

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF ADMINISTRATIVE LAW JUDGES

FRED MEYER STORES, INC.

and

ALLIED EMPLOYERS

and

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

Cases 19-CA-32908
19-CA-33052

COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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ACTING GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Counsel for the Acting General Counsel ("Acting General Counsel") respectfully submits this Brief to Administrative Law Judge Gregory Z. Meyerson in support of the consolidated complaint alleging that Fred Meyer Stores, Inc. ("Respondent Fred Meyer") and Allied Employers ("Respondent Allied"), collectively referred to as Respondents, violated the Act by altering the scope of two bargaining units represented by UFCW Local 367 ("Union") and by unilaterally changing the terms of the respective collective bargaining agreements by failing to apply the provisions of the units' collective bargaining agreements (including, *inter alia*, the ratification bonus, across the board wage increases, the Union's health and welfare plan, and the Union's pension plan) to the nutrition and Playland employees. Additionally, as alleged, Respondent Fred Meyer unlawfully blamed the Union for the fact that it was not paying out the ratification bonus and for the delay in reaching collective bargaining agreements. Accordingly, Acting General Counsel seeks an Order requiring Respondent to, *inter alia*, cease and desist from committing these unfair labor practices in violation of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C.

§ 151 *et seq.*, and include the nutrition and Playland employees in their respective units and provide them with the same contract benefits provided to all other unit employees.

I. INTRODUCTION

This matter involves Respondent Fred Meyer's latest refusal, this time with the assistance of Respondent Allied, to recognize and bargain with the Union about employees working in the nutrition department at Respondent Fred Meyer's Lacey and Tumwater stores and in the Playland department at Respondent Fred Meyer's University Place store in Tacoma, Washington.¹ (J Exhs. 5-8).

Since May 2009, Respondent Fred Meyer has refused to bargain with the Union with respect to the Lacey and Tumwater nutrition employees, who voted in a self-determination election to be a part of an existing grocery unit. (J Exh. 5; J Exh. 7). Since June 2009, Respondent Fred Meyer has also refused to bargain with the Union with respect to the Playland employees working at the University Place Playland Department, who voted in a self-determination election to be a part of an existing central checkstand unit ("CCK"). (J Exh. 6; J Exh. 8). On August 26, 2010, the Board found that the refusal to bargain regarding both the nutrition employees and the Playland employees violated Section 8(a)(5). (J Exhs. 5-8). On January 9, 2012, the Ninth Circuit Court of Appeals enforced the Board's order. (J Exh. 9).

Independent of Respondent Fred Meyer's failure to bargain over the nutrition employees as part of the existing grocery unit and the Playland employees as part of the

¹ References to the transcript appear as (---). The first number refers to the pages; the second to the lines. References to General Counsel Exhibits appear as (GC Exh. --). References to Respondent Exhibits appear as (R Exh. --).

References to Joint Exhibits appear as (J Exh. --). References to J Exh. 17, which contain exhibits from an arbitration proceeding, will indicate the relevant exhibit numbers used in that document such as (J Exh. 17: J --) when referencing a joint exhibit received into evidence during the arbitration, (J Exh. 17: U --) when referencing a Union exhibit received into evidence during the arbitration, or J Exh. 17: E --) when referencing an Employer exhibit received into evidence during the arbitration.

CCK unit, the parties' grocery and CCK collective bargaining agreements covering the rest of the units were nearing expiration when the refusals first occurred in 2009. (155:15-22; 156:11-15; J Exh. 10). Respondent Allied represents Respondent Fred Meyer and other grocer employers in contract negotiations. (140:22-25; 141:1-15; J Exh. 10; J Exh. 17:J 1).

In March 2010, the Union and Respondent Allied entered into a me-too agreement in which the parties agreed to extend the same contract agreements as negotiated by UFCW Locals 21 and 81 ("Local 21/81") sister locals, with the caveat that the differences in language between the Union's agreements and the Local 21/81 contract agreements would be preserved and that the parties would have the ability to go to arbitration to resolve any differences in interpretation of the me-too agreement at the time of applying the Local 21/81 contract agreements to the Union. (J Exh. 10).

Separate and apart from the me-too agreement entered into between the Union and Respondent Allied, the Union, in writing, requested bargaining over the nutrition and Playland employees because it did not believe the Local 21/81 negotiations would address these employees. (GC Exhs. 15-16). Respondent Fred Meyer, in writing, continued to refuse to bargain over these employees, and never put the Union on notice that it planned to use the negotiations with Local 21/81 to negotiate these classifications out of their respective units. (GC Exhs. 15-16).

Around December 3, 2010, the Union received the contract agreements from Respondent Allied based on its negotiations with Local 21/81. (J Exhs 11-12). Immediately after reviewing the contract agreements, the Union discovered that the Local 21/81 contract agreements had removed the nutrition and Playland employees from their respective bargaining units (the "Local 21/81 unit exclusions"). (GC Exh. 8; GC Exh. 10). As such, the Union notified Respondent Allied that the Local 21/81 unit exclusions set forth in the grocery

and CCK agreements did not apply to its units. (GC Exh. 10). Respondent Allied responded that the parties had agreed to extend the Local 21/81 settlements, including the Local 21/81 unit exclusions, under the me-too agreement. (GC Exh. 8). Realizing that the parties were at a stalemate regarding the application of the outstanding contract agreements, the Union invoked the arbitration provision of the me-too agreement so that the issue could be put before an arbitrator. (GC Exh. 10).

On January 5, 2011, Respondent Fred Meyer posted disparaging notices in its stores blaming the Union for the delay in implementing the new collective bargaining agreements and paying out the ratification bonuses. (GC Exh. 13).

On March 2, 2011, the parties held an arbitration to resolve whether the me-too agreement required the parties to apply the Local 21/81 unit exclusions to the Union represented CCK and grocery units, as well as several other issues. (J Exh. 16). On March 24, 2011, the arbitrator issued his binding decision and award finding that Respondent Allied had failed to properly apply the me-too agreement by proposing to exclude the nutrition and Playland employees from the Union represented grocery and CCK units; in short, the Local 21/81 unit exclusions were improperly applied to the Union's two units. (J Exh. 13). As such, the arbitrator ordered a distribution of the lump sum bonus. (J Exh. 13). To date, Respondent Fred Meyer has failed to apply the terms of the grocery and CCK collective bargaining agreements to the nutrition and Playland employees. (184:1-20; 185:3-14).

The me-too agreement in the instant matter did not waive the Union's bargaining rights regarding the scope or composition of the bargaining units. The arbitrator's decision that the me-too agreement did not bind the Union to the Local 21/81 unit-exclusions confirmed this. Because the Union did not waive its bargaining rights as to unit scope or composition, and the Board, Ninth Circuit, and an arbitrator have already found that the

nutrition and Playland employees are part of the grocery and CCK units, respectively, Respondents violated Section 8(a)(5) when they unilaterally removed the involved employees from the units. Respondents have further failed to apply the grocery and CCK contract terms applicable to all unit employees to the nutrition and Playland employees—including the lump sum ratification bonus, the across the board wage increases, the Union’s pension, and the Union’s health and welfare plan.

The case was tried before the Honorable Gregory Z. Meyerson on July 24-26, 2012, in Seattle, Washington.

