

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

FRED MEYER STORES, INC.

and

ALLIED EMPLOYERS

and

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

Cases 19-CA-32908
19-CA-33052

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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Ann Marie Skov, Counsel for Acting General Counsel ("General Counsel") files these exceptions to the Decision of Administrative Law Judge (ALJ) Gregory Z. Meyerson (the "ALJD") [JD(SF)-52-12], issued on November 14, 2012, in the above-captioned cases:

| <u>Page</u> | <u>Lines</u> | <u>Exception</u> |
|-------------|--------------|--|
| 17 | 1-17 | The ALJ's failure to find that Fred Meyer Stores, Inc. ("Respondent Fred Meyer") and Allied Employers ("Respondent Allied"), collectively referred to as Respondents, violated § 8(a)(5) of the National Labor Relations Act ("Act") by altering and/or effectively altering the scope of the Expanded Grocery Unit by removing the nutrition voting group of employees, as alleged in paragraph 7 of the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing ("Complaint"), and ordering a remedy for that violation. In support of this exception, the General Counsel relies upon the ALJ finding that the nutrition employees remained in the unit and that United Food and Commercial Workers Local 367 ("Union") did not waive its right to represent the nutrition employees. (ALJD 9:3-15, 14:32-46; 15:1-15, 17:1-17). Additionally, the General Counsel relies on Joint Exhibits 5-9; 14-15. |

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| 17 | 1-17 | The ALJ's failure to find that Respondents violated § 8(a)(5) of the Act by altering and/or effectively altering the scope of the Expanded CCK Unit by removing the Playland department voting group of employees, as alleged in paragraph 7 of the Complaint, and ordering a remedy for that violation. In support of this exception, the General Counsel relies upon the ALJ finding that the Playland employees remained in the unit and that the Union did not waive its right to represent the Playland employees. (ALJD 9:3-15, 14:32-46; 15:1-15; 17:1-17). Additionally, the General Counsel relies on Joint Exhibits 5-9; 14-15. |
| 17 | 1-17 | The ALJ's failure to find that Respondents violated § 8(a)(5) of the Act by altering and/or effectively altering the scope of the Expanded Grocery Unit by removing the nutrition employees and the Expanded CCK Unit by removing the Playland employees, as alleged in paragraph 7 of the Complaint, even though he concluded that the nutrition and Playland employees remained in their respective units and that the Union did not waive its right to represent them as part of their respective units by entering into the 2010 me-too agreement. In support of this exception, the General Counsel relies upon the ALJ finding that the nutrition and Playland employees remained in the unit and that the Union did not waive its right to represent them. (ALJD 9:3-15, 14:32-46; 15:1-15; 17:1-17). Additionally, the General Counsel relies on Joint Exhibits 5-9; 14-15. |
| 17 18 | 1-17; 40-45 | ALJ's failure to find that Respondents violated § 8(a)(5) of the Act by failing to pay the nutrition and Playland employees their ratification bonuses, apply the general terms of the collective bargaining agreements (including the hourly wage increases, health and welfare coverage, and pension coverage) and bargain about any terms and conditions of employment unique to the nutrition and Playland employees, as alleged in paragraphs 10 and 11 of the Complaint, and ordering a remedy for that violation. In support of this exception, the General Counsel relies upon the ALJ finding that the nutrition and Playland employees remained in the unit and that the Union did not waive its right to represent them. (ALJD 9:3-15, 14:32-46; 15:1-15; 17:1-17). Additionally, the General Counsel relies on Joint Exhibits 5-9; 14-15. |
| 17 | 1- 17;40-45 | The ALJ's failure to find that the parties had a "meeting of the minds" as to the 2010 me-too agreement as evidenced by the |

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| | | ratification of the 2010 me-too agreement, the use of arbitration to resolve issues arising out of applying newly bargained contract agreements to the Union, and the application of the grocery and CCK agreements, after arbitration, to the Union's 5,500 represented employees working for various employers. Moreover a meeting of the minds was established as evidenced by the ALJ's determination that the nutrition and Playland employees are in their respective units and the Union did not waive right to bargain about them by entering into the 2010 me-too agreement. In support of this exception, the General Counsel relies upon the ALJ finding that the nutrition and Playland employees remained in the unit and that the Union did not waive its right to represent them. (ALJD 9:3-15, 14:32-46; 15:1-15; 17:1-17). Additionally, the General Counsel relies on Joint Exhibits 5-10; 13-15. |
| 18 | | The ALJ's failure to find that Respondent Fred Meyer violated § 8(a)(1) of the Act by posting notices blaming the Union for the delayed payment of ratification bonuses, as alleged in paragraph 8 of the Complaint, and ordering a remedy for that violation. In support of this exception, the General Counsel relies upon GC Exh. 13. |
| 17-18 | | The ALJ's failure to remedy Respondents' failure to apply the collective bargaining agreements to the nutrition and Playland employees while the collective bargaining agreements applied to all other unit employees, as alleged in paragraph 9 and the special remedy paragraph of the Complaint, and ordering a remedy for those violations. In support of this exception, the General Counsel relies upon the ALJ finding that the nutrition and Playland employees remained in the unit and that the Union did not waive its right to represent them. (ALJD 9:3-15, 14:32-46; 15:1-15; 17:1-17). Additionally, the General Counsel relies on Joint Exhibits 5-10; 13-15. |
| | | The ALJ's failure to remedy Respondents' failure to reimburse nutrition and Playland employees for any excess federal income tax owed on backpay and/or submit the appropriate documentation to the Social Security Administration so that backpay will be allocated to the appropriate calendar quarters, as alleged in the special remedy paragraph of the Complaint, and ordering a remedy for these violations. |
| | | The ALJ's finding and conclusions that the allegations set forth in paragraphs 7, 8, 9, 10 and 11 of the Complaint should be dismissed. |

Signed at Seattle, Washington on December 12, 2012.

A handwritten signature in cursive script that reads "Ann Marie Skov". The signature is written in black ink and is positioned above a horizontal line.

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**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Counsel for Acting General Counsel ("General Counsel"), pursuant to Section 102.46(a), respectfully submits this Brief in Support of Exceptions to the Decision (the "Decision") of Administrative Law Judge Gregory Z. Meyerson (the "ALJ"). The Decision was issued on November 14, 2012, in the above captioned cases, dismissing the complaint in its entirety.¹ This Brief sets forth General Counsel's position concerning this case, identifies those areas of the Decision in which the ALJ erred as a matter of fact or law, and proposes a revised amended Order, with an attached Notice to Employees, accordingly. General Counsel does not take exception to any of the ALJ's credibility findings.

I. INTRODUCTION

This case involves Respondent Fred Meyer's latest refusal, this time with the assistance of Respondent Allied, to recognize and bargain with the United Food and

¹ Fred Meyer Stores, Inc., is referred to as Respondent Fred Meyer. Allied Employers is referred to as Respondent Allied. Respondent Fred Meyer and Respondent Allied are collectively referred to as Respondents.

Commercial Workers Local 367, Affiliated with United Food and Commercial Workers International Union (“Union”) about employees working in the nutrition department at Respondent Fred Meyer’s Lacey and Tumwater stores and in the Playland department at Respondent Fred Meyer’s University Place store in Tacoma, Washington.² (J Exhs. 5-8)(ALJD 3:28-42; 4:45-46; 5:1-3, 5-9).

In short, since May 2009, Respondent Fred Meyer has continually refused to bargain with the Union about the Lacey and Tumwater nutrition employees, who voted in a self-determination election to be a part of an existing grocery unit. (J Exh. 5; J Exh. 7)(ALJD 3:28-42; 4:45-46; 5:5-6). Since June 2009, Respondent Fred Meyer has also refused to bargain with the Union regarding the Playland employees working at the University Place Playland Department, who voted in a self-determination election to be a part of an existing central checkstand unit (“CCK”). (J Exh. 6; J Exh. 8)(ALJD 3:44-52; 4:1-5; 5:5-6). On August 26, 2010, the Board found that the refusals to bargain regarding the nutrition employees and the Playland employees violated Section 8(a)(5). (J Exhs. 5-8) (ALJD 3:28-42; 3:44-52; 4:1-5; 4:45-46; 5:1-3, 5-9). On January 9, 2012, the Ninth Circuit Court of Appeals enforced the Board’s orders. (J Exh. 9)(ALJD 5:6-9).

