

**UNITED STATES OF AMERICA  
DIVISION OF JUDGES, NATIONAL LABOR RELATIONS BOARD  
BEFORE GREGORY MEYERSON, ADMINISTRATIVE LAW JUDGE**

<p>In the Matter of:</p> <p>FRED MEYER STORES, INC.</p> <p style="text-align:center">and</p> <p>ALLIED EMPLOYERS,</p> <p style="text-align:center">and</p> <p>UNITED FOOD AND COMMERCIAL WORKERS LOCAL 367, AFFILIATED WITH UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION</p>	<p>Case No.      19-CA-32908                     19-CA-33052</p> <p><b>UNION'S POST-HEARING BRIEF</b></p>
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UNITED FOOD AND COMMERCIAL WORKERS LOCAL 367, AFFILIATED WITH  
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

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**UNION'S POST-HEARING BRIEF**

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## STATEMENT OF THE CASE

### *Overview*

This case involves a group of workers employed by Fred Meyer Stores who voted to join existing bargaining units represented by United Food and Commercial Workers (“UFCW”) Local 367 (herein “Union”) in 2008. Since that time, Fred Meyer Stores (“Employer” or “Fred Meyer”) and its bargaining agent, Allied Employers (herein collectively “Respondents” or only “Fred Meyer”) have failed to bargain with the Union for terms and conditions of employment for these workers. Despite orders to the contrary from the Ninth Circuit Court of Appeals enforcing a National Labor Relations Board decision and an arbitrator selected by the parties pursuant to a grievance-arbitration procedure, Fred Meyer insists that it need not bargain because the Union contractually waived its right to bargain.

Fred Meyer’s waiver defense, and any other defenses related to the Union’s legal ability to represent the groups of workers at issue here, have been decided by final orders and are not subject to review in this unfair labor practice proceeding. The only issue remaining is the appropriate remedy for Fred Meyer’s admitted refusal to bargain with the Union and its attempt to blame the Union for its decision to withhold ratification bonuses for the entire bargaining unit unless the Union gave up representation of the disputed workers.

### *Nutrition and playland workers select UFCW Local 367 in 2008.*

In 2007, UFCW 367 filed a petition for a self-determination election on behalf of workers in the nutrition department at two Fred Meyer stores in Mason and Thurston Counties. These workers sought to join an existing bargaining unit covered by the Mason/Thurston County “grocery” collective bargaining agreement (“CBA”) between Fred Meyer and the Union. Subsequently, in 2007, the Union filed another self-determination petition for workers in Fred

Meyer's playland department. These workers sought to join the existing "CCK" bargaining unit covered by the Pierce County CCK CBA between Fred Meyer and the Union.<sup>1</sup> See Jt. Exs. 1 & 3.<sup>2</sup>

Fred Meyer contested both elections on the basis, *inter alia*, that the Union had contractually waived its right to represent these workers. The thrust of Fred Meyer's argument was that by executing a me-too agreement which bound it to terms negotiated by a sister local in Seattle, the Union had waived its representational rights.<sup>3</sup> See Jt. Exs. 1 & 3. This me-too agreement, which is identical to the 2010 me-too agreement that Fred Meyer again seeks to rely on in support of its refusal to bargain in this unfair labor practice proceeding, states:

The parties [UFCW 367 and Allied/Fred Meyer] agree that all changes made in the King County Local 21/81 settlements that are approved and ratified by the members of Local 21 and 81 will be the same as those made in Local 367's agreements, but that the differences in language between the King County Local 21/81 agreements and Local 367's agreements will be preserved. For example, if a 50-cent increase in wages should be agreed to in King County Local 21/81, then the same 50-cent increase in wages would be applied to Local 367's agreements. In the same sense, if a holiday should be dropped in the King County Local 21/81 settlement, then the same holiday would be dropped in the settlement applied to Local 367's agreements.

Jt. Ex. 10.

The essential elements of the agreement were that Local 367 would ratify the me-too agreement in advance of the Seattle negotiations and agree to be bound by the outcome of negotiations in Seattle, with Local 367 retaining its unique contract language and differences even if the economic issues required a modification. The parties also agreed to use expedited

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<sup>1</sup> CCK stands for Central Checkstand Agreement. See Tr. 34.

<sup>2</sup> This brief abbreviates citations to the record as follows: joint is "Jt.," exhibit is "Ex.," transcript is "Tr.," Respondent is "R," Union is "U," and page is "p."

<sup>3</sup> "First, the Employer asserts that the Union waived its right to seek a self-determination election for Nutrition when it executed the me-too agreement covering Lacey Tumwater grocery employees that excluded Nutrition department employees." Jt. Ex. 1, p. 9.

binding arbitration to resolve any disputes regarding the terms of this me-too agreement or “its application of the terms of the Local 21/81 settlement to the Local 367 Agreements.” Jt. Ex. 10.

In directing the nutrition self-determination election in 2008, the Regional Director rejected Fred Meyer’s argument, holding that the Union had “not waived its right to represent Nutrition department employees” by operation of the me-too agreement. Jt. Ex. 1, p. 9. Fred Meyer appealed the Decision and Direction of Election. It again argued that the Union had waived its right to represent the employees. See Fred Meyer Petition for Review Table of Contents, January 23, 2008, p. 27, Case No. 19-RC-15036, Attachment 1.

In the meantime, workers in the nutrition and playland departments participated in self-determination elections and selected UFCW 367 to represent them. See 355 NLRB No. 130 (2010) at Jt. Ex. 8.

A two-member NLRB denied Fred Meyer’s petition for review of the Regional Director’s Decision and Direction of Election, Case No. 19-RC-15036, for the nutrition employees on April 21, 2009, and denied Fred Meyer’s petition to review the Regional Director’s Decision and Election, Case 19-RC-15194, for the playland employees on June 11, 2009.

On May 7, 2009, the Regional Director issued a certification for UFCW 367 as the bargaining representatives of “[a]ll full-time and regular part time employees, clerks, and assistant managers working in the Nutrition department of the Employer's Lacey and Tumwater, Washington stores; excluding [specific categories of workers] as defined in the Act.” Jt. Ex. 2. The Certification stated: “UFCW 367...may bargain for the above employees as part of the group of employees that it currently represents.” *Id.* Region 19 similarly certified UFCW 367 to bargain on behalf of the playland employees “as part of the group of employees that it currently represents” at the Pierce County store on December 8, 2009. Jt. Ex. 4.

