

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRED MEYER STORES, INC.,

and

ALLIED EMPLOYERS,

and

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

Case No. 19-CA-32908
19-CA-33052

**MEMORANDUM IN SUPPORT OF THE UNION'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On November 27, 2007, United Food and Commercial Workers (“UFCW”) Local 367 filed a petition seeking to represent all regular full-time and part-time employees, clerks, and assistant managers working in the Nutrition Departments of Respondent Fred Meyer's retail stores in Lacey and Tumwater, Washington, as part of the existing “Grocery” Unit. (Herein this group of workers is referred to as the “nutrition” group.) Later, on March 23, 2009, the Union also filed a petition seeking to represent the employees in the Playland Department of Respondent’s retail stores in Lacey and Tumwater, Washington, as part of the existing Central Check Stand (“CCK”) Unit. (Herein this group of workers is referred to as the “playland” group.)

In neither case did Respondent Fred Meyer¹ agree to recognize the Union as the bargaining representative for the playland and nutrition groups, nor did it consent to participate in a Board-supervised election to determine by secret ballot if union representation was desired. Instead, the Respondent argued that the nutrition group could not vote to join their coworkers in the existing Grocery Unit because the Union had contractually waived its right to represent these workers. See filings and decision related to Case 19-RC-15036; Decision and Direction of Election (“DDE”) at Jt. Ex. 1. Fred Meyer’s contention of a contractual waiver was found by this Board to be without merit.² An election was thereafter conducted, and the Regional Director

¹ Herein, “Respondent” includes both Fred Meyer and its bargaining agent, Respondent Allied Employers.

² Respondent’s request for review of the DDE was denied June 11, 2009, and that June 11, 2009 Board decision was affirmed August 26, 2010. 355 NLRB No. 130 (August 26, 2010) p. 1, n. 1. Fred Meyer similarly refused to recognize the Union as the bargaining representative after it filed its petition to represent the playland employees in 2009 and Fred Meyer contested the Board-supervised election in 19-RC-15194. At the time of the December 8, 2009 (corrected) certification of the Union for the playland employees, the CCK CBA was in effect. Although it had expired by its terms on May 1, 2010, the parties had agreed to extend the CBA until a successor agreement was

of Region 19 certified the Union to bargain on behalf of the nutrition workers as part of the Expanded Grocery Unit on April 24, 2009. Jt. Ex. 2. (Case 19-RC-15036).³ At the time of the certification, a collective bargaining agreement (“CBA”) was in effect between the Union and Respondent for the Grocery Unit with an expiration date of October 3, 2010. R. Ex. 20.

Even after the certification, Respondent did not agree to recognize the Union as the bargaining representative for the nutrition group. Respondent now claimed that it did not believe it was obligated 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), which it contended nullified the certifications because only two members of the Board rejected its appeal of the Region 19’s DDE. R. Ex. 22; Jt. Ex. 17 at U. 9. (Fred Meyer has never disputed that its employees actually voted for union representation, only that the Union had contractually waived the right to represent them.)

On October 16, 2009, the Union filed an unfair labor practice charge based on Respondent’s written refusals to bargain the terms and conditions for the nutrition employees (Case No. 19-CA-32171). On a motion for summary judgment, a two-member Board found that Fred Meyer had unlawfully refused to bargain regarding the nutrition group in violation of Sections 8(a)(5) and (1). *Fred Meyer Stores and UFCW Local 367*, 354 NLRB No. 127 (Jan. 4 2010) (further noting “[t]he Union continues to be the exclusive collective bargaining representative of the [nutrition] unit employees in the expanded [Grocery] unit under Section 9(a)”).

reached. A successor CCK CBA was reached in December 2010, and made retroactive to May 1, 2010. This new successor agreement does not expire until May 14, 2013.

³ The ALJ decision incorrectly states that the grocery group “voted” on April 24, 2009, and that the playland group “voted” on June 17, 2009, Decision at p. 3, when instead those were the dates of the certification of the elected bargaining unit, many months after these workers actually voted.

As Respondent had taken the same position regarding the playland group after the Union was certified as the bargaining representative on December 8, 2009, the Union filed the charge alleging a refusal to bargain on January 14, 2010 (Case No. 19-CA-32311). A three-member Board ruled on May 7, 2010, in 355 NLRB No. 30 (2010), holding:

On November 5, 2009 and January 7, 2010, the Respondent, in writing, informed the Union that it would not bargain unconditionally with it as the exclusive collective bargaining representative....We find that this failure and refusal constitutes an unlawful failure and refusal to bargain in violation of 8(a)(5) and (1) of the Act.

