

Supervalu, Inc. and United Food and Commercial Workers International Union, Local Union 23, CLC.¹ Cases 6-CA-31960, 6-CA-31962, and 6-CA-32004

September 30, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On April 16, 2002, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed a limited exception, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue in this case is whether the Respondent, having entered into agreements containing an "additional stores" clause, violated Section 8(a)(5) of the Act by refusing the Union's request to conduct card checks at three of its stores to determine whether the Union possessed majority support at those stores.² The resolution of this issue turns on whether the "additional stores" clause concerned a mandatory or merely a permissive subject of bargaining. If mandatory, the Act was violated; if permissive, it was not. See *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185-188 (1971). For the reasons set forth below, we find that the "additional stores" clause concerned a permissive subject of bargaining. Thus, the Respondent's actions did not violate the Act, and we will order that the complaint be dismissed.

I. BACKGROUND

The Respondent is engaged in the retail sale of food and grocery products. On May 10, 2000,³ the Respondent purchased the business of Thomi Co., d/b/a Westmoreland Mall Shop 'N Save (Westmoreland store), and continued to operate the store as an ongoing concern. On

¹ We have amended the caption to reflect the disaffiliation of the Commercial Workers International Union from the AFL-CIO effective July 29, 2005.

² We note that the General Counsel did not allege that the Respondent violated Sec. 8(a)(5) by refusing to *recognize* the Union at the three additional stores. The allegation was that Respondent violated Sec. 8(a)(5) by refusing to conduct card checks at those stores and that it thereby refused to bargain collectively and in good faith with the Union.

³ Unless indicated otherwise, all events in the instant case occurred in 2000.

July 15, the Respondent purchased the business of Butler Supermarkets, Inc., d/b/a Butler Shop N' Save (Butler store), and similarly continued to operate the store as an ongoing concern. At the time of these purchases, the Commercial Workers International Union, Local Union 23 (Union) was the collective-bargaining representative of employees in separate bargaining units at the Westmoreland and Butler stores and possessed a current collective-bargaining agreement with the predecessor employer at each of the stores.

The collective-bargaining agreements covering the Westmoreland and Butler stores contained an identical article 2.1, which read, in relevant part:

The Employer recognizes the Union as the sole and exclusive bargaining representative for all employees in the retail stores presently operated by the Employer or which may be operated in the Counties of [ten in Pennsylvania and forty-six in West Virginia], or which may be operated in any areas assigned to Local 23 by the United Food & Commercial Workers International Union.

At the time that it finalized the purchases of the Butler and Westmoreland stores, the Respondent signed recognition/successor agreements (RSAs) with the Union for each store. In each RSA, the Respondent (1) recognized the Union as the sole and exclusive bargaining representative for all employees at that store, with certain exclusions;⁴ and (2) agreed to abide by all terms and conditions of the existing collective-bargaining agreement covering the bargaining unit employees at that store.

On November 9, the Union wrote to the Respondent concerning the Respondent's Noblestown store, which the Respondent had purchased on August 17, 1998, and which had been nonunion. The Union's letter first reminded the Respondent that, pursuant to the parties' RSA, the Respondent had agreed to be bound to the terms of the Westmoreland collective-bargaining agreement, including article 2.1. The letter continued:

Local 23 currently possesses signed and dated authorization cards from a majority of your employees at the Noblestown Road, Pennsylvania store in which they have indicated their desire to be represented by Local 23 for collective bargaining purposes. Local 23 is prepared to turn over these cards to a neutral third party for review and confirmation of our majority status if you question the majority status.

⁴ The specific positions excluded from the scope of the recognition clause in the Westmoreland RSA are different from those excluded under the Butler RSA.

By virtue of Article 2.1 and Local 23 having obtained majority support, Local 23 is hereby demanding that you recognize it as the collective bargaining representative of your employees at the Noblestown [store].

