7772
d. Address (Street, city, state, and ZIP code) PO Box 42121 Portland, OR 97242	e. Employer Representative Carl Wojciechowski
	g. e-Mail
	h. Number of workers employed 250+
i. Type of Establishment (factory, mine, wholesaler, etc.) Retail Grocery/Merchandise	j. Identify principal product or service Food/Textile
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) <u>5</u> 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) Within the last six (6) months, the Employer has failed to bargain in good faith in violation of Section 8(a)(5) of the Act, specifically in its refusal, despite demand, to enter into contract negotiations for the Playland department represented by the Union at its store on Bridgeport Way in University Place, WA.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) United Food and Commercial Workers Union Local 367	
4a. Address (Street and number, city, state, and ZIP code) 6403 Lakewood Drive W Tacoma, WA 98467	4b. Tel. No. 253-589-0367
	4c. Cell No.
	4d. Fax No. 253-589-1512
	4e. e-Mail
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 International Union	
<b>6. DECLARATION</b>	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  (signature of representative of person making charge)	Finley Young, Attorney (Print/type name and title or office, if any)
6403 Lakewood Drive W, Tacoma, WA 98467	
1/13/2010 (date)	
Tel. No. 253-589-0367	
Office, if any, Cell No.	
Fax No. 253-589-1512	
e-Mail	

**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.nlr.gov>

January 14, 2010

Mr. Carl Wojciechowski  
Fred Meyer, Inc.  
PO Box 42121  
Portland, OR 97242-0121

Re: **Fred Meyer, Inc.**  
**Case 19-CA-32311**

This is to inform you that a charge, a copy of which is enclosed, was filed in the above-entitled matter. Also enclosed is a copy of *Form NLRB-4541, Parties Involved in an Unfair Labor Practice Charge Proceeding*, which briefly sets forth the procedures followed in the processing of unfair labor practice charges, which we trust will be helpful to you.

***Presentation of Your Evidence:*** 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. Please note that the agent may be unable to access E-mails when the agent is away from the office. For that reason, you are encouraged to submit all your evidence to the agent through the Agency's E-Filing system, described below, which is accessible to the agent's supervisor and others in the office. On all correspondence regarding this charge, please include the case name and number indicated above.

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.

**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.nlr.gov>. (See Attachment to this letter for instructions). Of course, the Agency will continue to accept timely filed paper documents.

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. Further, 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. § 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. § 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. Please state the case name and number on all correspondence.

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 set forth in the charge. Enclosed is a questionnaire regarding

commerce information (*Form NLRB-5081*) that should be completed, signed by you, and returned to my attention. If you are a non-English speaker and need assistance, please inform the Board agent assigned to this case.

**Right to Representation:** 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.

If your representative is an attorney, such attorney will receive exclusive service of all documents, except that you and your attorney will both receive those documents described in Casehandling Manual, Part One, Unfair Labor Practice Proceedings, Section 11842.3, available on the Agency's website at [www.nlrb.gov](http://www.nlrb.gov). However, your attorney may consent to have additional documents or correspondence served on you by making the appropriate designation on *Form NLRB-4701, Notice of Appearance*. If your representative is not an attorney, you and your representative may receive copies of all documents and correspondence.

**Freedom of Information Act:** Please be 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.

Customer service standards concerning the processing of unfair labor practice cases have been published by our Agency and are available on our Agency website at [www.nlrb.gov](http://www.nlrb.gov) under "Public Notices."

Sincerely,



Richard L. Ahearn  
Regional Director

Enclosures

Case assigned to: John H. Fawley  
Telephone No.: (206) 220-6326  
Email: [John.Fawley@nlrb.gov](mailto:John.Fawley@nlrb.gov)

cc: Richard J. Ali, 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, PO  
Box 42121, Portland, OR 97242

I certify that I served the above referred to charge  
on the 14 day of Jan, 2010, by paid  
paid U.S. mail on the addressee named above,  
together with a transmittal letter of which this  
is a true copy.

Debra Hornoto  
subscribed and sworn to before me this 17  
of Jan, 2010

  
Designated Agent

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

FRED MEYER STORES, INC.

and

Case 19-CA-32311

UNITED FOOD AND COMMERCIAL  
WORKERS LOCAL 367, affiliated with  
UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION

**COMPLAINT**

United Food and Commercial Workers Local 367, affiliated with United Food and Commercial Workers International Union ("Union"), has charged in Case 19-CA-32311, 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 alleges as follows:

1.

The Charge was filed by the Union on January 14, 2010, and was served on Respondent by regular mail on about that date.

EXHIBIT   **B**

2.

(a) Respondent, a State of Ohio corporation with an office and a place of business in Tacoma, Washington (the "University Place Store"), is engaged in the retail grocery business.

(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 its 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's Pierce County common check unit (the "Unit"), constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act:

all employees employed in the [Respondent's] Combination Food/Non-Food Checkstand Departments in Pierce County and all future Combination Food/Non-Food Checkstand Departments in Pierce County . . . excluding the Department Manager and two Assistant Department Managers.

(b) Since at least 1990, 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 is effective from May 6, 2007, to May 1, 2010.

6.

(a) On or about June 17, 2009, in Case 19-RC-15194, a majority of all regular full-time and part-time employees working in the Playland Department of the Respondent's University Place store (the "voting group"), 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 June 24, 2009, in Case 19-RC-15194, the Union was certified to bargain on behalf of employees in the voting group described above in paragraph 6(a).

(c) On or about December 8, 2009, a Corrected Certification of Representative issued certifying that the Union may bargain on behalf of the employees in the voting group of employees described above in paragraph 6(a) as part of the Unit already represented by the Union.

7.

On or about October 26, December 3, and December 8, 2009, the Union requested in writing that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the voting group described above in paragraph 6.

8.

On or about November 5, 2009, and January 7, 2010, Respondent, in writing by Wojciechowski, informed the Union that it would not bargain with it as the bargaining representative of the voting group of employees described above in paragraph 6 and, thereafter, has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of that group of employees.

9.

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

10.

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 February 16, 2010, or postmarked on or before February 14, 2010.** 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.nlr.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 not 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 1<sup>st</sup> day of February, 2010.

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

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

*file*

FRED MEYER STORES, INC.

and

UNITED FOOD AND COMMERCIAL  
WORKERS LOCAL 367, affiliated with  
UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION

Case 19-CA-32311

DATE OF MAILING: February 1, 2010

**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 3450 0001 6747 2417**

Fred Meyer, Inc.  
Attn: Carl Wojciechowski  
P. O. Box 42121  
Portland, OR 97242-0121

**REGULAR MAIL**

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 22<sup>nd</sup> Ave.  
P. O. Box 42121  
Portland, OR 97242

Finley Young, Attorney  
U.F.C.W. Local 367  
6403 Lakewood Dr. W.  
Lakewood, WA 98487-3331

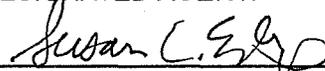


Kathlyn L. Mills, Secretary

Subscribed and sworn to before me

on February 1, 2010.

DESIGNATED AGENT:

  
NATIONAL LABOR RELATIONS BOARD

INTERNET  
FORM NLRB-502  
(2-08)

UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

DO NOT WRITE IN THIS SPACE

Case No. 19-RC-15194 Date Filed 3/23/09

Self Determination PETITION

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

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)
- 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 and 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 <b>Fred Meyer Stores Inc</b>		Employer Representative to contact <b>Cindy Thornton</b>	Tel. No. <b>503-232-8844 Ext. 7905</b>
3. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code) <b>6305 Bridgeport Way W University Place, WA 98467</b>			Fax No.
4a. Type of Establishment (Factory, mine, wholesaler, etc.) <b>Retail</b>	4b. Identify principal product or service <b>Grocery &amp; General Merchandise / CCK</b>		Cell No.
5. Unit Involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.) <b>Included All employees employed in the playland department of the Employer's University Place, WA store.</b>			6a. Number of Employees in Unit: <b>Present 3</b>
<b>Excluded Confidential employees, managerial employees, guards and supervisors as defined in the Act.</b>			Proposed (By UC/AC)
			6b. Is this petition supported by 30% or more of the employees in the unit? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> 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. <input checked="" type="checkbox"/> Request for recognition as Bargaining Representative was made on (Date) <u>Petition is demand</u> and Employer declined recognition on or about (Date) _____ (If no reply received, so state).	
7b. <input type="checkbox"/> 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.) <b>United Food and Commercial Workers Union, Local 367</b>	
Address <b>6403 Lakewood Dr W Tacoma, WA 98467</b>	
Tel. No. <b>253-589-0367</b>	
Cell No.	
Date of Recognition or Certification	
Fax No. <b>253-589-1512</b>	
e-Mail	
9. Expiration Date of Current Contract. If any (Month, Day, Year) <b>05/01/10</b>	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 <input type="checkbox"/> No <input checked="" type="checkbox"/>	11b. If so, approximately how many employees are participating? <b>N/A</b>
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	Address	Tel. No.	Fax No.
N/A			
		Cell No.	e-Mail

13. Full name of party filing petition (If labor organization, give full name, including local name and number)  
**United Food and Commercial Workers Union Local 367**

14a. Address (street and number, city, state, and ZIP code) <b>6403 Lakewood Dr. W Tacoma, WA 98467</b>	14b. Tel. No. EXT	14c. Fax No. <b>253-589-1512</b>
	14d. Cell No.	14e. e-Mail

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (to be filled in when petition is filed by a labor organization)  
**United Food and 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) <b>Gary L. Lyle</b>	Signature	Title (if any) <b>Organizing Director</b>
Address (street and number, city, state, and ZIP code) <b>6403 Lakewood Dr. W Tacoma, WA 98467</b>	Tel. No. <b>253-589-0367</b>	Fax No. <b>253-589-1512</b>
	Cell No.	e-Mail

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 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: [www.nlr.gov](http://www.nlr.gov)

March 23, 2009

Ms. Cindy Thornton  
Fred Meyer Stores, Inc.  
6305 Bridgeport Way W  
University Place, WA 98467

Re: **Fred Meyer Stores, Inc.**  
**Case 19-RC-15194**

Enclosed is a copy of a petition, under Section 9(c) of the National Labor Relations Act, filed with this office by **UFCW Local 367** on behalf of certain employees of the Employer, for certification of representative. Please post this copy on your employee bulletin board. Also enclosed is a copy of Form NLRB-4812, "Parties Involved in a Representation Petition," explaining the manner in which representation petitions are processed by the Agency.

