

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

FRED MEYER STORES. INC.,

and

ALLIED EMPLOYERS, INC.,

and

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

Cases 19-CA-32908
19-CA-33052

RESPONDENTS' STATEMENT IN
OPPOSITION TO UNION'S REQUEST
FOR SPECIAL PERMISSON TO APPEAL
ADMINISTRATIVE LAW JUDGE'S
DENIAL OF PARTS OF UNION'S
PETITION TO REVOKE AND REQUEST
TO APPEAL ALJ'S RULING

Pursuant to Section 102.26 of the Rules and Regulations of the National Labor Relations Board ("Board"), Respondents Fred Meyer Stores, Inc. and Allied Employers, Inc., submit this Statement in Opposition to UFCW Local 367's ("Union") Request for Special Permission to Appeal ("Union's Request") Administrative Law Judge ("ALJ") Meyerson's rulings on the Union's Petition to Revoke the subpoena *decus tecum* served on the Union by the Respondents. The Union's Request should be denied because there are no grounds on which to overrule the ALJ's rulings that the Union should produce its constitution, bylaws and position statements in response to the Respondents' subpoena.

The Consolidated Complaint in these cases alleged that Respondents violated Section 8(a)(5) and (1) of the National Labor Relations Act by, among other things, attempting to apply unit exclusions bargained with the Union's designated bargaining representative in

Page 1 RESPONDENT'S STATEMENT IN OPPOSITION TO UNION'S REQUEST FOR
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RULING

Seattle, WA, to the Union by virtue of the “me too” agreement the Union executed with the Respondents, and failing to pay ratification bonuses to the employees who were subject to those unit exclusions. (Union’s Request, Exhibit B.) In order to properly defend themselves against these allegations, Respondents served a subpoena *duces tecum* on the Union seeking, among other things, production of the Union’s constitution and bylaws, and documents submitted by the Union to the Board during the Board’s investigation of the Union’s unfair labor practice charges in these cases, including any position statements. The Union filed a Petition to Revoke the Respondents’ subpoena in its entirety, including those portions seeking production of the Union constitution, bylaws and position statements. ALJ Meyerson granted the majority of the Union’s Petition to Revoke, but ordered the Union to produce its constitution, bylaws and position statements. *See* Hearing Transcript, pps. 273-93, attached hereto as Exhibit “A.”

The Union refuses to produce its constitution and bylaws because they “are in no way relevant to this case” and the request for them “represents . . . an abuse of the discovery process by seeking to get at sensitive, strategic documents, completely irrelevant to the charges at hand.” (Union’s Request, p. 7.) The Union’s Request represents that ALJ Meyerson “held that the Union’s concerns regarding employer abuse amounted to ‘nothing’.” (Union’s Request, p. 3.) Contrary to the Union’s rather dramatic characterizations, Respondents request for the Union’s constitution and bylaws do not amount to an abuse of process. In fact, such requests are routinely made and responded to in the collective-bargaining context, and are no less relevant to the defense of unfair labor practice charges. Respondents established at hearing that their request was relevant to the issue of whether the Union provided the nutrition and playland employees at issue in this case the opportunity to vote on the “me too” agreement. (Ex. A., pps.

273-74.) This request was also relevant to the issue of whether the employees in the expanded grocery and CCK units were voting to grant bargaining authority to UFCW Local 21 when they voted to ratify the “me too” agreement. (*Id.*) ALJ Meyerson correctly agreed that the constitution and bylaws are relevant to these issues under the Board’s well-known liberal standard of discovery. (Ex. A., p. 277.)

Before making his ruling, ALJ Meyerson conducted an *in camera* review of the constitution and bylaws and determined that the Union’s concerns regarding “employer abuse” were “much ado about nothing,” since they were standard union documents containing nothing confidential that would prejudice the Union or its members’ Section 7 rights if they were produced, particularly when the documents are already available to the public from the Department of Labor. (Ex. A, pps. 278-79, 281-82.) It is well known that federal law requires Unions to adopt constitutions and bylaws, and to file two copies of each with the Department of Labor’s Office of Labor-Management Standards, along with a Labor Organization Information Report (Form LM-1). (Ex. A, p. 284.) The public can then submit forms to the Department of Labor requesting copies of a union’s constitution and bylaws. The Union has no legitimate basis for refusing to produce its relevant and publicly-available constitution and bylaws to the Respondents, and there are no grounds on which to overturn the ALJ’s ruling on this issue.

Similarly, the Union has failed to establish any grounds on which to overturn the ALJ’s ruling with respect to the Union’s position statements. The Union correctly stated that in *Kaiser Aluminum*, 339 NLRB 829 (2003) the Board held that the charging party’s position statements were exempted from production in response to a subpoena because they constituted

attorney work product as reflected in Rule 26(b)(3) of the Federal Rules of Civil Procedure.