II. STATEMENT OF FACTS

A. Background Information

United Food & Commercial Workers Local 367 (“Union”) represents over 5,500 employees of Fred Meyer, Albertsons, Safeway, Quality Food Centers (“QFC”), and Haggen supermarkets located in Pierce, Thurston, Mason, Lewis, Pacific, and Gray’s Harbor counties in the State of Washington. (136:5-21; J Exh. 17: J 7; J Exh. 19). The bargaining units represented by the Union are delineated by job classification: meat, grocery, common check (“CCK”), and general merchandise; each bargaining unit has its own collective bargaining agreement. (138:19-25; 139:1-10). Some of the units are multiemployer units (e.g., the multiemployer Pierce County grocery unit) and others are limited to a single employer (e.g., the Fred Meyer Mason/Thurston Counties grocery unit). (J Exh. 3 n.7; J Exh. 17:U 2 n.7).

Allied Employers, Inc. (“Respondent Allied”), represents Respondent Fred Meyer and other grocer employers such as Safeway and Albertsons in multi-employer bargaining with the Union and with its sister UFCW locals that have jurisdiction over adjacent geographical areas (e.g., King County). (140:22-25; 141:1-15; J Exh.10; J Exh. 17:J 1). Beyond negotiating collective bargaining agreements, Respondent Allied enters into health

and welfare agreements, welfare trusts, and pension trusts with the Union, and sister UFCW locals, on behalf of the grocer employers it represents. (141:17-25; 142: 1-25; 143:1-5; GC Exhs. 17, 18, 19). Randall Zeiler (“Zeiler”) is the President of Respondent Allied. (148:15-17).

B. Respondent Fred Meyer

Most of the other grocer employers represented by the Union only operate traditional grocery stores. (137:9-15). Respondent Fred Meyer, however, primarily operates “one-stop” retail stores that sell groceries, such as produce, frozen foods, general grocery, and nutrition items, and an extensive line of general merchandise such as electronics, sporting goods, furniture, automotive parts, clothing, shoes, and luggage. (137:2-3, 16-23; J Exh. 1 p. 4; J Exh. 17:U 1 p.4). These one-stop stores contain nutrition departments within their food departments that carry dietary supplements, organic food products, other grocery items, and non-food items. (149:16-25; J. Exh. 1 p.5; J Exh. 17:U 1 p.5). The nutrition aisles are surrounded by other sections of the food department such as produce, bakery, and other food-related sections. (J. Exh. 1 p.5; J Exh. 17:U 1 p.5). Some one-stop stores also contain “Playland” areas, which are supervised play areas for shoppers’ children.² (J Exh. 3; J Exh. 17:U 2). Respondent Fred Meyer’s Playland employees are responsible for supervising the shoppers’ children among other tasks. (151:25; 152:1-3; J Exh. 3 p. 5; J Exh. 17:U 2 p.5).

Although most Respondent Fred Meyer stores are one-stop stores, it also operates a small number of traditional grocery stores known as “marketplace” stores.³ (137:3-6). Employees who work in the nutrition aisles in Respondent Fred Meyer’s three Pierce

² For example, four of the seven Respondent Fred Meyer one-stop stores in Pierce County have Playland areas. (J Exh. 3 p.5; J Exh. 17:U 2 p.5).

³ Respondent Fred Meyer marketplace stores offer traditional groceries and a limited line of general merchandise.

County marketplace stores historically have been included in the multiemployer Pierce County grocery unit. (250:15-25; 251:1-3).

1. The Self-Determination Elections and Resultant Refusals to Bargain

On April 24, 2009, a majority of the nutrition department employees at the Fred Meyer one-stop stores in Lacey and Tumwater (both Thurston County) voted in a self-determination election to be represented by the Union as part of the existing Mason/Thurston two-county grocery unit.⁴ (150: 16-21; 151:13-24; J. Exh. 18). The certification issued on May 7, 2009. (J. Exh. 2). As early as May 27, 2009, Carl Wojciechowski, Respondent Fred Meyer's Group Vice President of Human Resources, informed the Union that he would be handling the nutrition negotiations and that the Union was to send all future correspondence to him. (153: 23-25; 154:1-4; GC Exh. 4).

On June 17, 2009, a majority of the Playland employees at Respondent Fred Meyer's one-stop store in University Place (Pierce County) voted in a self-determination election to be represented by the Union as part of the existing county-wide CCK unit.⁵ (152:4-15; J Exh. 18). A corrected certification issued on December 8, 2009. (J Exh. 4; J Exh. 17:U 3).

As of, June 26, 2009, Respondent Fred Meyer refused to bargain with respect to the Lacey and Tumwater nutrition employees to test the validity of the certification.⁶ (J Exh. 5; J Exh. 7; J Exh. 17:U4, U7). As of November 5, 2009, Respondent Fred Meyer refused to bargain with respect to the University Place Playland employees, again to test the validity of

⁴ Case 19-RC-15036. (J Exh. 18).

⁵ Case 19-RC-15194. (J Exh. 18).

⁶ Respondent Fred Meyer had opposed the self-determination election, *inter alia*, on the grounds that (1) the Union waived the right to organize the nutrition employees because it did not propose adding nutrition employees to the unit when it executed a "me-too" agreement in 2007, described below at n.17, and (2) the nutrition employees do not share a sufficient community of interest with the employees in the existing grocery unit. (J Exh. 1 p.2).

the certification.⁷ (J Exh. 6; J Exh. 8; J Exh. 17:U 5, U 6). On August 26, 2010, the Board found that the refusals to bargain violated Section 8(a)(5).⁸ (J Exhs. 7 and 8; J Exh. 17: U 6, U7). On January 9, 2012, the Ninth Circuit granted the Board's applications for enforcement of its orders requiring Respondent Fred Meyer to recognize and bargain with the Union about the terms and conditions of employment for the nutrition and Playland employees. (J Exh. 9).

C. The 2010 Me-Too Agreement

In March 2010, as the parties' multiple collective-bargaining agreements were nearing expiration, the Union and Respondent Allied, on behalf of the grocer employers it represents, entered into a "me-too" agreement which states that the listed grocer employers "agree to extend the same settlement as is negotiated" in the King County UFCW Local 21/81 grocery, meat, and CCK negotiations to the collective-bargaining agreements within the Union's jurisdiction.⁹ (155:15-22; 156:11-15; J Exh. 10; J Exh. 17:J 1). The 2010 me-too agreement also states that "all changes made in King County Local 21 and 81 settlements that are approved and ratified by the members of Local 21 and 81 will be the same as those made in [the Union's] agreements," but that "the difference in language between the King County Local 21/81 agreements and Local 367's agreements will be preserved." (156:15-19; J Exh. 10; J Exh. 17:J 1).¹⁰ In addition, the me-too agreement

⁷ Respondent Fred Meyer had opposed the self-determination election on the grounds that the Playland employees do not share a community of interest with the employees in the existing CCK unit. It further argued that, should a community of interest be found, the inclusion of the University Place Playland employees would still be inappropriate in a county-wide unit. (J Exh. 3 p.1, fn.4).