The Union sent virtually identical letters to the Respondent on November 13 and March 16, 2001, regarding two other previously nonunion stores: its Lawrenceville store and its North Hills store. The only substantive difference between these letters and the prior letter is that they referred to the Butler, rather than the Westmoreland, collective-bargaining agreement.⁵

Asserting that article 2.1 did not require it to conduct a card check or to otherwise recognize the Union, the Respondent denied the Union's requests for card checks at these three locations by letters of November 13 and 17, and March 26, 2001.

II. JUDGE'S DECISION

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing the Union's requests for card checks at the Noblestown, Lawrenceville, and North Hills stores. In finding the violation, the judge first concluded that, by entering into the RSAs for the Westmoreland and Butler stores, the Respondent had agreed to abide by all the terms of the existing Westmoreland and Butler collective-bargaining agreements, including article 2.1. The judge next found that article 2.1 of those collective-bargaining agreements constituted an "after acquired" clause, consistent with the Board's holding in *Kroger Co.*, 219 NLRB 388 (1975) (*Kroger*) and its progeny.⁶ Accordingly, the judge found that, under *Kroger*, the Respondent was contractually obligated to recognize and bargain with the Union in any of Respondent's stores in the area designated under article 2.1, so long as the Union obtained authorization cards from a majority of Respondent's employees in an appropriate unit at the additional store. The judge finally concluded that, in light of that contractual obligation, the Respondent violated Section 8(a)(5) and (1) by refusing to conduct a card check at the Noblestown, Lawrenceville, and North Hills stores for the purpose of determining whether, in fact, the Union had obtained authorization cards from a majority of employees in an appropriate unit at those stores.

⁵ It is undisputed that the three additional stores were located within the geographic area described in article 2.1.

⁶ As explained in *Alpha Beta Co.*, 294 NLRB 228, 229 (1989) (fn. omitted):

Once an employer has waived its right to insist on a Board election by entering into a contract containing an after-acquired stores clause provision, it is obligated to recognize the union if the union presented it with concrete evidence of support by a majority of the employees in the group to be added to the existing unit.

III. DISCUSSION

At issue in this case is whether the Respondent violated Section 8(a)(5) and (1) by, in effect, repudiating article 2.1 of the parties' collective-bargaining agreements at the Westmoreland and Butler stores. As stated above, the resolution of this issue turns on whether article 2.1 of these agreements, which required the Respondent to recognize the Union as the exclusive bargaining representative of employees who were not employed at either the Westmoreland or the Butler store, constituted a mandatory or a permissive subject of bargaining.⁷

In *Pittsburgh Plate Glass*, the Supreme Court considered whether an employer's decision to remove retirees from its insurance plan constituted a mandatory or permissive subject of bargaining. *Pittsburgh Plate Glass*, supra, 404 U.S. at 157. The Court first held that mandatory subjects of bargaining under the Act are generally limited to "issues that settle an aspect of the relationship between the employer and employees" within the bargaining unit, and it recognized that, generally, matters involving individuals who are not part of the bargaining unit fall outside this category and thus constitute permissive rather than mandatory subjects of bargaining. *Id.* at 178. The Court further recognized, however, that, in some circumstances, a third-party concern would constitute a mandatory subject of bargaining, provided that the third-party concern "vitaly affects" the terms and conditions of employment of the bargaining-unit employees. *Id.* at 178-179. In adopting the "vitaly affects" test, the Court relied, in part, on its decision in *Teamsters Union v. Oliver*, 358 U.S. 283 (1959), in which it had found the minimum rental term at issue there to be a mandatory subject of bargaining because that term "was integral to the establishment of a stable wage structure for clearly covered employee-drivers" and thus constituted a "direct frontal attack" upon an issue that vitaly concerned the employee-drivers in the bargaining unit.⁸ *Id.* at 178 & fn.

⁷ We note that, although the Respondent, in its answer, asserted as an affirmative defense that art. 2.1 did not constitute a mandatory subject of bargaining, attempted to adduce evidence relevant to the issue at the hearing, and argued the point in its posthearing brief, the judge failed to make any explicit findings on this issue.