Fed.R.Civ.P. 26(b)(3) provides, in part, that:

(A) Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

The Board in *Kaiser Aluminum*, supra, reversed the ALJ's ruling that the position statements submitted by the charging party should be admitted into evidence. In doing so, the Board stated, without elaboration, that "it appears undisputed that the Charging Party's position statements constitute 'work product' within the meaning of FRCP 26(b)(3)" and found that the charging party had not waived the "privilege" by submitting the position statements to the General Counsel during the investigation. *Id.* The Board in *Kaiser Aluminum* did not explain why a charged party waives the work product protection when it submits a position statement to the Board, but the charging party does not.

The General Counsel advanced a potential explanation in *Evergreen Am. Corp.*, 348 NLRB 178 (2006). In that case, the General Counsel argued that charged parties waive the work product protection because they are adversaries to the Region, but that charging parties do not waive the protection because they are not potential adversaries to the Region. *Id.* at. 188. The General Counsel further noted that, in the event complaint issues, the charging party and the General Counsel are on the same side and in such circumstances the protection is preserved and

not waived.¹ *Id.* The ALJ and the Board did not decide this argument one way or the other and, as noted by ALJ Meyerson, the issue remains unresolved today.

One ALJ has rejected the distinction argued for by the General Counsel as “unfair.” In *Unite Here (Sam’s Town Hotel & Gambling Hall Tunica)* the ALJ relied on the holding of *Kaiser Aluminum* to sustain the respondent union’s objection to the General Counsel’s attempt to admit respondent’s position statement into evidence at hearing. 357 NLRB No. 14, J.D. slip op. at 4 (July 13, 2001). The ALJ reasoned that the holding of *Kaiser Aluminum* should apply to charging and charged parties alike, saying:

In the present case, the Union is the Respondent rather than the Charging Party, but I discern no logical reason why a position statement submitted by the lawyer for one party should be accorded the privilege but the position statement submitted by the lawyer for another party should not. Indeed, it would seem not merely asymmetrical but unfair for the position statement of one party’s lawyer to be accorded the privilege but a similar statement from the other party’s lawyer to be denied the privilege.

Id. The ALJ’s reasoning is sound and for provides ample justification for rejecting the distinction drawn by the Acting General Counsel.

Even under the General Counsel’s reasoning in *Evergreen Am. Corp.*, however, the granting of work product protection to a charging party’s position statement is not automatic but depends on whether the charging party is a potentially adverse party to the General Counsel. Such a determination must necessarily be made on case by case basis, and in this case the

¹ Counsel for the Acting General Counsel advances this same argument in her Memorandum in Partial Support of Union Request for Special Permission to Appeal Administrative Law Judge’s Denial of Parts of Union Petition to Revoke and Request to Appeal Administrative Law Judge’s Ruling, filed in the above-referenced cases on August 3, 2012.

Union's position statements should be granted work product protection because the Union is a potentially adverse party to the Acting General Counsel.

This case involves extremely convoluted legal theories and facts. This is evident from a simple review of the Consolidated Complaint. The Union's legal theories throughout this case clearly have not been the same as those advanced by the Acting General Counsel. The Union advanced difference theories for liability in its initial unfair labor practice charge, its subsequent amendments to that charge, and its filings of new charges with new and alternative legal theories. (*See* Union's Request, Exhibit B.) All of those theories are different from those relied upon by the Acting General Counsel in the Consolidated Complaint and at hearing. Thus, the Union's position statements submitted in support of its various charges necessarily differed and/or conflicted with those advanced by the Acting General Counsel in the Consolidated Complaint and at hearing. This is especially true because the Acting General Counsel did not even issue the Consolidated Complaint based on the Union's theory of liability, or even his own theory of liability, but on the wholly novel theory of liability apparently outlined by the Board's Division of Advice.

Not only did the Union's legal theories differ from and/or conflict with the Acting General Counsel's theories, but its conduct prior the issuance of the Consolidated Complaint was contrary to and undermined the Acting General Counsel's theory of liability. The Union may be on the same side as the Acting General Counsel with regard to the remedy sought in this case, but the Union must be in an adversarial position to the Acting General Counsel if its own theories and conduct are contrary to and undermine those of the Acting General Counsel.

Even if the Union did not waive the work product protection in this case, that protection is not absolute. Even the Board noted as much in *Kaiser Aluminum*. 339 NLRB at 829 (citing FRCP 23(b)(3), the Board found that the work product protection afforded the charging party's position statements should not be waived because Respondent employer had not "demonstrated a substantial need for the position statements.") In the case of non-opinion work product, it may be discovered if the requesting party shows that "it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed.R.Civ.P. 26(b)(3). Even opinion work product may be discovered "when mental impressions are *at issue* in a case and the need for the material is compelling." *Holmgren v. State Farm Mut. Automobile Ins. Co.*, 976 F.2d 573, 577 (9th Cir.1992) (emphasis in original).

Mental impressions are at the heart of this case since the entire case hinges on what was in the minds of the parties when they executed the "me-too" agreement and whether they believed they had negotiated terms during the Seattle negotiations that applied to the nutrition and playland employees at issue in this case. If, like Respondents, the Union did not believe that the terms of the Seattle Settlements would apply to the nutrition and playland employees (and the evidence certainly suggests that it did not), the Board cannot force those terms on the parties because the parties did not consciously bargain those terms.