Independent of Respondent Fred Meyer’s failure to bargain over the nutrition employees as part of the existing grocery unit and the Playland employees as part of the CCK unit, the parties’ grocery and CCK collective bargaining agreements covering the rest of the units were nearing expiration when the refusals first occurred in 2009. (155:15-22;

² References to the transcript appear as (–:–). The first number refers to the pages; the second to the lines. References to General Counsel Exhibits appear as (GC Exh. –). References to Respondent Exhibits appear as (R Exh. –). References to Joint Exhibits appear as (J Exh. –). References to J Exh. 17, which contain exhibits from an arbitration proceeding, will indicate the relevant exhibit numbers used in that document such as (J Exh. 17: J –) when referencing a joint exhibit received into evidence during the arbitration, (J Exh. 17: U –) when referencing a Union exhibit received into evidence during the arbitration, or (J Exh. 17: E –) when referencing an Employer exhibit received into evidence during the arbitration. References to the Decision appear as (ALJD __:__).

156:11-15; J Exh. 10)(ALJD 7:1-9; 11:19-24). Respondent Allied represents Respondent Fred Meyer and other grocer employers in contract negotiations. (140:22-25; 141:1-15; J Exh. 10; J Exh. 17:J 1)(ALJD 7:1-9; 11:19-24).

In March 2010, as Respondent Allied was gearing up to represent Respondent Fred Meyer and other grocer employers in contract negotiations for succeeding agreements, Respondent Allied and the Union entered into a me-too agreement. (140:22-25; 141:1-15; J Exh. 10; J Exh. 17:J 1)(ALJD 7:1-9; 11:19-24). Pursuant to the me-too agreement, the parties agreed to extend the same contract agreements as negotiated by UFCW Locals 21 and 81 ("Local 21/81") sister locals, with the caveat that the differences in language between the Union's agreements and the Local 21/81 contract agreements would be preserved and that the parties would have the ability to go to arbitration to resolve any differences in interpretation of the me-too agreement at the time of applying the Local 21/81 contract agreements to the Union. (J Exh. 10)(ALJD 7:1-9, 32-36; 11:20-24).

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

Around December 3, 2010, the Union received the contract agreements from Respondent Allied based on its negotiations on behalf of the various grocers, including Respondent Fred Meyer, with Local 21/81. (J Exhs 11-12)(ALJD 8:2-4). Immediately after reviewing the contract agreements, the Union discovered that the Local 21/81 contract agreements had removed the nutrition and Playland employees from their respective

bargaining units (the "Local 21/81 unit exclusions"). (GC Exh. 8; GC Exh. 10)(ALJD 8:4-6). As such, the Union notified Respondent Allied that the Local 21/81 unit exclusions set forth in the grocery and CCK agreements did not apply to its units. (GC Exh. 10)(ALJD 8:4-6). Respondent Allied responded that the parties had agreed to extend the Local 21/81 settlements, including the Local 21/81 unit exclusions, under the me-too agreement. (GC Exh. 8)(ALJD 8:6-12). Realizing that the parties were at a stalemate regarding the application of the outstanding contract agreements to the nutrition and Playland unit members, the Union invoked the arbitration provision of the me-too agreement so that the issue of contract interpretation could be put before an arbitrator. (GC Exh. 10)(ALJD 8:22-32).

On January 5, 2011, Respondent Fred Meyer posted disparaging notices in its stores blaming the Union for the delay in implementing the new collective bargaining agreements and paying out the ratification bonuses. (GC Exh. 13)(ALJD 8:36-42).

On March 2, 2011, the parties held an arbitration to resolve whether the me-too agreement required the parties to apply the Local 21/81 unit exclusions to the Union represented CCK and grocery units, as well as several other issues. (J Exh. 16)(ALJD 8:47; 9:1-4). On March 24, 2011, the arbitrator issued his binding decision and award finding that Respondent Allied had failed to properly apply the me-too agreement by proposing to exclude the nutrition and Playland employees from the Union represented grocery and CCK units; in short, the Local 21/81 unit exclusions were improperly applied to the Union's two units. (J Exh. 13)(ALJD 9:3-15). As such, the arbitrator ordered a distribution of the lump sum bonus. (J Exh. 13). To date, Respondent Fred Meyer has failed to apply the terms of the grocery and CCK collective bargaining agreements to the nutrition and Playland employees. (184:1-20; 185:3-14)(ALJD 9:15-17).

In his Decision, the ALJ dismissed the complaint in its entirety based on findings that Respondents did not: alter the scope of the Expanded Grocery Unit by removing the nutrition voting group of employees; alter the scope of the Expanded CCK Unit by removing the Playland department voting group of employees; or fail to distribute the lump sum ratification bonus to the nutrition and Playland employees. The ALJ further found that Respondent Fred Meyer did not post a notice blaming the Union for its failure to pay employees the ratification bonuses and the delay in reaching collective bargaining agreements. Moreover, the ALJ concluded that, while the nutrition and Playland employees remained in their respective units, it would be inappropriate to apply the general terms of the CCK and Grocery agreements to them by virtue of the me-too agreement because there was no “meeting of the minds” as to the scope of the me-too agreement.

General Counsel takes exception to the ALJ’s failure to find that Respondents violated Section 8(a)(5) of the Act when they unilaterally attempted to remove the nutrition and Playland employees from their respective units. Indeed, the ALJ concluded both that the Union did not waive its bargaining rights regarding the scope of the bargaining units and that the nutrition and Playland employees are part of their respective units as previously determined by the Board, Ninth Circuit, and an arbitrator. Accordingly, a finding that these disputed employees were unlawfully removed from their units will ensure that the issue regarding their status is resolved once and for all.

Additionally, the General Counsel takes exception to the ALJ’s dismissal of the allegation that Respondents failed to provide the nutrition and Playland employees with the contract terms afforded to the rest of their fellow unit members after the arbitrator’s decision issued, including the ratification bonus, across the board wage increases, the Union’s health and welfare plan, and the Union’s pension plan. The nutrition and Playland employees were in the Union represented units prior to the application of the Local 21/81 agreements.

A failure to apply the same general contract terms as those applied to the rest of the unit employees rewards Respondent Fred Meyer for its persistent refusal to acknowledge the nutrition and Playland employees as part of their respective units for almost an entire 3 year contract cycle during which time the Board and the Ninth Circuit told them to do so. This conduct must not be sanctioned.

Finally, General Counsel takes exception to the ALJ's dismissal of the allegation that Respondent Fred Meyer violated Section 8(a)(1) by posting notices that blamed the delay in distributing lump sum ratification bonuses on the Union's refusal to accept the agreements applied to the units via the me-too "as...written."

As a result of Respondents' violations of the Act, the General Counsel contends that the ALJ failed to order the appropriate remedy in this matter that would require Respondent Fred Meyer, as explained in greater detail below, to apply the general terms (*i.e.* terms that apply to all unit members) of the grocery contracts to the Lacey/Tumwater nutrition employees and the CCK contract to the University Place Playland employees, while also requiring bargaining over the "unique" matters (*i.e.* terms in appendices that are unique to classifications covered by those appendices).

II. STATEMENT OF FACTS

A. Background Information

The Union represents over 5,500 employees of Fred Meyer, Albertsons, Safeway, Quality Food Centers ("QFC"), and Haggen supermarkets located in Pierce, Thurston, Mason, Lewis, Pacific, and Gray's Harbor counties in the State of Washington. (136:5-21; J Exh. 17: J 7; J Exh. 19)(ALJD 4:19-21). The bargaining units represented by the Union are delineated by job classification: meat, grocery, common check ("CCK"), and general merchandise; each bargaining unit has its own collective bargaining agreement. (138:19-25; 139:1-10)(ALJD 4:29-30). Some of the units are multiemployer units (*e.g.*, the

multiemployer Pierce County grocery unit) and others are limited to a single employer (e.g., the Fred Meyer Mason/Thurston Counties grocery unit). (J Exh. 3 n.7; J Exh. 17:U 2 n.7).

Allied Employers, Inc. ("Respondent Allied"), represents Respondent Fred Meyer and other grocer employers such as Safeway and Albertsons in multi-employer bargaining with the Union and with its sister UFCW locals that have jurisdiction over adjacent geographical areas (e.g., King County). (140:22-25; 141:1-15; J Exh.10; J Exh. 17:J 1)(ALJD 2:26-31; 4:24-27). Beyond negotiating collective bargaining agreements, Respondent Allied enters into health and welfare agreements, welfare trusts, and pension trusts with the Union, and sister UFCW locals, on behalf of the grocer employers it represents. (141:17-25; 142: 1-25; 143:1-5; GC Exhs. 17, 18, 19)(ALJD 2:26-34). Randall Zeiler ("Zeiler") is the President of Respondent Allied. (148:15-17)(ALJD 5:20-21).