**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.nlr.gov>. (See Attachment to this letter for instructions). Of course, the Agency will continue to accept timely filed paper documents.

The investigation of this case has been assigned to the Board Agent listed below and any communications relative to the case should be directed to that Agent.

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 you choose to have a representative appear on your behalf, please have your representative complete "Notice of Appearance," Form NLRB-4701, and forward it promptly to this office.

Please be 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.

Please submit the following information to this office as soon as possible:

1. The enclosed Commerce Questionnaire filled out in the appropriate sections if you have not submitted such information in prior cases.
2. Copies of correspondence and existing or recently expired collective bargaining contracts, if any, covering any of the employees in the unit alleged in the petition. (Names of any other labor organizations claiming to represent any of the employees in the proposed unit.)
3. An alphabetized list of employees described in the petition, together with their job classifications, for the payroll period immediately preceding the date of this letter.
4. Your position as to the appropriateness of the unit.

If a question concerning representation exists and if the parties do not utilize the consent election procedure, please be advised that a representation hearing will be scheduled in this matter at **Seattle, Washington on or before April 3, 2009.**

Fred Meyer Stores, Inc.  
Case 19-RC-15194  
March 23, 2009

We do not know what final disposition will be made of the petition at this time, but experience tells us that an explanation of rights, responsibilities and Board procedures can be helpful to your employees. The Board believes that employees should have readily available information about their rights and the proper conduct of employee representation elections. At the same time, employers and unions should be apprised of their responsibilities to refrain from conduct which could impede employees' freedom of choice.

Accordingly, you are requested to post the enclosed Notice to Employees in a conspicuous place in an area where employees such as those described in the enclosed petition work, and advise this office as to your compliance with the posting request. Copies of this Notice are being made available to the labor organization(s) involved. In the event an election is not conducted pursuant to this petition, you are requested to remove the posted Notice.

Your attention is directed to the Board's rule, as set forth fully below, concerning the requirement that the Notice of Election, when and if issued, be posted for three (3) full working days prior to any election conducted in this matter.

Section 103.20 Posting of Election Notices.

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24 hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objecting to nonposting of notices if it is responsible for nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

(d) Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

Your cooperation in this matter will be appreciated. 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 representation cases have been published by the Agency and can be found on our Agency website at [www.nlr.gov](http://www.nlr.gov).

Sincerely,



James R. Kobe  
Acting Regional Director

Enclosures

**Case Assigned to: Dianne T. Todd**  
**Telephone No.: (206) 220-6319**  
**Email: [Dianne.Todd@nlrb.gov](mailto:Dianne.Todd@nlrb.gov)**

cc: Randall L. Zeiler, Attorney, Allied Employers, 4030 Lake Washington Blvd NE, Suite 201, Kirkland, WA 98033-7870  
Richard J. Alli, Jr., Attorney, BULLARD SMITH JERNSTEDT & WILSON, 1000 SW Broadway, Suite 1900 Portland, OR 97205

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

FRED MEYER STORES, INC.

Employer

and

Case 19-RC-15194

UNITED FOOD AND COMMERCIAL  
WORKERS, LOCAL 367, 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").<sup>1</sup> 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 in this proceeding, I make the following findings and conclusions.<sup>2</sup>

Petitioner ("the Union") represents certain employees at Fred Meyer Stores, Inc. ("the Employer") in a number of bargaining units, including a common check unit, or "CCK" unit. Petitioner in this case seeks a self-determination election among three Playland attendants ("attendants") employed at the Employer's University Place store ("University Place"), located in Pierce County, Washington, to decide whether those employees wish to be included in the existing county-wide unit of common check employees.<sup>3</sup>

The Employer opposes the petition, asserting the attendants do not share a community of interest with the employees in the existing common check unit.<sup>4</sup> Petitioner

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<sup>1</sup> 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.

<sup>2</sup> The Employer and Petitioner timely submitted briefs, which I have carefully considered.

<sup>3</sup> No other labor organization seeks to represent the employees covered by the instant petition.

<sup>4</sup> The Employer also maintains that, should a community of interest be found with the common check unit, the potential inclusion of only one location's attendants is inappropriate because the common check unit is a county-wide multilocation unit.

maintains a community of interest exists, and that a self-determination election among the University Place attendants is appropriate.

Based on the record as a whole and the parties' respective briefs, I find that the attendants share a community of interest with the employees in the existing common check bargaining unit, and that the petitioned-for self-determination election is appropriate.

Below, I have summarized the record evidence detailing the parties' bargaining history, and the Employer's operations. Following my summary of the relevant record evidence is my analysis of the applicable legal standards, and their application to the facts of this case. Given my conclusion that there is no basis to dismiss the petition, the final section sets forth the direction of election and the process for requesting review of this decision.

## II. RECORD EVIDENCE<sup>5</sup>

### A. Relevant Bargaining History

The Employer is a State of Ohio corporation that operates 128 stores in Alaska, Washington, Oregon, and Idaho, 120 of which are large "one-stop" retail stores (each over 100,000 square feet) that sell a full line of products, including groceries and general merchandise.<sup>6</sup> The Employer operates seven "one-stop" stores in Pierce County, Washington: Bonney Lake, Puyallup, South Hill, Sumner, Tacoma Pacific, Tacoma Stevens, and University Place.

The parties have long maintained a collective-bargaining relationship regarding the Pierce County stores, executing successive multilocation collective bargaining agreements. At present, the Employer and the Union are party to four collective bargaining agreements: grocery, meat, general merchandise, and common check.<sup>7</sup> All four contracts cover multiple stores.

The common check unit was developed by the Employer, after bargaining with the Union, in 1990 to integrate what were previously two sets of cashiers, food and non-food.<sup>8</sup> Over time, additional classifications have been added to the unit, including customer service desk employees ("service desk employees") a "couple" of years ago and accounting

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<sup>5</sup> At hearing, the Employer called University Place Store Director Kelly Price, University Place Customer Service Manager Jay Tinnerstet, and Vice President of Human Resources and Employee Relations Carl Wojciechowski as witnesses. Petitioner called attendant Laura Cutter, cashier Nancy Ferguson and Union Representative Karen Kolley.

<sup>6</sup> The remaining eight stores are "marketplace" stores which primarily sell grocery items and a more limited line of general merchandise.

<sup>7</sup> In addition to being a multilocation agreement, the grocery agreement is also a multiemployer agreement, negotiated by a multiemployer group to which the Employer belongs.

<sup>8</sup> The Employer has recognized and bargained with Petitioner as the exclusive collective-bargaining representative of the Pierce County common check unit, described in the current collective bargaining agreement as "...all employees employed in the Employer's Combination Food/Non-Food Checkstand Departments in Pierce County and all future Combination Food/Non-Food Checkstand Departments in Pierce County...excluding the Department Manager and two Assistant Department Managers."

cashiers about a year and a half ago.<sup>9</sup> The record is not clear when parcel clerks were added to the unit. The most recent Pierce County common check contract is effective May 6, 2007, to May 1, 2010.

The parties' collective bargaining agreements covering Pierce County have accretion clauses covering future stores.<sup>10</sup> These clauses permit card check recognition where Petitioner obtains authorization cards from a majority of employees in a previously unrepresented department. The accretion clauses function on a store-by-store basis, which requires the Petitioner to demonstrate majority support in a previously unrepresented department at a future or new location. Once recognized, however, the newly represented group is covered by the terms of the appropriate county-wide contract. The result is that all four contracts may not be applicable to every store in Pierce County. For example, the general merchandise and deli units at the Sumner location are not represented by the Union, as Petitioner could not demonstrate majority support in those two groups of employees following the opening of the Sumner store and Petitioner's organizational efforts. Therefore these particular Sumner employees are not covered by the collective bargaining agreements applicable at the other locations.<sup>11</sup>

### **B. Employer's Operation**

The Employer divides the operation of its stores into sections. Several sections are specific to certain merchandise, including the Food, Home, Apparel, and Electronics sections. These sections also mirror the general division of the sales floor. Other sections have responsibility for services provided or utilized by the store, including Customer Service, Human Resources and Loss Prevention. Whether merchandise or service based, each section is run by a Section Manager, who in turn reports to the Store Director.

209 total employees work at University Place, which is open to the public daily from 7:00 a.m. to 11:00 p.m. Typical of the Employer's "one-stop" stores, University Place has two entrances on the side of the building facing the parking lot. The space inside the store between the entrances, approximately 10 percent of the store's total floor space, contains the checkstands and a number of small departments, including Pharmacy, Electronics, Jewelry, and Playland. University Place also has a small space in this area utilized by a third party financial institution. Adjacent to Playland on one side is a hallway leading to the restrooms, a supply room, an accounting room and the time clock for all employees. The Electronics section is adjacent to Playland on the other side.

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<sup>9</sup> Accounting cashiers are a subset of the cashier classification, a distinction explained in more detail in the following section. Unless otherwise indicated, "cashiers," as used in this decision, refers to cashiers and accounting cashiers collectively. I additionally note that accounting cashier is a relatively new title, and in the record this position is also referred to as "teller," the title of the position when it was added to the common check unit.