⁸ *Fred Meyer Stores*, 355 NLRB No. 141, slip op. at 2 (2010), incorporating by reference *Fred Meyer Stores*, 354 NLRB No. 127 (2010) (J Exh. 5; J Exh. 7); *Fred Meyer Stores, Inc.*, 355 NLRB No. 130, slip op. at 2 (2010), incorporating by reference *Fred Meyer Stores, Inc.*, 355 NLRB No. 30 (May 7, 2010) (J Exh. 6; J Exh. 8).

⁹ Local 21 represents employees working in King County, Kitsap County, and Whatcom counties, among other counties in Washington. (156:22-25; J Exh. 19). Local 81 represents meat cutters, wrappers, and seafood employees in King, Kitsap, and part of Mason/Thurston counties. (157:1-5; J Exh. 19).

¹⁰ The me-too agreement also sets forth the following examples to explain how the Local 21/81 settlements would be applied: if a 50-cent increase in wages is agreed to in the Local 21/81 settlement,

provides that either party may request expedited arbitration to resolve any disputes that arise under its terms or the application of the Local 21/81 settlement to the Union's agreements.¹¹ (J Exh. 10; J Exh. 17:J 1).

The 2010 me-too agreement did not cover negotiations over the general merchandise unit because Local 367 was going to negotiate its general merchandise agreement directly with Respondent Allied in separate negotiations. (J Exh. 10; J Exh. 17:J 1). Although, Local 21 represents nutrition employees working for Respondent Fred Meyer as a part of its general merchandise unit covered by a general merchandise agreement, it does not represent employees working in Respondent Fred Meyer's Playland department. (157:7-15).

Prior to the execution of the 2010 me-too agreement, Respondent Allied and the Union did not discuss that it, or Respondent Fred Meyer, would be seeking to remove the nutrition or Playland employees from their respective units. (157:16-25; 158:1-5; 236:5-8; J Exh. 16).

The Union did not have any agreements with Local 21/81 to represent it in the 2010 negotiations nor did the Union assign bargaining rights to Local 21/81. (162:24-25; 163:1-4; J Exh. 16). The Union did not communicate with Local 21/81 while the 2010 negotiations were taking in place in King County due to a communication blackout. (163:5-14). Moreover, the Union did not attend any of the Local 21/81 negotiation sessions. (163:15-17). Indeed, the Union only knew the status of negotiations via media reports. (163:18-20).

the "same 50-cent increase would apply" to the Union's agreements, and if a holiday is dropped in the Local 21/81 settlement, the "same holiday would be dropped" in the Union's agreements. (156:14-15; J Exh. 10).

¹¹ On April 27, the Union's membership ratified the 2010 me-too agreement. (154:21-25; GC Exh. 5).

D. Previous Me-Too Agreements

Even before the 2010 negotiations, the parties' history establishes that they track in their own agreements the results of bargaining between Local 21/81 and the grocer employers. (J 13 p.4-5; J Exh. 16). For example, in 2004, the Union participated in a multi-union bargaining group with Local 21/81 to negotiate meat, grocery, and CCK contracts with Respondent Allied and the grocer employers, but the Union exited the negotiations before the parties reached a settlement. (162:1-7; J 13 p.4-5; J Exh. 16). The parties subsequently made the same changes to the Union agreements as were made to the contracts of the King County locals, while preserving the differences in the underlying language. (J 13 p.4-5; J Exh. 16).

In 2007, the Union and Respondent Allied entered into its first "me-too" agreement with language identical to that of the 2010 me-too agreement. (J 13 p.4-5; J Exh. 16). In negotiations leading up to the execution of the 2007 me-too agreement, Union President Teresa Iverson ("Iverson") sent an e-mail to Respondent Allied President Zeiler stating that the "blank check will be tougher to ratify." (159:8-17; J Exh. 16; J 17:E 9 p.17). Initially, the Union proposed conducting two votes by the units: ratification of the 2007 me-too agreement (the first vote) and ratification of the contract agreement after the Local 21/81 negotiations (the second vote). (J 17:E 9). The blank check the Union was referring to was the elimination of the second vote (*i.e.* elimination of a procedural step) and was not an admission that the Union would have to take whatever came down from Local 21/81 because the underlying me-too was premised on preserving underlying differences. (159:20-25; 160:11-25; 161:1-8; J 13; J 17: E 9 p.17). Indeed, by letter dated May 31, 2007, the Union described the elimination of the second vote to the membership by explaining that the membership would vote on whether to ratify the me-too agreement (*i.e.* the first vote) but would not have "two bites at the apple" meaning they would not get to vote

on whether to ratify the contract agreement reached by Local 21/81(*i.e.* the second vote) prior to implementation. (218:6-25; 219:10-14; R Exh. 1). The language of both the 2007 and 2010 me-too agreements, however, preserved differences between the Local 21/81 agreements and the Union's agreements and allowed for a dispute resolution process through arbitration if issues arose at the time of applying the Local 21/81 agreements to the Union. (220:2-10; J Exh. 10; J Exh. 13; J Exh. 16).

After Respondent Allied and Local 21/81 reached contract agreements in 2007, the Union applied the contract agreements to its bargaining units. (R Exh. 2). The contract agreements that applied to the Union by virtue of the 2007 me-too agreement did not remove any classifications from the bargaining units involved. (158:13-23).

E. The Union's Requests to Bargain Separately over Nutrition and Playland Employees After the Execution of the 2010 Me-too Agreements

In a letter dated April 29, 2010, the Union requested that Respondent Fred Meyer bargain over the Playland employees at its University Place store because it did not believe the Local 21/81 negotiations would address those employees.¹² (GC Exh. 15; J Exh. 17:U 9). In a letter dated September 13, 2010, the Union requested that Respondent Fred Meyer bargain over the nutrition employees at Respondent Fred Meyer's Lacey and Tumwater stores. (GC Exh. 16; J Exh. 17:U 8).

In separate letters dated September 30, 2010, Respondent Fred Meyer stated that the request to bargain over the nutrition employees was premature in light of the outstanding legal issues pending before the circuit court of appeals. (GC Exh. 16; J Exh. 17:U 8). In separate letters dated November 9, 2010, the Union again requested that Respondent Fred Meyer bargain over the nutrition and Playland employees and put Respondent Fred Meyer on notice that the outstanding legal issues pending before the

circuit court of appeals were insufficient grounds for refusing to bargain with the Union. (GC Exh. 15; GC Exh. 16; J Exh. 17:U 8, U 9).

In all of its correspondence, Respondent Fred Meyer gave no indication that it was trying to excise the nutrition and Playland employees through its bargaining with Local 21/81. (GC Exh. 15; GC Exh. 16; J Exh. 17:U 8, U 9). Around November 30, 2010, after the Local 21/81 contract agreements had been reached, Respondent Allied indicated to the Union during negotiations for the general merchandise agreement that Local 21/81 had agreed to exclude the nutrition employees from the grocery agreement. (268:2-14).

F. Local 21/81 Agreements and Aftermath

Respondent Allied and the employer grocers, including Respondent Fred Meyer, negotiated for several months in 2010 with Local 21/81, and reached tentative agreements in November 2010 for the Local 21/81 jurisdiction. (164:18-23; 165:1-3; GC Exh. 6; R Exh. 3). On December 3, 2010, Respondent Allied notified the Union that the Local 21/81 agreements had been ratified, provided the Union with copies of them, and stated that they applied to the Union's jurisdiction. (170:9-25; GC Exh. 7; J Exh. 11; J Exh. 12; J Exh. 17:U 12, U 13, E 11).