B. Respondent Fred Meyer

Most of the other grocer employers represented by the Union only operate traditional grocery stores. (137:9-15). Respondent Fred Meyer, however, primarily operates "one-stop" retail stores that sell groceries, such as produce, frozen foods, general grocery, and nutrition items, and an extensive line of general merchandise such as electronics, sporting goods, furniture, automotive parts, clothing, shoes, and luggage. (137:2-3, 16-23; J Exh. 1 p. 4; J Exh. 17:U 1 p.4)(ALJD 4:13-15). These one-stop stores contain nutrition departments within their food departments that carry dietary supplements, organic food products, other grocery items, and non-food items. (149:16-25; J. Exh. 1 p.5; J Exh. 17:U 1 p.5)(ALJD 4:n.3). The nutrition aisles are surrounded by other sections of the food department such as produce, bakery, and other food-related sections. (J. Exh. 1 p.5; J Exh. 17:U 1 p.5)(ALJD 4:n.3). Some one-stop stores also contain "Playland" areas, which are

supervised play areas for shoppers' children.³ (J Exh. 3; J Exh. 17:U 2)(ALJD 4:n.4). Respondent Fred Meyer's Playland employees are responsible for supervising the shoppers' children among other tasks. (151:25; 152:1-3; J Exh. 3 p. 5; J Exh. 17:U 2 p.5)(ALJD 4:n.4).

Although most Respondent Fred Meyer stores are one-stop stores, it also operates a small number of traditional grocery stores known as "marketplace" stores.⁴ (137:3-6)(ALJD 4:16-17). Employees who work in the nutrition aisles in Respondent Fred Meyer's three Pierce County marketplace stores historically have been included in the multiemployer Pierce County grocery unit. (250:15-25; 251:1-3).

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

On April 24, 2009, a majority of the nutrition department employees at the Fred Meyer one-stop stores in Lacey and Tumwater (both Thurston County) voted in a self-determination election to be represented by the Union as part of the existing Mason/Thurston two-county grocery unit.⁵ (150: 16-21; 151:13-24; J. Exh. 18)(ALJD 4:36-39). The certification issued on May 7, 2009. (J. Exh. 2) (ALJD 4:39). As early as May 27, 2009, Carl Wojciechowski, Respondent Fred Meyer's Group Vice President of Human Resources, informed the Union that he would be handling the nutrition negotiations and that the Union was to send all future correspondence to him.⁶ (153: 23-25; 154:1-4; GC Exh. 4).

On June 17, 2009, a majority of the Playland employees at Respondent Fred Meyer's one-stop store in University Place (Pierce County) voted in a self-determination

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

⁴ Respondent Fred Meyer marketplace stores offer traditional groceries and a limited line of general merchandise.

⁵ Case 19-RC-15036. (J Exh. 18).

⁶ The ALJ does not discuss the correspondence between the Union and Respondent Fred Meyer about meeting to bargain over the nutrition and Playland employees.

election to be represented by the Union as part of the existing county-wide CCK unit.⁷ (152:4-15; J Exh. 18)(ALJD 3:20-26). A corrected certification issued on December 8, 2009. (J Exh. 4; J Exh. 17:U 3)(ALJD 4:42-43).

As of, June 26, 2009, Respondent Fred Meyer refused to bargain with respect to the Lacey and Tumwater nutrition employees to test the validity of the certification.⁸ (J Exh. 5; J Exh. 7; J Exh. 17:U4, U7)(ALJD 4:45-46). As of November 5, 2009, Respondent Fred Meyer refused to bargain with respect to the University Place Playland employees, again to test the validity of the certification.⁹ (J Exh. 6; J Exh. 8; J Exh. 17:U 5, U 6) (ALJD 5:1-3). On August 26, 2010, the Board found that the Expanded Grocery Unit included the nutrition employees and that Respondent Fred Meyer's refusal to bargain over the terms and conditions of employment of the nutrition employees violated Section 8(a)(5).¹⁰ (J Exhs. 7 and 8; J Exh. 17: U 6, U7)(ALJD 3:28-42; 5:5-6). On August 26, 2010, the Board found that the Expanded CCK Unit included the Playland employees and that Respondent Fred Meyer's refusal to bargain over the terms and conditions of employment of the Playland employees violated Section 8(a)(5).¹¹ (ALJD 3:44-52; 4:1-5; 5:5-6). On January 9, 2012, the Ninth Circuit granted the Board's applications for enforcement of its orders requiring Respondent Fred Meyer to recognize and bargain with the Union about the terms and conditions of employment for the nutrition and Playland employees. (J Exh. 9)(ALJD 5:6-9).

⁷ Case 19-RC-15194. (J Exh. 18).

⁸ Respondent Fred Meyer had opposed the self-determination election, *inter alia*, on the grounds that (1) the Union waived the right to organize the nutrition employees because it did not propose adding nutrition employees to the unit when it executed a "me-too" agreement in 2007, described below at n.21, and (2) the nutrition employees do not share a sufficient community of interest with the employees in the existing grocery unit. (J Exh. 1 p.2).

⁹ Respondent Fred Meyer had opposed the self-determination election on the grounds that the Playland employees do not share a community of interest with the employees in the existing CCK unit. It further argued that, should a community of interest be found, the inclusion of the University Place Playland employees would still be inappropriate in a county-wide unit. (J Exh. 3 p.1, fn.4).

¹⁰ *Fred Meyer Stores*, 355 NLRB No. 141, slip op. at 2 (2010), incorporating by reference *Fred Meyer Stores*, 354 NLRB No. 127 (2010) (J Exh. 5; J Exh. 7) (ALJD 5:n.6).

C. The 2010 Me-Too Agreement

In March 2010, as the parties' multiple collective-bargaining agreements were nearing expiration, the Union and Respondent Allied, on behalf of the grocer employers it represents, entered into a "me-too" agreement which states that the listed grocer employers "agree to extend the same settlement as is negotiated" in the King County UFCW Local 21/81 grocery, meat, and CCK negotiations to the collective-bargaining agreements within the Union's jurisdiction.¹² (155:15-22; 156:11-15; J Exh. 10; J Exh. 17:J 1)(ALJD 7:1-9; 11:19-24). The 2010 me-too agreement also states that "all changes made in King County Local 21 and 81 settlements that are approved and ratified by the members of Local 21 and 81 will be the same as those made in [the Union's] agreements," but that "the difference in language between the King County Local 21/81 agreements and Local 367's agreements will be preserved." (156:15-19; J Exh. 10; J Exh. 17:J 1)(ALJD 7:1-9; 11:20-24).¹³ In addition, the me-too agreement provides that either party may request expedited arbitration to resolve any disputes that arise under its terms or the application of the Local 21/81 settlement to the Union's agreements.¹⁴ (J Exh. 10; J Exh. 17:J 1)(ALJD 7:32-35).

The 2010 me-too agreement did not cover negotiations over the general merchandise unit because Local 367 was going to negotiate its general merchandise agreement directly with Respondent Allied in separate negotiations. (J Exh. 10; J Exh. 17:J

¹¹ *Fred Meyer Stores, Inc.*, 355 NLRB No. 130, slip op. at 2 (2010), incorporating by reference *Fred Meyer Stores, Inc.*, 355 NLRB No. 30 (May 7, 2010) (J Exh. 6; J Exh. 8) (ALJD 5:n.6).

¹² Local 21 represents employees working in King County, Kitsap County, and Whatcom counties, among other counties in Washington. (156:22-25; J Exh. 19). Local 81 represents meat cutters, wrappers, and seafood employees in King, Kitsap, and part of Mason/Thurston counties. (157:1-5; J Exh. 19)(ALJD 4:21-24).

¹³ The me-too agreement also sets forth the following examples to explain how the Local 21/81 settlements would be applied: if a 50-cent increase in wages is agreed to in the Local 21/81 settlement, the "same 50-cent increase would apply" to the Union's agreements, and if a holiday is dropped in the Local 21/81 settlement, the "same holiday would be dropped" in the Union's agreements. (156:14-15; J Exh. 10)(ALJD 11:24-28).

¹⁴ On April 27, the Union's membership ratified the 2010 me-too agreement. (154:21-25; GC Exh. 5)(ALJD 7:17).