⁸ In *Oliver*, the issue was whether the State court had erred by enjoining as price fixing in violation of State law the application of the minimum rental provision established in the collective-bargaining agreement. The minimum rental provision established a minimum rental for vehicles when owner-operators drove their own vehicles for the employer. The provision prohibited the employer from paying the owner-operators a rental fee less than the cost of operating the vehicle so that the owner-operator would not have to cover that loss out of the wages he was paid under the contract. In finding that the state court was precluded from applying state antitrust law to prohibit the parties from carrying out the minimum rental provision, the *Oliver* Court explained:

18 (internal quotations omitted). Applying the “vitality affects” test to the issue presented, the Court found that “the benefits that active workers may reap by including retired employees under the same health insurance contract are speculative and insubstantial at best,” and therefore concluded that the employer’s elimination of retirees from its insurance plan did not constitute a mandatory subject of bargaining. *Id.* at 180.

Although it may well be a breach of contract actionable under Section 301 of the Labor Management Relations Act, it is not a violation of Section 8(a)(5) to refuse to comply with a provision in a collective-bargaining agreement that concerns a permissive subject of bargaining. *Pittsburgh Plate Glass*, supra at 185–188. Thus, as part of his burden to prove an 8(a)(5) violation here, the General Counsel had the burden to show, by a preponderance of evidence, that the Respondent’s agreement under article 2.1 to recognize employees at other stores “vitality affects” the terms and conditions of employment of the bargaining-unit employees at the Westmoreland and Butler stores and was therefore a mandatory subject. See *Pall Biomedical Products Corp.*, 331 NLRB 1674, 1676 (2000), enf. denied 275 F.3d 116 (D.C. Cir. 2002).⁹

The regulations embody not the “remote and indirect approach to the subject of wages” perceived by the Court of Common Pleas but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. The inadequacy of a rental which means that the owner makes up his excess costs from his driver’s wages not only clearly bears a close relation to labor’s efforts to improve working conditions but is in fact of vital concern to the carrier’s employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service.

Id. at 294.

⁹ In denying enforcement of the Board’s order in *Pall*, the D.C. Circuit applied a “two-pronged” test for determining whether a contract term constitutes a mandatory subject of bargaining:

An issue arising from outside the bargaining unit may be a mandatory subject of bargaining if it “vitality affects” the terms and conditions of employment within the bargaining unit [*Pittsburgh Plate Glass*, 404 U.S. at 179]; lest the obligation to bargain be extended beyond its statutory limit, however, a proposal dealing with such a vital issue is a mandatory subject of bargaining only if it is a “direct frontal attack” upon the perceived problem. *Local 24, Int’l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 294 . . . (1959).

Pall Corp. v. NLRB, 275 F.3d at 120.

In denying enforcement, the court agreed with the Board that the concern at issue, the possible transfer of work out of the bargaining unit, would “vitality affect” the terms and conditions of the bargaining unit employees, but found that the “modest reach” of the agreement at issue in *Pall* did not constitute a “direct frontal attack” upon that problem. *Id.* at 121 (internal quotations omitted). In the present case, for the reasons set out below, we find that the concern at issue here did not “vitality affect” the bargaining unit employees. We therefore find it unnecessary to pass on whether the term at issue here, art. 2.1, constituted a “direct frontal attack” on the perceived problem or, further, on whether the D.C. Circuit’s two-pronged test is the appropriate test to

We find that the General Counsel has failed to meet this burden because he has failed to establish either (1) that the three additional stores at issue would be *included* in an existing bargaining unit so that a *Kroger* analysis would apply, or (2) that article 2.1 addresses a concern that “vitality affects” the unit employees.