The Local 21/81 settlements changed, *inter alia*, the recognition/unit description provisions of the grocery and CCK agreements. (J Exh. 11 p.12; J Exh. 12 p.1; J Exh. 17:U 12, U 13). Specifically, attached to the new Union grocery agreement was "Letter of Understanding #12 (New) Fred Meyer Article 1.1," which excluded the following job classifications from Article 1 - Recognition and Bargaining Unit: "Nutrition, Pharmacy, Health and Beauty Aids, Floral, Garden Center, Apparel, Shoe, Home Fashion, Photo Electronics, General Merchandise Departments, Playland, Jewelry Department, Time and Attendance,

¹² As stated earlier, Playland employees were not included in any of the Local 21/81 bargaining units. (157:7-15).

Human Resource Administrators...” (173: 17-25; J Exh. 11 p.12; J Exh. 17:U 12). Similarly, the new CCK agreement stated that the aforementioned departments at Fred Meyer would be listed in the contractual recognition and bargaining unit provision as exclusions from the unit. (174:8-18; J Exh. 12 p.1; J Exh. 17:U 13). Local 21/81 explained to its membership, however, that the new exclusionary language was language that was just reaffirming existing exclusions as the named excluded employees, including the nutrition employees, were already covered under its general merchandise agreement, and it did not represent Playland employees. (250: 3-5; J Exh. 17: U 11).

Also, the contract agreements included new no-pyramiding and holiday-pay language in the meat contract and nullified previous arbitrator decisions that removed a backpay cap from termination grievances if there was evidence that an employer was delaying the processing of such a grievance. (GC Exh. 10). Finally, the contract agreements provided for a lump sum ratification bonus that amounted to about \$500 for full-time employees. (171:14-18; J Exh. 11 p.13; J Exh. 12 p. 12; J Exh. 17:U 12, U 13).

In early December 2010, Respondent Allied sent the Union an e-mail expressing an interest in finalizing the Union's contracts so all of the Union-represented employees could receive their lump sum bonuses by the end of the month. (165:16-25; 166:3-8; GC Exh. 7; J Exh. 17: E 11). The Union responded that it had concerns regarding the settlements and stated that the changes to the unit description in the CCK and grocery agreements did not apply to its units. (171:3-5, 22-25; 172:1-3; GC Exh. 8; GC Exh. 9; J Exh. 17: E 11). Respondent Allied replied that, under the terms of the me-too agreement, the parties had agreed to extend the Local 21/81 contract agreement to the Union-represented units, including the language excluding nutrition and Playland employees from the grocery and CCK units. (GC Exh. 8; J Exh. 17: E 11). On December 12, 2010, Respondent Allied sent the Union an e-mail stating that the lump sum bonus would not be paid until the Union

agreed that “all terms of the [Local 21/81] settlements apply to [the Union] with no exceptions per the ‘me too’ agreement.” (GC Exh. 9; J Exh. 17: E 11).

In a letter to Respondent Allied dated December 15, 2010, the Union requested that the grocer employers, including Respondent Fred Meyer, implement all terms of the Local 21/81 settlements except for the exclusions from the CCK and grocery bargaining units, the provisions nullifying the backpay-cap arbitration decisions, and the no-pyramiding and holiday-pay language in the meat agreement. (175: 13-25; GC Exh. 10; J Exh. 17:J 3). The letter stated that those provisions did not comply with the me-too agreement, and that the Union would seek expedited arbitration if Respondent Allied continued to insist that they be included in the Union's agreements. (175: 21-25; GC Exh. 10; J Exh. 17:J 3).

On December 23, 2010, Respondent Allied responded to a series of questions posed by the Union by reiterating its position that the Local 21/81 unit exclusions in both the grocery and CCK settlements applied to the Union just as it applied to Local 21/81. (177:12-25; 178:1-3; GC Exh. 11; J Exh. 17: E 11).

On January 5, 2011, Respondent Fred Meyer posted a notice at their stores stating that the Union had signed a me-too agreement requiring it to “accept the same settlement” that the Employers had reached with Local 21/81 without further negotiations. (130:22-25; 131:1-13; GC Exh. 13; J Exh. 17: U 16). The notice further stated that, “[u]nfortunately, after the settlement was ratified by your coworkers in Locals 21 and 81, your Union refused to accept it as they had agreed. As a result, we cannot pay you a ratification bonus or move forward on any of the other contract provisions until this matter is resolved.” (GC Exh. 13; J Exh. 17: U 16). The notices also stated that the parties might need to go to arbitration to settle their differences. (GC Exh. 13; J Exh. 17: U 16).

G. Expedited Arbitration

On March 2, 2011, the parties held an arbitration hearing to resolve whether the me-too agreement required the parties to apply the Local 21/81 unit exclusions to the Union-represented CCK and grocery units, as well as the disputes over the nullification of the backpay-cap arbitration decisions and the holiday-pay language in the meat agreement.¹³ (J Exh. 16).

During both the arbitration hearing and the instant hearing on the unfair labor practice charges, former Union President Iverson consistently testified that the Union had never abandoned or relinquished representation of the nutrition employees working at Respondent Fred Meyer's Lacey and Tumwater stores or the Playland employees working at Respondent Fred Meyer's University Place store. (155:7-14; J Exh. 16).

On March 24, 2011, the arbitrator issued his decision and award. (J Exh. 13). The arbitrator found that Respondents failed to properly apply the me-too agreement by proposing to exclude the nutrition and Playland employees from the Union-represented grocery and CCK units. (J Exh. 13). The arbitrator found that the me-too agreement only required the Union to adopt the "same settlement" negotiated by Respondents and Local 21/81, *i.e.* the changes that resulted from those negotiations, but not the identical contract language. (J Exh. 13). In other words, the Union was only required to accept a result that was proportional to the result obtained by Local 21/81. (J Exh. 13).

Since Local 21/81 represented the nutrition employees as part of its general merchandise unit¹⁴ and the Playland employees had never been included in its bargaining

¹³ The Union dropped its objection to the inclusion of "no-pyramiding" language in the meat agreement. (J. Exh. 16).

¹⁴ The 2010 me-too did not cover Local 21/81 negotiations over its general merchandise agreement because the Union was going to negotiate its own general merchandise agreement with Respondent Allied. (J Exh. 10).

units, the unit exclusion language in its grocery and CCK units merely memorialized the status quo for the Local 21/81 grocery and CCK units. (J Exh. 13). The arbitrator found that applying the same exclusionary language to the Union's grocery and CCK bargaining units would not memorialize the status quo but, rather, would result in a significant change, removing numerous employees from the units.¹⁵ (J Exh. 13).

The arbitrator's award, *inter alia*, ordered the parties to "retain the status quo with regard to the scope of the bargaining unit,"¹⁶ and ordered Respondents to distribute the lump sum bonus upon the receipt and implementation of the award. (J Exh. 13). The award was prospective only; the arbitrator found that the Respondents did not breach any agreement by failing to pay the lump sum bonus prior to the resolution of the arbitration proceeding. (J Exh. 13).