At the time of the Region's certifications, a CBA with an expiration date of October 3, 2010, covered the bargaining unit that the nutrition workers had elected to join. R. Ex. 20; Jt. Ex. 17 at Jt. 4-10. Similarly, a CBA with an expiration date of May 2, 2010, covered the bargaining unit the playland workers had elected to join. R. Ex. 19; Jt. Ex. 17 at Jt. 4-9.

***Fred Meyer's refusal to bargain***

In October 2009, the Union began requesting to bargain with the Employer on behalf of the playland employees. Jt. Ex. 17 at U. 9.<sup>4</sup> In November 2009 and subsequently Fred Meyer refused on the basis that it had no obligation to do so because of *Laurel Baye Healthcare of Lake Lanier v. NLRB*, 564 F.2d 469 (D.C. Cir. 2009) (holding that Section 3(b) of the National Labor Relations Act requires at least three positions on the Board to be filled for a panel to issue decisions). R. Ex. 22; Jt. Ex. 17 at U. 9. On a motion for summary judgment filed on February 18, 2010, a three-member panel of the Board issued a decision finding that Fred Meyer had unlawfully failed to bargain with UFCW 367 regarding the playland employees. The three-member panel held:

The [Company] asserts that even though it is not obligated to do so, it has been bargaining in good faith with the Union, as evidenced by its willingness to meet and confer and its exchange of proposals. The [Company's] asserted "bargaining," however, has consisted of rejecting a proposal made by the Union, proposing to hold the Union's information request in abeyance, and proposing to delay bargaining until the current contract expires or the question of the Board's statutory authority to issue decisions is resolved by the Supreme Court. Further, the [Company] has consistently stated that it does not have any legal obligation to bargain with the Union. In these circumstances, it is clear that the [Company's] purported bargaining, which is largely premised on a future event, is conditional. Contrary to the [Company], such conduct does not constitute bargaining in good faith.

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<sup>4</sup> See 10/26/09 letter from UFCW 367 Secretary-Treasurer Blaine Sherfinski to Fred Meyer Vice President Carl Wojciechowski requesting bargaining; 12/3/09 letter from Sherfinski to Wojciechowski declining Employer's request to delay bargaining; 12/8/09 letter from Sherfinski to Wojciechowski requesting bargaining after certification of UFCW as bargaining representative; 1/5/10 letter from Sherfinski to Wojciechowski reiterating request to bargain. Jt. Ex. 17, U. 9. UFCW 367 reiterated its request to bargain in letters dated 3/22/10, 4/29/10, and 11/9/10. *Id.*

Jt. Ex. 6.

On May 13, 2010, Fred Meyer petitioned for review of the Board's decision, and the Board cross-applied for enforcement. See 355 NLRB No. 130 at Jt. Ex. 8. On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, holding that Section 3(b) of the Act required at least three Board members to exercise the delegated authority of the Board. The Board then set aside its May 7, 2010, Decision and Order because it was based in part on a two-member denial of the Company's request for review in the representation proceeding. See 355 NLRB No. 130 at Jt. Ex. 8.

On August 26, 2010, a three-member panel considered Fred Meyer's objections to the certification of UFCW 367 as the bargaining agent and the refusal to bargain allegation. It found that Fred Meyer had "no valid basis for challenging the results of the election or the Regional Director's Certification of Representative." *Id.* It adopted the Board's May 7, 2010, decision. The Board directed Fred Meyer to bargain with the Union upon request and to employ any understanding reached in a signed agreement. *Id.*

Similarly, in May 2009 the Union offered dates to the Employer to begin negotiations on behalf of the nutrition employees. Jt. Ex. 17 at U. 8. However, due to *Laurel Baye*, 564 F.2d 469, *supra*, Fred Meyer claimed it did not have a duty to bargain with the Union regarding the nutrition employees and refused to engage in negotiations. Jt. Ex. 17 at U. 8. The Union filed an unfair labor practice charge against the Employer for its refusal to bargain on October 16, 2009, Case No. 19-CA-32171. On January 4, 2010, the NLRB order the Employer to bargain with the Union in a decision reported at 354 NLRB No. 127, Jt. Ex. 5, but subsequently set this decision aside due to *New Process Steel, supra*. On August 26, 2010, a three-member panel of the NLRB reviewed 354 NLRB No. 127 and affirmed it, upholding the nutrition employees' election of

UFCW 367 as its bargaining representative and ordering Fred Meyer to bargain with the Union on behalf of those employees. 355 NLRB No. 141 at Jt. Ex. 7.

The Board applied to the Ninth Circuit for enforcement of its Orders. In those proceedings, Fred Meyer continued to claim that the Union had waived its right to bargain but, in the alternative, that the Board had failed to recognize its communications with the Union as genuine good faith bargaining. Attachment 1.<sup>5</sup> [As noted above, the Board held that Fred Meyer's purported efforts to bargain did not constitute genuine good faith bargaining.] On January 9, 2012, the Ninth Circuit enforced the Board's April 26, 2010, decision (355 NLRB No. 141 (2010), 19-CA-32171) which found that Fred Meyer had failed to bargain with the Union for the playland employees. Jt. Ex. 9. The same Order also enforced the Board's decision finding that Fred Meyer had similarly violated the Act in regard to the nutrition employees (355 NLRB No. 130 (2010), 19-CA-32311).

Fred Meyer continues to contend that it has no duty to bargain with the Union. In accordance with this belief, it did not bargain with the Union regarding any terms for the nutrition or playland workers – neither during the life of the 2007-2010 CBAs that were in place at the time of the certifications, nor after those contracts expired.<sup>6</sup>

### *The Successor CBAs*

In March 2010, the parties again negotiated a me-too agreement with identical terms to the 2010 agreement. Jt. Ex. 10. As part of the me-too agreement, the parties agreed to "...extend the 2007-2010 agreements until the ratification date of the new/successor Local 21/81

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<sup>5</sup> Official notice may be taken of the record of the prior proceedings, including motions, pursuant to 29 CFR 102.68.