Respondents believe that the Union has been taking conflicting positions in this case. As mentioned above, the allegations in these cases have undergone substantial revisions since the Union filed its first unfair labor practice charge. Respondents also suspect that the Union's theories of this case have not comported with, and have in fact directly conflicted with,

the Acting General Counsel's theories. Respondent is entitled to discover evidence relevant to these issues and to cross-examine the Acting General Counsel's witnesses on these points. ALJ Meyerson concluded, after an *in camera* review, that the Union's position statements were relevant to, and should be produced for, that purpose. (Ex. A., pps. 288-89.) Respondents have no other means of obtaining this evidence, so the need for production of the Union's position statements in this case is compelling. The Board should deny the Union's Request, and the Union must produce its position statements in accordance with ALJ Meyerson's ruling.

In sum, Respondents request that the Board deny the Union's Request for Permission to Appeal ALJ Meyerson's denial of parts of the Union's Petition to Revoke and that the Union be ordered to produce its constitution and bylaws, and the position statements it submitted to Region 19 in these consolidated cases.

DATED: August 9, 2012.

BULLARD SMITH JERNSTEDT WILSON

By: s/Jennifer A. Sabovik
Richard J. Alli, Jr., OSB No. 801478
Jennifer A. Sabovik, OSB No. 053418
Of Attorneys for Respondents

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 19

In the Matter of:

FRED MEYER STORES, INC.

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Cases: 19-CA-32908
19-CA-33052

The above-entitled matter came on for further hearing pursuant to adjournment, before, **Gregory Meyerson, Administrative Law Judge**, at the National Labor Relations Board, Jackson Federal Building, 915 Second Avenue, Seattle, Washington on Wednesday, July 25, 2012 at 9:00 a.m.

1 are disclosable pursuant to the subpoena, producible pursuant
2 to the subpoena and I'm going to direct that you turn those two
3 position statements over to counsel for the Respondent. And
4 I'll assume you're not going to do that?

5 MS. GLICKMAN-FLORA: No, the Union's position has not
6 changed in that.

7 JUDGE MEYERSON: Thank you. So what does the General
8 Counsel intend to do? Does the General Counsel have a position
9 to take, does the General Counsel -- I didn't mean to leave you
10 out of the discussion, I mean, I think I asked you when we
11 first started the hearing if you wanted to weigh in on the
12 subpoena questions and I think you told me that you did not,
13 since it didn't directly involve the General Counsel.

14 MS. SKOV: Correct.

15 JUDGE MEYERSON: Well, now it does involve the General
16 Counsel because I've directed that counsel for the Union
17 furnish these documents to the Employers' representatives and I
18 need to find out what the position of the General Counsel is,
19 whether the General Counsel intends to seek enforcement, if the
20 General Counsel doesn't intend to seek enforcement, what does
21 the General Counsel suggest? Are sanctions appropriate? If
22 so, what those sanctions should be and there we are. Now, I
23 don't know whether counsel for General Counsel is in position
24 now to take a position or whether you feel the need at this
25 point to confer with Regional officials?

1 JUDGE MEYERSON: Alright. Very good. So we are left with
2 the question of the position statements and the Constitution
3 and By-Laws. I should probably note, counsel of the Union has
4 apparently now taken the position that she does not intend to
5 comply with the subpoena so far as the request for the
6 Constitution of the Union in addition to the By-Laws. You may
7 recall yesterday, it seems like it was longer than yesterday,
8 but I guess it was just yesterday. Counsel had indicated that
9 she was going to, going to furnish the Constitution, but she
10 has apparently changed her mind and does not intend to obtain
11 either document. I have made an in camera inspection of the
12 Union's Constitution and the By-Laws. Let me hear again, Mr.
13 Alli, why you believe these documents are relevant and
14 necessary for the presentation of your case.

15 MR. ALLI: We don't know what's in them and I think that's
16 the starting place first.

17 JUDGE MEYERSON: Alright. I do, but go ahead.

18 MR. ALLI: Okay. So, you know, the Board's standard is a
19 very liberal standard, it's not only relevant information, but
20 information that may lead to other relevant information. It
21 may provide us with some lines of inquiry that we could pursue
22 in cross-examination regarding the authority of the Union to
23 enter into the Me-Too Agreement or there may be exceptions to
24 that. What do the employees get to vote on this, how do they
25 get to vote on this, we're very interested in --

1 JUDGE MEYERSON: One of the issues --

2 MR. ALLI: -- well, I'll talk more about it when we talk
3 about the second issue, I mean, one of the issues here that I
4 think is probably the essential issue in this case is what did
5 the parties mean when they entered into the Me-Too Agreement.
6 That document may or may not provide us some guidance, but I
7 don't know that until I take a look at it.

8 JUDGE MEYERSON: Uh-huh. Counsel for the Union, you had
9 indicated yesterday, and I believe this is generally known,
10 that the Union on the regulations from the Department of Labor,
11 has to tender to the Department of Labor a copy of the Union's
12 Constitution, correct?