Following the arbitrator's decision, the Respondents paid the lump sum bonus to all of the Union-represented employees except the nutrition employees at the Fred Meyer one-stop stores in Lacey and Tumwater and the Playland employees at the Fred Meyer one-stop store in University Place. (184:1-20; 185:3-14). Moreover, the October 3, 2010 to October 5, 2013 grocery agreement and the May 10, 2010 to May 4, 2013 CCK collective bargaining agreements covering Respondent Fred Meyer employees represented by the Union are now in effect, and contain none of the recognition clause exemptions set forth in either the grocery or the CCK contract agreements. (147:10-25; 148:2-7, 20-23; J Exhs.

¹⁵ The arbitrator also posited an alternative rationale: that the me-too agreement bound the Union to changes in wages, hours, and other mandatory subjects of bargaining, as is customary in me-too agreements, but not to nonmandatory subjects of bargaining, such as changes to unit scope, in the absence of explicit language to that effect. (J Exh. 13). With respect to the remaining issues—the nullification of the backpay-cap arbitration decisions and the holiday-pay language in the meat agreement—the arbitrator ruled in favor of Respondent Allied. (J Exh. 13).

¹⁶ The arbitrator recognized that Respondent Fred Meyer's test of certification regarding the Lacey and Tumwater nutrition employees and the University Place Playland employees was pending before the Ninth Circuit, but stated that "[w]hile the matter is under appeal, the Arbitrator's view is that the NLRB decision reflects the status quo of the bargaining unit. That status quo must be respected by the Employers until and unless they are able to prevail in the appeal." (J Exh. 13).

14, 15). Nevertheless, the terms and conditions of their respective collective bargaining agreements have not been applied to the nutrition and Playland employees. (184:1-20; 185:3-14).

More specifically, Respondent Fred Meyer has not applied the general terms of the 2010 to 2013 Mason/Thurston grocery agreement (including the lump sum ratification payment, health and welfare coverage, pension coverage, and across the board wage increases to name a few terms) to the nutrition employees working in Lacey and Tumwater. (184:1-20). Similarly, Respondent Fred Meyer has not applied the general terms of the 2010 to 2012 Pierce County CCK agreement (the lump sum ratification payment, health and welfare coverage, pension coverage, and across the board wage increases) to the Playland employees working at its University Place store. (185:3-14). All of the terms of both the Mason/Thurston grocery agreement and the CCK agreement before the appendices are general terms that apply to the entire bargaining units irrespective of job classifications. (186:7-12, 22-25; J Exh. 14; J Exh. 15). The appendices contain unique provisions, such as wage rate by job classification, that apply to the employees covered by the appendices in both collective bargaining agreements. (185:17-25; J Exh. 14; J Exh. 15).

III. ARGUMENT

The Union did not relinquish its bargaining rights regarding the scope of the bargaining unit by signing the me-too agreement. Therefore, Respondents Fred Meyer and Allied violated Section 8(a)(5) by unilaterally removing the nutrition and Playland employees from the grocery and CCK bargaining units and by failing to provide them with the contract terms afforded to the rest of their fellow unit members after the arbitrator's decision issued, including the ratification bonus, across the board wage increases, the Union's health and welfare plan, and the Union's pension plan. Finally, Respondent Fred Meyer violated

Section 8(a)(1) by posting notices blaming the Union for the employees' failure to timely receive ratification bonuses.

A. Respondents Unilaterally Removed the Nutrition and Playland Employees from the Grocery and CCK Units

Under longstanding Board law, unit scope and composition are permissive subjects of bargaining. Thus, once a specific job has been included in the scope of a bargaining unit, neither party can remove or alter that position without first securing the consent of the other party or the Board. See, e.g., *Wackenhut Corp.*, 345 NLRB 850, 852 (2005); *Boise Cascade Corp.*, 283 NLRB 462, 467, 475 (1987), *enfd.* 860 F.2d 471 (D.C. Cir. 1988); *Newport News Shipbuilding*, 236 NLRB 1637, 1637 (1978), *enfd.* 602 F.2d 73 (4th Cir. 1979). Although a union can waive its bargaining rights as to unit scope, such a waiver will not be lightly inferred; it must be "clear and unmistakable." *Silver Springs Nursing Center*, 317 NLRB 80, 82 (1995). See also *Sumter Electric Cooperative, Inc.*, Case 12-CA-25384, Advice Memorandum dated February 27, 2008 (finding that a collective-bargaining agreement did not entitle the employer to unilaterally alter scope of unit; no clear and unmistakable waiver). Otherwise, an employer could use its bargaining power to restrict the scope of union representation "in derogation of employees' guaranteed right" to representatives of their own choosing. *SFX Target Center Arena Mgt., LLC*, 342 NLRB 725, 735 (2004), quoting *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400-01 (D.C. Cir. 1988). The evidence overwhelmingly establishes that, by signing the me-too agreement in the instant matter, the Union neither consented to nor waived its bargaining rights regarding the scope or composition of the bargaining units.

The parties expressly agreed that if any dispute arose upon application of the Local 21/81 contract agreements to the Union, either party could request expedited arbitration of the dispute. The arbitrator unequivocally found that the me-too agreement did not bind the

Union to the new unit-exclusion language in the Local 21/81 agreements. Since the arbitrator's ruling clearly assessed the contract language at issue; the parties' past practices; the relevant bargaining history; and any other provisions that, taken together, may shed light on the parties' intent, there could be no "clear and unmistakable waiver" found. *Provena St. Joseph Medical Center*, 350 NLRB 808, 815 (2007).

Here, the me-too agreement does not mention unit scope/composition or changes to it on the face of the document; thus, there could be no consent to or waiver of anything. The parties have no past practice applying a me-too agreement to changes in a bargaining unit.¹⁷ As for bargaining history, the parties did not discuss unit issues when negotiating the 2010 me-too agreement. And, although the Union had described the nearly identical 2007 me-too agreement as a "blank check" in 2007, the Union was referring to the absence of a post-contract settlement ratification requirement, not the scope of bargaining subjects to which it would be bound.

Moreover, the written correspondence between Respondent Fred Meyer and the Union after the 2010 me-too was signed and before Local 21/81 reached a contract agreement reveals that the Union never contemplated that the Local 21/81 negotiations would cover the nutrition and Playland employees since the Union repeatedly asked to bargain over these classifications. Respondent Fred Meyer never indicated that the Local 21/81 negotiations would cover these classifications. Rather, Respondent Fred Meyer continued to claim, as it had since 2009, that there was pending litigation and that it was unwilling to bargain.

¹⁷ Although Respondent Fred Meyer argued in Case 19-RC-15036 that the Union waived the right to organize the nutrition employees because it did not propose adding them to the grocery unit when it executed the 2007 me-too agreement, that argument was rejected by the Region in its pre-election decision long before the parties entered the 2010 me-too agreement. Moreover, the Board, in its August 26, 2010 decision, considered Respondent Fred Meyer's pre-election issues and found them to be without merit. *Fred Meyer Stores, Inc.*, 355 NLRB No. 141 (2010).

Because the evidence undeniably shows that the Union did not waive its bargaining rights as to unit scope or composition, and the Board, as affirmed by the Ninth Circuit, has already found that the nutrition and Playland employees are part of the grocery and CCK units, respectively, Respondents violated Section 8(a)(5) when they unilaterally removed those employees from the units.