Fred Meyer Stores and UFCW Local 36, 355 NLRB No. 30 (2010) (also holding “The Union continues to be the exclusive collective bargaining representative of the [playland] unit employees in the expanded [CCK] unit under Section 9(a)”).

Respondent still did not bargain. Instead, it challenged the Board’s finding of a violation for its refusal to bargain to the United States Court of Appeals for the District of Columbia Circuit.⁴ Subsequently, as a result of *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the Board adopted its analysis and decision in 354 NLRB No. 127 (2010) (related to the nutrition group) in 355 NLRB No. 141 (2010), and 355 NLRB No. 30 (2010) (related to the playland group) in 355 NLRB No. 130 (2010).

It is not disputed that Fred Meyer had not bargained with the Union up to the date of the August 26, 2010, Board decisions despite the certification of the Union as the representative for the nutrition employees on April 24, 2009, and playland employees June 17, 2009. (Those decisions determined that Fred Meyer had failed to bargain and were predicated on the factual finding that Fred Meyer had indeed failed to bargain.)

⁴ Although the Board’s decision regarding Fred Meyer’s refusal to bargain for the playland group was by a three-member panel, Fred Meyer continued to argue that the DDE for the playland group was ineffective. See 355 NLRB No. 130 (Jt. Ex. 8).

It is also not disputed that Fred Meyer continued to refuse to bargain while the Board sought enforcement of its August 26, 2010, decisions, which were not enforced by the United States Court of Appeals for the Ninth Circuit until January 2, 2012.⁵

II. THE INSTANT UNFAIR LABOR PRACTICE CHARGES

The Union filed the instant ULP charges on January 14, 2011, and April 15, 2011 (both amended April 28, 2011), after Fred Meyer again stated that it would not unconditionally bargain regarding the playland and nutrition groups. Jt. Ex. 17 at U. 9.⁶ GC Exs. 15 & 16.⁷ Tr. 261:18-262:4. At the hearing related to Respondent's refusal to bargain held in Seattle, Washington, on July 24, 25 and 26, 2012, Respondent did not contest that it had not bargained since the Ninth Circuit Order dated January 2, 2012.

Since the certification of the Union as the bargaining agent for the nutrition and playland groups in their respective existing represented units, Fred Meyer has always and consistently claimed that it has no legal duty to bargain. Even while the parties negotiated new CBAs covering the overall units that included the nutrition and playland workers in 2010, Fred Meyer would not agree to bargain terms for these workers. Respondent's position is in plain violation of the law, and now it is too late for the parties to merely "start" bargaining for these workers as is the only remedy for the Respondent's refusal to bargain in the decision below. As set forth below and in the Union's post-hearing brief (attached as Exhibit A), where workers have elected through a self-determination election to join an existing represented unit, and the employer refuses to bargain initial terms and conditions of employment when the existing collective

⁵ Respondent had delayed these proceedings by seeking to improperly supplement the record. *NLRB v. Fred Meyer Stores*, Case No. 10-72651 (9th Cir. January 9, 2012).

⁶ 1/7/10 Letter Wojciechowski to Sherfinski.

⁷ 6/26/09 Letter Wojciechowski to Sherfinski; 9/30/10 Letter Wojciechowski to Sherfinski

bargaining agreement expires, the employer loses its opportunity to bargain separate terms for these workers and these workers must be included under their unit's existing CBA.

EXCEPTIONS PRESENTED

1. Was the Administrative Law Judge ("ALJ") correct to engage in a contract law analysis to determine if the parties' current and past Collective Bargaining Agreements ("CBAs") existed, and then determine that parts of the CBA did not exist when the only issue before the ALJ was whether the Respondent had refused to bargain and disparaged the Union?
2. Did the decision below correctly "presume" that the Respondent stood ready to bargain after the substantial evidence showed that Respondent has been engaged in a multiyear legal battle denying it had a duty to bargain and maintained this same legal position in the unfair labor practice proceeding?
3. Was it error to fail to apply the terms and conditions of the parties' successor CBA to all workers in the expanded CCK and Grocery Units, including the nutrition and playland groups?
4. Did the ALJ correctly apply the law when determining that the Respondent's communication to its workers blaming the Union for the employer's own decision to withhold holiday ratification bonuses was protected by 8(C) when this was untrue and obviously coercive?