13 MS. GLICKMAN-FLORA: That's my understanding of the
14 obligation. I could not cite you the specific regulation.

15 JUDGE MEYERSON: Right. But I think that's generally
16 known, I mean, I have been aware of that, although I certainly
17 can't cite you the, without looking it up somewhere, the
18 particular provision. But it is your understanding it doesn't
19 apply to the By-Laws, is that right?

20 MS. GLICKMAN-FLORA: My understanding is that it does not
21 apply to the By-Laws.

22 JUDGE MEYERSON: Okay. Does the Employer know, does the
23 Employer have a contrary view --

24 MR. ALLI: I have a contrary understanding, but like
25 everybody else in this room, I don't have a particular piece of

1 the CFRs that I could point you to. I have often found local
2 by-laws that have been filed with the U.S. Department of Labor.
3 It is not uncommon, in my experience, for them to be filed and
4 be available to the public.

5 JUDGE MEYERSON: But you don't know whether it's a
6 requirement or not?

7 MR. ALLI: I do not know whether there is a requirement --

8 JUDGE MEYERSON: But are you representing, at least so far
9 as the Constitution is concerned, that once that document is
10 tendered to the Department of Labor becomes a public document
11 and can be viewed by members of the public?

12 MR. ALLI: That's, it's correct, in fact --

13 MS. SABOVIK: It can actually be downloaded from the DOL
14 website.

15 JUDGE MEYERSON: I mean, that would seem logical to me,
16 frankly, because it becomes, normally become a public document.

17 MR. ALLI: Right.

18 JUDGE MEYERSON: But I don't know, I don't have any
19 firsthand knowledge of it and I've not attempted to look it up.

20 MS. GLICKMAN-FLORA: Your Honor, I, that is, I would like
21 to see that website. It is my understanding that you write the
22 Department of Labor and get the constitution. It may not
23 matter for these purposes, but --

24 JUDGE MEYERSON: Okay. But so you, it's your
25 understanding that --

1 MS. GLICKMAN-FLORA: It's not online somewhere.

2 JUDGE MEYERSON: -- what -- that a requesting party must
3 write to them?

4 MS. GLICKMAN-FLORA: Yes.

5 JUDGE MEYERSON: Well, I don't think that --

6 MS. GLICKMAN-FLORA: And I, and I, it is not online.

7 JUDGE MEYERSON: Okay. Let's assume --

8 MS. GLICKMAN-FLORA: So that's incorrect.

9 JUDGE MEYERSON: -- let's assume that's true. Let's
10 assume your representation is correct. It would seem to me
11 it's still available to the public. I mean, it may require the
12 requesting party to make a bigger effort, writing a letter or
13 sending some kind of a document to the Department of Labor, but
14 it's still, it's still available. Okay. I, you know, I've
15 looked at these documents and, and I'm somewhat troubled by
16 requiring their production as a preliminary matter because they
17 contain pages or paragraphs dealing with the Union's
18 objectives, why does the Union exist. Well, I mean, they state
19 -- it states matters which would constitute standard union
20 activity, you know, to organize employees and to represent
21 employees and so, if I order their production, am I somehow
22 forcing the Union to disclose its legitimate Section 7
23 activities with employees? I don't really think so because as
24 spelled out, these objectives are so basic that any, any self-
25 respecting Union would have these objectives. That's why

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1 unions exist. They exist to represent people, to improve their
2 wages and hours and working conditions, to organize, so I, I
3 don't think this really is any kind of disclosure that would
4 infringe on Section 7 rights of employees or the union activity
5 of employees. Then the other, the other matter that I
6 preliminary find somewhat troubling is they talk about the
7 participation by members in the organization. What a member
8 has to do to maintain good standing, if disciplinary action is
9 taken against a member, what, what due process procedures are
10 used. I mean, I, I don't see a lot in these documents that
11 would be particularly relevant. On the other hand, as you
12 pointed out, Mr. Alli, the Board has a very liberal standard
13 when it comes to the subpoenaing of documents and records and
14 if something is potentially relevant, there are probably
15 hundreds, if not more than hundreds of Board cases saying that
16 these documents are producible. I don't think the Union is
17 prejudiced by having to produce these documents and I think the
18 Respondent has set forth a plausible explanation about how
19 these documents might potentially be relevant. Now counsel for
20 the, counsel for the Union cited several cases to me that I
21 should, I should at least mention. One of them is Intrastate
22 Builders, reported at 334 NLRB No. 104. It's a 2001 case and I
23 don't find this decision to be particularly helpful, I mean, it
24 talks about a party not being able to engage in a fishing
25 expedition or engage in a collateral attack or seek documents

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1 that are so remote that it's an unjustified burden upon the
2 other party to have to produce the documents, but there is no
3 reference to a union constitution and union by-laws, so I don't
4 find this case to be particularly on point or all that helpful.
5 The other case cited by the Union is Burns International
6 Security Services, which is reported at, well unfortunately the
7 Xerox machine cut off the citation. Does counsel have that
8 handy, the citation?