<sup>10</sup> The language referencing future units in the recognition clause (Article 1.1, Recognition and Bargaining Unit, quoted in fn. 8 above) is described by the parties as the "accretion clause." This language is also referred to in the record as the "after-acquired store clause." The procedure described is not contained in this language, but is instead an established practice. To the extent this practice is documented in a written agreement, it is outside the scope of the evidence in the record.

<sup>11</sup> The nature of the store may also make some contracts inapplicable. For example, the marketplace locations do not utilize a common check system, so they do not have a common check unit.

## 1. Checkstands and Customer Service Desk

Each of the seven "one-stop" stores in Pierce County, including University Place, has a common checkstand area with registers and an adjacent, but separate, customer service desk. Cashiers, accounting cashiers, service desk employees, and parcel clerks are employed at University Place. These classifications are all included in the Employer's customer service section, and report to Customer Service Manager Jay Tinnerstet.<sup>12</sup> At University Place, the Employer's customer service section also includes two file maintenance employees and three Playland attendants; both of these classifications likewise report to Tinnerstet.<sup>13</sup>

Approximately 45 cashiers, accounting cashiers and service desk employees are employed at University Place.<sup>14</sup> The primary task of cashiers is to perform sales transactions for customers at the checkstand area. In addition, cashiers are required to open and close their registers, bag merchandise, and adequately stock and clean the checkstand area. Accounting cashiers perform this cashier function, but also have responsibility for balancing the registers, preparing bank deposits, auditing reports, and are responsible for ordering and issuing lottery tickets, postage stamps and money orders. Both types of cashiers are included in the common check bargaining unit.

The customer service desk is located in the front of the store, close to the cashiers' checkstands. Service desk employees handle returns and exchanges, process money orders, layaways, job applications, sell gift certificates and fish and game licenses. They also provide information to customers, and answer phones. Service desk employees are included in the common check bargaining unit.

Parcel clerks assist customers in taking their purchased merchandise from the store to the parking lot, and collect and return carts from the parking lot to the store. They also return merchandise from the checkstands to the sales floor, assist in bagging, and have cleaning responsibilities. At least some parcel clerks are cross-trained and are able to perform cashier duties, operating a register and completing sales transactions. Parcel clerks are included in the common check bargaining unit.

With regard to pay and benefits, cashiers, accounting cashiers, service desk employees and parcel clerks constitute the common check bargaining unit and their terms and conditions of employment are governed by the common check collective-bargaining

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<sup>12</sup> The assistant manager for the customer service section is Amber Southworth, the "third in charge" is Christine Hilario, both of whom are not included in the common check bargaining unit. Three or four employees in the customer service section are apparently designated with the title "person in charge" (PIC), and are excluded from the bargaining unit.

<sup>13</sup> The Employer's file maintenance staff ensures that prices within the Employer's computer system are correct, and also perform some time and attendance duties. The file maintenance staff is not included in any bargaining unit. The parties did not specify the particular work area where file maintenance employees are located in the store.

<sup>14</sup> The record does not indicate the number of parcel clerks employed at University Place.

agreement. Further, all common check unit employees apparently receive cashier training prior to commencing work for the Employer.<sup>15</sup>

All employees at University Place use the same time clock, break room, and receive on-site training via a web-based learning system. All hourly employees, including all of the classifications at issue in this case, are evaluated using the same system.

## 2. Playland

At four of the seven “one-stop” stores in Pierce County, the Employer also has a Playland. Playland is a supervised play area located at the front of the store, near the checkstands and customer service desk. When shopping at University Place, during Playland’s operating hours of 11:00 a.m. to 7:00 p.m., parents can leave children, who meet the participation requirements, for up to 1 hour.<sup>16</sup>

Playland is a small, open area, approximately 25 square feet, but with controlled access so that the children remain inside and adults, other than the attendant, are outside. The attendant sits at a counter near the adult entrance, which faces the checkstands. A second, small door for children is adjacent to the adult door. The design of Playland allows the attendant to interact with adults on the other side of the counter without leaving Playland, but also prevents the children from being able to leave unattended.

When a parent brings a child to Playland, the attendant will first determine if the child has been to that Playland previously. If so, the attendant retrieves the child’s file card from Playland records, signs the child in, and provides the parent and child number coded bracelets. If the child has not been to that location before; the attendant completes the paperwork (providing the parent a copy of Playland rules, and recording personal information). Playland is equipped with toys, art and games; when not checking children in or out, the attendant plays with the children.<sup>17</sup> Playland also has equipment to play movies for children. At University Place, Playland’s maximum capacity is 8 children, so that a 1 adult to 8 children maximum ratio is maintained.<sup>18</sup>

The 8 hours of Playland’s operation are divided into two 4-hour shifts; 1 attendant is scheduled for each shift.<sup>19</sup> Attendants have a few additional responsibilities in addition to monitoring children. They sort coupons previously used by customers in purchases at the store, frequently at the beginning of the morning shift before children begin arriving. Attendants also color code work schedules for the customer service section. On Fridays, the attendants are given the paychecks for the store’s entire staff for distribution to

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<sup>15</sup> It is not clear from the record that parcel clerks receive such training, but it would appear such training would occur if parcel clerks also perform cashier duties.

<sup>16</sup> To be admitted to Playland, a child must be at least 2 years of age, but not yet have entered kindergarten. Children must also be able to enter Playland freely through the child’s door entrance, in effect an age and maximum height restriction.

<sup>17</sup> The check-out process is similar to check-in process. The attendant matches the numbered bracelets and the parent signs out.

<sup>18</sup> At hearing, it was estimated that the amount of time when no children are present in Playland is between 30 minutes and an hour per 4 hour shift.

<sup>19</sup> With the exception of when a new hire is participating in training.

employees who receive their paychecks at work. Attendants then distribute the paychecks as employees report to Playland.<sup>20</sup>

The record reveals varying additional tasks performed by the attendants intermittently over a long period of time, or consistently for a brief period of time. In the past this has included performing a regular check of the restrooms (looking for any problems, wiping the sink, replacing paper towels, toilet paper and seat covers), work also performed by parcel clerks.<sup>21</sup> The record also indicates attendants may have, on occasion, returned stock from the checkstands to the floor, and bagged groceries.<sup>22</sup> It is clear the bathroom cleaning assignment was discontinued, while the other tasks appear to have been a combination of assignment by management, or the initiation by attendants when no children were present in Playland.<sup>23</sup> The parties did not detail in the record the extent of work performed at the checkstands by the attendants, and there is no evidence in the record that any checkstand work actually involved operation of cashier equipment.

All attendants work part-time, between 12 and 20 hours a week, and are paid according to the Employer's non-union pay scale. Non-union employees of the Employer, such as the attendants, are also covered by the Employer's policies for non-represented employees in regard to sick pay, short-term disability, vacation, holidays, funeral pay, jury duty and overtime, and participate in the Employer's health and welfare plan, as well as the Employer's 401(k) plan. Attendants are required to have cardiopulmonary resuscitation (CPR) and first aid certifications, and complete a class on bloodborn pathogens. The Employer provides the training both to obtain the certifications, and the pathogen class, over the course of one 4-hour training period after the attendant is hired, but before they begin work with the children. When the Playland attendant is taking lunch or a break, the supervisor is required to cover that absence with an employee with the same certifications and training.<sup>24</sup>

During the hiring process the Employer submits all new employees to a background check. However, the Employer submits prospective or new hire attendants to a more extensive background check because they are working with small children.

### III. ANALYSIS

A union may seek to add unrepresented employees to an existing bargaining unit by petitioning for a self-determination election. In a self-determination election, if the majority

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<sup>20</sup> The parties did not present any evidence regarding whether the Employer offers its employees the option of receiving their pay through direct deposit to bank accounts.

<sup>21</sup> This work was performed by attendants for a period of 2 weeks.

<sup>22</sup> The record contains two grievances filed by the Union over the attendants performing bargaining unit work. The first is dated June 11, 2008, and involves an attendant bagging groceries. The second is dated October 24, 2008, and involves cleaning and other tasks.

<sup>23</sup> Reverse crossover work, bargaining unit employees working in Playland, has not occurred in the recent past. The record contains evidence of a dispute in 1998-1999 regarding whether bargaining unit employees could volunteer, or be assigned to work shifts or cover breaks in Playland. The apparent resolution of the dispute was removal of bargaining unit employees from Playland, as the record contains no evidence of any bargaining unit employee involvement in Playland since that point.

<sup>24</sup> Tinnerstet, Southworth and Hilario and the PIC's (non-unit employees) have the necessary training to cover attendant's absences.

of employees votes against representation, they remain unrepresented, but if the majority of employees votes for representation, they become part of the existing unit.<sup>25</sup>

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 can only represent the employees in the residual unit by adding them to the existing unit, usually by means of a self-determination election.<sup>26</sup> 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."<sup>27</sup>

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.<sup>28</sup> Thus, in determining whether a unit is appropriate, the Board first examines the petitioned-for unit. If the petitioned-for unit is *an* appropriate unit, the inquiry ends.<sup>29</sup> 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.<sup>30</sup> To determine whether a petitioned-for unit is appropriate, the Board evaluates the following factors: functional integration; employee interchange; employees' skills and duties; terms and conditions of employment; common management and supervision; and bargaining history.<sup>31</sup>

In the instant case, no party asserts that a residual unit is at issue. The question presented is whether the attendants are an identifiable, distinct segment that shares a community of interest with the existing unit. Based upon a careful review of the record evidence and analysis of relevant Board principles, I find, contrary to the Employer, that the attendants do share a community of interest with employees currently in the common check bargaining unit.