1). Although, Local 21 represents nutrition employees working for Respondent Fred Meyer as a part of its general merchandise unit covered by a general merchandise agreement, it does not represent employees working in Respondent Fred Meyer's Playland department. (157:7-15).

Prior to the execution of the 2010 me-too agreement, Respondent Allied and the Union did not discuss that it, or Respondent Fred Meyer, would be seeking to remove the nutrition or Playland employees from their respective units. (157:16-25; 158:1-5; 236:5-8; J Exh. 16)(ALJD 7:36-38).

The Union did not have any agreements with Local 21/81 to represent it in the 2010 negotiations nor did the Union assign bargaining rights to Local 21/81. (162:24-25; 163:1-4; J Exh. 16)(ALJD 12: n.12). The Union did not communicate with Local 21/81 while the 2010 negotiations were taking in place in King County due to a communication blackout. (163:5-14)(ALJD 7:38-40). Moreover, the Union did not attend any of the Local 21/81 negotiation sessions. (163:15-17)(ALJD 7:38-40).

D. Previous Me-Too Agreements

Even before the 2010 negotiations, the parties' history establishes that they track in their own agreements the results of bargaining between Local 21/81 and the grocer employers. (J 13 p.4-5; J Exh. 16)(ALJD 5:31-39; 6:25-28). For example, in 2004, the Union participated in a multi-union bargaining group with Local 21/81 to negotiate meat, grocery, and CCK contracts with Respondent Allied and the grocer employers, but the Union exited the negotiations before the parties reached a settlement. (162:1-7; J 13 p.4-5; J Exh. 16)(ALJD 5:22-23). The parties subsequently made the same changes to the Union agreements as were made to the contracts of the King County locals, while preserving the differences in the underlying language. (J 13 p.4-5; J Exh. 16)(ALJD 5:25-38).

In 2007, the Union and Respondent Allied entered into its first “me-too” agreement with language identical to that of the 2010 me-too agreement. (J 13 p.4-5; J Exh. 16)(ALJD 6: 1-4, 31-35, 49-50; 7:1-3). In negotiations leading up to the execution of the 2007 me-too agreement, Union President Teresa Iverson (“Iverson”) sent an e-mail to Respondent Allied President Zeiler stating that the “blank check will be tougher to ratify.” (159:8-17; J Exh. 16; J 17:E 9 p.17)(ALJD 12: n.13). Initially, the Union proposed conducting two votes by the units: ratification of the 2007 me-too agreement (the first vote) and ratification of the contract agreement after the Local 21/81 negotiations (the second vote). (J 17:E 9)(ALJD 6:9-23; 12:n.13). The blank check the Union was referring to was the elimination of the second vote (*i.e.*, elimination of a procedural step) and was not an admission that the Union would have to take whatever came down from Local 21/81 because the underlying me-too was premised on preserving underlying differences. (159:20-25; 160:11-25; 161:1-8; J 13; J 17: E 9 p.17)(ALJD 6:9-23; 12: n.13). Indeed, by letter dated May 31, 2007, the Union described the elimination of the second vote to the membership by explaining that the membership would vote on whether to ratify the me-too agreement (*i.e.*, the first vote) but would not have “two bites at the apple” meaning they would not get to vote on whether to ratify the contract agreement reached by Local 21/81(*i.e.* the second vote) prior to implementation. (218:6-25; 219:10-14; R Exh. 1)(ALJD 6:9-23). The ALJ concluded that there is no real dispute that the “blank check” reference related to the elimination of the second vote to accept or reject the Local 21/81 contract agreement. (ALJD 12: n.13).

The language of both the 2007 and 2010 me-too agreements, however, preserved differences between the Local 21/81 agreements and the Union’s agreements and allowed for a dispute resolution process through arbitration if issues arose at the time of applying the Local 21/81 agreements to the Union. (220:2-10; J Exh. 10; J Exh. 13; J Exh. 16)(ALJD 6:19-21; 7:1-9; 11:21-29; 13:46-47; 14:1-9).

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

E. The Union's Requests to Bargain Separately over Nutrition and Playland Employees After the Execution of the 2010 Me-too Agreements¹⁵

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

In separate letters dated September 30, 2010, Respondent Fred Meyer stated that the request to bargain over the nutrition employees was premature in light of the outstanding legal issues pending before the circuit court of appeals. (GC Exh. 16; J Exh. 17:U 8). In separate letters dated November 9, 2010, the Union again requested that Respondent Fred Meyer bargain over the nutrition and Playland employees and put Respondent Fred Meyer on notice that the outstanding legal issues pending before the circuit court of appeals were insufficient grounds for refusing to bargain with the Union. (GC Exh. 15; GC Exh. 16; J Exh. 17:U 8, U 9).

In all of its correspondence, Respondent Fred Meyer gave no indication that it was trying to excise the nutrition and Playland employees through its bargaining with Local 21/81. (GC Exh. 15; GC Exh. 16; J Exh. 17:U 8, U 9). Around November 30, 2010, after

¹⁵ The ALJ does not discuss the correspondence between the Union and Respondent Fred Meyer concerning bargaining about the nutrition and Playland employees.

the Local 21/81 contract agreements had been reached, Respondent Allied indicated to the Union during negotiations for the general merchandise agreement that Local 21/81 had agreed to exclude the nutrition employees from the grocery agreement. (268:2-14).

F. Local 21/81 Agreements and Aftermath

Respondent Allied and the employer grocers, including Respondent Fred Meyer, negotiated for several months in 2010 with Local 21/81, and reached tentative agreements in November 2010 for the Local 21/81 jurisdiction. (164:18-23; 165:1-3; GC Exh. 6; R Exh. 3)(ALJD 7:19-29). On December 3, 2010, Respondent Allied notified the Union that the Local 21/81 agreements had been ratified, provided the Union with copies of them, and stated that they applied to the Union's jurisdiction. (170:9-25; GC Exh. 7; J Exh. 11; J Exh. 12; J Exh. 17:U 12, U 13, E 11)(ALJD 7:27-29; 8:2-4).

The Local 21/81 settlements changed, *inter alia*, the recognition/unit description provisions of the grocery and CCK agreements. (J Exh. 11 p.12; J Exh. 12 p.1; J Exh. 17:U 12, U 13)(ALJD 7:19-27). Specifically, attached to the new Union grocery agreement was "Letter of Understanding #12 (New) Fred Meyer Article 1.1," which excluded the following job classifications from Article 1 - Recognition and Bargaining Unit: "Nutrition, Pharmacy, Health and Beauty Aids, Floral, Garden Center, Apparel, Shoe, Home Fashion, Photo Electronics, General Merchandise Departments, Playland, Jewelry Department, Time and Attendance, Human Resource Administrators..." (173: 17-25; J Exh. 11 p.12; J Exh. 17:U 12)(ALJD 7:19-27). Similarly, the new CCK agreement stated that the aforementioned departments at Fred Meyer would be listed in the contractual recognition and bargaining unit provision as exclusions from the unit. (174:8-18; J Exh. 12 p.1; J Exh. 17:U 13)(ALJD 7:24-27). Local 21/81 explained to its membership, however, that the new exclusionary

¹⁶ As stated earlier, Playland employees were not included in any of the Local 21/81 bargaining units. (157:7-15).

language was language that was just reaffirming existing exclusions as the named excluded employees, including the nutrition employees, were already covered under its general merchandise agreement, and it did not represent Playland employees. (250: 3-5; J Exh. 17: U 11).

Also, the contract agreements included new no-pyramiding and holiday-pay language in the meat contract and nullified previous arbitrator decisions that removed a backpay cap from termination grievances if there was evidence that an employer was delaying the processing of such a grievance. (GC Exh. 10). Finally, the contract agreements provided for a lump sum ratification bonus that amounted to about \$500 for full-time employees. (171:14-18; J Exh. 11 p.13; J Exh. 12 p. 12; J Exh. 17:U 12, U 13)(ALJD 7:29-30).