<sup>6</sup> At various times since 2007, Fred Meyer has made an argument in the alternative that even if it had a duty to bargain it had fulfilled this duty to bargain in various ways such as agreeing to discuss where bargaining might happen if it were to agree to bargain. As Fred Meyer put forth no such additional evidence in this proceeding, the Union assumes that it has abandoned its claim that it has somehow participated in genuine good faith bargaining with the Union. If it again makes this argument, the Union again notes that no bargaining meetings have ever occurred for these workers, and that Fred Meyer cannot steadfastly claim that it has no obligation and yet at the same time claim that it is engaging in good faith bargaining. The two positions are mutually exclusive.

agreements...” *Id.* Allied, acting as Fred Meyer’s agent for purposes of bargaining, provided UFCW 367 with draft CBAs purporting to reflect modifications required by the me-too agreement and the Local 21/81 settlement. Tr. 170; Jt. Ex. 11 at p. 12; Jt. Ex. 12 at p. 1. The proposed CBAs included explicit language excluding nutrition and playland represented employees from the bargaining unit. *Id.*

Fred Meyer sought to do what it had failed to do in the prior litigation; that is, to deprive the nutrition and playland workers of their chosen representative in collective bargaining. The Union objected to the exclusions in the proposed CBAs and moved the issue to arbitration pursuant to the expedited arbitration provision of the me-too agreement. Jt. Ex. 10. In response to the Union’s arbitration request, Fred Meyer chose to deny application of *all* the new terms and conditions of the CBAs to the entire bargaining unit, including a much desired ratification bonus. Fred Meyer posted notices to the Local 367 represented employees advising them that they would not be receiving the ratification bonuses and blamed Local 367 for it. Tr. 85; Jt. Ex. 17 at U. Ex. 16. Local 367 protested to no avail. Tr. 86; Jt. Ex. 17 at U. Ex. 17.

The Arbitrator issued his decision on March 24, 2011. The Arbitrator held: “Allied Employers did breach the [Me-Too] Agreement of March 18, 2010 by insisting that Local 367 agreements include provisions in the Local 367 Grocery and CCK agreements excluding workers currently represented by Local 367.”<sup>7</sup> He explained:

[T]he Union has carried its burden of proof regarding the allegation that the Employers’ proposal to exclude Nutrition and Playland employees from the Local’s Grocery contracts is in violation of the Parties’ “Me-Too” Agreement.

When the Parties negotiated the “Me-Too” Agreement, they were careful to include the following language:

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<sup>7</sup> Fred Meyer submitted to the arbitrator’s jurisdiction and never argued that the Union’s grievance was not procedurally or substantively arbitrable.

The parties agree 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 Local 367's agreements, but that the difference in language between the King County Local 21/81 agreements and Local 367's agreements will be preserved.

In so stating, both Parties recognize that there are underlying differences in language between the two sets of CBAs. The sentence above indicates the Parties' commitment to retain those underlying differences. In making their arguments, the Parties do not dispute that the intention behind the language is not to have Local 367 adopt the new King County contract language whole scale. Rather, it will be the settlement that is adopted; that is, all the changes that result from the negotiations...

In negotiating the language excluding Nutrition and Playland employees from the Grocery contract with Locals 21 and 81, the Employers merely memorialized the status quo. Nutrition and Playland employees were not included in the Grocery agreements with these locals. The change in contract language did not result in the removal of employees from the bargaining unit for the Seattle locals, it would simply limit the unions' ability to challenge whether affected employees might belong to the Grocery bargaining unit in the future (Tr 147). Thus, the settlement in Seattle was very nearly "no change."

In proposing to apply the same exclusion language to Local 367's contracts, the Employers are not seeking to memorialize the status quo. It is undisputed that adoption of the Employers' proposal would result in numerous employees, many of them recently organized, being removed from the bargaining unit. This does not reflect the near "no change" settlement reached in Seattle. It is illogical that employees in Local 367's jurisdiction should lose their representation as a result of a near "no change" in the terms of Locals 21 and 81. The Seattle locals settled for a small diminishment to their employees' flexibility with regard to future representation status. They did not settle for significant cuts to the membership of their bargaining unit. The changes proposed by the Employer for Local 367 are thus not proportional to the settlement reached with the King County locals.

Jt. Ex. 13, pp. 33-36.

The Arbitrator recognized a second, independent basis supporting his conclusion that the me-too agreement between the parties had not authorized Fred Meyer to implement any changes in the UFCW 367 CBA that were not mandatory subjects of

bargaining. This reason was that the me-too agreement only encompassed “traditional, mandatory subjects.” Jt. Ex. 13, p. 38. He held that while the Union had agreed in the me-too agreement that the Seattle Local’s settlement with “respect to wages, hours and working conditions would be applicable to [the UFCW 367] contracts,” there was “no recognition from either side of the potential applicability of a settlement with respect to the non-mandatory subjects of bargaining that might arise between Locals 21 and 81 and the Employers.” Jt. Ex. 13, p. 38.

For these two separate reasons, the Arbitrator found “no evidence upon which to conclude that, when Local 367 agreed to have no voice in the ongoing negotiations, it thereby agreed to surrender control over the scope of the bargaining unit,” Jt. Ex. 13, p. 40, and that, therefore, Fred Meyer had breached the me-too agreement when it attempted to unilaterally remove the nutrition and playland workers from the UFCW 367 contracts. Fred Meyer did not move to vacate the Arbitrator’s award. It then paid the ratification bonus and applied the terms and conditions of the settlement agreement to the UFCW 367 bargaining units, but continued to treat the playland and nutrition employees as unrepresented and did not apply the terms of the contract to these workers or provide them with the ratification bonus. Tr. 367-370. On February 29, 2012, Region 19 issued the Complaint in this matter. GC Ex. 1(i). After a three-day hearing in this matter, the ALJ directed the parties to file post-hearing briefs.<sup>8</sup>

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<sup>8</sup> The procedural history of this matter is complicated. The Union has provided a graphical representation of the prior proceedings to assist the ALJ at Attachment 2.

## ARGUMENT

### I. IT IS SETTLED THAT THE NUTRITION AND PLAYLAND WORKERS ARE PART OF THE EXPANDED GROCERY AND CCK UNITS.

#### A. Respondent Is Precluded From Re-Litigating Representation Issues At This Unfair Labor Practice Proceeding.

“It is well settled that in absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.” *Bay Medical Center, Inc.*, 239 NLRB 731, 733 (1978) (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941)). See also *Friendly Cab Co*, 344 NLRB 528 (2005) (rejecting employer’s arguments in unfair labor practice proceeding that had been decided adversely to it in representation proceedings); 29 CFR 102.67(f). Here, Respondent will attempt, for a third time, to relitigate and test the right of the Union to represent nutrition employees as part of the Mason-Thurston County grocery bargaining unit and the playland employees as part of the Pierce County CCK bargaining unit.