#### **A. Functional Integration**

The record regarding whether Playland is functionally and operationally integrated with the rest of the Employer's customer service section is mixed. Initially, I note that the employees at issue in the instant case, both the existing common check unit employees (the two classifications of cashiers, service desk employees, and parcel clerks) and the attendants, are all part of the Employer's customer service section. Playland is physically proximate to the work at the check stands and the service desk, the work area of the cashiers, service

<sup>25</sup> *Warner-Lambert Co.*, 298 NLRB 993 (1990).

<sup>26</sup> *St. John's Hospital*, 307 NLRB 767 (1992).

<sup>27</sup> *Warner-Lambert*, 298 NLRB at 995. See also *University of Pittsburgh Medical Center*, 313 NLRB 1341 (1994).

<sup>28</sup> *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).

<sup>29</sup> *Barlett Collins, Co.*, 334 NLRB 484, 484 (2001).

<sup>30</sup> *Overnite Transportation Co.*, 331 NLRB 664, 663 (2000).

<sup>31</sup> See, e.g., *Bashas', Inc.*, 337 NLRB 710 (2002) and cases cited therein.

desk employees and parcel clerks. Indeed, the convenient location of Playland near the checkstands permits customers to walk a relatively short distance to pick up their children after purchasing their items at the store.

As the name implies, the employees in the customer service section provide customers with services to facilitate their shopping. Cashiers conduct sales transactions. Likewise, service desk employees conduct sales and other transactions for customers, as well as provide information. Parcel clerks bag and transfer purchases to the parking lot for customers. Similarly, attendants provide customers with supervised care for their children. For example, if a parcel clerk observes a high volume of customers at the checkstands, the parcel clerk may stop collecting carts and instead help, either by acting as a cashier or by bagging. Similarly, the record indicates attendants have bagged groceries and returned merchandise to the shelves when no children were present in Playland and the cashiers, service desk staff and parcel clerks were busy.<sup>32</sup> When children are present in Playland, and attendants are not able to leave, they have in the past used the Employer's intercom system to call parcel clerks to assist at the checkstands.

On the other hand, attendants provide child care and do not perform a sales transaction. Presently, attendants are not trained on use of the registers and could not perform a sales transaction. Playland is also separate from the checkstands.<sup>33</sup>

Attendants also share supplies with the cashiers, service desk staff and parcel clerks, and as customer service section employees they share a common schedule, and wear identical uniforms and nametags. On balance, I find that the functional integration factor is mixed and inconclusive as no element in that factor clearly predominates.

## **B. Interchange**

Attendants have regular contact with Petitioner-represented employees, and there is evidence of limited interchange between the positions. As noted above, attendants have on occasion worked with cashiers and parcel clerks when children are not present in Playland, bagging groceries and returning merchandise. When cleaning Playland, attendants obtain supplies from the parcel clerks cleaning cart. The record also demonstrates a period where attendants briefly cleaned the restrooms, a task currently assigned to the parcel clerks. However, attendants are not trained as cashiers and thus do not substitute as such.

The location of Playland facilitates frequent contact with the other employees in the customer service section. Playland is located between the store entrances, which parcel

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<sup>32</sup> I note, however, the Employer now prohibits attendants from bagging groceries, but the evidence indicates this development is based on the Union's claim to the work. As Petitioner is seeking to add the attendants to the common check unit, presumably that jurisdictional claim would no longer constitute a barrier to the Employer's apparent desire to utilize idle attendants when the checkstand area is extraordinarily busy.

<sup>33</sup> The Employer overstates the separation, however, when stating in brief that Playland "...is completely separate from every other department in the store, being locked at all times and accessible only to the Playland employees themselves and the manager or PIC who is relieving them..." Attendants are not locked away, the lock exists to prevent children from leaving and adults from physically entering, but the record is clear that adults such as the attendants and other employees can communicate freely over the Playland counter. The fact that the door is locked does not have a significant impact on the functional integration of the employees at issue.

clerks enter and exit throughout the day. Further, the hallway immediately adjacent to Playland leads to the time clock used by all employees, a storeroom that contains supplies for the parcel clerks and cashiers, the "accounting room" used by the accounting cashiers, and the restrooms. Attendants also have regular contact with customer service employees at least once a week as a function of distributing paychecks. Additionally, all employees utilize a common breakroom.

The evidence of permanent transfers between the customer service positions is very scant, with the record only referencing one employee transferring from the attendant position to a common check bargaining unit position, and then back to an attendant. In addition, short-term assignments, that is a common check bargaining unit employee working in Playland when an attendant is unavailable, have not occurred in the recent past. The grievances and other evidence in the record, however, demonstrate that interchange between the positions is limited in part by jurisdictional boundaries. Where, as here, a factor is limited as a direct result of a bargaining agreement between the parties, the value of that factor in determining a community of interest is mitigated. On balance, particularly given the frequent contact, I find interchange provides support, albeit not overwhelming, in favor of Petitioner's position.

### **C. Similar Skills and Functions**

With regard to skills and functions, a minimum level of training is required for both positions. After hire, on-the-job training for either the cashier or the attendant position takes 1 to 2 days, and no significant educational or other requirements exist for employment in these positions.

Attendants are required to have CPR and first aid certification, bloodborn pathogen training (training not required of employees in the common check unit), and a more extensive background check. However, the training is Employer provided and is accomplished in a relatively short amount of time (4 hours). In addition, the attendants' primary function is child care, whereas the common check unit employees primarily handle registers, engage in accounting, run the service desk and handle parcels. On balance, particularly examining the primary functions of the positions, I find that the similar skills and functions factor does not favor Petitioner's position.

### **D. Terms and Conditions of Employment**

The record reveals that common check bargaining unit employees and attendants have different pay and benefits. Those differences, however, are the direct result of the common check bargaining agreement between the parties. As such, evidence regarding this factor is of little material value.

Attendants are scheduled between 11:00 a.m. and 7:00 p.m., Playland's hours of operation. Cashiers, service desk employees and parcel clerks are scheduled between 7:00 a.m. and 11:00 p.m., the hours University Place is open to the public. Although attendants do not work as many hours as cashiers, service desk employees and parcel clerks, these employees are working at all times when Playland is in operation.

Attendants have the same opportunity to apply for internal job openings as the bargaining unit employees. In the circumstances of this case, I find the terms and conditions of attendants' employment are not sufficiently distinguishable from the terms and conditions of common check unit employees, and thus I do not find this factor favors either position.

#### **E. Common Management and Supervision**

Attendants are part of the customer service section, as are cashiers, service desk employees and parcel clerks. As such, the attendants and the common check bargaining unit employees report to Customer Service Manager Jay Tinnerstet, Assistant Manager Amber Southworth, and Third-in-Charge Christine Hilario. The record does not indicate any other manager having involvement with these employees.

Although the Employer attempts to minimize this factor by arguing that the customer service supervisors use the same evaluation forms used for all employees throughout the store, this circumstance does not diminish the important reality that the attendants and common check unit employees share common supervision. Accordingly, this factor weighs strongly in favor of finding attendants share a community of interest with the common check bargaining unit employees.

#### **F. Bargaining History**

Generally speaking, when determining the appropriateness of a bargaining unit, the Board gives prior bargaining history substantial weight and 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.<sup>34</sup> However, the bargaining history regarding one group of organized employees does not control the unit determination for every other group of unorganized employees.<sup>35</sup> For similar reasons, the bargaining pattern for other employees of the same employer, or in the particular industry, will not be considered controlling in relation to another bargaining unit of the employer.<sup>36</sup>

The record reveals a bargaining history between Petitioner and the Employer involving other categories of employees not in dispute here.<sup>37</sup> The record also reveals the attendants are not included in any bargaining units at any of the Employer's four Pierce County "one-stop" stores with a Playland. Although not specifically addressed in the four collective bargaining agreements in place in Pierce County, the parties, in at least one previous representation case proceeding, stipulated that Playland attendants do not share a community of interest with either the grocery or general merchandise units. There is no evidence of any such stipulation with respect to the common check unit.

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<sup>34</sup> See, e.g., *Canal Carting*, 339 NLRB 969 (2003); *Ready Mix USA, Inc.*, 340 NLRB 946 (2003).

<sup>35</sup> *North American Rockwell Corp.*, 193 NLRB 985 (1971); *Piggly Wiggly California Co.*, 144 NLRB 708 (1963); *Arcata Plywood Corp.*, 120 NLRB 1648, 1651 (1958); *Joseph E. Seagram & Sons, Inc.*, 101 NLRB 101 (1953).

<sup>36</sup> *Big Y Foods*, 238 NLRB 855 (1978); *Miller & Miller Motor Freight Lines*, 101 NLRB 581 (1953).

<sup>37</sup> The record indicates that at one of the Employer's stores in Longview, Washington, where employees are represented by a different UFCW local, the attendants are represented in a separate bargaining unit. However, Longview, Washington, is outside of Pierce County.

The Employer asserts that the common check unit was created in 1990 to integrate two sets of cashiers. Subsequently, certain classifications (customer service desk employees and accounting cashiers) were added to the unit by the parties. It is not clear when parcel clerks were added to the unit. Regardless, the record reveals that all of these classifications' duties include or possibly could include operating cashiers' equipment. Thus, I recognize this thread running through the common check unit's bargaining history. However, operating cashier equipment is a relatively simple skill to obtain, as the Employer trains employees in this skill in a matter of hours. Moreover, operating cashier equipment is a limited function for certain common check unit employees. Indeed, the record reveals very limited and isolated instances of a parcel clerk operating cashier equipment. The record also reveals that interchange and functional integration between the attendants and common check unit employees would have occurred on a more frequent basis to some extent had Petitioner not objected and/or filed grievances on jurisdictional grounds. In sum, the common thread of operating cashier equipment, in the circumstances of this case, is clearly not so dominant as to negate the community of interest that I find exists between the common check unit employees and the University Place store attendants.