As to the *Kroger* analysis, where, through an “additional stores” or “after-acquired stores” clause in a collective-bargaining agreement, an employer agrees to recognize the union as the representative of employees in the additional stores, such a clause has been held, at least implicitly, to constitute a mandatory subject of bargaining where the employees in the additional store would become part of an existing contractual unit. Thus, in *Kroger*, supra, 219 NLRB at 388, the respondent had separate bargaining agreements with two unions. In each contract, the recognition clause indicated that the employer would recognize the union as the bargaining representative of employees at all stores operated by the respondent in the State of Texas, and the parties’ years-long practice had been to treat all newly represented employees as accretions to the existing contractual bargaining units. The Board found that, although the principles of accretion did not resolve the issue in the case because the stores had a sufficient separate existence to constitute separate appropriate units, the recognition clauses in the two contracts were “additional stores” clauses and thus constituted “contractual commitments by the Employer to forgo its right to resort to the use of the Board’s election process in determining the Union’s representation status in these new stores.” *Id.* at 389. The Board in *Kroger* did not discuss the mandatory-subject issue, but, by finding that the employer violated Section 8(a)(5) by refusing to recognize the union as the representative of employees in additional stores upon the union’s showing of majority support, it implicitly held that “additional stores” clauses, at least under the circumstances of that case, constitute mandatory subjects of bargaining. See also *Raley’s*, 336 NLRB 374 (2001) (implicitly finding additional stores clause at issue, which required employer to recognize all employees working within a certain geographical area as “an appropriate unit,” to be a mandatory subject of bargaining under *Kroger*).¹⁰

apply. We recognize, however, that the applicable test has two aspects: the matter at issue (e.g., work transfer) and the contract term or proposal purportedly addressing that matter (e.g., the recognition agreement in *Pall*). The Supreme Court in *Pittsburgh Plate Glass* was cognizant of the latter aspect, holding that, for a contract term or proposal to constitute a mandatory subject of bargaining, it must be shown that the effect that the term has on a concern that “vitality affects” unit employees is neither “speculative” nor “insubstantial.”

¹⁰ Member Schaumber did not participate in either *Kroger* or *Raley’s* and does not pass on whether those cases were correctly decided.

This case is factually distinguishable from *Kroger* and *Raley's*. In those cases, the employees in additional stores were to be included in the *same* bargaining unit as the employees in the contractual unit. Thus, the issue of transfer of work out of the bargaining unit, an issue that would “vitaly affect” unit employees, was directly addressed in those cases by including the additional stores in the bargaining unit. In the instant case, however, it has not been established that employees at the three additional stores would be included in either the Westmoreland or Butler bargaining unit. Article 2.1 is silent as to the scope of the bargaining unit contemplated by the parties. Although it states that “[t]he Employer recognizes the Union as the sole and exclusive bargaining representative for all employees in the retail stores presently operated by the Employer or which may be operated in” 56 named counties, it does not explain whether those employees will be added to an existing contractual unit or will constitute separate, single-store units.

Furthermore, neither the Butler nor Westmoreland contract, read in its entirety, creates a clear understanding as to what unit or units any newly-represented employees would be placed into. For instance, the Westmoreland contract provides that each steward under the contract “shall be an employee in the particular unit.” This language suggests single-store units, as it would be rendered meaningless if all represented employees within the Union’s geographical jurisdiction constituted a single unit. Other language in the Butler and Westmoreland contracts refers to “stores” in the plural but is ambiguous as to unit scope. Thus, article 3.1 in each contract refers to “the Employer’s retail establishments covered by this Agreement,” and article 4 sets forth management rights pertaining to “rules and regulations covering the operations of the stores covered by this Agreement.” Such language leaves uncertain whether employees at the “stores” or “retail establishments” referred to would be included in an existing bargaining unit so as to constitute a single, multistore unit. Thus, we find that the General Counsel has failed to show that *Kroger* governs the mandatory-subject issue because the General Counsel has failed to establish that the employees at the additional stores would be included in an existing unit.