ARGUMENT

I. THE ALJ'S FINDINGS REGARDING THE QUESTION OF THE EXISTENCE OF COLLECTIVE BARGAINING AGREEMENTS BETWEEN THE PARTIES ARE IRRELEVANT TO THE ISSUE OF WHETHER THE RESPONDENT VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT BY REFUSING TO BARGAIN AND SHOULD BE DISREGARDED. (Exception 1).

The bulk of the decision below focuses on the Administrative Law Judge's ("ALJ") own question regarding the legal existence of the parties' collective bargaining agreements ("CBA"). The ALJ considered, as a threshold matter, whether there was a CBA covering the Grocery Unit, which the nutrition group elected to join, and the CCK Unit, which the playland group elected to join. As the decision below describes in great detail, these CBAs are multi-employer agreements that include other UFCW locals and other grocers in Western Washington – sometimes known as

“master” agreements – setting forth the terms and conditions for tens of thousands of Washington state workers. There is of course much history and detail related to these agreements, only a few of which are relevant in any way to the unfair labor practice charges against the Respondent presented by this case.⁸ Significantly, the expiration and successor dates of the CBA for the Grocery Unit (which includes the nutrition unit) – October 3, 2010 – and the CBA for the CCK Unit (which includes the playland group) – May 1, 2010 – are significant to the analysis.⁹

Neither the Respondent, nor the Union, nor the counsel for the General Counsel, suggested that the parties’ CBA was illusory or non-existent in some way, yet most of the hearing and decision examined the irrelevant extensional questions about the parties’ past and present CBAs. As the entire analysis is irrelevant to the unfair labor practice at issue before the Board, these sections should be disregarded in their entirety.¹⁰ While irrelevant, disregarding it

⁸ The ALJ presented the issue as: “The principal dispute between the parties is whether the Me-Too Agreement between the Respondent Allied Employers and the Union effectively removed the Nutrition Department employees at the Respondent Fred Meyer's Lacey and Tumwater stores from what has been referred to as the Expanded Grocery Unit, and also effectively removed the Playland Department employees at the Respondent Fred Meyer's University Place store from what has been referred to as the Expanded CCK Unit. The Respondents take the position that the Nutrition Department employees have been so removed such that the Grocery Agreement that went into effect, with effective dates from October 3, 2010 to October 5, 2013 (Jt. Ex. 14.), does not apply to them; and that the Playland Department employees have been so removed such that the CCK Agreement that went into effect, with effective dates from May 10, 2010 to May 4 2013 (Jt. Ex. 15.), does not apply to them. Concomitantly, the Respondent Fred Meyer has refused to apply the terms and conditions of those respective contracts to the nutrition and playland employees, and has also refused to include them in the payment of lump sum bonuses...Of course, the Union and Counsel for the Acting General Counsel take the opposite position, contending that the Me-Too Agreement was never intended by the parties (Respondent Allied Employers and the Union) to authorize the removal of the nutrition and playland employees from their respective Expanded Units, those units to which they were included by virtue of the self-determination elections in 2009.” Decision, p. 9. This was not the issue presented to him by the Complaint. The ALJ was to determine if Respondents had violated Section 8(a)(1) and (5) of the Act. Page 9 of the ALJ’s decision, with the exception to the reference to the CBAs’ duration dates, should be disregarded in its entirety as it has no relevance to the unfair labor practice allegations at issue.

⁹ The ALJ also analyzed whether these workers’ prior contract that set forth their working conditions from 2007 to 2010 had ever existed because the former contract also contained the waiver language that interested in the ALJ. It is not clear what the impact would be if the ALJ had determined that these parties did not have a CBA in the past, nor the impact of such a finding on future collective bargaining and the parties’ ability to rely on their contracts.

¹⁰ While the ALJ’s ultimate finding that the Union did not and could not waive its statutory right to represent the nutrition and playland groups was correct, the Board should not rely on the ALJ’s discussion regarding the irrelevant testimony, as in *Virginia Mason*, 358 NLRB No. 64, n 2. (2012).

will avoid future questions regarding interpretation and needless disputes if the parties are ever required to address an alleged conflict between the ALJ's decision and the Arbitrator's decision on March 24, 2011.