Petitioner asserts the parties' bargaining history in Pierce County demonstrates there is precedent for single-location organizing under the county-wide agreements, in that the accretion clauses function on a store-by-store basis. The Employer argues the same bargaining history dictates only a county-wide unit of attendants would be appropriate. Specifically, in brief, the Employer argues the parties have only added employees to existing units when three conditions have been met: a community of interest exists, the parties agree, and the employees have been added on a countywide basis. What the Employer describes, however, are circumstances where, on its initiative, the common check unit has been expanded by moving represented employees from one unit to another, for example when the service desk employees and accounting cashiers were removed from the general merchandise unit and added to the common check unit, after bargaining with the Union. This is not the situation presented here, where the Union seeks to add a *previously unrepresented* group of employees to an existing unit. Rather, I find the situation here, involving previously unrepresented employees, is more closely related to the circumstances covered by the parties' accretion clause, which as Petitioner states, is addressed on a store-by-store basis.<sup>38</sup>

The parties' Pierce County bargaining history establishes the Employer has recognized units on a unit-by-unit basis, following a majority card showing by Petitioner. In light of the parties' bargaining history of seeking majority status on a department by department and store by store basis, it would be inappropriate to reject a petitioned-for election in a single store unit. As such, I do not accept the Employer's argument that the bargaining history between the parties establishes a community of interest between the University Place attendants and the

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<sup>38</sup> The Employer also makes the argument on brief that allowing a vote in a single location could create incongruity among the attendants in Pierce County, where the terms and conditions differ for employees performing the same job, and preventing cross-store coverage. This is true, but I do not find it persuasive in that this is exactly the situation created by the accretion clause, and which already exists in departments such as the Sumner deli and general merchandise unit, where the Union does not represent the employees in question.

other Pierce County attendants so great as to make a county-wide unit the *only* appropriate unit.<sup>39</sup>

In these circumstances, I find that the parties' relevant bargaining history, including its practice of granting recognition on a department by department and store by store basis, supports finding that University Place attendants employees share a sufficient community of interest with common check unit employees. This bargaining history factor in conjunction with other community of interest factors noted above supports my finding that the petitioned-for employees are an appropriate voting group.

#### IV. CONCLUSION

The Employer essentially argues the parties' bargaining history dictates that the only appropriate unit involving attendants is a county-wide unit. However, I find the history of store-by-store recognition where unrepresented employees are involved defeats that argument. Further, whatever effects that follow from this result are a result of the parties' agreement; the Employer cannot now use those consequences as a persuasive reason to deny attendants a self-determination election.

Based on the foregoing, the entire record, and having carefully considered the parties' respective briefs, I conclude that the petitioned-for self-determination election is appropriate.<sup>40</sup> The record evidence establishes that attendants have some meaningful interchange, limited interaction, and shared supervision with the cashiers, service desk employees and parcel clerks. In addition, I particularly find the bargaining history in this case further supports finding the petitioned-for voting group appropriate.<sup>41</sup>

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

All full-time and regular part-time employees employed in the Playland department of the Employer's University Place store, located in Tacoma, Washington; excluding guards and supervisors as defined in the Act.

There are approximately three (3) 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.

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<sup>39</sup> I do recognize that the attendants at the four Pierce County stores may also share a community of interest and could be an appropriate voting group. However, Petitioner has not sought such a voting group. I need not find the most appropriate unit, rather only decide whether the unit sought is an appropriate one.

<sup>40</sup> In reaching this conclusion, I recognize that several of the community of interest factors arguably support the Employer's position, and that the community of interest is not as strong as in many other cases. However, on balance, I conclude a minimally sufficient community of interest exists to allow a self-determination election, permitting the attendants to decide whether to be included in the common check unit.

<sup>41</sup> In reaching my determination that attendants share a community of interest with the common check unit, I also note that there is no evidence that attendants share any community of interest with any of the other bargaining units recognized by the Employer.

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 that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 367, affiliated with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION. If a majority of the valid ballots in the election are cast for the Petitioner, the employees will be taken to have indicated their desire to be included in the existing recognized common check (CCK) Unit currently represented by the Petitioner, and it may bargain for those employees as part of that Unit. If a majority of the valid ballots are cast against representation, the employees will be deemed to have indicated their desire to remain unrepresented.

**A. List of Voters**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29<sup>th</sup> Floor, Seattle, Washington 98174, on or before **May 1, 2009**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

**B. Notice Posting Obligations**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

**C. Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **May 8, 2009**. The request may be filed through E-Gov on the Board's web site, [www.nlr.gov](http://www.nlr.gov), but may not be filed by facsimile.<sup>42</sup>

**DATED** at Seattle, Washington, this 24<sup>th</sup> day of April 2009.



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

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<sup>42</sup> To file a request for review electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, [www.nlr.gov](http://www.nlr.gov).

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRED MEYER STORES, INC.

Employer

and

UNITED FOOD AND COMMERCIAL  
WORKERS LOCAL 367, AFFILIATED  
WITH UFCW INTERNATIONAL UNION

Petitioner

Case 19-RC-15194

DATE OF MAILING: April 24, 2009

**AFFIDAVIT OF SERVICE OF DECISION AND DIRECTION OF ELECTION**

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 by fax and/or first-class mail upon the following persons, addressed to them at the following addresses:

Ms. Cindy Thornton  
Fred Meyer Stores, Inc.  
6305 Bridgeport Way W  
University Place, WA 98467  
(Employer) - via first-class mail

Gary L. Lyle, Organizing Director  
UFCW Local 367  
6403 Lakewood Dr W  
Tacoma, WA 98467-3331  
(Petitioner) - via first-class mail

Jackie Damm and  
Jennifer A. Sabovik, Attorneys  
BULLARD SMITH JERNSTEDT & WILSON  
1000 SW Broadway, Suite 1900  
Portland, OR 97205  
(Counsel for Employer) - via first-class mail and  
fax

Finley Young, Attorney  
UFCW Local 367  
6403 Lakewood Dr W  
Tacoma, WA 98467-3331  
(Counsel for Petitioner) - via first-class mail and  
fax



Cynthia Lundgren, Secretary

Subscribed and sworn to before me

on April 24, 2009

DESIGNATED AGENT:

  
NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRED MEYER STORES, INC.

Employer

and

Case 19-RC-15194

UNITED FOOD AND COMMERCIAL  
WORKERS, LOCAL 367 a/w 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.<sup>1</sup>

WILMA B. LIEBMAN, CHAIRMAN

PETER C. SCHAUMBER, MEMBER

Dated, Washington, D.C., June 11, 2009

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<sup>1</sup>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 *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. May 1, 2009), *petition for cert. filed* \_\_ U.S.L.W. \_\_ (U.S. May 27, 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. May 1, 2009), *petition for rehearing filed*, Nos. 08-1162, 08-1214 (May 27, 2009).

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

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

**FRED MEYER STORES, INC.**  
Employer

**UNITED FOOD AND COMMERCIAL WORKERS LOCAL 367,  
affiliated with UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION**  
Petitioner

Date Filed 3/23/09

Case No. 19-RC-15194

Date Issued 6/05/09 6/17/09

Type of Election (Check one):  
 Stipulation  
 Board Direction  
 Consent Agreement  
 RD Direction  
 Incumbent Union (Code) \_\_\_\_\_

(If applicable check either or both):  
 8(b) (7)  
 Mail Ballot

**TALLY OF BALLOTS**

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

- 1. Approximate number of eligible voters ..... 3
- 2. Number of Void ballots ..... 2
- 3. Number of Votes cast for PETITIONER ..... 3
- 4. Number of Votes cast for \_\_\_\_\_
- 5. Number of Votes cast for \_\_\_\_\_
- 6. Number of Votes cast against participating labor organization(s) ..... 0
- 7. Number of Valid votes counted (sum of 3, 4, 5, and 6) ..... 3
- 8. Number of Challenged ballots ..... 2
- 9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) ..... 3
- 10. Challenges are (not) sufficient in number to affect the results of the election.
- 11. A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for \_\_\_\_\_

**UNITED FOOD AND COMMERCIAL WORKERS LOCAL 367, affiliated with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION.**

For the Regional Director \_\_\_\_\_

**Region 19**

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER  
Not Present

For PETITIONER

For \_\_\_\_\_

For \_\_\_\_\_  
**EXHIBIT G**

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 19

**FRED MEYER STORES, INC.**

Employer

and

**UNITED FOOD AND COMMERCIAL WORKERS  
LOCAL 367, AFFILIATED WITH UNITED FOOD  
AND COMMERCIAL WORKERS INTERNA-  
TIONAL UNION**

Petitioner

**TYPE OF ELECTION**  
(CHECK ONE)

- CONSENT
- STIPULATED
- RD DIRECTED
- BOARD DIRECTED

(ALSO CHECK BOX BELOW  
WHEN APPROPRIATE)

8(b)(7)

**CASE 19-RC-15194**

**CERTIFICATION OF REPRESENTATIVE**

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for

**UNITED FOOD AND COMMERCIAL WORKERS LOCAL 367, AFFILIATED WITH  
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION**

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

**UNIT:** Included: All full-time and regular part-time employees employed in the Playland Department of the Employer's University Place store, located in Tacoma, Washington.

Excluding: Guards and supervisors as defined in the Act.