Respondent first made its waiver argument during the representational proceedings in this matter. The Board rejected Respondent’s contention of a contractual waiver based on *UMass Memorial Medical Center*, 349 NLRB No. 35 (2007), which holds that there is no waiver of a right to represent employees unless the “contract itself contains an express promise” of a union to refrain from representing employees. *Jt. Ex. 5* at p. 4. A waiver to represent employees cannot be implied. *Briggs Indiana Corp.*, 63 NLRB 1270 (1945); *Cessna Aircraft Co.*, 123 NLRB 855, 856 (1959).<sup>9</sup>

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<sup>9</sup> The me-too agreement contains no explicit exclusion of either the nutrition employees or the playland employees from any master agreement. To the extent Respondent may argue that the exclusions from the Seattle settlement should work as a waiver, it would not satisfy the *Briggs Indiana* or *Cessna Aircraft* rule because the Union *never* made an express promise in the me-too contract itself to refrain from representing nutrition or playland employees.

Here, Respondent will recycle the same previous rejected “waiver” theory, arguing that the me-too agreement of 2010, which includes the precise language of the 2007 agreement, waived the Union’s right to represent the nutrition and playland employees. Yet, as in 2007, the 2010 me-too agreement contains no express promise by the Union not to represent either the nutrition or playland employees. While Respondent presented significant testimony concerning the negotiation history between the parties concerning the me-too agreements, including the notion that the Union somehow *knew*, or should have known, that nutrition and playland exclusions would be bargained in Seattle, the bargaining history or any direct or imputed knowledge of the Union is irrelevant. There can be no implied waivers or promises not to represent employees because, under *Briggs Indiana/Cessna Aircraft*, waivers or promises not to represent employees must be clearly *expressed* in writing.<sup>10</sup>

Finally, the Respondent raises neither due process violations nor does Respondent raise any other arguments concerning prejudice that would warrant relitigation of the representation issues. Therefore, Respondent is precluded from raising its waiver argument or otherwise challenging the scope of the expanded Grocery (Mason-Thurston Counties) and CCK (Pierce County) units at this unfair labor practice hearing.

**B. Arbitrator Timothy Williams, in Binding Arbitration Pursuant to a Duly Negotiated Arbitration Clause in the Me-Too Agreement, Determined That The Local Did Not Waive Its Right To Represent The Nutrition And Playland Employees.**

Since the *Steelworkers’ Trilogy*, the Supreme Court has given deference and legal legitimacy to the arbitration process and arbitration awards resulting from the parties’ use of the

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<sup>10</sup> It is important to note that the exclusionary language affected more than simply Nutrition employees. In certain areas, Respondent operates “marketplace” stores where nutrition employees are already under the grocery contract, as well as other employees, such as Time and Attendance clerks. Thus, the exclusionary language proposed by Respondent, would have resulted in individuals who had been members of Local 367 for years being removed from the grocery unit and thereby being unrepresented.

arbitration process. In *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960), the Supreme Court explained that:

Arbitration is the very means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Here, Fred Meyer, through its representative Allied Employers, Inc., agreed to be bound by the Pierce County me-too agreement in 2010 which included a grievance-arbitration clause. When Fred Meyer claimed that the me-too had operated to “waive” the Union’s right to represent the playland and nutrition employees, permitting it to add exclusions to the contracts of the nutrition and playland employees, the Union timely grieved pursuant to the arbitration clause in the parties’ “me-too” agreement. At no time during the proceedings leading up to, or at, the arbitration hearing, did Respondent challenge the authority of the arbitrator to decide the issue of whether the me-too operated to waive the Union’s right to represent the nutrition and playland employees. These facts are not in dispute. It is also not in dispute that the arbitrator held in favor of the Union, finding that the Union did not waive the right to represent the nutrition and playland workers. Fred Meyer did not move to vacate the decision.

Yet, Respondent argues that the arbitrator’s decision is not binding on the Board because scope of the unit issues are within the exclusive jurisdiction of the Board. In this regard, Respondent is erroneously attempting to characterize Arbitrator Williams’ decision and award as a decision concerning a representation issue. However, Respondent’s argument cannot be more misplaced, because the issue before the arbitrator was not whether the expanded Grocery and CCK units were appropriate for the purposes of collective bargaining, but was instead whether the meaning of the parties’ “me-too” language required application of the entire Seattle

settlement wholesale to the Union's contracts and, as to those parts that did, how did the parties intend the Seattle settlement to apply.

Respondent may still argue that the Board has exclusive jurisdiction over the subject matter of the arbitration and may rely upon *Hershey Food Corp.*, 208 NLRB 452 (1974) and *Commonwealth Gas Co.*, 218 NLRB 857 (1975). These cases stand for the proposition that the Board will not defer to an arbitration decision and award concerning a representation issue. However, the Board in *Hershey*, in limiting the scope of *Raley's Supermarkets*, 143 NLRB 256 (1963), explained that deferral to an arbitration award is appropriate where the award addresses contract interpretation. *See also, Morgan Services*, 339 NLRB 463 (2003) ("Considering the arbitrator's decision along with the Union's election objections may help avoid inconsistent outcomes and would respect the parties' decision to resolve disputes through the arbitration machinery").

For example, in *Marion Power Shovel Co.*, 230 NLRB 576 (1977), the Board refused to defer to an arbitrator's award concerning the representation of newly added employees at a separate plant because it involved a question of representation and the appropriateness of the unit. Two rival unions were competing for representation of particular units, and the Board explained that "the determinations of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standard, and criteria. 230 NLRB at 577. In that case, the Board then examined factors such as change in the work performed, functional integration and interchange among employees, bargaining history, and other community of interest factors.

Here, Arbitrator Williams' award involved no application of statutory standards for the determination of the appropriateness of the expanded Grocery and CCK units. He neither

examined nor applied any community of interest factors or other statutory standards in reaching his conclusions about the nature of the Grocery or CCK units. Indeed, whether the expanded Grocery and CCK units were appropriate was never in question. Instead, his decision turned on the interpretation of the parties' me-too agreement to determine whether the parties agreed to apply all or some of the changes of the Seattle settlement and how it was to be applied. In so doing, the Arbitrator held:

[T]he Union has carried its burden of proof regarding the allegation that the Employers' proposal to exclude Nutrition and Playland employees from the Local's Grocery contracts is in violation of the Parties' "Me-Too" Agreement.