Moreover, aside from the fact that the ALJ opines on a matter not at issue (the same matter having been already decided by an arbitrator in a decision that neither party sought to vacate), the ALJ's erroneous application of a basic contract principle requires that the analysis on pp. 10-17 of his decision be vacated. While the Board maintains its own contract law principles (enforcing oral promises and permitting parol evidence for interpretation, for example), in any contract law system if there is no "meeting of the minds," there is no contract and there is no question of interpretation. There cannot be a meeting of the minds as to some terms in a contract and not as to other terms in a contract as the ALJ found when he held: "I conclude that the Respondents and the Union simply viewed the 2010 Me-Too Agreement differently. So differently in fact that I am of the view there was no "meeting of the minds" as to what was encompassed by that agreement..." Dec., p. 14. But then later, the ALJ holds: "[t]he only failure to reach a "meeting of the minds" was in regard to the nutrition and playland employees." *Id.* at 15.¹¹ Those two statements are simply incompatible under any rules of contract. If there is no meeting of the minds, there are no terms. If there is a meeting of the minds, there are terms but the parties may disagree as to their meanings. There cannot be no meeting of the minds AND a contract interpretation question about the meaning of contract terms because there is contract. Which would obviously be an absurd result in this case, as such a decision would, *ex post facto*, nullify the CBAs for not only the workers represented by UFCW Local 367 but for thousands

¹¹ The ALJ again draws the impossible conclusion, on p. 17, that: "As to the nutrition and playland employees, while I conclude that they remain part of their respective Expanded Units, because the parties failed to reach a "meeting of the minds" regarding the Me-Too Agreement and its application of the Seattle Negotiated Settlement to these two classifications, I conclude that they are not covered by the contracts in effect for the other members of their respective units."

more represented by UFCW Local 21 in Seattle and the surrounding areas who are covered by these CBAs.

While the ALJ ultimately correctly found that, “[a]ccordingly, the Union not having waived its right to represent the nutrition and playland employees, they continue to remain as part of their respective bargaining units,” his application of contract law is incorrect and, as noted above, potentially harmful to the collective bargaining relationship between the parties. To effectuate the Act’s purpose of promoting collective bargaining, page 5 at line 10 (where the discussion of the “historical perspective of the parties” bargaining history begins) through page 7 of the Decision, as well as the entire section entitled “conclusion and analysis” beginning on page 9, should be found to be in error if the Board does not entirely vacate the decision below. It should also be noted that this Board had already decided – in two decisions enforced by the Ninth Circuit – that these employees were already part of “their respective bargaining units” and the Respondent had a duty to bargain; thus, there is no need for the ALJ’s finding that this is so. There is no need to preserve this correct finding of the ALJ that Respondent has an obligation to bargain as this finding is cumulative.

II. SUBSTANTIAL EVIDENCE DEMONSTRATED THAT THE RESPONDENT FAILED TO BARGAIN REGARDING THE PLAYLAND AND NUTRITION GROUPS WHEN IT NEGOTIATED THE SUCCESSOR CBAS COVERING THEIR BARGAINING UNITS, AND THE APPROPRIATE REMEDY IS TO NOW PROVIDE THE CBA TERMS TO THE GROUPS. (Exceptions 2-3).

The Respondent does not dispute that it has refused to bargain the terms and conditions of the employment for the playland and nutrition groups with the Union at all times since its certification. Tr. 261:18-262:4; Jt. Ex. 17 at U. 9; GC Exs. 15 & 17. See, *supra*, n. 8, 9. Indeed, the three days of hearing focused on Fred Meyer’s *reasons* for refusing to bargain (essentially the same recycled contractual waiver arguments previously addressed in the representation

proceedings and resolved in part in the Union's favor and in part in the Respondent-Employer's favor on in the Arbitrator's decision of March 24, 2011, Jt. Ex. 13). Yet, inexplicably, the ALJ – fully aware of the extensive prior litigation in which Fred Meyer has consistently and unwaveringly stating it would not unconditionally bargain with the Union because it *still* believed that the Union had contractually waived its statutory right to represent these workers, found that: “Presumably, the Respondents stand ready to bargain with the Union over the initial terms and conditions of employment of the nutrition and playland employees, independent of those terms and conditions negotiated in the Grocery and CCK Agreements.” Dec., p. 9.

There is no evidence in the record that Fred Meyer stands ready to do anything of the kind. In fact, Fred Meyer has spent the last four years engaged in litigation to evade the very act that the ALJ presumes it stands ready to do. It continued to do so in front of the ALJ for three days in July 2012, and has not suggested its position has changed since the hearing.