**SIGNED** at Seattle, Washington on  
the 24th<sup>th</sup> day of June, 2009.

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

Copies sent to the following 6/24/09:

Ms. Cindy Thornton  
Fred Meyer Stores, Inc.  
6305 Bridgeport Way W  
University Place, WA 98467

Richard J. Alli Jr.  
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Portland, OR 97205

Gary L. Lyle, Organizing Director  
UFCW Local 367  
6403 Lakewood Dr W  
Tacoma, WA 98467-3331

Finley Young, Attorney  
UFCW Local 367  
6403 Lakewood Dr W  
Tacoma, WA 98467-3331

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 19

**FRED MEYER STORES, INC.**

Employer

and

**UNITED FOOD AND COMMERCIAL WORKERS  
LOCAL 367, AFFILIATED WITH UNITED FOOD  
AND COMMERCIAL WORKERS INTERNA-  
TIONAL UNION**

Petitioner

**TYPE OF ELECTION**  
(CHECK ONE)

- CONSENT
- STIPULATED
- RD DIRECTED
- BOARD DIRECTED

(ALSO CHECK BOX BELOW  
WHEN APPROPRIATE)

8(b)(7)

**CASE 19-RC-15194**

**CORRECTED CERTIFICATION OF REPRESENTATIVE**

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

All full-time and regular part-time employees employed in the Playland Department of the Employer's University Place store, located in Tacoma, Washington; excluding 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 367, AFFILIATED WITH  
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION**

may bargain for the above employees as part of the Pierce County common check (CCK) unit that it currently represents.



**SIGNED** at Seattle, Washington on  
the 8<sup>th</sup> day of December, 2009.

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

Copies sent to the following 12/8/09:

Ms. Cindy Thornton  
Fred Meyer Stores, Inc.  
6305 Bridgeport Way W  
University Place, WA 98467

Richard J. Alli Jr.  
BULLARD SMITH JERNSTEDT & WILSON  
1000 SW Broadway, Suite 1900  
Portland, OR 97205

Gary L. Lyle, Organizing Director  
UFCW Local 367  
6403 Lakewood Dr W  
Tacoma, WA 98467-3331

Finley Young, Attorney  
UFCW Local 367  
6403 Lakewood Dr W  
Tacoma, WA 98467-3331



Teresa Iverson, President ▪ Blaine Sherfinski, Secretary/Treasurer

October 26, 2009

Mr. Carl Wojciechowski, Group VP  
Fred Meyer, Inc.  
Human Resources 35-B  
P. O. Box 42121  
Portland, OR 97242

Re: Fred Meyer WUP (University Place) - Playland Associates

Dear Mr. Wojciechowski:

The purpose of this letter is to request bargaining on behalf of the above-referenced employees concerning their wages, hours, and other terms and conditions of employment. Therefore, please provide dates upon which you are available to negotiate on behalf of the Employer.

In the interim, please provide a list of all Playland Associates for the above location, their contact information, dates of hire, wage rates, and medical coverage, which includes, but is not limited to, level of coverage and under what plan. In addition, please provide pension and/or 401(k) contribution information, which includes information relating to individual and company contributions.

The above information is necessary and relevant to bargaining and, in order to effectively prepare for negotiations, we request that you provide this information by November 5, 2009. If you have any questions or concerns relating to this request, please do not hesitate to contact me.

Thank you for your attention to this letter.

Sincerely,

UFCW UNION LOCAL NO.367

BLAINE R. SHERFINSKI  
Secretary/Treasurer

BRS:tc

cc: Teresa Iverson  
Daniel Comeau

F:\wpdata\oct26.tc.wpd

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL NO. 367

6403 Lakewood Drive W ▪ Tacoma, WA 98467-3331 ▪ (253) 589-0367 ▪ Outside Pierce Co. (800-562-3645) ▪ FAX (253) 589-1512



EXHIBIT     J



December 3, 2009

Teresa Iverson, President ▪ Blaine Sherfinski, Secretary/Treasurer

Mr. Carl Wojciechowski, Group VP  
Fred Meyer, Inc.  
Human Resources 35-B  
P. O. Box 42121  
Portland, OR 97242

Re: University Place Playland Negotiations

Dear Mr. Wojciechowski:

This letter is in response to your November 5<sup>th</sup> communication regarding the above-referenced matter.

We believe you are obligated to bargain with us based upon the fact that the Regional Office has issued a complaint in the Nutrition employee case wherein you took the same position based upon the District of Columbia Court decision. We further believe that even if the Supreme Court were to rule that the two person board could not render decisions, that the matter will be upheld once the new members are seated. Our belief is based upon the make up of the current executive branch and the appointments that President Obama will make to the Board.

Regarding your request to delay bargaining until the current CCK agreement expires and its' various contingencies, the answer is no, we do not agree. However, if you would agree to place the employees under the current agreement with all terms and conditions applicable, we would consider placing them under the agreement at their current pay rates (provided the company continued any current pay progressions) and negotiate the wage rates and other terms and conditions of employment when we bargain the successor CCK Agreement. We would need to be certain that the transition to the Sound Health and Wellness Trust was a seamless transition with no breaks in coverage etc. We believe our proposal makes sense especially given the fact that your CCK managers are utilizing playland employees to perform CCK unit work and duties.

If you are willing to consider our concept, please contact me and we should be able to work out the details by telephone. In the event you are not willing to proceed in this manner, please be advised it is and will be our position that there should be a tolling of the certification time period of a duration equal to the period of the delay to afford the parties adequate time to conclude the negotiations.

Sincerely,

UFCW UNION LOCAL NO.367

  
BLAINE R. SHERFINSKI  
Secretary/Treasurer

BRS:tc

cc: Teresa Iverson

F:\wpdata\dec3.tc.wpd

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL NO. 367

6403 Lakewood Drive W ▪ Tacoma, WA 98467-3331 ▪ (253) 589-0367 ▪ Outside Pierce Co. (800-562-3645) ▪ FAX (253) 589-1512

EXHIBIT

K



Teresa Iverson, President ▪ Blaine Sherfinski, Secretary/Treasurer

December 8, 2009

Mr. Carl Wojciechowski, Group VP  
Fred Meyer, Inc.  
Human Resources 35-B  
P. O. Box 42121  
Portland, OR 97242

Re: Fred Meyer WUP (University Place) - Playland Associates

Dear Mr. Wojciechowski:

In light of the NLRB's issuance of a corrected certification of representative, the purpose of this letter is to request bargaining on behalf of the above-referenced employees concerning their wages, hours, and other terms and conditions of employment. Therefore, please provide dates upon which you are available to negotiate on behalf of the Employer, or please consider our proposals in my letter to you on December 3, 2009.

In the interim, please provide a list of all Playland Associates for the above location, their contact information, dates of hire, wage rates, and medical coverage, which includes, but is not limited to, level of coverage and under what plan. In addition, please provide pension and/or 401(k) contribution information, which includes information relating to individual and company contributions.

The above information is necessary and relevant to bargaining and, in order to effectively prepare for negotiations, we request that you provide this information by December 18, 2009. If you have any questions or concerns relating to this request, please do not hesitate to contact me.

Thank you for your attention to this letter.

Sincerely,

UFCW UNION LOCAL NO.367

BLAINE R. SHERFINSKI  
Secretary/Treasurer

BRS:tc

cc: Teresa Iverson  
Daniel Comeau

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UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL NO. 367

6403 Lakewood Drive W ▪ Tacoma, WA 98467-3331 ▪ (253) 589-0367 ▪ Outside Pierce Co. (800-562-3645) ▪ FAX (253) 589-1512



EXHIBIT 1

RECEIVED  
NOV - 9 2009

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

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

November 5, 2009

Mr. Blaine Sherfinski  
Secretary-Treasurer  
UFCW Union Local 367  
6403 Lakewood Drive W.  
Tacoma, WA 98467

**RE: University Place Playland Associates**

Dear Mr. Sherfinski:

I received your letter dated October 26, 2009 in my office on October 20, 2009, in which you request bargaining on behalf of the Playland Associates working at the Employer's University Place store. 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-15194, in which the Regional Director directed that a self-determination election be held in a unit comprised of Playland Associates at the University Place store to determine whether they wished to be included in the existing multi-facility CCK 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; and Fred Meyer's Request for Review still is pending until it can be considered and resolved by a fully constituted Board. Since its Request for Review still is pending, Fred Meyer does not believe that it has a duty to start bargaining with Local 367 regarding the terms and conditions of employment of the University Place Playland Associates, and that it will not have a duty to start bargaining until its Request for Review is resolved. As you may know, the United States Supreme Court recently granted certiorari to consider the issue of whether the two-member Board had authority to issue decisions. Given the current composition of the Court, Fred Meyer believes that the Court will decide that the two-member Board did not have such authority.

Although Fred Meyer does not have a duty to bargain regarding the Playland Associates, it proposes that the Parties postpone any bargaining regarding the Playland Associates until the current multi-facility CCK collective-bargaining agreement applicable to the University Place CCK unit expires. Fred Meyer makes this proposal without waiving its position that it does not have a duty to bargain regarding the Playland Associates with Local 367. Should the Supreme Court decide after the expiration of the current CCK contract that the two-member Board did not have authority to issue its decision regarding Fred Meyer's Request for Review, then the Request for Review still will be pending; and any bargaining that had begun regarding the Playland Associates would have to cease at that time. Please advise me of the Union's position regarding whether it will agree to either postpone its demand to bargain until there is an ultimate resolution of Fred Meyer's Request for Review, or until expiration of the current CCK contract.

Respectfully,

  
Carl Wojciechowski  
Group Vice President  
Human Resources

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

Richard J. Alli  
Attorney  
Bullard Smith Wilson & Jernstedt

Jennifer Sabovik  
Attorney  
Bullard Smith Wilson & Jernstedt

RECEIVED  
JAN 11 2010

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

**Fred Meyer**

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

January 7, 2010

Mr. Blaine Sherfinski  
Secretary-Treasurer  
UFCW Union Local 367  
6403 Lakewood Drive W.  
Tacoma, WA 98467

**RE: Fred Meyer / University Place Playland Negotiations**

Dear Mr. Sherfinski:

I received your letter dated December 3 and 8, 2009, which I received on December 7 and 10, respectively. I apologize for the delay in my response, but it is due to the fact that I was out of the office during the holiday season.