B. Respondent Fred Meyer Posted Notices Blaming the Union for the Delayed Payment of Ratification Bonuses

Respondent Fred Meyer violated Section 8(a)(1) by posting notices that blamed the delay in distributing lump sum ratification bonuses on the Union's refusal to accept Local 21/81 agreements "as...written." The notices did not accurately inform employees of the reason for the delay – that the contracts had not been finalized. Instead, they misled employees to believe that the delay was caused by Union obduracy, rather than the inability of *both* parties to reach consensus on what constituted their agreement. As such, the notices tended to undermine employee support for the Union. See *RTP Co.*, 334 NLRB 466, 467 (2001), *enfd.*, 315 F.3d 951 (8th Cir. 2003) (letter to employees misrepresenting union's bargaining positions and blaming union for preventing employees from receiving customary annual wage increase violated Section 8(a)(1)). See also *Bryant & Stratton Business Institute*, 327 NLRB 1135, 1137, 1152 (1999) (memo to employees blaming union for employer's unlawful failure to grant merit pay increases violated Section 8(a)(1)); *Alachua Nursing Center*, 318 NLRB 1020, 1030-31 (1995) (memo denigrating union for failing to agree to wage increase that employer had presented in take-it-or-leave-it manner violated Section 8(a)(1)).

C. Respondents Failed to Apply the Collective Bargaining Agreements and Pay the Nutrition and Playland Employees their Ratification Bonuses

In the instant matter, the Union and the Employer did not reach a "complete" agreement until after the arbitrator resolved the parties' differing views as to whether certain

provisions of the Local 21/81 contract agreements were binding on the Union. The parties' disagreement concerned not only the nonmandatory unit scope issues, but also mandatory subjects such as whether the backpay-cap arbitration decisions would continue to apply. Following the arbitrator's decision, Respondent Fred Meyer, and the other grocer employers, paid the ratification bonuses to the vast majority of Union-represented employees working in the Union's jurisdiction and the contracts went into effect for 5,500 employees working for multiple employers with the exception of the nutrition employees working at Respondent Fred Meyer's Lacey and Tumwater stores and the Playland employees working at Fred Meyer's University Place store in Tacoma. Moreover, the Grocery agreement went into effect, with effective dates from October 3, 2010 to October 5, 2013, and does not contain the exclusionary language that is in question in this case. The CCK agreement also went into effect, with effective dates from May 10, 2010 to May 4, 2013, and does not contain the exclusionary language that is in question in this case.

Nevertheless, Respondents have violated Section 8(a)(5) by failing to pay ratification bonuses to the Lacey and Tumwater nutrition employees and the University Place Playland employees even after the arbitrator's decision issued. Moreover, Respondent Fred Meyer and Respondent Allied have violated Section 8(a)(5) by failing to apply the general terms of the grocery and CCK collective bargaining agreements, that apply to all other unit members, to the nutrition and Playland employees. The Board, as affirmed by the Ninth Circuit, has found that, following the self-determination elections in 2009, Respondent Fred Meyer had a duty to bargain with the Union over the Lacey and Tumwater nutrition employees as part of the Mason/Thurston Counties grocery unit and over the University Place Playland employees as part of the Pierce County CCK unit. *Fred Meyer Stores*, 355 NLRB No. 141, slip op. at 2 (nutrition employees) and 355 NLRB No. 130, slip op. at 2 (Playland employees).

Once the historical units' contracts expired in 2010, the parties were obligated to bargain over a single agreement for each of the newly enlarged units. *Federal-Mogul Corp.*, 209 NLRB 343, 344 (1974) (finding that after an unrepresented "fringe group" of employees voted to join an existing bargaining unit through a self-determination election, and once the historic unit's contract expires, the parties are obligated to bargain over a single agreement covering the newly enlarged unit). Accordingly, once the arbitrator's decision issued and the parties had reached complete agreement on new contracts covering the Union-represented grocery and CCK units, the general terms and conditions of the collective bargaining agreements applied to all employees in the respective units, including the Lacey and Tumwater nutrition employees and the University Place Playland employees. Respondents unilaterally changed those employees' terms and conditions of employment and modified the contracts, in violation of Sections 8(a)(5) and 8(d), by failing to apply the terms of the collective bargaining agreements to the nutrition and Playland employees.

D. Meeting of the Minds

Whether parties have reached a "meeting of the minds" is determined "not by the parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other." *MK-Ferguson Co.*, 296 NLRB 776 n.2 (1988). Clearly, after the ratification of the Local 21/81 agreements, the parties had differing opinions regarding what impact, if any, changes to those agreements would have on the Union because of the 2010 me-too agreement. Nevertheless, the parties agreed to expedited arbitration, as set forth in the me-too agreement, as an internal mechanism for resolving disputes arising out of the application of the terms of the Local 21/81 contract agreements to the Union.¹⁸ The parties,

¹⁸ While the Respondents will try and portray Union President Iverson as not credible because she viewed the me-too agreement as applying only economic changes and not all changes, the fact remains that the parties contemplated that disputes would arise in the application of the contract settlements and, therefore, the parties agreed to arbitrate potential disputes. Indeed, the parties used the dispute

in fact, went to arbitration and, while the arbitrator determined that the me-too did not bind the Union to the new unit-exclusion language in the Local 21/81 agreements, the arbitrator also found that the me-too did bind the Union to provisions nullifying the backpay arbitration decisions and by including holiday work week language in the meat agreement.

After the arbitration decision issued, the grocer employers, including Respondent Fred Meyer, began applying the terms of the contract agreement to its 5,500 employees represented by the Union. The contract agreements that went into effect apply to multiple employers, only one of which is Respondent Fred Meyer. More importantly, the grocery agreement and the CCK agreement that went into effect after the arbitration does not contain the language excluding the nutrition and Playland employees.

These contract agreements were retroactively applied and the effective dates are 2010 through 2013. A finding that there was no meeting of the minds at the time the 2010 me-too agreement was negotiated would unnecessarily disrupt labor stability for 5,500 employees and multiple grocer employers not involved in this dispute. *Colgate-Palmolive-Peet Co.*, 338 U.S. 355, 362 (1949)(primary objective of Congress in enacting the National Labor Relations Act was achieving stability of labor relations). In fact, the grocery and CCK contracts are now in effect and apply to most of the 5,500 unit members. The only ones excluded are those the Board, Ninth Circuit, and an arbitrator have all said are included in these units.

As such, the time has come for Respondents to apply these same terms and conditions to the select few nutrition and Playland employees that have been denied these benefits. It is disingenuous for Respondents to now argue, after the contracts have

resolution process and now Respondents need to live with the outcome of the arbitrator's decision that the me-too did not privilege the Respondent to remove the nutrition and Playland employees from their respective units. The fact that they disagree with the arbitrator does not make President Iverson not credible.

retroactively been in effect for more than two years, that there was no meeting of the minds based on the limited number of issues that went to arbitration.