9 MS. GLICKMAN-FLORA: Are you speaking about the Burns
10 case?

11 JUDGE MEYERSON: Yes.

12 MS. GLICKMAN-FLORA: The citation, yes, mine is also cut
13 off, Your Honor.

14 JUDGE MEYERSON: Okay. Well, the Board case number is
15 case 39-RC-306. It's a 1986 case and I can read the, the
16 number of the decision is, looks like, oh, here we go. It's
17 565 NLRB No. 70, it looks like, I believe that's right.
18 Anyway, this also doesn't refer specifically to constitution or
19 by-laws of the union. It talks about fishing expeditions and
20 the, again, and the party that seeks documents should not be
21 entitled to go on a fishing expedition and the subpoena is
22 quashed ultimately because the termination was that it was
23 simply a fishing expedition. I don't feel that the Respondents'
24 request to see the Constitution and the By-Laws of the Union
25 constitute a fishing expedition. I think they've set forth a

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1 reasonable basis for looking at the documents. I have reviewed
2 them in camera, I don't think their production will disclose
3 anything I would particularly consider to be confidential, I
4 don't believe there is any infringement on the Section 7
5 activities of employees or Union members. At least the
6 Constitution, I'm convinced is discoverable simply by
7 requesting a copy from the Department of Labor. I can't say
8 it, that the By-Laws are, but I don't see any reason why they
9 should be protected if the Constitution is not. So, I am
10 directing that the Union turn over to counsel for the
11 Respondents a copy of the Union's By-Laws and Constitution
12 because I believe they are potentially relevant to counsel's
13 case-in-chief. Now, does the Union intend to comply?

14 MS. GLICKMAN-FLORA: No, Your Honor, we do not agree that
15 the two reasons stated by the Respondents, that they think
16 there is something in those documents that would suggest that
17 the, that 367 did not have authority to enter into a Me-Too,
18 those documents have nothing to do with that and Your Honor has
19 already stated that it is completely irrelevant whether or not
20 workers voted on this ratification or not. Those are the two
21 specifics that the Respondent has provided. Other than that,
22 they just want this. And I would submit that these two cases,
23 the number one request in the subpoenas that were quashed, were
24 the Constitution and By-Laws, so they do speak to the
25 Constitution and By-Laws.

1 JUDGE MEYERSON: Which case was that?

2 MS. GLICKMAN-FLORA: Both, Interstate Bakery or Interstate
3 Builders and Burns. If you look, that's the number one request
4 on both of those subpoenas.

5 JUDGE MEYERSON: Alright. Alright. Where do you --

6 MS. GLICKMAN-FLORA: The first page of Burns --

7 JUDGE MEYERSON: I'm sorry, which page?

8 MS. GLICKMAN-FLORA: The very first page, 565.

9 JUDGE MEYERSON: 565, oh, okay on Burns, 565, yes.

10 MS. GLICKMAN-FLORA: Yes, the request is for the Union's
11 Constitution and By-Laws.

12 JUDGE MEYERSON: Where do you see that? I'm sure you see
13 it, I just don't, I am just not seeing it.

14 MS. GLICKMAN-FLORA: May I approach, Your Honor.

15 JUDGE MEYERSON: Where?

16 MS. GLICKMAN-FLORA: May I approach?

17 JUDGE MEYERSON: Yes.

18 MS. GLICKMAN-FLORA: This is a recitation in the subpoena
19 and it's the same in the Interstate Building, Builders' case as
20 well. That is on page 841, it is request number one, "The
21 current Constitution of the --

22 JUDGE MEYERSON: Alright, I see, I see, thank you.
23 Alright, that's true. I hadn't seen that specific reference,
24 but you're right, that's true. I don't think that changes my
25 ruling. I don't think this is a fishing expedition. I think

1 the Respondent has set forth a reasonable basis for wanting the
2 documents. I don't think the Union is prejudiced by producing
3 the documents. I don't think there is anything particularly
4 confidential in the documents, anything that would constitute
5 an infringement on Section 7 activity of Union members and, as
6 I said, I don't think it is a fishing expedition. That's the,
7 that's the holding in these cases, that the documents
8 requested, and you're right, they were the constitution and by-
9 laws, were requested simply as a fishing expedition. I don't,
10 I don't reach that in this case. I think the Respondents have
11 set forth a reasonable basis to see these documents and they
12 are potentially relevant and at least one, if not both of them
13 are available to the public. So alright, you've indicated you
14 don't, why you don't intend to comply and --

15 MS. GLICKMAN-FLORA: I would appreciate if there is
16 another relevance argument, other than the two that I heard
17 from Respondents, is there something else, is there other --

18 JUDGE MEYERSON: I assume that's what Respondent had to
19 support its position.

20 MS. GLICKMAN-FLORA: Okay.

21 JUDGE MEYERSON: Is there some other rationale that you
22 have?

23 MR. ALLI: I mean, I could add a couple of different
24 arguments, but I don't think it matters. I mean, the, this is
25 a very interesting case, I guess that's the word I'll use here.