Jt. Ex. 13, p. 33.

Therefore, the deferral question in this matter falls squarely under *Raley's Supermarkets*, as the nature of Arbitrator Williams' decision is simply one of contract interpretation. Under *Raley's Supermarkets*, the Board will defer to an arbitrator's decision unless the decision is "repugnant to the purposes and policies of the Act." 143 NLRB at 259. In the present matter, Arbitrator Williams' award is not repugnant to the purposes and policies of the Act for two main reasons. First, given that the Union made no express promise *not* to represent the nutrition and playland employees, the Arbitrator's decision is consistent with the Board's *Briggs Indiana* and *UMass Medical Center* standards on waiver and promises not to represent employees. Second, the end result of the Arbitrator's award is that original Board determinations as to the appropriateness of the expanded Grocery and CCK units were preserved.<sup>11</sup> In other words, had Arbitrator Williams reached his conclusion by analyzing community of interest factors and other statutory standards to conclude the expanded Grocery and CCK units were appropriate, his

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<sup>11</sup> Indeed, what Respondent must ultimately contend with is that, should Arbitrator William's decision be ignored here, Respondent is still left with the *Board's* determinations that the expanded Grocery and CCK units are appropriate.

conclusion would have been no different from what the Board had already found and the Board, in taking jurisdiction, and he would have reached the same conclusion.

**II. FOLLOWING THE SELF-DETERMINATION ELECTIONS FOR NUTRITION AND PLAYLAND EMPLOYEES, FRED MEYER FAILED TO BARGAIN WITH THEIR EXCLUSIVE BARGAINING REPRESENTATIVE IN VIOLATION OF 8(A)(1) AND (5).**

In a self-determination election, the Board recognizes two separate “phases” of bargaining, as self-determination elections are likely to occur when a collective bargaining agreement is already in effect. The first phase is the period when “a collective-bargaining agreement is still in effect for the preexisting unit.” *CBS Broadcasting KYW-TV*, Division of Advice Memorandum, Case 4-CA-37264 (May 26, 2010) (citing *Federal-Mogul Corp.*, 209 NLRB 343 (1974)). During this period, the parties are required to engage in “interim bargaining” for the newly added workers, which, the Board noted, “in all likelihood [will] be an addendum to the existing...contract.” *Federal-Mogul Corp.*, 209 NLRB at 344. The second phase of bargaining commences when the existing contract expires. *Id.* at 343-44. During this second phase, “the parties are obligated to bargain over a single agreement covering the newly enlarged unit.” *SPEEA Local 2001 (The Boeing Company)*, Division of Advice Memorandum, Case 27-CB-5025 (July 28, 2008) (citing *Federal-Mogul*). In the instant matter, Respondent failed to bargain in good faith in both the first and the second phases of bargaining.

**A. Fred Meyer Failed To Bargain In “Phase One,” A Violation Of Section 8(a)(1) And 8(a)(5).**

Despite repeated requests to engage in bargaining, Fred Meyer failed to engage in negotiations. Jt. Ex. 17, U. 8 & U. 9; GC Ex. 15. This is simply a case of Respondent’s blatant refusal to even meet and confer with the Union’s representatives regarding the terms and conditions of these newly represented workers. The Union made multiple attempts to bargain

with Fred Meyer, including letters requesting bargaining dated May 6, 2009; October 26, 2009; December 3, 2009; December 8, 2009; January 5, 2010; March 22, 2010; April 29, 2010; September 13, 2010; and November 9, 2010. *Id.* Via letter dated September 30, 2010, Respondent again stated in writing what its actions had demonstrated since the certification of UFCW 367 as the bargaining representative: it would not bargain. Jt. Ex. 17, U. 8. Indeed, because of Fred Meyer's refusal, no bargaining occurred on behalf of these workers during phase one.<sup>12</sup> Fred Meyer's failure to bargain during this phase has already been found to be unlawful by the Ninth Circuit. See Jt. Ex. 9.

**B. Fred Meyer Failed To Bargain In The "Second Phase," A Violation of Section 8(a)(1) and 8(a)(5).**

When the Mason-Thurston Grocery contract expired on October 3, 2010, and the Pierce County CCK contract expired on May 1, 2010, phase one bargaining ended and phase two bargaining began. During the second phase, Respondent also failed to bargain in good faith. Rather than engage in discussions with the Union, it insisted that the Union accept the Seattle settlement that included recognition language excluding the nutrition and playland employees from the expanded Grocery and CCK units, respectively. Such insistence is antithetical to the obligation to bargain in good faith as it is unlawful to insist to impasse "upon a totally separate agreement so designed as to effectively destroy the basic oneness of the unit which we have found appropriate" after a self-determination election. *Federal-Mogul*, 209 NLRB at 345; *Detroit Newspapers*, 327 NLRB 799, 800 (1999) (a party may not insist to impasse on a change in unit scope, a permissive subject of bargaining, or "posit the matter as an ultimatum").

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<sup>12</sup> Fred Meyer has suggested that its unsuccessful efforts to appeal the Regional Director's Directions of Elections and the Board's subsequent holding that it failed to bargain during the first phase somehow extended phase one so phase two of its bargaining obligation has not begun. There is no support for this theory in Board law as it is well established that "the pendency of unfair labor practice charges or other collateral litigation does not suspend the obligation to bargain." *Int'l Paper Co.*, 319 NLRB 1253, 1264 (1995) (citing *Wells Fargo Armored Service Corp.*, 300 NLRB 1104, 1109 (1990)).

While Respondent may claim that it believed that the me-too permitted it to destroy the oneness of the units, this contention must be rejected as Respondents already knew – even prior to the Arbitrator’s ruling – that the me-too could not operate as a waiver of the Union’s representational rights. By excluding these employees from those units, Respondent treated them, by definition, as separate from the Grocery and CCK units and foreclosed them from the benefits of the same contracts that the rest of these units enjoy. As in *Bay Medical Center, Inc.*, 239 NLRB 731 (1978), this insistence was a “repudiation of its present and future bargaining obligation.”