As to the “vitaly affects” analysis, we find that the General Counsel has failed to meet his burden of establishing that article 2.1 vitaly affects unit employees’ terms and conditions of employment under the rationale of *Pall Biomedical Products*, supra. In *Pall*, the Board considered whether an employer violated Section 8(a)(5) and (1) by unilaterally revoking a letter of agreement providing that the employer would extend recognition to the union at an additional facility (its Port Washington,

New York facility) in the event that one or more employees performing unit work were employed there. The letter of agreement at issue was signed by the parties in 1990, at which time the “unit employees were so concerned about the possibility that bargaining unit work would be transferred to the Port Washington facility that they engaged in a strike,” which did not end until the employer executed the letter of agreement. *Id.* at 1676. Further, in 1994, the employer “did, in fact, transfer equipment [from the bargaining unit employees’ facility] to Port Washington and [the employer] began hiring new employees at Port Washington in positions with titles and duties similar to those of unit employees.” *Id.* Based on these facts, the Board found that the General Counsel met his burden of showing, by a preponderance of evidence, that the parties’ letter of agreement vitaly affected the terms and conditions of employment of the bargaining unit employees.

In the instant case, however, the General Counsel did not introduce any evidence to support a finding that the “additional stores” clause at issue vitaly affects the terms and conditions of employment of bargaining unit employees under the work-transfer rationale of *Pall*.¹¹ In contrast to that case, where unit employees went on strike as a result of their concerns that bargaining unit work might be transferred to the Port Washington facility, the General Counsel has not provided any evidence that the unit employees at Butler and Westmoreland were, in fact, concerned about the transfer of work from those stores to additional stores. Nor has the General Counsel presented any evidence suggesting that, in fact, any such work-transfer possibility existed. Indeed, the only party to attempt to introduce evidence on the issue was the Respondent, which sought to elicit testimony from expert witnesses that transfers of work, or price-driven shifting of customers, between grocery stores located 30 minutes to an hour apart¹² does not generally occur in the industry. The judge, however, granted the General Counsel’s objection to the line of questioning on grounds of relevance, thus preventing the Respondent from entering the testimony into the record.

¹¹ It should be noted that, despite the fact that the Respondent has consistently asserted that art. 2.1 was a permissive, rather than mandatory, subject of bargaining, the General Counsel failed to address this issue in either its posthearing brief or its answering brief to Respondent’s exceptions.

¹² The record establishes that it would take approximately 1 hour to drive from the Westmoreland store to the Noblestown store, approximately 45 minutes to drive from the Butler store to the North Hills store, and approximately 30 minutes to drive from the Butler store to the Lawrenceville store.

Our dissenting colleague would find the “vitality affects” test met. He relies on two cases: a *Beck* case¹³ and a case involving employer property rights vis-à-vis employee Section 7 rights.¹⁴ In these cases, the Board found *some* relationship between the interests of unit employees and the organization of other employees within the same industry. However, it did so applying different and far less exacting standards of analysis than the “vitality affects” standard applicable to the bargaining issue in this case under *Pittsburgh Plate Glass*. Thus, neither case supports a finding that the General Counsel has met his burden here.

The issue in *Hillhaven*, supra, involved balancing the Section 7 rights of “offsite” employees—i.e., employees of an employer, employed at one facility and seeking to organize at another facility of the same employer—against the employer’s private property rights. In short, *Hillhaven* was an access case. Rejecting the employer’s argument that offsite employees are generally akin to nonemployee union organizers excludable (with narrow exceptions) under *Lechmere*,¹⁵ the Board relied on the broad scope of Section 7 rights under *Eastex*¹⁶ and the Court’s “admonition that the ‘[a]ccommodation between employees’ [Section 7] rights and employers’ property rights . . . ‘must be obtained with as little destruction of one as is consistent with the maintenance of the other.’”¹⁷ By contrast, as discussed above, the Supreme Court takes a much narrower view of the mandatory bargaining status of extra-unit issues, holding them presumptively nonbargainable subject to an exception for those that meet the exacting “vitality affects” test. Thus, *Hillhaven* is inapposite.

