

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

FRED MEYER STORES, INC.

and

Cases 19-CA-32908
19-CA-33052

ALLIED EMPLOYERS

and

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

**MEMORANDUM IN PARTIAL SUPPORT OF UNION'S REQUEST FOR
SPECIAL PERMISSION TO APPEAL ADMINISTRATIVE LAW JUDGE'S
DENIAL OF PARTS OF UNION'S PETITION TO REVOKE AND REQUEST TO
APPEAL ADMINISTRATIVE LAW JUDGE'S RULING**

Counsel for the Acting General Counsel submits this memorandum in partial support of UFCW Local 367's ("Union") request for special permission to appeal Administrative Law Judge Meyerson's ("ALJ") ruling on the Union's Petition to Revoke the Fred Meyer, Inc. and Allied Employers (the "Respondents") Subpoena Duces Tecum No. B-648027 in consolidated Cases 19-CA-32908 and 19-CA-33052. Counsel for the Acting General Counsel supports the Union's requests for special permission to appeal and reverse the ALJ's order of production as to those portions of the Subpoena that seek the Union's position statements authored by its attorneys and filed with Region 19 during the course of the underlying investigation in the above-captioned matter.

Counsel for the Acting General Counsel takes no position as to any of the other items encompassed by the Union's Request.

The ALJ's ruling arose in the context of hearing of the Region's Consolidated Complaint alleging that Respondents engaged in multiple violations of Sections 8(a)(1) and (5) of the Act, including altering the scope of the unit. Prior to hearing on the Consolidated Complaint, Respondents served upon the Union, the Charging Party in this matter, Subpoena Duces Tecum No. B-648027. The Union filed a Petition to Revoke that subpoena. On July 25, 2012, ALJ Meyerson addressed issues related to the Union's Petition to Revoke.

While ALJ Meyerson limited many of the requests, he ordered the Union to turn over, *inter alia*, its two position statements submitted to Region 19 during the underlying investigation. The Union, relying on *Kaiser Aluminum*, 339 NLRB 829 (2003), asserted that it did not have to produce its two position statements. Counsel for the Acting General Counsel agreed with that position on the record. In *Kaiser Aluminum*, the Board found that the Charging Party's position statements were exempt from subpoena because they constituted attorney work product as reflected in Rule 26(b)(3) of the Federal Rules of Civil Procedure, and that the Charging Party did not waive the work product privilege by submitting such position papers to the General Counsel. *Id.*

ALJ Meyerson stated that, while he understood the holding in *Kaiser Aluminum*, he viewed the law as unsettled, tilting in favor of production, and cited the following two post-*Kaiser Aluminum* cases: *Evergreen Am. Corp.*, 348 NLRB

178 (2006), and *Raley's*, 348 NLRB 382 (2006).¹ In *Evergreen Am. Corp.*, the administrative law judge received two position papers into evidence over the objection of Respondent.² 348 NLRB at 188. He did so after asking the parties to brief whether *Kaiser Aluminum* changed longstanding Board precedent that permits receiving and relying on position papers. *Id.* (citing *Mackenzie Engineering Co.*, 326 NLRB 473, 485 n.6 (1998); *Black Entertainment Television*, 324 NLRB 1161 (1997); *Massillon Community Hosp.*, 282 NLRB 675 n. 5 (1987); *Florida Steel Co.*, 235 NLRB 1010, 1011-12 (1978); *Steven Aloï Ford, Inc.*, 179 NLRB 229 n. 2 (1969)). The respondent argued that *Kaiser Aluminum* represented a wholesale overruling of prior precedent allowing position statements to be used as evidence. *Id.* The General Counsel argued on brief that it was not inconsistent to receive and rely on position papers filed by the respondent even though the charging party was not required to produce position statements pursuant to subpoena; the reason being that the charging party and the General Counsel are not potential adversaries and, therefore, the work product privilege is not waived. *Id.* Conversely, charged parties know, from the moment the charges are filed against them, that they are generating position statements for potential adversaries and waive the privilege. *Id.*

¹ In *Raley's*, the administrative law judge found that the assertion made by a party's attorney in a position statement submitted to the Board during the investigation of a case could be received in the trial of the case as an admission of that party if those assertions are in conflict with the party's current litigation position or the testimony of the party's witness. 348 NLRB 382, 501 n.184 (2006). The Board affirmed many of the findings in *Raley's* without commenting on the ALJ's reliance on a position statement. *Id.*

² The administrative law judge concluded that there were Board cases post-*Kaiser Aluminum* where the Board affirmed the judge's decisions requiring production without commenting on his reliance on position papers filed by respondents. *Id.* (citing *Harris Roger's Corp.*, 344 NLRB 60 (2005); *Tarmac America, Inc.*, 342 NLRB 1049 (2004); *Smucker Co.* 341 NLRB 35, 40 (2004)). The Board affirmed most of the judge's findings without comment on his decision to accept the position paper into evidence. 348 NLRB 178.

Counsel for the Acting General Counsel posits that the view advanced by the General Counsel on brief in *Evergreen America Corp.* contending that there is no inconsistency between receiving and relying on position papers filed by respondents and exempting charging parties from the requirement to produce position statements pursuant to subpoenas is correct. As that General Counsel noted, charging parties and the General Counsel are not potential adversaries and, therefore, the work product privilege is not waived. *Id.* This position is consistent with the Board's holding in *Kaiser Aluminum* as well as longstanding precedent allowing the receipt of respondents' position statements into evidence as admissions or to show shifting defenses. See *Raley's*, 348 NLRB 382 (2006); *Harris Roger's Corp.*, 344 NLRB 60 (2005); *Tarmac Am., Inc.*, 342 NLRB 1049 (2004); *Smucker Co.*, 341 NLRB 35, 40 (2004).

Accordingly, the Acting General Counsel supports the Union's requests for special permission to appeal and reverse the ALJ's order of production as to those portions of the Subpoena that seek the Union's position statements authored by its attorneys and filed with Region 19 during the course of the underlying investigation in the above-captioned matter.

DATED at Seattle, Washington, this 3rd day of August, 2012.

A handwritten signature in black ink that reads "Ann Marie Skov" with a circled "AS" in the bottom right corner of the signature.

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WORKERS LOCAL 367, affiliated with
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**AFFIDAVIT OF SERVICE OF MEMORANDUM IN PARTIAL SUPPORT OF UNION'S
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I, the undersigned employee of the National Labor Relations Board, state under oath that on August 3, 2012, I served the above-entitled document(s) by E-File, E-Mail and post-paid regular mail upon the following persons, addressed to them at the following addresses:

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