Moreover, the ALJ ignores the fact that since the Union began representing the playland and nutrition workers, it is significant that the Union and Respondent *already* negotiated a new successor collective bargaining agreement for the Grocery and CCK Units. When the CBAs covering the playland group's unit and the nutrition group's unit expired, the parties agreed to a successor CBA. (See Union's post-hearing brief at pages 6-7 at Exhibit A). Fred Meyer's duty to bargain was indisputably in effect at the time the CBAs expired and successor CBAs were negotiated, yet no party disputes that Fred Meyer refused and failed to bargain terms and conditions for the newly included grocery and nutrition employees as part of the Grocery Unit and CCK Unit (respectively). As set forth in the Union's post hearing brief, Respondent failed to bargain during negotiations for these workers, and now cannot be rewarded for its refusal. Without a remedy for the violation, Respondent will enjoy the benefits of its violation without

paying any penalty nor bear the cost of returning the parties to the positions before the violation. The workers who voted to unionize will have been deprived of the benefits of union representation for literally years. The ALJ's failure to order a remedy for Fred Meyer's refusal to bargain by applying the terms of the collective bargaining agreement to the Union-represented playland and nutrition workers rewards the Respondent for its bad act, suggesting that litigation strategies aimed at delays will ultimately succeed to suppress the voting rights of employees and the principles of collective bargaining.

III. RESPONDENT WITHHELD HOLIDAY RATIFICATION BONUSES FOR MEMBERS OF UFCW 367 AND BLAMED THE UNION WHILE IT CONTINUED TO UNLAWFULLY REFUSE TO BARGAIN REGARDING THE NURTITION AND PLAYLAND GROUPS. IN SO DOING, IT VIOALTED SECTION 8(a)(1) OF THE ACT. (Exception 4).

A central issue the ALJ was asked to decide was whether the Respondent Fred Meyer's posting of a notice to all UFCW 367-represented bargaining unit members on January 5, 2011, which stated that: "Your Union refused to accept [the master agreement] 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..." Jt. Ex. 17, U. 16, violated Section 8(a)(1) of the Act. Respondent's communication to the membership was untrue as the Union had agreed to the master agreement – and certainly had agreed to ratification bonuses at holiday time for their members! – but did not agree that Respondent could exclude the playland and nutrition workers (and thereby destroy the oneness of the Unit). At no time did the Union ever suggest or request that the Respondent withhold money from its membership.¹² For the reasons set forth in the Union's post-hearing brief at pages 10-24, the decision below should vacated and the Board

¹² And, consistent with its position that it has no duty to bargain with the Union regarding the playland and nutrition groups, Fred Meyer has still never paid these employees their ratification bonuses. The other members of the bargaining units received the ratification bonuses after the Union prevailed on that question in private arbitration on March 24, 2011. Jt. Ex. 13.

should find that the Respondent violated the Act by withholding pay and untruthfully blaming the Union for its decision.

CONCLUSION

The Union requests that the ALJ's decision be vacated, the Respondent be ordered to apply the terms and conditions of the CBAs covering the CCK and Grocery Units to the playland and nutrition groups, commence bargaining in good faith, and post a notice regarding its violations, and any other remedies as deemed appropriate by this Board or as requested by the General Counsel be ordered.

RESPECTFULLY SUBMITTED this 12th day of December, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2012, I caused the foregoing Memorandum in Support of the Union's Exceptions to the Decision of the Administrative Law Judge to be filed with the Board electronically at www.nlr.gov, and caused true and correct copies of the same to be sent via email to:

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EXHIBIT A

**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>UNION'S POST-HEARING BRIEF</p>
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UNITED FOOD AND COMMERCIAL WORKERS LOCAL 367, AFFILIATED WITH
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

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.¹ See Jt. Exs. 1 & 3.²

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.³ 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

¹ CCK stands for Central Checkstand Agreement. See Tr. 34.

² 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."

³ "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. 9.⁴ 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.

⁴ 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 1.⁵ [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.⁶

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

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

⁶ 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.”⁷ 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:

⁷ 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.⁸

⁸ 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).⁹

⁹ 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.¹⁰

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

¹⁰ 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.¹¹ 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

¹¹ 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.¹² 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").

¹² 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 81¹³ (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

¹³ 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 7th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2012, I caused the foregoing Union's Post-Hearing Brief to be filed via e-filing at 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**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FRED MEYER STORES, INC.,

Respondent.

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

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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