So is *Meijer*, for similar reasons. In *Meijer*, the issue was whether the union breached its duty of fair representation by charging objecting nonmembers for expenses related to organizing employees of other employers within the same competitive market. To decide that issue, the Board applied the test from *California Saw*,¹⁸ which requires that, to be chargeable, extra-unit expenses

must be both “germane” to the union’s representational duties and “incurred ‘for services that may ultimately inure to the benefit’” of the objector’s unit.¹⁹ Clearly, a union seeking to meet the *California Saw* standard faces a significantly lesser burden than a party seeking to satisfy the “vitality affects” standard under *Pittsburgh Plate Glass*. Certainly, “germane” is a less demanding test than “vitality affects.” If this were not so, a party could meet the *Pittsburgh Plate Glass* test simply by establishing that the extra-unit issue is *relevant* to unit employees’ terms and conditions of employment. That is not the case. Further, the modest *California Saw* requirement that it be shown that extra-unit expenditures “*may ultimately inure*” to the objector’s unit’s benefit encompasses a range of potential, temporally remote benefits that the Supreme Court explicitly rejected as insufficient to satisfy the “vitality affects” standard. See *Pittsburgh Plate Glass*, 404 U.S. at 182 (finding that, while unit employees could possibly benefit in the future as a result of advancing current pensioners’ interests, such benefits provided “too speculative a foundation” on which to base an obligation to bargain).

IV. CONCLUSION

As discussed above, the Supreme Court has held that, for a contract provision concerning individuals outside the bargaining unit to constitute a mandatory subject of bargaining, it must be shown that the concern at issue vitally affects the terms and conditions of employment of unit employees. This showing cannot be based on pure speculation but, rather, must be based on record evidence. Based on the record in this case, we find that the General Counsel has not met his burden of showing that the additional stores clauses contained in the Butler and Westmoreland agreements addressed a concern that vitally affected the terms and conditions of the bargaining unit employees at those stores. Indeed, the General Counsel has not established that article 2.1’s requirement that the Respondent recognize the Union as the bargaining representative of employees at additional stores has any substantial relationship to, let alone “vitality affects,” the concerns of bargaining unit employees at the Butler and Westmoreland stores. Thus, we find that the unproven effect of the “additional stores” clause on the unit employees’ terms and conditions of employment is simply “too speculative a foundation on which to base an obligation to bargain,” *Pittsburgh Plate Glass*, 404 U.S.

¹³ *Commercial Workers Local 951 (Meijer, Inc.)*, 329 NLRB 730 (1999), enfd. 307 F.3d 760 (9th Cir. 2002) (en banc), cert. denied 537 U.S. 1024 (2002).

¹⁴ *Hillhaven Highland House*, 336 NLRB 646 (2001), enfd. 344 F.3d 523 (6th Cir. 2003).

¹⁵ *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

¹⁶ *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

¹⁷ *Hillhaven*, supra at 650 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (quoting *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956))). Member Schaumber and Member Kirsanow did not participate in *Hillhaven* and express no views as to the correctness of that decision.

¹⁸ *California Saw & Knife Works*, 320 NLRB 224 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Machinists v. NLRB*, 525 U.S. 813 (1998).

¹⁹ *Meijer*, 329 NLRB at 733 (citing *California Saw*, 320 NLRB at 239 (quoting *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 524 (1991))). Member Kirsanow expresses no view as to whether *Meijer* was rightly decided. For the reasons set out in his partial dissent in *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77, 84–92 (2007), Member Schaumber would overrule *Meijer*.

at 182, and that therefore the General Counsel has failed to establish that the parties' "additional stores" clause constituted a mandatory subject of bargaining. Because the clause at issue was a permissive subject of bargaining, we find that the Respondent did not violate Section 8(a)(5) and (1) by refusing to conduct card checks at the request of the Union at its Noblestown, Lawrenceville, and North Hills stores. Accordingly, we will dismiss the General Counsel's complaint.

ORDER

The complaint is dismissed.

MEMBER WALSH, dissenting.