**III. FRED MEYER’S COMMUNICATION TO THE GROCERY AND CCK BARGAINING UNITS ATTEMPTING TO BLAME THE UNION FOR ITS OWN UNLAWFUL DECISION TO WITHHOLD BENEFITS OF THE NEW CONTRACTS VIOLATED SECTION 8(a)(1).**

Compounding the harmful impact of Fred Meyer’s refusal to bargain on the parties’ collective bargaining relationship was its effort to undermine the Union in the eyes of the membership. On January 5, 2011, Fred Meyer announced to the bargaining unit that:

...[Y]our Union refused to accept [the Local 21/81 settlement excluding the Playland and Nutrition workers] 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...

We want to pay you the ratification bonus and hope to have this issue resolved quickly, but you should note that we may need to go to arbitration to settle our differences with Local 367.

Jt. Ex. 17, U. 16.

While 8(c) of the Act provides employers with some freedom to speak to its workforce regarding collective bargaining issues, it bars employers from blaming the Union for causing the employer to withhold a benefit, as Fred Meyer did here. As the Board explained in *Northrop Corp.*, 187 NLRB 172, 202-03 (1970):

When employers declare their desire to grant immediate wage or fringe benefits to employees, but then shift, to the labor organization concerned, the blame for their failure to grant such benefits promptly, determination is considered warranted that they have been seeking to discredit that labor organization, and to discourage membership therein.

*See also McCormick Longmeadow Stone Company*, 158 NLRB 1237, 1242 (1966) (“We further find that, through this conduct, the Respondent sought to discredit the Union and discourage membership therein by announcing a desire to offer immediate benefits to its employees and then shifting to the Union the onus for not instituting these benefits”); *Big Three Indus. Gas & Equip. Co.*, 181 NLRB 1125, 1127-28 (1970) (“Although we regret that the Union's action [to file an election petition] has imposed this [wage] freeze on our employees, under the current decision of the National Labor Relations Board, we have no other alternative”); *Somerset Welding*, 304 NLRB 32, 47 (1991) (employer may be privileged to withhold a benefit, “provided that it does not utilize the incident as a means of combatting unionization by casting blame for the employee's loss upon the Union, the Board or the election process”); “[I]n making such announcements [to withhold benefits], however, an employer must avoid attributing to the union ‘the onus for the postponement of adjustments in wages and benefits,’ or disparag[ing] and undermin[ing] the [union] by creating the impression that it stood in the way of their getting planned wage increases and benefits.” *In Re Grouse Mountain Associates II*, 333 NLRB 1322, 1324 (2001) (internal citations omitted).

An employer violates section 8(a)(1) of the Act when substantial evidence demonstrates that the employer's statements, considered from the employees' point of view, had a reasonable tendency to coerce or interfere with their rights. *Beverly Health & Rehab. Servs. v. N.L.R.B.*, 297 F.3d 468, 476 (6th Cir. 2002). It is not disputed that Fred Meyer created and distributed the letter blaming the Union for its false claim that “we cannot pay you the ratification bonus.” Tr.

130:4-131:24; Jt. Ex. 17 at U. Ex. 16. An employee reading the posting would conclude from it that the Union was the reason that Respondent was not paying the bonus.

Respondent's letter failed to mention that the "me-too" contained a valid arbitration clause, to which even Respondent agreed, so that the parties could efficiently resolve disputes concerning the application of the Seattle settlement without having to resort to economic warfare (i.e., strikes or lockouts). Second, it further failed to mention that the Union, as early as December 2010, requested on more than one occasion that Allied-represented employers pay the ratification bonus, illustrating that the Union was willing to accept terms of the Seattle settlement while *only* arbitrating the remaining disputed changes. Third, the arbitration clause allowed the parties to settle *disputes*, and there was no dispute as to the payment of the ratification bonus. It consisted of a simple formula that would provide bargaining unit members with a certain amount of money (25¢, 15¢, 20¢, or 10¢, depending upon classification) for all hours worked in the previous twelve months. In addition, to receive the bonus an employee had to be on the payroll as of the date of ratification. Respondent needed only to apply this to bargaining unit members and its obligation in this regard would have been satisfied.

Finally, and most informative as to Respondent's intention, is that Respondent knew, or should have known through its agent Allied Employers, the damage that withholding the bonuses would cause to the Union's relationship with its members. In Thurston County, UFCW Local 367 members (grocery) work with UFCW Local 81<sup>13</sup> (meat) members. Jt. Ex. 16, p. 55. As an employee, it would be reasonable to conclude that my Union is responsible for not getting the bonus because members of other unions, who are not going to arbitration, are getting their bonuses. Therefore, Respondent's notices to the Union's members, in conjunction with its

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<sup>13</sup> At the time of ratification of the settlement, UFCW Local 81 represented meat employees in certain counties in Western Washington. Presently, UFCW Local 21 and 81 are now UFCW Local 21 due to a recent merger between the Locals.

refusal to pay the ratification bonuses, interfered with, coerced, and restrained the Union's members' rights.

**IV. FRED MEYER'S REFUSAL TO BARGAIN IS ONLY REMEDIED IN THIS CASE BY THE APPLICATION OF THE TERMS AND CONDITIONS OF THE EXISTING 2010-2013 CBAS.**

As in *Federal-Mogul*, the parties' existing contracts at the time of the self-determination elections did not cover the nutrition and playland employees, and thus "no 'bargain' can be said to have been consciously made by the parties for them." *Federal-Mogul*, 209 NLRB 343 (1974). In *Federal-Mogul*, the employer had attempted to deprive the voters in the self-determination election of pre-existing benefits they enjoyed by placing them under the existing CBA without any bargaining with their union. The Board held:

Were the Board to require unilateral application of the existing contract to the setup men we would, in effect, be compelling both parties to agree to specific contractual provisions in clear violation of the H. K. Porter doctrine. We understand the teaching of that case to be that we have no statutory authority here to force on these employees and their Union, as well as the Employer, contractual responsibilities *which neither party has ever had the opportunity to negotiate.*

*Federal Mogul*, 209 NLRB at 344 (emphasis added).