1 I mean, we've got unusual events with respect to Me-Too
2 Agreements, we've got contested testimony or soon to be
3 contested testimony about what it means, who has got authority
4 to do what, the Union's arguing in this case there is actually
5 an implied limit on, at least on the face of it, from our
6 perspective is a document that permits the Employer to bargain
7 with Local 21 over exclusions or permissive subjects. I don't
8 know what's in the Constitution. I don't know if there is any
9 limits on the presence authority, I don't know any of that
10 stuff.

11 JUDGE MEYERSON: Alright, I mean, I think honestly,
12 counsel for the Union, I think that this is frankly much ado
13 about nothing because I, as I look at these documents, there is
14 nothing particularly confidential here and you've decided
15 obviously that, that you've got some interest or your client
16 has some interest in not, in not releasing them, when in fact,
17 at least the Constitution, if not the Constitution and the By-
18 Laws, are public records. So I really think this is, you are
19 making much ado about nothing, but you are entitled to do that
20 and if you have a position, which you apparently do and you've
21 taken that position that you're not going to comply, so be it,
22 I need to move beyond that now and decide what, what if
23 anything I'm going to do about your failure to comply.

24 MS. GLICKMAN-FLORA: Yes, Your Honor, and I, with all due
25 respect, it is not nothing to the Union, it's own By-Laws are

1 not public information, they are only provided to its active
2 members. While it may seem nothing to you, it is actually
3 quite important to the Union that its internal governing
4 documents remain internal, so I, you may believe that this is
5 not important to the Union, I'm telling you otherwise and
6 frankly, I think I'm in the better position to say what matters
7 to the Union and we both appear to agree, I agree, this has
8 nothing to do with this case whatsoever, you already rejected
9 this argument that it was somehow relevant whether or not
10 workers voted or not --

11 JUDGE MEYERSON: I declined, I declined to take testimony
12 on it, that's correct. I didn't suggest they couldn't come up
13 in some other context and I, and I don't, I didn't mean to be
14 disparaging of the Union or of your position when I said it is
15 much to do about nothing. I understand you have a strongly
16 held view, you're entitled to do that. I'm telling you from my
17 standpoint, I think it's much ado about nothing. And I've been
18 through the By-Laws and I don't know what's so secretive about
19 it, they seem pretty standard to me, but that's okay. You may
20 be right and ultimately I may be wrong, and I have no problem
21 with your taking the position you're taking, that's your right.
22 Now, but I meant no disrespect to the Union or to you,
23 counselor. Now, the question is, what to do about it.

24 MS. GLICKMAN-FLORA: Your Honor?

25 JUDGE MEYERSON: Yes.

1 MS. SABOVIK: If I may interject. Before we get to that
2 question, I believe that I have an answer as to whether or not
3 the By-Laws are also public information. It would support your
4 ruling here and I have brought up the Department of Labor's
5 website on my phone. I'd be happy to print this off, if the
6 computer can be made available and printer, but the DOL website
7 indicates that Form LM-1 must be filed with the Department of
8 Labor by Unions. It says that it "Must be filed within 90 days
9 after the date on which the labor organization first became
10 subject to the LMRDA or CSRA. The initial information report
11 includes copies of a reporting union's Constitution and By-
12 Laws. Thereafter a union updates its initial Form LM-1 Report
13 by filing an amended form LM-1 as necessary with its Annual
14 Financial Report to disclose changes in the practices or
15 procedures, which are not contained in the union's Constitution
16 and By-Laws. A union must also file copies of any amended
17 Constitution and By-Laws. Copies of Collective Bargaining
18 Agreements are not required to be filed with OLMS," and you can
19 submit requests to DOL for both Constitution and By-Laws that
20 are filed with it, any member of the public can.

21 MR. ALLI: Digiously and they arrive --

22 MS. SABOVIK: Within days.

23 MR. ALLI: -- within minutes. Oh, it's days or minutes,
24 depending on whether you can print them out yourself.

25 JUDGE MEYERSON: Alright. That, I mean, at this point,

1 that's a representation of counsel. I have no, I have no doubt
2 you're reading it into the record off of your smart phone and
3 it represents what you say it represents, but at this point,
4 it's not evidence because it's not in evidence --

5 MS. SABOVIK: Sure.

6 JUDGE MEYERSON: -- but it's a representation of counsel
7 and I would suggest the likelihood of what you said being
8 accurate is pretty good. But, I don't think that necessarily
9 means that the Union has to change its position. You've taken
10 the position you've taken, so be it. I think, I think this is
11 something, however, that the General Counsel is going to need
12 to consider in terms of how to proceed. Now, I'm not going to
13 ask the General Counsel this moment for a position, because I
14 want to go on to the position statements. I think, I think I
15 noted that, let me find my, oh yes, I think I noted that I have
16 made an in camera inspection of the position statements and I
17 noted the date of the second one, the longer of the two, which
18 was March 27, 2011 and counsel, can you just give me the date
19 of the earlier one, the shorter one, so I can, if necessary,
20 distinguish between the two?