The parties bargained and agreed upon standard "additional stores" clauses, requiring the Respondent to honor the results of card checks at its nonunion stores.¹ But today's majority, ignoring precedent and taking a cramped view of what "vitally affects"² unit employees' terms and conditions of employment, refuses to hold the Respondent to its bargain. In my view, it is beyond question that organized employees are vitally affected by the degree of unionization at their employer's other facilities. Accordingly, the additional stores clause embodied in article 2.1 here is a mandatory subject of bargaining. As a result, and as the administrative law judge properly found, it follows that the Respondent violated Section 8(a)(5) and (1) by refusing the Union's request for card checks.

I.

The facts, set forth more fully in the judge's decision, are summarized briefly below.

The Respondent operates a number of retail grocery stores in Pennsylvania and West Virginia. The Union represents employees at some of those stores, including the Butler and Westmoreland stores. The collective-bargaining agreements covering the Butler and Westmoreland stores each contain an identical article 2.1, which states in relevant part:

The Employer recognizes the Union as the sole and exclusive bargaining representative for all employees in the retail stores presently operated by the Employer or which may be operated in the Counties of [10 in Pennsylvania and 46 in West Virginia], or which may be operated in any areas assigned to [the Union] by the United Food & Commercial Workers International Union.

¹ See, e.g., *Houston Division of the Kroger Co.*, 219 NLRB 388 (1975).

² See *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176 (1971).

On November 9, 2000, the Union notified the Respondent that it possessed signed authorization cards from a majority of employees at the Respondent's Noblestown store, where the employees had no collective-bargaining representation. Pursuant to article 2.1 of the Westmoreland agreement, the Union requested a card check. Similarly, on November 13, 2000, and March 16, 2001, the Union requested a card check at the Respondent's Lawrenceville and North Hills stores, citing article 2.1 of the Butler agreement. The Respondent refused all three requests.

The judge found that the refusals violated Section 8(a)(5) and (1). He reasoned that article 2.1 constituted an "after-acquired clause" (also known as an additional stores clause) comparable to that in *Kroger*, supra, and that the Board has held that an employer violates Section 8(a)(5) and (1) by refusing to honor such a clause.

II.

The majority reverses the judge and dismisses the complaint, finding that article 2.1 was not a mandatory subject of bargaining and that the Respondent therefore did not violate Section 8(a)(5) and (1) by repudiating it.

The majority states that the General Counsel, in order to prove that article 2.1 is a mandatory subject, must prove that it "vitally affects" the terms and conditions of employment of the Butler and Westmoreland employees. *Pittsburgh Plate Glass Co.*, supra, 404 U.S. at 185-188; *Pall Biomedical Products Corp.*, 331 NLRB 1674, 1676 (2000), enf. denied 275 F.3d 116 (D.C. Cir. 2002). The majority concludes that this standard was not met. I disagree.

The majority concedes that, in other cases, the Board has either expressly or implicitly found certain contract clauses providing for voluntary recognition at other facilities to be mandatory subjects of bargaining. See *Kroger*, supra (holding that employer violated 8(a)(5) by failing to honor additional stores clause, thereby implicitly holding that clause was a mandatory subject of bargaining); *Raley's*, 336 NLRB 374 (2001) (following *Kroger*, but remanding for evidence of majority status); *Pall*, supra (expressly finding that the "vitally affects" test was met). In finding that the "vitally affects" standard was not met here, the majority purports to distinguish those decisions. The majority reasons that, in contrast to *Kroger* and *Raley's*, the evidence here does not make clear whether the additional stores' employees would be added to an existing unit. The majority further finds that, in contrast to *Pall*, the evidence here does not show that employees at the Butler and Westmoreland stores were concerned that unit work would be transferred to the Respondent's nonunion stores.