In early December 2010, Respondent Allied sent the Union an e-mail expressing an interest in finalizing the Union's contracts so all of the Union-represented employees could receive their lump sum bonuses by the end of the month. (165:16-25; 166:3-8; GC Exh. 7; J Exh. 17: E 11) (ALJD 8:2-4). The Union responded that it had concerns regarding the settlements and stated that the changes to the unit description in the CCK and grocery agreements did not apply to its units. (171:3-5, 22-25; 172:1-3; GC Exh. 8; GC Exh. 9; J Exh. 17: E 11) (ALJD 8:4-6). Respondent Allied replied that, under the terms of the me-too agreement, the parties had agreed to extend the Local 21/81 contract agreement to the Union-represented units, including the language excluding nutrition and Playland employees from the grocery and CCK units. (GC Exh. 8; J Exh. 17: E 11)(ALJD 8:6-12). On December 12, 2010, Respondent Allied sent the Union an e-mail stating that the lump sum bonus would not be paid until the Union agreed that "all terms of the [Local 21/81] settlements apply to [the Union] with no exceptions per the 'me too' agreement." (GC Exh. 9; J Exh. 17: E 11)(ALJD 8:13-16).

In a letter to Respondent Allied dated December 15, 2010, the Union requested that the grocer employers, including Respondent Fred Meyer, implement all terms of the Local 21/81 settlements except for the exclusions from the CCK and grocery bargaining units, the provisions nullifying the backpay-cap arbitration decisions, and the no-pyramiding and holiday-pay language in the meat agreement. (175: 13-25; GC Exh. 10; J Exh. 17:J 3)(ALJD 8:22-25). The letter stated that those provisions did not comply with the me-too agreement, and that the Union would seek expedited arbitration if Respondent Allied continued to insist that they be included in the Union's agreements. (175: 21-25; GC Exh. 10; J Exh. 17:J 3)(ALJD 8:22-32).

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

On January 5, 2011, Respondent Fred Meyer posted a notice at their stores stating that the Union had signed a me-too agreement requiring it to "accept the same settlement" that the Employers had reached with Local 21/81 without further negotiations. (130:22-25; 131:1-13; GC Exh. 13; J Exh. 17: U 16)(ALJD 8:36-39). The notice further stated that, "[u]nfortunately, after the settlement was ratified by your coworkers in Locals 21 and 81, your Union refused to accept it as they had agreed. As a result, we cannot pay you a ratification bonus or move forward on any of the other contract provisions until this matter is resolved." (GC Exh. 13; J Exh. 17: U 16)(ALJD 8:39-42). The notices also stated that the parties might need to go to arbitration to settle their differences. (GC Exh. 13; J Exh. 17: U 16)(ALJD 8:42-44). The ALJ incorrectly found that the notices stated the undisputed facts (*i.e.*, that the Union refused to accept the Local 21/81 agreements and that Respondent Fred Meyer would refuse to pay the lump sum bonus to the Union represented

employees until the matter could be resolved through arbitration). (ALJD 18: 36-40). Alternatively, the ALJ found that even if a reading of the notice would tend to lead the reader to feel the Union was at fault for the situation, he determined that the notice was permissible propaganda under Section 8(c) because it constituted an expression of “views, argument, or opinion,” which “contains no threat of reprisal, or force, or promise of benefit.” (ALJD 18:46-49). The ALJ failed to give weight to the fact that these notices were posted during a time when Respondent Fred Meyer was blaming the Union for its delay in issuing bonuses because the Union was protesting the unlawful removal of unit members from the Grocery and CCK bargaining units.

G. Expedited Arbitration

On March 2, 2011, the parties held an arbitration hearing to resolve whether the me-too agreement required the parties to apply the Local 21/81 unit exclusions to the Union-represented CCK and grocery units, as well as the disputes over the nullification of the backpay-cap arbitration decisions and the holiday-pay language in the meat agreement.¹⁷ (J Exh. 16)(ALJD 8:47; 9:1-4).

During the arbitration hearing, former Union President Iverson consistently testified that the Union had never abandoned or relinquished representation of the nutrition employees working at Respondent Fred Meyer’s Lacey and Tumwater stores or the Playland employees working at Respondent Fred Meyer’s University Place store. (155:7-14; J Exh. 16)(ALJD 14: 5-7).

On March 24, 2011, the arbitrator issued his decision and award. (J Exh. 13) (ALJD 9:3-4). The arbitrator found that Respondents failed to properly apply the me-too agreement by proposing to exclude the nutrition and Playland employees from the Union-

¹⁷ The Union dropped its objection to the inclusion of “no-pyramiding” language in the meat agreement. (J. Exh. 16).

represented grocery and CCK units. (J Exh. 13)(ALJD 9:4-15). The arbitrator found that the me-too agreement only required the Union to adopt the “same settlement” negotiated by Respondents and Local 21/81; *i.e.*, the changes that resulted from those negotiations, but not the identical contract language. (J Exh. 13). In other words, the Union was only required to accept a result that was proportional to the result obtained by Local 21/81. (J Exh. 13).

Since Local 21/81 represented the nutrition employees as part of its general merchandise unit¹⁸ and the Playland employees had never been included in its bargaining units, the unit exclusion language in its grocery and CCK units merely memorialized the status quo for the Local 21/81 grocery and CCK units. (J Exh. 13). The arbitrator found that applying the same exclusionary language to the Union’s grocery and CCK bargaining units would not memorialize the status quo but, rather, would result in a significant change, removing numerous employees from the units.¹⁹ (J Exh. 13).

The arbitrator’s award, *inter alia*, ordered the parties to “retain the status quo with regard to the scope of the bargaining unit,”²⁰ and ordered Respondents to distribute the lump sum bonus upon the receipt and implementation of the award. (J Exh. 13)(ALJD 9:11-15). The award was prospective only; the arbitrator found that the Respondents did not

¹⁸ The 2010 me-too did not cover Local 21/81 negotiations over its general merchandise agreement because the Union was going to negotiate its own general merchandise agreement with Respondent Allied. (J Exh. 10).

¹⁹ The arbitrator also posited an alternative rationale: that the me-too agreement bound the Union to changes in wages, hours, and other mandatory subjects of bargaining, as is customary in me-too agreements, but not to nonmandatory subjects of bargaining, such as changes to unit scope, in the absence of explicit language to that effect. (J Exh. 13). With respect to the remaining issues—the nullification of the backpay-cap arbitration decisions and the holiday-pay language in the meat agreement—the arbitrator ruled in favor of Respondent Allied. (J Exh. 13).

²⁰ The arbitrator recognized that Respondent Fred Meyer’s test of certification regarding the Lacey and Tumwater nutrition employees and the University Place Playland employees was pending before the Ninth Circuit, but stated that “[w]hile the matter is under appeal, the Arbitrator’s view is that the NLRB decision reflects the status quo of the bargaining unit. That status quo must be respected by the Employers until and unless they are able to prevail in the appeal.” (J Exh. 13).

breach any agreement by failing to pay the lump sum bonus prior to the resolution of the arbitration proceeding. (J Exh. 13)(ALJD 9:8-10).

Following the arbitrator's decision, the Respondents paid the lump sum bonus to all of the Union's grocery and CCK unit employees except the nutrition employees at the Fred Meyer one-stop stores in Lacey and Tumwater and the Playland employees at the Fred Meyer one-stop store in University Place. (184:1-20; 185:3-14)(ALJD 9:15-17). Moreover, the October 3, 2010, to October 5, 2013 grocery agreement and the May 10, 2010 to May 4, 2013 CCK collective bargaining agreements covering Respondent Fred Meyer employees represented by the Union are now in effect, and contain none of the recognition clause exemptions set forth in either the grocery or the CCK contract agreements. (147:10-25; 148:2-7, 20-23; J Exhs. 14, 15)(ALJD 16:40-45, n. 15). Nevertheless, the terms and conditions of their respective collective bargaining agreements have not been applied to the nutrition and Playland employees. (184:1-20; 185:3-14)(ALJD 16:40-45).

More specifically, Respondent Fred Meyer has not applied the general terms of the 2010 to 2013 Mason/Thurston grocery agreement (including the lump sum ratification payment, health and welfare coverage, pension coverage, and across the board wage increases to name a few terms) to the nutrition employees working in Lacey and Tumwater. (184:1-20)(ALJD 16:40-45). Similarly, Respondent Fred Meyer has not applied the general terms of the 2010 to 2012 Pierce County CCK agreement (the lump sum ratification payment, health and welfare coverage, pension coverage, and across the board wage increases) to the Playland employees working at its University Place store. (185:3-14)(ALJD 16:40-45). All of the terms of both the Mason/Thurston grocery agreement and the CCK agreement before the appendices are general terms that apply to the entire bargaining units irrespective of job classifications. (186:7-12, 22-25; J Exh. 14; J Exh. 15). The appendices contain unique provisions, such as wage rate by job classification, that

apply to the employees covered by the appendices in both collective bargaining agreements. (185:17-25; J Exh. 14; J Exh. 15).