E. Respondents' Failure to Apply the Collective Bargaining Agreements to the Nutrition and Playland Employees Must be Remedied

For the reasons discussed below, the appropriate remedy in the instant matter would require Respondent Fred Meyer to apply the general terms (*i.e.* terms that apply to all unit members) of the grocery contract to the Lacey/Tumwater nutrition employees and the CCK contract to the University Place Playland employees, while also requiring bargaining over the “unique” matters (*i.e.* terms in appendices that are unique to classifications covered by those appendices). Counsel for the Acting General Counsel does not, however, seek a remedial order requiring application of particular contractual wage scales to the nutrition and Playland employees because such an order would appear to be inconsistent with Board precedent. For example, the wage scales constitute issues unique to particular employee classifications.

In *Federal-Mogul Corp.*,¹⁹ the Board articulated a framework of bargaining obligations to apply when an unrepresented “fringe group” of employees has voted to join an existing bargaining unit through a *Globe-Armour*²⁰ self-determination election. That framework established two phases of bargaining. During the first phase of bargaining, the employer must maintain any existing collective-bargaining agreement covering the historic unit, and negotiate interim separate terms for the Globed-in employees. *Federal-Mogul Corp.*, 209 NLRB at 343-44. The Board noted that an agreement during this interim stage of bargaining “in all likelihood [will] be an addendum to the existing...contract.” *Id.* at 344. The Board does not require application of the existing agreement to the Globed-in

¹⁹ 209 NLRB 343, 344 (1974).

²⁰ *Globe Machine and Stamping Co.*, 3 NLRB 294 (1937); *Armour and Co.*, 40 NLRB 1333 (1942).

employees, since that “would, in effect, be compelling both parties to agree to specific contractual provisions in clear violation of the *H.K. Porter* doctrine.” *Id.* at 344, citing *H.K. Porter v. NLRB*, 397 U.S. 99, 102 (1970) (while the Board may require employers and employees to negotiate, it is “without power to compel a company or a union to agree to any substantive contractual provision” of a collective-bargaining agreement).

During the second phase of *Federal-Mogul* bargaining, which occurs after the historical unit’s contract has expired, the parties must bargain over a single agreement for the newly enlarged unit. 209 NLRB at 344. With respect to such “phase two” bargaining, the Board stated that neither party could insist to impasse on a separate contract for the newly added employees because that would “effectively destroy the basic oneness of the unit.” *Id.* at 345.

Although there are no subsequent Board decisions applying *Federal-Mogul* in the context of “phase two” negotiations, the Board’s statement in *Federal-Mogul* regarding the “basic oneness” of the unit suggests that general Section 8(a)(5) principles should apply.²¹ And, under general Section 8(a)(5) principles, a union and employer are under a continuing duty to bargain, upon demand, over matters “neither discussed nor embodied in any of the terms and conditions” of a single contract covering a bargaining unit. See *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 683-84 (2d Cir. 1952), *enfg.* 94 NLRB 1214 (1951).

Based on the above, the appropriate remedy for Fred Meyer’s unlawful refusal to apply the grocery and CCK contracts, negotiated during “phase-two” *Federal-Mogul* bargaining, to the nutrition and Playland employees, would require Fred Meyer to, *inter alia*, honor the contracts and apply them retroactively; make the nutrition and Playland employees whole; and bargain with the Union over how to apply the contracts regarding

“unique” issues affecting the nutrition and Playland employees, in the sense that those issues are not covered by the contracts. *Cf. Baltimore Sun Co.*, 335 NLRB 163, 163 n.2, 169 (2001), where the Board ordered an employer to honor the extant contract, make accreted employees whole, and bargain with the union over how to apply the contract to the accreted employees with respect to issues not covered by the contract, where the employer had unlawfully refused to apply the contract to the accreted employees. Although *Baltimore Sun* involved an accretion following a UC proceeding rather than “phase two” *Federal-Mogul* bargaining, it is instructive. In *Baltimore Sun*, the ALJ, in a decision adopted by the Board, reasoned that applying the extant contract to the entire unit was the “only result that would effectuate the accretion doctrine” which, like the second phase of the *Federal-Mogul* bargaining framework, emphasizes the oneness of the newly enlarged bargaining unit. The ALJ also relied on the general Section 8(a)(5) principle that a union and employer have a continuing duty to bargain, upon demand, over matters neither discussed nor embodied in the single contract covering the bargaining unit. 335 at 169, citing *NLRB v. Jacobs Mfg Co.*, 196 F.2d at 683-84. This principle certainly is not restricted to accretion matters, and logically is equally applicable to “phase two” *Federal-Mogul* bargaining obligations.

Here, most of the contracts’ terms—including health/welfare and retirement—clearly would apply to the nutrition and Playland employees, just as they do to the other employees in the units. However, the contracts set forth different pay scales for different classifications of employees and do not state where nutrition or Playland employees would be slotted. Respondents will argue that even the Union never contemplated that the grocery and CCK contracts being negotiated by Local 21/81 would apply to the nutrition and Playland employees as evidenced by their separate requests to bargain. However, Respondent Fred

²¹ See *CBS Broadcasting KYW-TV*, Case 4-CA-37264, Advice Memorandum dated May 26, 2010 (finding no violation during “phase two” *Federal Mogul* bargaining because employer did not insist to

Meyer refused to bargain. Accordingly, the appropriate order would require Respondents to apply to the nutrition and Playland employees the terms of the collective bargaining agreement that cover all unit employees generally, while requiring additional bargaining over their “unique” issues not covered by the collective bargaining agreements.

F. Respondent Allied is Liable for Employees’ Non-Inclusion

Respondent Allied will argue that it does not employ the impacted unit members and therefore has no liability in the instant matter. The mere fact that a multi-employer association does not employ the impacted employees does not, by itself, preclude a finding against the multi-employer association. See *Dews Construction Corp.*, 231 NLRB 182, n. 4 (1977)(one employer may violate the Act when it unlawfully affects the working conditions of another employer’s employees); *Georgia-Pacific Corp.*, 221 NLRB 982, 986 (1975); *Fabric Services, Inc.*, 190 NLRB 540, 541-543 (1971). In certain circumstances, a multi-employer association may share liability for Section 8(a)(5) bargaining violations of its member-employers as principals. See, e.g., *Southern Florida Hotel and Motel Association, et al.*, 245 NLRB 561 (1979), *enfd.*, 751 F.2d 1571 (11th Cir. 1985). Here, Respondent Allied negotiated and entered into the 2010 me-too agreement on behalf of employer grocers, including Respondent Fred Meyer. Respondent Allied informed the Union of the terms of the contract agreement resulting from the Local 21/81 negotiations. The parties involved in the arbitration were Respondent Allied and the Union and the arbitrator ordered Respondent Allied to distribute the ratification bonuses. In sum, Respondent Allied played an integral role in bargaining the nutrition and Playland employees out of the units. Accordingly, Respondent Allied, in addition to Respondent Fred Meyer, violated Section 8(a)(5) of the Act by unilaterally removing nutrition and Playland classifications from the

impasse on change in unit scope, a nonmandatory subject of bargaining).

grocery and CCK bargaining units and by failing to provide them the contract terms afforded to the rest of the unit members.