The Board's rationale for its decision was that it "promote[d] bargaining stability, since a major consequence of the opposite view would be that in contract negotiations both parties would be held to be making agreements for groups of persons whose identity and number would be totally unknown to, and unpredictable by, either party." *Id.* However, after the expiration of the existing contract, "the Union and the Employer must bargain for a single contract to cover the entire unit..." *Id.*

*Federal-Mogul's* expectation that the parties bargain terms and conditions for the new bargaining unit members, rather than treating them as part of the whole unit already covered by the existing CBA, applies only when a collective bargaining agreement at the time of the self-

determination election is still in effect. See *SPEEA Local 2001 (The Boeing Company)*, General Counsel Advice Memorandum, Case 27-CB-5025 (July 28, 2008) (“During this period, the parties are also barred from unilaterally covering the new additions with the existing agreement, since their application would materially alter the bargained-for agreement”). The Fifth Circuit explained:

In regulating fringe-group elections where there is an existing bargaining agreement, the NLRB rulings protect the employer if a fringe group selects a bargaining representative during the term of an existing bargaining agreement. The newly added employees may not invoke coverage by the existing agreement; rather, they must bargain the terms of a completely new agreement. This rule envisions representation elections by fringe groups during the life of a bargaining agreement.

*N.L.R.B. v. Mississippi Power & Light Co.*, 769 F.2d 276, 280 (5th Cir. 1985).

However, even the prohibition requiring the application of the existing contract during the first phase is not absolute. For example, the Ninth Circuit declined to follow the framework, and held that the existing contract should be applied to the new bargaining unit members when their work duties were “functionally similar” to the employees within the existing bargaining unit. *N.L.R.B. v. Abex Corp. Aerospace Div.*, 543 F.2d 719, 721 (9th Cir. 1976). In that case, the “only differences” in compensation for the new and existing employees were “fringe benefits and in some instances pay.” *Id.* Therefore, the employer had not violated Section 8(a)(5) by applying the existing contract. *Id.*

Similarly, in a case in which workers voted to join an existing bargaining unit during bargaining for a successor agreement, the General Counsel found that the employer “had an obligation to apply terms of the new agreement germane to the entire unit to the ‘Globed-in’ employees and then, upon request, to bargain with the Union about terms specific to the Case Managers that were not covered by that agreement.” *Robert Wood Johnson University Hospital*, General Counsel Advice Memorandum, Case 22-CA-27693 (May 29, 2007). In so finding, the

General Counsel found that *Federal-Mogul* did not address the specific circumstances of “whether the Employer must apply an agreement where the ‘Globed-in’ employees were certified as part of the unit during negotiations for the agreement” and its concerns regarding the freedom to contract were not applicable. *Id.* The central difference was that “the parties here had a full opportunity to bargain over these employees.” *Id.* The General Counsel therefore found that accretion principles which require an existing bargaining agreement to apply to newly accreted employees were appropriate in that case and that this conclusion “reaches equitable and pragmatic results that have a salutary effect on the parties' bargaining.” *Id.*

What *Federal-Mogul* is concerned with is that the parties have the opportunity to bargain, and that they not be bound to terms which they had no opportunity to bargain beforehand. Here, Fred Meyer denied the Union the opportunity to bargain for new bargaining unit members. Its unlawful act prevented the parties from negotiating the “addendum” envisioned by *Federal-Mogul* that would have provided terms for the newly added workers until a new agreement for the enlarged bargaining unit could be negotiated upon the expiration of the existing agreement. As noted above, this was not for lack of trying on the part of the Union. Yet, Fred Meyer steadfastly refused to engage in good faith bargaining despite its opportunity to do so.

*Federal-Mogul's* concern is therefore not present in this case. The parties had an opportunity to bargain terms for the new bargaining unit members and Fred Meyer chose not to use that opportunity. The parties have now reached new agreements that cover the bargaining units that the nutrition and playland employees chose to join. These agreements are wholly applicable to the playland and nutrition employees and no additional bargaining is required. The Mason/Thurston Grocery agreement, which covers the bargaining unit including the nutrition employees, contains one general classification and two separate classifications for a “courtesy

clerk” and a “helper clerk” which do not perform checking duties. Jt. Ex. 14 at p. 27. Once placed in the classification, the wages and fringe benefits are determined by the hours worked. *Id.* at 29 and Tr. 185:17-186:3. With the exception of some unique terms for the snack bar, take-out food, salad bar, and deli departments, all other terms are terms of general application. *Id.* at p. 35-42 and Tr. 186:5-12. There is no credible argument that the nutrition employees are covered by the prepared food addendums, or that they are “courtesy” or “helper” clerks; indeed, nutrition workers at other Fred Meyer stores work under the grocery CBA. Jt. Ex. 16, p. 61. Rather, in determining that the nutrition employees were appropriately part of the grocery unit, the Regional Director recognized that the nutrition clerks were often used interchangeably with the grocery clerks. Jt. Ex. 1. Respondent had the opportunity to bargain these workers into a different classification, but instead chose an aggressive and unsuccessful legal strategy to prevent these workers from being part of the unit. It must now live with the consequences, which is that these workers are grocery clerks entitled to the benefits of the existing collective bargaining agreement.

The same is true for the playland workers. The Pierce County CCK contains one primary classification and a second classification for “courtesy clerks” who perform duties specifically defined by the CBA and none other, which includes but is not limited to bagging groceries and collecting shopping carts. Jt. Ex. 15, p. 25. Like the grocery agreement, Appendix A of the CCK agreement sets forth the wage scale which is based on hours worked. The playland workers do not perform the duties listed on page 25 for the “courtesy clerks,” see Decision and Direction of Election for playland, Jt. Ex. 3. Their wages are therefore determined by the number of hours they have worked, and their fringe benefits derive from the same. The remaining terms are terms of general application. As with the nutrition employees, Respondent

must live with the consequences, which is that playland employees are entitled to the benefits of the existing collective bargaining agreement.

Fred Meyer refused to use its opportunity to bargain unique terms for the nutrition and playland employees when it failed to engage in bargaining with the Union during phase one. There are now collective bargaining agreements in place that define the terms and conditions of employment for the nutrition and playland workers. As there is nothing left to bargain, the appropriate remedy is to require Fred Meyer to honor the terms of the respective CBAs for the nutrition and playland workers.

### CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Administrative Law Judge find that Respondents violated Sections 8(a)(1) and (5) of the Act and order the remedy requested. Because the remedy sought will effectuate the purposes of the Act in the circumstances of this case, it will not be disturbed upon review. *See, e.g., Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533 (1943) (“We refrain from disturbing the Board’s remedial order unless it can be shown that the order constitutes ‘a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’”)

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of September, 2012.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 7<sup>th</sup> day of September, 2012, I caused the foregoing Union's Post-Hearing Brief to be filed via e-filing at [www.nlr.gov](http://www.nlr.gov) with the Division of Judges, and true and correct copies of the same to be sent via email to:

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# **Attachment 1**

No. 10-72652

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**NATIONAL LABOR RELATIONS BOARD,**

Petitioner,

v.