H. ALJ Decision

Despite dismissing the complaint in its entirety, the ALJ determined that the Union continues to represent the nutrition and Playland employees in their respective Expanded Units. (ALJD 14:32-33). Indeed, the ALJ found in the instant matter that “the record unequivocally indicates that there was no ‘clear and unmistakable’ waiver by the Union as to the bargaining rights of the nutrition and playland employees.” (ALJD 15: 4-6). The ALJ initially determined that the 2010 me-too contained no language, on its face, regarding the exclusion of either of these groups nor did it mention any type of waiver to unit scope or unit composition as changes that could be applied pursuant to the Local 21/81 Agreement. (ALJD 15:6-9). The ALJ also found that there was no suggestion that changes to the bargaining units’ scope and composition were even contemplated during the 2010 me-too negotiations. (ALJD 15:9-11). Moreover, the ALJ found that there was no evidence in the record suggesting the Union manifested any intent to waive its bargaining rights with respect to the scope and composition of the two bargaining units. (ALJD 15:11-14). The evidence overwhelmingly establishes and the ALJ found, that, by signing the me-too agreement in the instant matter, the Union neither consented to nor waived its bargaining rights regarding the scope or composition of the bargaining units. (ALJD 14:32-46; 15:1-15). Thus, the ALJ found that the Union did not waive its right to represent the nutrition and Playland employees and, as a result, they continue to remain included in their respective bargaining units. (ALJD 15:14-15). Having so found, the ALJ should have also found that Respondents removed nutrition and Playland employees from the units by contending they were excluded from their respective recognition clauses by virtue of the me-too agreement.

The ALJ determined that all principal witnesses for all parties' testified credibly but that Respondents and the Union simply viewed the 2010 me-too differently and that there was no "meeting of the minds" as to what was encompassed by the agreement. (ALJD 14:9-12). Accordingly, as discussed below, the ALJ concluded erroneously that no valid contract existed between Respondent Fred Meyer and the Union as to the nutrition and Playland employees. (ALJD 17:44-46).

III. ARGUMENT

Since, as the ALJ properly found, the Union did not waive its bargaining rights regarding the scope of the bargaining unit by signing the me-too agreement, Respondents violated Section 8(a)(5) when they unilaterally removed the nutrition and Playland employees from the grocery and CCK bargaining units and failed to provide them with the contract terms afforded to the rest of their fellow unit members (including the ratification bonus, across the board wage increases, the Union's health and welfare plan, and the Union's pension plan). Respondent Fred Meyer further violated the Act by posting notices blaming the Union for the employees' failure to timely receive ratification bonuses.

A. The ALJ Erred by Failing to Find Respondents Violated §8(a)(5) by Unilaterally Removing the Nutrition and Playland Employees from the Grocery and CCK Units

Although the ALJ dismissed the Complaint, he also affirmatively found that the Union continues to represent the nutrition and Playland employees in their respective Expanded Units and appropriately reiterated the longstanding Board precedent holding, "once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that position without first securing the consent of the union or the Board." *Wackenhut Corp.*, 345 NLRB 850, 852 (2005). See *Boise Cascade Corp.*, 283 NLRB 462, 467, 475 (1987), *enfd.*, 860

F.2d 471 (D.C. Cir. 1988); *Newport News Shipbuilding*, 236 NLRB 1637, 1637 (1978), *enfd.*, 602 F.2d 73 (4th Cir. 1979). (ALJD 14:32-33, 43-46; 15:1-2). Further, the ALJ correctly found that “the record unequivocally indicates that there was no ‘clear and unmistakable’ waiver by the Union as to the bargaining rights of the nutrition and playland employees.” (ALJD 15: 4-6). Although a union can waive its bargaining rights as to unit scope thereby making unilateral removal from a unit permissible, such a waiver will not be lightly inferred; it must be “clear and unmistakable.” *Silver Springs Nursing Center*, 317 NLRB 80, 82 (1995). See also *Sumter Electric Cooperative, Inc.*, Case 12-CA-25384, Advice Memorandum dated February 27, 2008 (finding that a collective-bargaining agreement did not entitle the employer to unilaterally alter scope of unit; no clear and unmistakable waiver). Otherwise, an employer could use its bargaining power to restrict the scope of union representation “in derogation of employees’ guaranteed right” to representatives of their own choosing. *SFX Target Center Arena Mgt., LLC*, 342 NLRB 725, 735 (2004), quoting *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400-01 (D.C. Cir. 1988). Having set forth the correct precedent, the ALJ erred in his application thereof, by failing to find that the Respondents unilaterally removed the nutrition employees from the Grocery unit and the Playland employees from the CCK unit.

In order to apply the precedent correctly, it is necessary to start with the me-too agreement. The parties expressly agreed that if any dispute arose upon application of the Local 21/81 contract agreements to the Union, either party could request expedited arbitration of the dispute. They did so, and the arbitrator unequivocally found that the me-too agreement did not bind the Union to the new unit-exclusion language in the Local 21/81 agreements. Since the arbitrator’s ruling clearly assessed the contract language at issue; the parties’ past practices; the relevant bargaining history; and any other provisions that, taken together, may shed light on the parties’ intent, there could be no “clear and

unmistakable waiver” found. *Provena St. Joseph Medical Center*, 350 NLRB 808, 815 (2007).

Here, the me-too agreement does not mention unit scope/composition or changes to it on the face of the document; thus, there could be no consent to or waiver of anything. The parties have no past practice applying a me-too agreement to changes in a bargaining unit.²¹ As for bargaining history, the parties did not discuss unit issues when negotiating the 2010 me-too agreement. And, although the Union had described the nearly identical 2007 me-too agreement as a “blank check” in 2007, the Union was referring to the absence of a post-contract settlement ratification requirement, not the scope of bargaining subjects to which it would be bound.

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

In analyzing the 2010 me-too agreement, the ALJ correctly determined that it contained no language, on its face, regarding the exclusion of either of these groups nor did it mention any type of waiver to unit scope or unit composition as changes that could be

²¹ Although Respondent Fred Meyer argued in Case 19-RC-15036 that the Union waived the right to organize the nutrition employees because it did not propose adding them to the grocery unit when it executed the 2007 me-too agreement, that argument was rejected by the Region in its pre-election decision long before the parties entered the 2010 me-too agreement. Moreover, the Board, in its August 26, 2010 decision, considered Respondent Fred Meyer’s pre-election issues and found them to be without merit. *Fred Meyer Stores, Inc.*, 355 NLRB No. 141 (2010).

applied pursuant to the Local 21/81 Agreement. (ALJD 15:6-9). Rather, the ALJ found that there was no suggestion that changes to the bargaining units' scope and composition were even contemplated during the 2010 me-too negotiations. (ALJD 15:9-11). Moreover, the ALJ found that there was no evidence in the record suggesting the Union manifested any intent on any level to waive its bargaining rights with respect to the scope and composition of the two bargaining units. (ALJD 15:11-14).

By signing the me-too agreement in the instant matter, the Union neither consented to nor waived its bargaining rights regarding the scope or composition of the bargaining units. (ALJD 14:32-46; 15:1-15). Accordingly, the ALJ properly found that the Union did not waive its right represent the nutrition and Playland employees and, as a result, they continue to remain as part of their respective bargaining units. (ALJD 15:14-15). Having found no contractual waiver, it then became a matter of straight analysis of whether, under § 8(a)(5) the Act, Respondents effectively removed those employees from the units by their conduct. It was here that the ALJ erred: he failed to find that Respondents altered the scope of the Grocery and CCK units. The net result of the ALJ's error is to give Respondent Fred Meyer a 3 year "free pass" from having to apply contract agreements to the nutrition and Playland employees that voted to be part of their respective units prior to the expiration of the preceding contract agreements. This is clearly conduct in violation of § 8(a)(5) the Act. *Cf. Baltimore Sun Co.*, 335 NLRB 163, 163 n. 2, 169 (2001).

B. The ALJ Erred by Finding that the Parties Did Not Have a "Meeting of the Minds" as to the 2010 Me-Too Agreement

The ALJ determined that all principal witnesses for all parties' testified credibly but that Respondents and the Union simply viewed the 2010 me-too differently, to the point where there was no "meeting of the minds" as to what was encompassed by the agreement. (ALJ 14:9-12). Here, there is no doubt that the parties' entered into the 2010 me-too

agreement that was ratified by the Union's membership and executed by Respondent Allied and the Union.