Your December 8 letter requests bargaining on behalf of the employees employed in the Playland Department at the university Place store and requests dates upon which I am available for such bargaining. As I have previously stated, Fred Meyer does not have a duty to bargain with regard to the Playland employees in light of the Court's decision in *Laurel Baye Healthcare of Lake Lanier v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009). Since the Court held in that case that the two-member Board did not have authority under the National Labor Relations Act to issue its order denying Fred Meyer's Request for Review in Case No. 19-RC-15194, the Regional Director did not have authority to issue either the original Certification of Representative or the subsequent corrected Certification. Consequently, Local 367 was not properly certified as the exclusive representative of the Playland employees.

I understand that you disagree with Fred Meyer's position on this issue, but your statement that Fred Meyer is "obligated to bargain with [you] based upon the fact that the Regional Office has issued a complaint in the Nutrition employee case" is unpersuasive. The Region's opinion on this matter is irrelevant to the issue of whether the two-member Board has statutory authority to issue decisions. As you mention in your letter, only the United States Supreme Court can resolve this issue; and, even if, as you suggest, the Court issues an adverse decision, and the new fully-constituted Board upholds this matter, Fred Meyer does not have a duty to bargain until such time.

Since Local 367 has not been properly certified as the exclusive representative of the University Place Playland employees, it is not entitled to make requests for information regarding those employees. Fred Meyer is not refusing to respond to the request for information contained in your

December 8 letter. Instead, it seems appropriate in these circumstances to hold the information request in abeyance until Local 367 is properly certified as the exclusive representative of the Playland employees. Fred Meyer happily will provide the requested information at that time. Fred Meyer will, however, provide Local 367 with the following list of employees currently working in the University Place Playland Department because such information is not confidential to the employees:

- Katherine M. Crader
- Arlene F. Bachman
- Laura M. Cutter

I have considered the proposal contained in your December 3 letter. I must reject that proposal, since it would require Fred Meyer to apply the current multi-facility CCK contract to the Playland employees before the issues regarding the Union's status as exclusive representative of the Playland employees have been resolved. Fred Meyer continues to believe that the best options for both Parties are either to postpone bargaining until there is an ultimate resolution of Fred Meyer's Request for Review or until the current CCK contract expires. The Playland employees will not be prejudiced by this delay; the Union seems to recognize this since it proposes to maintain the employees' current wage rates even if the current CCK contract is applied to the employees. If the Union still will not agree to postpone bargaining until Fred Meyer's Request for Review, or until the current CCK contract expires, but can propose an alternative to applying the current CCK contract to the Playland employees, please put forth that alternative for my consideration. It is my hope that we can reach some agreement on how to handle these issues until there is some ultimate resolution by the Supreme Court and a fully-constituted Board.

In response to your statement that the Union will take the position that "there should be a tolling of the certification time period of a duration equal to the period of delay," no such tolling would be appropriate, especially here, where the delay has been caused by legitimate objections to the Region's certification, which were raised by a split in the Circuit Courts that only can be resolved by the Supreme Court.

Respectfully,

  
Carl Wojciechowski  
Group Vice President  
Human Resources

Copies to: Cindy Thornton, VP Labor & Associate Relations - Fred Meyer Stores  
Richard J. Alli, Attorney - Bullard Smith Wilson & Jernstedt  
Jennifer Sabovik, Attorney - Bullard Smith Wilson & Jernstedt

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 19

**FRED MEYER STORES, INC.,**

Respondent,

and

**UNITED FOOD AND COMMERCIAL  
WORKERS LOCAL 367, chartered by  
UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION,**

Charging Party.

Case No. CA-32311

**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 admits the allegations contained in Paragraph No. 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.

5.

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

6.

(a) Respondent admits the allegations contained in Paragraph No. 6(a) of the Complaint.

(b) In response to the allegations contained in Paragraph No. 6(b) of the Complaint, Respondent admits that on or about June 24, 2009, in Case 19-RC-15194, the Region attempted to certify the Union to bargain on behalf employees in the voting group described in Paragraph 6(a) of the Complaint, but denies that the Region had authority to issue the certification.

(c) In response to the allegations contained in Paragraph No. 6(c) of the Complaint, Respondent admits that on or about December 8, 2009, the Region issued a Corrected Certification of Representative also attempting to certify that the Union may bargain on behalf employees in the voting group described in Paragraph 6(a) of the Complaint as part of the Unit described in Paragraph 5(a) of the Complaint and already represented by the Union, but denies that the Region had authority to issue the Corrected Certification.

7.

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

8.

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

9.

Respondent denies the allegations contained in Paragraph No. 9 of the Complaint.

10.

Respondent denies the allegations contained in Paragraph No. 10 of the Complaint.

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 playland 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-15194 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-15194. 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 June 11, 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.

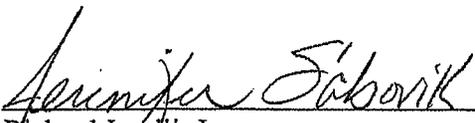
THIRD AFFIRMATIVE DEFENSE

Without waving its argument and defense that it has no duty to bargain with the Union regarding the playland employees, the Respondent has in been bargaining with the Union in good faith. The parties have exchanged substantive proposals, and the Employer is waiting for the Union to make counter-proposals to the Employer's last proposal. The issue of whether the Employer has been engaged in good faith bargaining with the Union presents a question of fact that can only be resolved by an administrative law judge after a hearing.

WHEREFORE, having fully answered all counts of this Complaint, Respondent Fred Meyer Stores, Inc., respectfully requests that it be dismissed in its entirety.

DATED: February 12, 2010.

BULLARD SMITH JERNSTEDT WILSON

By:   
Richard J. Ali, Jr.  
Jennifer A. Sabovik.  
Attorneys for Respondent  
Fred Meyer Stores, Inc.

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

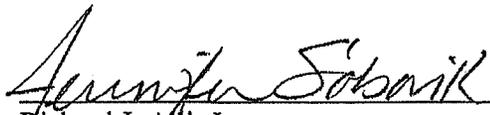
## CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2010 I served the foregoing ANSWER AND

**AFFIRMATIVE DEFENSES** on:

Mr. Finley Young  
Attorney  
UFCW Local 367  
6403 Lakewood Drive, West  
Tacoma, WA 98467  
[finley@ufcw367.org](mailto:finley@ufcw367.org)

- by **mailing** a true and correct copy to the last known address of each person listed. It was contained in a sealed envelope, with postage paid, addressed as stated above, and deposited with the U.S. Postal Service in Portland, Oregon.
- by causing a true and correct copy to be **hand-delivered** to the last known address of each person listed. It was contained in a sealed envelope and addressed as stated above.
- by causing a true and correct copy to be delivered **via overnight courier** to the last known address of each person listed. It was contained in a sealed envelope, with courier fees paid, and addressed as stated above.
- by **faxing** a true and correct copy to the last known facsimile number of each person listed, with confirmation of delivery. It was addressed as stated above.
- by **emailing** a true and correct copy to the last known email address of each person listed, with confirmation of delivery.

  
Richard J. Ali, Jr.  
Jennifer A. Sabovik  
Attorneys for Respondent  
Fred Meyer Stores, Inc.

## ORDER

The National Labor Relations Board orders that the Respondent, Fred Meyer Stores, Inc., University Place Store located in Tacoma, Washington, 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 367, affiliated with United Food and Commercial Workers International Union, ("Union") as the exclusive collective-bargaining representative of the employees employed by the Respondent in the Playland department of its University Place retail store located in Tacoma, Washington ("University Place Store").

(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) On request, bargain with the Union as the exclusive collective-bargaining representative of the following group of employees as part of the recognized Pierce County common check unit (the "Unit") on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All regular full-time and part-time employees employed in the Playland department of the Respondent's University Place Store, located in Tacoma, Washington; excluding guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its University Place Store, copies of the attached notice marked "Appendix."<sup>1</sup> 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 November 5, 2009.

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<sup>1</sup> 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."

(c) 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

## 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 Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;

Choose representatives to bargain with us on your behalf;

Act together with other employees for your benefit and protection; and

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Food and Commercial Workers, Local 367, affiliated with United Food and Commercial Workers International Union ("Union"), as the exclusive collective-bargaining representative of our employees in the Playland department of our University Place retail store ("University Place Store") located in Tacoma, Washington.

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, on request, bargain with the Union as the exclusive collective-bargaining representative of the following group of employees as part of the recognized Pierce County common check unit (the "Unit"), and put in writing and sign any agreement reached on terms and conditions of employment for those employees:

All regular full-time and part-time employees employed in the Playland department of the Respondent's University Place Store, located in Tacoma, Washington; excluding guards and supervisors as defined in the Act.

FRED MEYER STORES, INC.

EXHIBIT

Q

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

FRED MEYER STORES, INC.

and

Case 19-CA-32311

UNITED FOOD AND COMMERCIAL  
WORKERS LOCAL 367, affiliated with  
UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION

**MEMORANDUM IN SUPPORT OF MOTIONS TO TRANSFER  
CASE TO THE 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 the 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-32311 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 367, affiliated with United Food and Commercial Workers International Union ("Union") filed the instant charge on January 14, 2010 (the "Charge"), alleging that Respondent violated §§ 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of certain disputed Playland Department employees ("Playland employees") employed at Respondent's University

Place retail store located in Tacoma, Washington ("University Place Store").<sup>1</sup> (Exhibit A). The Regional Director of Region 19 of the Board ("Regional Director") issued a Complaint on February 1, 2010, based on the allegations in the Charge. (Exhibit B). Respondent filed an Answer and Affirmative Defenses ("Answer") to the Complaint on February 12, 2010. (Exhibit O).