IV. CONCLUSION

Based on the foregoing, Acting General Counsel requests that the Administrative Law Judge find that Respondents violated §§ 8(a)(1) and (5) of the Act as alleged and order that Respondents include the nutrition and Playland employees in their respective grocery and CCK bargaining units and apply the contract terms afforded to the rest of the unit members, including the ratification bonus, across the board wage increases, the Union's health and welfare plan, and the Union's pension plan. Additionally, the Acting General Counsel requests that the Administrative Law Judge find that Respondent Fred Meyer made unlawful statements in notices posted at its stores blaming the Union for the employees' failure to timely receive ratification bonuses, require that Respondents post an appropriate Notice to Employees, and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

DATED at Seattle, Washington, this 7th day of September, 2012.



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APPENDIX

Proposed Order

Fred Meyer, Inc. and Allied Employers, its officers, agents, successors and assigns, shall

1. Cease and desist from:
 - a. failing and refusing to recognize and bargain collectively in good faith with United Food and Commercial Workers Local 367, herein called the Union, concerning the wages, hours, and other terms and conditions of employment of the employees in the following units:

Lacey/Tumwater Nutrition Employees

All employees employed in [the] Respondent Fred Meyer's present and future grocery stores, ... located in Mason-Thurston Counties, State of Washington, and all regular full-time and part-time employees, clerks, and assistant managers working in the nutrition department of the Respondent Fred Meyer's Lacey and Tumwater, Washington, retail stores; excluding nutrition department managers of the Lacey and Tumwater, Washington, retail stores, employees whose work is performed within a meat, culinary, prescription or bakery production department location of the retail establishment, [and] supervisory employees within the meaning of the Labor Management Relations Act of 1947 as amended.

University Place Playland Employees

All employees employed in the Respondent Fred Meyer's Combination Food/Non-Food Checkstand Departments in Pierce County and all future Combination Food/Non-Food Checkstand Departments in Pierce County ... and all regular full-time and part-time employees working in the Playland Department of the Respondent Fred Meyer's University Place retail store, located in Tacoma, Washington; excluding guards, the Department Manager, two Assistant Department Managers, and supervisors as defined in the Act.

- b. unilaterally and without the consent of the Union altering the scope of the certified bargaining units by removing the Lacey and Tumwater nutrition employees and the University Place Playland employees from their respective bargaining units.

c. failing to pay ratification bonuses to the Lacey and Tumwater nutrition employees and the University Place Playland employees and failing to apply the general terms of their respective collective bargaining agreements that apply to the units as a whole such as health and welfare coverage under the Sound Health and Wellness Trust, pension coverage under the Retail Clerks' Pension, and the across the board wage increases set forth in their respective collective bargaining agreements.

d. posting notices to employees blaming the Union for the bargaining unit employees' failure to receive ratification bonuses.

e. in any like or related manner interfere with employees' rights under Section 7 of the Act.

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

a. pay the Lacey and Tumwater nutrition employees and the University Place Playland employees their ratification bonuses and apply the terms of their respective collective bargaining agreements that apply to the unit as a whole such as health and welfare coverage under the Sound Health and Wellness Trust, pension coverage under the Retail Clerks' Pension, and the across the board wage increases set forth in the respective agreements.

b. if requested by the Union, bargain with the Union about the unique terms and conditions of employment relating to the Lacey and Tumwater nutrition employees and the University Place Playland employees including the wage rates of these employees.

c. inform employees that the Union was not to blame for the delay in receiving their ratification bonuses.

d. within 14 days after service by Region 19, post copies of the Notice in this matter at all locations where Respondents' notices to employees are customarily posted; maintain such notices free from all obstructions or defacements; and grant to agents of the Board reasonable access to Respondent's facilities to monitor compliance with this posting requirement.

e. within twenty (21) days after service by the Region, file with the Regional Director of Region 19 of the Board, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondents have taken to comply with the terms of this order, including the exact locations where Respondents posted the required Notice.

NOTICE TO EMPLOYEES

**Posted by Order of an
Administrative Law Judge
of the National Labor Relations Board
An Agency of the United States Government**

An Administrative Law Judge of the National Labor Relations Board has found that we violated the 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
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with, restrains, or coerces employees with respect to these rights, and more specifically:

WE WILL NOT fail and refuse to bargain collectively in good faith with United Food and Commercial Workers Local 367, herein called the Union, concerning the wages, hours, and other terms and conditions of employment of our employees in the following units:

Lacey/Tumwater Nutrition Employees

All employees employed in [the] Employer's present and future grocery stores, ... located in Mason-Thurston Counties, State of Washington, and all regular full-time and part-time employees, clerks, and assistant managers working in the nutrition department of the Employer's Lacey and Tumwater, Washington, retail stores; excluding nutrition department managers of the Lacey and Tumwater, Washington, retail stores, employees whose work is performed within a meat, culinary, prescription or bakery production department location of the retail establishment, [and] supervisory employees within the meaning of the Labor Management Relations Act of 1947 as amended.

University Place Playland Employees

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 ... and all regular full-time and part-time employees working in the Playland Department of the Respondent's University Place retail store, located in Tacoma, Washington; excluding guards, the Department Manager, two Assistant Department Managers, and supervisors as defined in the Act.

WE WILL NOT unilaterally and without the consent of the Union alter the scope of any certified or recognized bargaining unit by removing the Lacey and Tumwater nutrition employees or the University Place Playland employees from their respective bargaining units.

WE WILL NOT fail to pay ratification bonuses to the Lacey and Tumwater nutrition employees or the University Place Playland employees or fail to apply the general terms of their respective collective bargaining agreements that apply to the units as a whole such as health and welfare coverage under the Sound Health and Wellness Trust, pension coverage under the Retail Clerks' Pension, and the across the board wage increases set forth in their respective agreements.

WE WILL NOT post notices to employees blaming the Union for the bargaining unit employees' failure to receive ratification bonuses.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL, pay the Lacey and Tumwater nutrition employees and the University Place Playland employees their ratification bonuses and apply the terms of their respective collective bargaining agreements that apply to the unit as a whole such as health and welfare coverage under the Sound Health and Wellness Trust, pension coverage under the Retail Clerks' Pension, and the across the board wage increases set forth in the respective agreements.

WE WILL, if requested by the Union, bargain with the Union about the unique terms and conditions of employment relating to the Lacey and Tumwater nutrition employees and the University Place Playland employees including the wage rates of these employees.

WE WILL inform employees that the Union was not to blame for the delay in receiving their ratification bonuses.

**FRED MEYER, STORES, INC.
AND ALLIED EMPLOYERS**

(Respondents)

Dated: _____
(Representative)

By: _____
(Title)

Dated: _____
(Representative)

By: _____
(Title)

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF ADMINISTRATIVE LAW JUDGES**

FRED MEYER STORES, INC.

and

ALLIED EMPLOYERS

**Cases 19-CA-032908
19-CA-033052**

and

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

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTNG GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE.**

I, the undersigned employee of the National Labor Relations Board, state under oath that on September 7, 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:

E-FILE

THE HONORABLE GREGORY Z. MYERSON
ADMINISTRATIVE LAW JUDGE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
901 MARKET STREET – SUITE 300
SAN FRANCISCO, CA 94103

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September 7, 2012.

Date

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/s/ DENNIS SNOOK

Dennis Snook, Designated Agent of NLRB

Name


Kathlyn L. Mills, Secretary

Signature