Clearly, after the ratification of the Local 21/81 agreements, the parties had differing opinions regarding what impact, if any, changes to those agreements would have on the Union because of the 2010 me-too agreement. Nevertheless, the parties agreed to expedited arbitration, as set forth in the me-too agreement, as an internal mechanism for resolving disputes arising out of the application of the terms of the Local 21/81 contract agreements to the Union.²²

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

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

These contract agreements were retroactively applied and the effective dates are 2010 through 2013. A finding that there was no meeting of the minds at the time the 2010

²² The parties clearly contemplated that disputes would arise in the application of the contract settlements and, therefore, the parties agreed to arbitrate potential disputes. Indeed, the parties used the dispute resolution process and now Respondents need to live with the outcome of the arbitrator's decision that the me-too did not privilege the Respondent to remove the nutrition and Playland employees from their respective units. The fact that they disagree with the arbitrator's interpretation of the 2010 me-too agreement does not mean that it is now appropriate to determine there was no meeting of the minds.

me-too agreement was negotiated would unnecessarily disrupt labor stability for 5,500 employees and multiple grocer employers not involved in this dispute. *Colgate-Palmolive-Peet Co.*, 338 U.S. 355, 362 (1949) (primary objective of Congress in enacting the National Labor Relations Act was achieving stability of labor relations). In fact, the grocery and CCK contracts are now in effect and apply to most of the 5,500 unit members. The only ones excluded (*i.e.* the nutrition and Playland employees) are those the Board, Ninth Circuit, an arbitrator, and now an ALJ have all said are included in these units.

It is unconscionable, after the Grocery and CCK contracts have retroactively been in effect for more than two years and applied to 5,500 employees, most of whom are not involved in this dispute, to find that that there was no meeting of the minds concerning the 2010 me-too agreement. The 2010 me-too agreement was a contract that the parties entered into after Union ratification. The 2010 me-too agreement created a mechanism for interpreting the 2010 me-too agreement in the event issues arose in applying the Local 21/81 agreements in the Union's jurisdiction. It is appropriate to use meeting of the minds analysis when assessing formation, which is not at issue given that the 2010 me-too agreement was clear, the Union members ratified it, and both parties entered into the me-too agreement. See *Intermountain Rural Electric Association*, 209 NLRB 1189 (1992); *Lincoln Hills Nursing Home, Inc.*, 257 NLRB 1145, 1153 (1981).

The only issue here was the application of the Local 21/81 exclusions to the Union. See *Windward Teachers Ass'n*, 346 NLRB 1148, 1150-52 (2006) (clause language was clear and union reviewed, approved, and ratified contract without objecting to clause; question over clause interpretation did not prevent meeting of minds). A question over a clause interpretation of the 2010 me-too agreement could not and did not prevent a meeting of the minds as to its formation. Indeed, the parties created a provision allowing for expedited arbitration of disputes arising out of the application of the Local 21/81 agreements

to the Union's bargaining units in the event of a dispute. Thus, the ALJ erred in finding both that that the parties did not have a "meeting of the minds" regarding the me-too agreement and its affect on the nutrition and Playland employees and in finding no valid contract existed between Respondent Fred Meyer and the Union. (ALJD 17:44-46).

Should the Board determine that a "meeting of the minds" analysis is even proper given that this is not a formation issue, there clearly is a meeting of the minds regarding the me-too agreement and its application to the nutrition and Playland employees. As the ALJ correctly found, they were in their respective units and that the Union did not waive its right to bargain over their placement in the units by entering into the me-too agreement.

C. The ALJ Erred by Failing to Find Respondents Failed to Apply the Collective Bargaining Agreements and Pay the Nutrition and Playland Employees their Ratification Bonuses

The Board, as affirmed by the Ninth Circuit, has already found that, following the self-determination elections in 2009, Respondent Fred Meyer had a duty to bargain with the Union over the Lacey and Tumwater nutrition employees as part of the Mason/Thurston Counties grocery unit and over the University Place Playland employees as part of the Pierce County CCK unit. *Fred Meyer Stores*, 355 NLRB No. 141, slip op. at 2 (2010) (nutrition employees) and 355 NLRB No. 130, slip op. at 2 (2010) (Playland employees). Once the historical units' contracts expired in 2010, the parties were obligated to bargain over a single agreement for each of the newly enlarged units. *Federal-Mogul Corp.*, 209 NLRB 343, 344 (1974) (finding that after an unrepresented "fringe group" of employees voted to join an existing bargaining unit through a self-determination election, and once the historic unit's contract expires, the parties are obligated to bargain over a single agreement covering the newly enlarged unit). Accordingly, once the arbitrator's decision issued and the parties had reached complete agreement on new contracts covering the Union-represented grocery and CCK units, the general terms and conditions of the collective

bargaining agreements applied to all employees in the respective units, including the Lacey and Tumwater nutrition employees and the University Place Playland employees.

The Union and Respondents did not reach a “complete” agreement until after the arbitrator resolved the parties’ differing views as to whether certain provisions of the Local 21/81 contract agreements were binding on the Union. The parties’ disagreement concerned not only the nonmandatory unit scope issues, but also mandatory subjects such as whether the backpay-cap arbitration decisions would continue to apply. The Grocery agreement went into effect, with effective dates from October 3, 2010 to October 5, 2013, and does not contain any exclusionary language as to the nutrition or Playland employees. The CCK agreement also went into effect, with effective dates from May 10, 2010 to May 4, 2013, and does not contain any exclusionary language as to the nutrition or Playland employees. Following the arbitrator’s decision, Respondent Fred Meyer and the other grocer employers, pursuant to the contracts, paid the ratification bonuses to the vast majority of Union-represented employees working in the Union’s jurisdiction and the contracts went into effect for 5,500 employees working for multiple employers; the only exceptions were the nutrition employees working at Respondent Fred Meyer’s Lacey and Tumwater stores and the Playland employees working at Fred Meyer’s University Place store in Tacoma.

Simply stated, the logical conclusion of finding that the nutrition and Playland employees remained in their respective units is to find that the general contract terms that apply to the rest of the unit employees also apply to them. By failing to draw this conclusion, the ALJ rewards Respondents for their ongoing unlawful unilateral changes and modifications. Moreover, the nutrition and Playland employees who were in the unit before negotiations began for the 2010 agreement, are treated like second class members of the unit because they are not covered by the same general contract terms as the other 5,500

unit members. As such, the ALJ erred by failing to find that Respondents violated Section 8(a)(5) by not paying the contractual ratification bonuses after arbitration to only the Lacey and Tumwater nutrition employees and the University Place Playland employees. Similarly, the ALJ also incorrectly failed to find that Respondents violated Section 8(a)(5) by not applying the general terms of the grocery and CCK collective bargaining agreements covering all other unit members to the nutrition and Playland employees.

D. The ALJ Erred By Failing to Remedy Respondents' Failure to Apply the Collective Bargaining Agreements to the Nutrition and Playland Employees

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

In *Federal-Mogul Corp.*,²³ the Board articulated a framework of bargaining obligations to apply when an unrepresented “fringe group” of employees has voted to join an existing bargaining unit through a *Globe-Armour*²⁴ self-determination election. That framework established two phases of bargaining. During the first phase of bargaining, the employer must maintain any existing collective-bargaining agreement covering the historic unit, and negotiate interim separate terms for the Globed-in employees. *Federal-Mogul*

²³ 209 NLRB 343, 344 (1974).

²⁴ *Globe Machine and Stamping Co.*, 3 NLRB 294 (1937); *Armour and Co.*, 40 NLRB 1333 (1942).

Corp., 209 NLRB at 343-44. The Board noted that an agreement during this interim stage of bargaining “in all likelihood [will] be an addendum to the existing...contract.” *Id.* at 344. The Board does not require application of the existing agreement to the Globed-in employees, since that “would, in effect, be compelling both parties to agree to specific contractual provisions in clear violation of the *H.K. Porter* doctrine.” *Id.* at 344, citing *H.K. Porter v. NLRB*, 397 U.S. 99, 102 (1970) (while the Board may require employers and employees to negotiate, it is “without power to compel a company or a union to agree to any substantive contractual provision” of a collective-bargaining agreement).