## II. STATEMENT OF FACTS

Pursuant to a Petition filed in Case 19-RC-15194 on March 23, 2009 (Exhibit C), the Regional Director issued a Decision and Direction of Election on April 24, 2009 ("Decision") (Exhibit D), directing a self-determination election among the Playland employees at the University Place Store to determine if they wished to be included in the existing Unit described in paragraph 6 of the Motion for Summary Judgment. On May 11, 2009, Respondent filed a Request for Review of the Decision. (Exhibit E). The Board issued an Order denying Respondent's Request for Review on June 11, 2009. (Exhibit F).

On June 17, 2009, in accordance with the Decision, the ballots from a secret mail ballot self-determination election among Respondent's Playland employees at its University Place Store were counted under the direction and supervision of the Regional Director. The Tally of Ballots issued showing there were three eligible voters with three valid ballots cast. The three valid ballots were cast for the Union. (Exhibit G).

On June 24, 2009, in Case 19-RC-15194, the Regional Director issued a Certification of Representative ("Certification") certifying the Union as the exclusive

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<sup>1</sup> All exhibits referred herein are attached to the accompanying Motion for Summary Judgment and are made a part thereof.

collective-bargaining representative of University Place Store's Playland employees as described in paragraphs 8 and 11 of the Motion for Summary Judgment. (Exhibit H).

On December 8, 2009, in Case 19-RC-15194, the Regional Director issued a Corrected Certification of Representative ("Corrected Certification") certifying that the Union, as the exclusive collective-bargaining representative of the University Place Store Playland employees described in paragraphs 8 and 11 of the Motion for Summary Judgment, may bargain on their behalf as part of the Unit described in paragraph 6 of the Motion for Summary Judgment. (Exhibit I).

On or about October 26, December 3, and December 8, 2009, the Union requested in writing that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the University Place Store Playland employees. (Exhibits J, K, and L, respectively).

On or about November 5, 2009, and January 7, 2010, Respondent, by admitted agent Carl Wojciechowski, informed the Union in writing that, until the two-member Board issue is resolved, it would not bargain with it as the exclusive collective-bargaining representative of the University Place Store Playland employees and, since then, has sought to postpone bargaining indefinitely and has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of that group of employees. (Exhibits M and N, respectively).

**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 January 14, 2010, and was served on Respondent by regular mail on about that date. (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 State of Incorporation, derived gross revenues in excess of \$500,000. In its Answer Respondent admits that it is a State of Ohio Corporation. (Exhibit B, paragraphs 2(a) and (b)).

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, purchased and received at the University Place 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's Pierce County common check unit (the "Unit"), constitute a unit appropriate for the purposes of collective-bargaining within the meaning of § 9(b) of the Act:

All employees employed in the [Respondent's] Combination Food/Non-Food Checkstand Departments in Pierce County

and all future Combination Food/Non-Food Checkstand Departments in Pierce County . . . excluding the Department Manager and two Assistant Department Managers.

(Exhibit B, paragraph 5(a)).

8. Since at least 1990, 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 is effective from May 6, 2007, to May 1, 2010. (Exhibit B, paragraph 5(b)).

9. On or about June 17, 2009, in Case 19-RC-15194, a majority of all regular full-time and part-time employees working in the Playland Department of the Respondent's University Place 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 already represented by the Union. (Exhibit B, paragraph 6(a)).

10. On or about June 24, 2009, the Regional Director issued a Certification of Representative in Case 19-RC-15194 certifying the Union to bargain on behalf of the voting group of University Place Store Playland employees. (Exhibit B, paragraph 6(b)).

11. On or about December 8, 2009, the Regional Director issued a Corrected Certification of Representative in Case 19-RC-15194 certifying that the Union may bargain on behalf of the voting group of University Place Store Playland employees as part of the Unit already represented by the Union to bargain on behalf of the voting group of University Place Store Playland employees. (Exhibit B, paragraph 6(c)).

12. On or about October 26, December 3, and December 8, 2009, the Union requested in writing that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the voting group of Playland employees described in paragraph 6 of the Complaint. (Exhibit B, paragraph 7).

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

1. The Complaint alleges that, on or about June 24, 2009, in Case 19-RC-15194, the Union was certified as the exclusive collective-bargaining representative of the voting group of Playland employees described in paragraph 6(a) of the Complaint. In its Answer, Respondent admits only that a Certification of Representative issued and denies the remainder of the allegation, arguing that the Regional Director did not have the authority to certify the Union as the exclusive collective-bargaining representative of the University Place Store's Playland employees. (Exhibit B, paragraph 6(b)).

2. The Complaint alleges that, on or about December 8, 2009, in Case 19-RC-15194, a Corrected Certification of Representative issued certifying that the Union may bargain on behalf of the employees in the voting group of employees described in paragraph 6(a) of the Complaint as part of the Unit already represented by the Union. In its Answer, Respondent admits only that a Corrected Certification of Representative issued and denies the remainder of the allegation, arguing that the Regional Director did not have the authority to certify that the Union may bargain on behalf of the voting group of University Place Store Playland employees as part of the Unit already represented by the Union. (Exhibit B, paragraph 6(c)).

3. The Complaint alleges that on or about November 5, 2009, and January 7, 2010, Respondent, in writing by Wojciechowski, informed the Union that it would not bargain with it as the bargaining representative of the Playland employees described in paragraph 6 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. In its Answer, Respondent denies this allegation. (Exhibit B, paragraph 8).

4. The Complaint alleges that by the conduct described in paragraph 8 of the Complaint, described above in paragraph 3, Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its Playland employees described in paragraph 6 of the Complaint in violation of §§ 8(a)(1) and (5) of the Act. In its Answer, Respondent denies this allegation. (Exhibit B, paragraph 9).

5. 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 10).

#### IV. ARGUMENT

##### **Respondent's Refusal to Recognize and Bargain with the Union Regarding Its Playland Employees at the University Place Store Raises No Disputed Material Issues of Fact or Law**

Respondent admits that, by letter October 26, December 3, and December 8, 2009, the Union asked it to recognize and bargain with the Union as the exclusive collective-bargaining representative of the voting group of Playland employees at Respondent's University Place Store. In response to the Union's

October 26, 2009, letter, Respondent sent a letter dated November 5, 2009, to the Union stating it "does not believe that it has a duty to start bargaining with [the Union] regarding the terms and conditions of employment of the University Place Playland [employees], and that it will not have a duty to start bargaining until its Request for Review is resolved." (Exhibit M). Respondent also sent a letter dated January 7, 2010, to the Union stating it "does not have a duty to bargain with regard to the Playland employees in light of the Court's decision in *Laurel Baye Healthcare of Lake Lanier v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009)." (Exhibit N). Thus, letters sent by Respondent and the evidence, in its entirety, establishes that Respondent has refused to recognize and bargain with the Union with regard to its University Place Store Playland employees.

Respondent denies, however, that the Union is the exclusive collective-bargaining representative of the Playland 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 June 11, 2009, Order denying Respondent's May 11, 2009, Request for Review. Further, Respondent contends that, because of this lack of authority, no obligation to bargain has attached regarding the Playland employees at the University Place Store 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 *Teamsters Local 523 v. NLRB*, 590 F.3d 849 (10<sup>th</sup> Cir. 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4<sup>th</sup> Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *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, n 1 (July 29, 2009). See also *Fred Meyer Stores, Inc.*, 354 NLRB No. 127, n1, 2 (January 4, 2010); *Fred Meyer Stores, Inc.*, 354 NLRB No. 88, n1, 2 (September 30, 2009). The Regional Director's issuance of the Certification of Representative and Corrected Certification of Representative, which issued subsequent to the Board's Order denying Respondent's Request for Review, established the Union as the exclusive collective-bargaining representative of Respondent's University Place Store's Playland employees.

While Respondent attempts to assert as an affirmative defense that it has been bargaining with the Union in good faith as evidenced by its proposal to postpone bargaining until the Supreme Court and a fully-constituted Board resolves Respondent's request for review or until the Unit's collective bargaining agreement expires, its affirmative defense fails. Proposing to postpone bargaining until an unspecified time in the future does not constitute bargaining in good faith. Rather, it shows Respondent is attempting to camouflage its refusal to bargain by presenting it as a bargaining proposal. This it cannot do. See, e.g., *Henry M. Hald High School Ass'n.*, 213 NLRB

463 (1974), *enf'd.*, 559 F.2d 1204 (2<sup>nd</sup> Cir. 1977) (failure to bargain in good faith found in part due to postponement requests premised on pending state court decision).

Even when a representation petition is filed by a rival union, putting into question whether the incumbent union maintains majority support, the existence of such rival petition does not relieve an employer's obligation to meet and bargain with the incumbent union. *See, e.g., Dresser Industries*, 264 NLRB 1088, 1089 (1982); *RCA Del Caribe*, 262 NLRB 963, 965 (1982). Moreover, a withdrawal of recognition petition, standing alone, does not privilege an employer to withdraw recognition or suspend the employer's obligation to bargain in good faith despite the fact that the union might no longer enjoy majority support. *See, e.g., Lee Lumber and Building Material*, 306 NLRB 408, 410, 419-420 (1992). It follows in the instant matter that Respondent, like an employer dealing with a withdrawal of recognition and/or a decertification petition, is not privileged to suspend and/or postpone bargaining until some uncertain date in the future when the Board or a Court might determine that the Region lacked legal authority to certify the Union as the collective bargaining representative. 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 November 5, 2009, and January 7, 2010, by failing and refusing to bargain with the

exclusive collective-bargaining representative of its University Place Store's Playland 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 P and Q).

**DATED** at Seattle, Washington, this 18<sup>th</sup> day of February, 2010.



Ann Marie Cummins Skov  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 18<sup>th</sup> day of February 2010, I caused copies of Counsel for the General Counsel's *Motions to Transfer Case to the Board and For Summary Judgment* and Counsel for the General Counsel's *Memorandum in Support of Motions to Transfer Case to the Board and For Summary Judgment* to be served upon each of the following via E-File, E-Mail and/or Federal Express:

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Vicky Perkins, Secretary