21 MS. GLICKMAN-FLORA: It's January 14th, 2011, however, I
22 would be hoping Your Honor would not be revealing the contents
23 of either one --

24 JUDGE MEYERSON: Not now, no, no, no, because you are --

25 MS. GLICKMAN-FLORA: -- My apologies, I --

1 JUDGE MEYERSON: -- no, that's fine, I mean, your
2 objection is you don't want the information disclosed through
3 the furnishing of the documents to the Respondents, so I
4 wouldn't want to do that orally, that would defeat the whole
5 purpose of this. So no, I'm not going to disclose that
6 contents. And counsel, you authored both of them, am I
7 correct?

8 MS. GLICKMAN-FLORA: That's correct.

9 JUDGE MEYERSON: Alright. Okay. Alright. This is a
10 little more difficult because I believe the case law is
11 unsettled. There are cases dealing with position statements
12 and whether they are producible under subpoena. Some of them
13 have to do with position statements by a respondent, some of
14 them have to do with position statements by a charging party
15 and I suppose one could argue that there is a difference
16 between the two. I don't see that at the moment, but certainly
17 that's something that someone could raise. Ms. Glickman-Flora
18 cites the case to me of Kaiser Aluminum and Chemical
19 Corporation, July 25, 2003 case. It is, let me see if I can
20 find that citation. Just bear with me a moment, I seem to have
21 more cases floating around than I can handle. I think it is
22 339 NLRB No. 100. And this case and others cite the work
23 product doctrine as reflected in the Federal Rules of Civil
24 Procedure, 26(b)(3) and the Board is saying that the position
25 statement does constitute a work product of counsel and that

1 there is not a waiver of the privilege of non-disclosure by
2 submitting the position statement to the General Counsel during
3 the investigation of the case. So, you know, the holding of
4 that case would seem to suggest that position statements are
5 not discoverable through the subpoena process, however, there
6 are some more recent cases that I think have a contrary
7 holding. One of them is Evergreen America Corporation,
8 September 21, 2006 reported at 248 NLRB No. 12 and in that
9 case, as well as in a very lengthy case, Retail and
10 International Drug Clerks' Association reported at 382 NLRB No.
11 25, and let me note that the specific pages in these decisions
12 where the issues is raised, in the Retail case, it can be found
13 at page 501 and in the Evergreen case, it can be found at page
14 187. The Judges are saying that there needs to be some reason
15 why the position statement is disclosable, why, why it can be
16 produced pursuant to subpoena and they, one of the cases,
17 perhaps both of them, mention conflicting positions by the
18 counsel who prepared the position statement or some kind of a
19 conflict with the evidence that's been revealed through the,
20 through the hearing, through the testimony of witnesses or the
21 submission of other documents. So, and then to be fair,
22 counsel for the Union furnished me with two additional cases,
23 even more recent. One is entitled Naples Community Hospital,
24 August 27, 2010 reported at 355 NLRB No. 171 and the other
25 being a Unite Here Boyd Tunica, Inc., doing business as Sam's

1 Town Hotel and Gambling Hall, recorded at 357 NLRB No. 14 and
2 that, in that case, the language counsel is requesting that I
3 look at or that she believes is dispositive is found at, it's a
4 slip opinion at Star Eight in the decision and then in the
5 Naples Community Hospital case, which is a long case, counsel
6 is directing my attention and believes that the dispositive
7 language is found, let's see, after, again it is a slip
8 opinion, after Star 55, where the ALJ begins to discuss the
9 analysis of the case. And both cases cite to the original case
10 I mentioned, the first case that counsel for the Union cited to
11 me, Kaiser Aluminum, but I don't believe they are dispositive.
12 I think the case law is unsettled and I'm going to rule on this
13 after hearing what counsel for Respondent has to say about why
14 he believes it's necessary to see the position statements and
15 after I hear what counsel for the Union has to say, so Mr.
16 Alli?

17 MR. ALLI: Sure. As the Judge has noted in a couple of
18 occasions, this is a very convoluted case. It appears to me,
19 at least, in terms of the record that has already been created,
20 that both the Region and the Union have taken a series of
21 positions. If you simply look at the two unfair labor practice
22 charges, they appear to suggest different and potentially
23 conflicting theories of the case. The evidence in this case,
24 at least the part of this evidence in this case we believe is
25 contrary, frankly, to the testimony of Ms. Iverson on the stand

1 as to what she claims today that the Me-Too Agreements meant at
2 the time she entered into those and we think that there are
3 contemporaneous documents that she wrote to others, including
4 her membership and Mr. Zeiler, that undercut that particular
5 claim. So essentially we're dealing with a case in which there
6 are credibility issues, there are issues regarding conflicting
7 positions. One of the letters that's in the evidence to date
8 talks about the ratification bonus and we have a specific
9 allegation in this complaint that it was unlawful not to pay
10 the ratification bonus and yet in the letter that Ms. Iverson
11 sends to her membership, she suggested in correspondence that
12 it is not, it is something that we'll deal with in arbitration,
13 we're going to arbitrate this dispute. So I think the Union
14 and General Counsel have both taken conflicting and different
15 positions in this case, I think credibility is an issue and
16 certainly my ability to cross-examine the witnesses that have
17 been presented today has been harmed by my inability to
18 understand the positions that they've taken previously with the
19 Board. I still don't understand the Board's theory in this
20 case, despite all the evidence that we've heard to date.