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

Although there are no subsequent Board decisions applying *Federal-Mogul* in the context of “phase two” negotiations, the Board’s statement in *Federal-Mogul* regarding the “basic oneness” of the unit suggests that general Section 8(a)(5) principles should apply.²⁵ And, under general Section 8(a)(5) principles, a union and employer are under a continuing duty to bargain, upon demand, over matters “neither discussed nor embodied in any of the terms and conditions” of a single contract covering a bargaining unit. See *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680, 683-84 (2d Cir. 1952), *enfg.* 94 NLRB 1214 (1951).

Based on the above, the appropriate remedy for Respondent Fred Meyer’s unlawful refusal to apply the grocery and CCK contracts, negotiated during “phase-two” *Federal-*

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

Here, the overwhelming majority of the contracts’ terms—including health/welfare and retirement—clearly would apply to the nutrition and Playland employees, just as they do to the other employees in the units. However, the contracts set forth different pay scales for different classifications of employees and do not state where nutrition or Playland

²⁵ See *CBS Broadcasting KYW-TV*, Case 4-CA-37264, Advice Memorandum dated May 26, 2010 (finding no violation during “phase two” *Federal Mogul* bargaining because employer did not insist to impasse on

employees would be slotted. In view of Respondent Fred Meyer's egregious and protracted refusal to bargain, the ALJ erred by failing to order Respondents to apply to the nutrition and Playland employees the terms of the collective bargaining agreements that cover all unit employees generally, while ordering additional bargaining over their "unique" issues not covered by the collective bargaining agreements.

E. The ALJ Erred By Failing to Find a Violation of §8(a)(1) of the Act Based on Respondent Fred Meyer's Posting of Notices Blaming the Union for the Delayed Payment of Ratification Bonuses

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

The ALJ incorrectly found that the notice stated the facts as is (*i.e.* that the Union refused to accept the Local 21/81 agreements and that Respondent Fred Meyer would

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

refuse to pay the lump sum bonus to the Union represented employees until the matter could be resolved through arbitration). Alternatively, the ALJ found that, even if a reading of the notice would tend to lead the reader to feel the Union was at fault for the situation, he determined that the notice was permissible propaganda under Section 8(c) because it constituted an expression of “views, argument, or opinion,” which “contains no threat of reprisal, or force, or promise of benefit.” The ALJ failed to see the notice for what it was – an opportunity for Respondent Fred Meyer to blame the Union for the employees’ delay in receiving their bonuses because it was protesting the unlawful removal of unit members from the Grocery and CCK bargaining units.

F. The ALJ Erred By Failing to Remedy Respondents’ Failure to Reimburse Nutrition and Playland Employees for any Excess Federal Income Owed on Backpay and/or to Submit the Appropriate Documentation to the Social Security Administration so that Backpay Will be Allocated to the Appropriate Calendar Quarters

The ALJ erroneously failed to order the proper remedy, including ordering Respondents to: (1) reimburse the involved nutrition and Playland employees for any excess federal income taxes they may owe from receiving a lump-sum backpay award; and/or (2) submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate calendar quarters.

1. The Board has the Authority Under the Act to Include Tax Gross Ups and Social Security Notification in its Backpay Awards

The Board has broad powers under Section 10(c) of the Act, 29 U.S.C. Sec. 160(c), to fashion remedies, including affirmative orders, that will effectuate the policies of the Act. *NLRB v. Strong Roofing & Insulating*, 393 U.S. 357, 359 (1969); *Teamsters Local 115 v NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981). Making workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. *Phelps Dodge Corp. v. NLRB*, 313 US 177, 197 (1941). In applying its

authority over backpay orders, the Board has not used rigid formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. *Id.* at 198. Moreover, the Board has periodically updated and reformed these remedies to more perfectly respond to new “devices and stratagems for circumventing the policies of the Act.” See *id.* at 194. Indeed, the Supreme Court has commanded the Board to “draw on enlightenment gained from experience” in crafting new remedies designed to undo the effects of unfair labor practices. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

2. Lump-Sum Back Payments May Cause Substantial Negative Tax Consequences for Discriminatees Under Current Tax Law

A victim of unilateral conduct who receives a lump-sum backpay award may incur a heightened tax burden as a result. This is because the Internal Revenue Service (“IRS”) considers a backpay award to be taxable income earned in the year the award is paid, regardless of when the income should have been earned and received. See *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001) (finding that for tax purposes backpay is income the year it is actually paid, even if for Social Security benefits purposes backpay is allocated to the years it should have been paid).

3. Including a Tax Component in Backpay Remedies Will Better Effectuate the Remedial Purpose of the Act by Restoring Discriminatees to the Position They Should Have Occupied

The status quo ante should be measured based on the discriminatee’s after-tax income. See *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493–94 (1980) (recognizing that “after-tax income, rather than one’s gross income before taxes . . . provides the only realistic measure” of lost income under the Federal Employer’s Liability Act). Otherwise, discriminatees might, through no fault of their own, receive only a portion of the after-tax income they would have received absent the unlawful discrimination. As one court put it,

“[i]t’s not how much you make, it is how much you *keep*.” *O’Neill v. Sears, Roebuck & Co.*, 108 F. Supp. 2d 443, 447 (2000) (including a tax component in its ADEA make-whole remedy).

The Board should adopt former Member Liebman’s dissenting position in *Unite Here Local 26*, in which she argued that the Board should order tax compensation as part of its backpay remedy. 344 NLRB 567 (2005).

4. Respondents Should Be Responsible for Reporting Back Pay to the Social Security Administration

Aside from tax consequences, lump-sum backpay awards may also adversely impact the benefits a discriminatee eventually receives from social security. As discussed above, backpay awards, for tax purposes, are considered wages the year they are paid, not the year they ought to have been paid. See *Cleveland Indians Baseball Co.*, 532 U.S. at 219. Yet, each year’s wages are important in calculating an individual’s social security benefits, and receiving several years of wages all in one year may negatively impact those benefits. As the Supreme Court observed, “[e]ligibility for these benefits and their amount depends upon the total wages which the employee received *and the periods in which wages were paid*.” *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 364 (1946) (emphasis added). The Supreme Court has determined that unlike taxes, backpay awards under the NLRA²⁶ can be allocated to past years for the purposes of social security benefit calculations. *Id.* at 370. However, before the Social Security Administration will allocate backpay to previous years, it requires that either the employer or the employee give it notice with the proper paperwork. IRS, Dep’t of the Treasury, Pub. No. 957, Reporting Back Pay and Special Wage Payments to the Social Security Administration 2 (2010).

²⁶ The Social Security Administration has expanded this ruling to also include backpay awards pursuant to other state and federal labor and employment laws. See 20 CFR § 404.1241 (2010).

The Board should order respondents to complete the necessary paperwork so that discriminatees do not lose social security benefits due to the respondent's unlawful discrimination. The respondent has access to all of the needed information, including its own corporate address, its employer identification number, the employee's social security number, the amount of backpay and the period it covers, and whether the employer has paid any other wages to the discriminatee the year the backpay is awarded (if for instance the discriminatee was reinstated). *See id.* at 2, 3 tbl.1.

IV. CONCLUSION

General Counsel respectfully submits that the evidence in the record and relevant case law establish that Respondents violated Sections 8(a)(1) and (5) of the Act as alleged in the Complaint.

DATED at Seattle, Washington, this 12th day of December, 2012.



Ann Marie Skov
Counsel for Acting General Counsel
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

APPENDIX

Proposed Order

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

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

Lacey/Tumwater Nutrition Employees

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

University Place Playland Employees

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

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

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

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

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

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

a. within 14 days of the Board's Order, pay the Lacey and Tumwater nutrition employees and the University Place Playland employees their ratification bonuses and apply the terms of their respective collective bargaining agreements that apply to the unit as a whole such as health and welfare coverage under the Sound Health and Wellness Trust, pension coverage under the Retail Clerks' Pension, and the across the board wage increases set forth in the respective agreements.

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

c. within 14 days of the Board's Order, inform employees that the Union was not to blame for the delay in receiving their ratification bonuses.

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

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

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal Labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

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

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

Lacey/Tumwater Nutrition Employees

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

University Place Playland Employees

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

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

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

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

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

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

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

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

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

(Respondents)

Dated: _____ **By:** _____
(Representative) (Title)

Dated: _____ **By:** _____
(Representative) (Title)

**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 UNION**

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

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND BRIEF IN
SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION.**

I, the undersigned employee of the National Labor Relations Board, state under oath that on December 12, 2012, I served the above-entitled document(s) via E-File, E-Mail and by post-paid regular mail upon the following persons, addressed to them at the following addresses:

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Date

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Signature