**FRED MEYER STORES, INC.,**

Respondent.

---

On Appeal from National Labor Relations Board  
Case No. 19-CA-32311

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**OPENING BRIEF OF RESPONDENT FRED MEYER STORES, INC.**

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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Fred Meyer Stores, Inc.,

Employer,

And

United Food and Commercial Workers Union,  
Local 367, AFL-CIO,

Petitioner.

Case No. 19-RC-15036

**EMPLOYER'S REQUEST FOR REVIEW OF**  
**REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

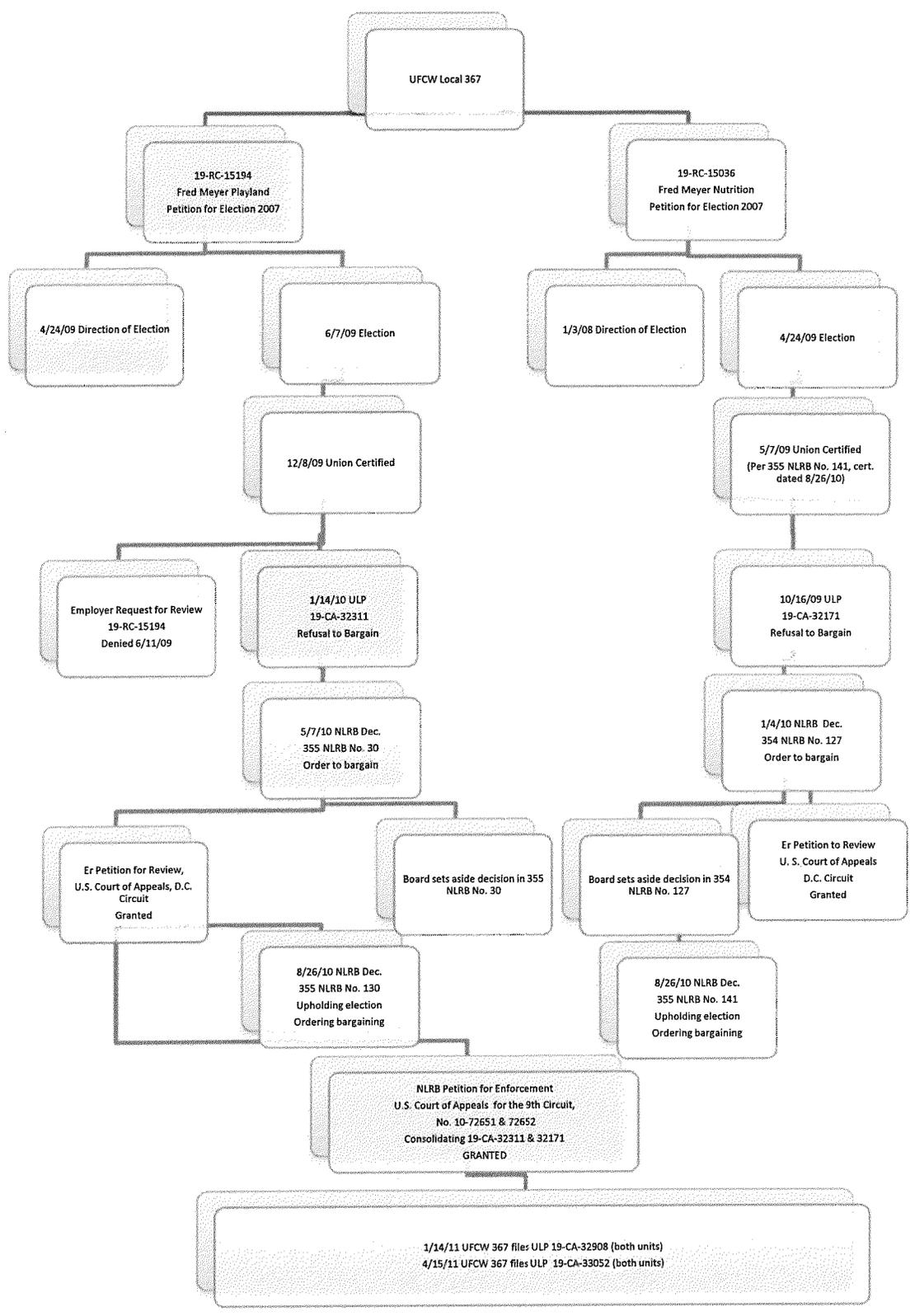
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## **Attachment 2**



UFCW Local 367

19-RC-15194  
Fred Meyer Playland  
Petition for Election 2007

19-RC-15036  
Fred Meyer Nutrition  
Petition for Election 2007

4/24/09 Direction of Election

6/7/09 Election

1/3/08 Direction of Election

4/24/09 Election

12/8/09 Union Certified

5/7/09 Union Certified  
(Per 355 NLRB No. 141, cert.  
dated 8/26/10)

Employer Request for Review  
19-RC-15194  
Denied 6/11/09

1/14/10 ULP  
19-CA-32311  
Refusal to Bargain

10/16/09 ULP  
19-CA-32171  
Refusal to Bargain

5/7/10 NLRB Dec.  
355 NLRB No. 30  
Order to bargain

1/4/10 NLRB Dec.  
354 NLRB No. 127  
Order to bargain

Petition for Review,  
U.S. Court of Appeals, D.C.  
Circuit  
Granted

Board sets aside decision in 355  
NLRB No. 30

Board sets aside decision in 354  
NLRB No. 127

Petition for Review  
U.S. Court of Appeals  
D.C. Circuit  
Granted

8/26/10 NLRB Dec.  
355 NLRB No. 130  
Upholding election  
Ordering bargaining

8/26/10 NLRB Dec.  
355 NLRB No. 141  
Upholding election  
Ordering bargaining

Petition for Enforcement  
U.S. Court of Appeals for the 9th Circuit,  
No. 10-72651 & 72652  
Consolidating 19-CA-32311 & 32171  
GRANTED

1/14/11 UFCW 367 files ULP 19-CA-32908 (both units)  
4/15/11 UFCW 367 files ULP 19-CA-33052 (both units)