21 JUDGE MEYERSON: Alright. Ms. Glickman, do you want to be
22 heard?

23 MS. GLICKMAN-FLORA: Yes, thank you, Your Honor. The
24 Union does not agree that this area of law is unsettled.
25 Kaiser is still good court law. The areas where this comes up

1 is when there is, in a position statement, a representation
2 made that later is shown to be untrue, and its very purpose is
3 of impeachment only. There is no suggestion other than Mr.
4 Alli's idea that perhaps the Union put forth a different legal
5 theory at some point. That has nothing to do with impeachment,
6 so what? So what if one of our position statements said, you
7 know what, we think they violated the Act just because they are
8 big jerks? Well, that doesn't matter, that's, that's not
9 really a -- what does that have to do with anything? What
10 matters is the General Counsel's legal theory. Our legal
11 theories as expressed by our attorney have no bearing on this
12 case. There is no, other than documents that were attached and
13 there are, which have already been made part of the record,
14 there are assertions by counsel of certain facts. That's not
15 going to help Mr. Alli when he crosses or when he puts on his
16 case. The cases that Your Honor is looking at in the ALJ
17 Manual are when a respondent, be it union or employer, tells a
18 Board agent something during the investigation and then later
19 that's found not to be true or later they say something that is
20 conflicting, so at that point, for impeachment purposes, the
21 position statement can come in.

22 Here we just have a desire by an employer, the Respondent,
23 the wrongdoer in this case, who wants to invade the attorney
24 work product of the Union for, without any real justification.
25 In every case, there is going to be disputed facts, so if

1 that's enough, if that's enough to destroy attorney work
2 product, there is no attorney work product privilege if the
3 Respondent can just say, hey, you know, I think there might be
4 something in there I want to see.

5 JUDGE MEYERSON: Okay. First of all, at this point, the
6 Respondent is not the wrongdoer. The Respondent is the
7 Respondent, remains to be seen --

8 MS. GLICKMAN-FLORA: In my view, this Respondent is a
9 wrongdoer, it's been five years since these workers first
10 expressed interest in being in a union, are they in a union
11 today or not? They are not despite their free choice --

12 JUDGE MEYERSON: Counsel --

13 MS. GLICKMAN-FLORA: -- so forgive me, but this is our
14 third time around on this same issue and we're still at the
15 same place, the Union is still spending money, trying to get
16 these workers representation, heck yeah, these people are the
17 wrongdoers here, not the Union.

18 JUDGE MEYERSON: Okay. I understand that you have
19 strongly held views and you are entitled to them, that's fine.
20 But, and I understand that you believe that the Respondent has
21 violated the Act, and that's why you filed the charges and
22 that's why we're here today, but so far, the Respondent has not
23 been found guilty of an unfair labor practice in this case.
24 Maybe they will be, but they haven't yet. So far as your
25 feeling about Kaiser, you are entitled to that. I read the

1 cases differently. I do not believe the law is settled. I've
2 said probably numerous times on the record, off the record, how
3 confusing I find this case to be and while I find it somewhat
4 less confusing as time has gone on and I've heard the testimony
5 of the witnesses, I'm still finding it somewhat, at least
6 somewhat confusing. Now maybe when I've had a chance to read
7 all the documents, to reflect on the testimony of the
8 witnesses, I'll no longer feel that way, but right now, I do.

9 I've read your position statements. So far, and I'm not
10 going to disclose anything in the position statements, but so
11 far as the longer statement is concerned, there is a lot of
12 material that is reflected in that position statement. Now I
13 can't, I won't say whether there is anything of a conflicting
14 nature in that, in that statement, but it is certainly possible
15 for someone to make that argument. And that's, again, that's
16 not a reflection on, at all on you. Anyone who was writing the
17 position statement on a case of this complexity would probably
18 be subject to a suggestion that there is something in there
19 that's of a conflicting nature. So again, it's not, not
20 intended to be a reflection on you. I found them to be very
21 well written, well thought out, but there is a lot there. I
22 think the longer of the two is about 25 pages. There is a lot
23 of information there. And it may be that Respondent's counsel
24 can find something there that is of a conflicting nature. And
25 I, I think under those circumstances, the position statements

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2012, I served true and correct copies of the foregoing RESPONDENT'S STATEMENT IN OPPOSITION TO UNION'S REQUEST FOR SPECIAL PERMISSON TO APPEAL ADMINISTRATIVE LAW JUDGE'S DENIAL OF PARTS OF UNION'S PETITION TO REVOKE AND REQUEST TO APPEAL ALJ'S RULING on the following persons via E-Mail:

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