The facts the majority finds missing are not determinative. The cited cases do not represent the *only* circumstances in which an agreement to recognize the union in other locations upon a majority showing will vitally affect unit employees' terms and conditions of employment. The Board in *Pall* expressly rejected the notion that employees must be added to an existing unit in order for an additional stores clause to be a mandatory subject of bargaining. See 331 NLRB at 1676. It is true, as a factual matter, that employees in *Pall* were concerned about the transfer of unit work away from their facility, and that the Board noted their concern in its analysis. *Id.* The Board, however, did not hold that satisfaction of the "vitally affects" test was dependent upon specific evidence of such a concern.³

As explained below, in my view, the Respondent's agreement to recognize the Union at additional stores upon a showing of majority status vitally affects the Butler and Westmoreland employees, whether or not the additional stores' employees would be added to the existing unit, and whether or not the unit employees had a subjective concern that the Respondent would transfer work to its nonunion stores.

III.

"Congress envisioned broad economic benefits to society flowing from the organization of employees for the purposes [of] collective bargaining." *Commercial Workers Local 951 (Meijer, Inc.)*, 329 NLRB 730, 734 (1999), *enfd. en banc* 307 F.3d 760 (9th Cir. 2002), *cert. denied* 537 U.S. 1024 (2002). Those benefits extend beyond the specific unit being organized. As the Board made clear, in a case involving employees engaged in organizing activity at their employer's other facilities, "employees may reasonably believe . . . that organizing employees at a different facility, even in a different potential bargain-

³ The majority notes that in *Pall*, *supra*, the D.C. Circuit applied a "two-pronged" test. The court found that in order to constitute a mandatory subject of bargaining, an issue arising from outside the bargaining unit must both "vitally affect" the terms and conditions of employment of bargaining unit employees *and* constitute a "direct frontal attack" upon the perceived problem." 275 F.3d at 120 (quoting *Teamsters Local 24 v. Oliver*, 358 U.S. 283, 294 (1959)). The majority finds it unnecessary to pass on whether "direct frontal attack" is an appropriate part of the test. I find that it is not. The Supreme Court in *Pittsburgh Plate Glass*, *supra*, plainly stated that the test is whether the "third-party concern . . . vitally affects the 'terms and conditions' of [unit employees'] employment." 404 U.S. at 179. Although the Court referred to *Oliver*, *supra*, a preemption case in which a contract term *was* found to be a direct frontal attack on a perceived problem concerning unit employees, *Oliver* did not hold that a contract term *must* be a direct frontal attack in order to constitute a mandatory subject of bargaining. Under *Pittsburgh Plate Glass*, the "vitally affects" test is the sole test, and one way—but not the only way—of satisfying that test is to show a "direct frontal attack."

ing unit, could bolster their efforts to improve their own working conditions. *It seems correspondingly clear that the unorganized status of fellow employees at one facility can undermine the gains or potential gains won by the union elsewhere.*" *Hillhaven Highland House*, 336 NLRB 646, 649 (2001), *enfd.* 344 F.3d 523 (6th Cir. 2003) (emphasis added). Stated otherwise, the work a union does to extend its representation to an employer's unorganized locations is inextricably intertwined with its representation of the employer's bargaining unit employees.

Similarly, the Board has recognized that unionized employees' wages are affected by the degree of unionization among their employer's competitors. See *Meijer*, *supra* at 734. The Board in *Meijer* held generally that "represented employees . . . benefit, through the results of collective bargaining, from that union's organization of other employees . . ." *Id.* at 736; see also 1 Leg. Hist. 680 (LMRA 1947) ("Employees must make their combination extend beyond one shop"; otherwise, "[t]he organized workers would . . . be required to conform to the standards of the lowest paid, unorganized workers.") (Rep. Price, opposing a proposed amendment that would have prohibited industry wide bargaining).⁵

It is even more clear that the unionization of additional stores operated by the *same* employer vitally affects the existing unit employees. See *Hillhaven*, *supra* at 649 (employees' "shared interests . . . are not limited to circumstances in which employees have the same employer

⁴ The issue in *Meijer* was whether the union violated its duty of fair representation by charging nonmembers for fees related to organizing activities. The Board held that, at least with respect to organizing within the same competitive market, such fees were chargeable to nonmembers. 329 NLRB at 734. The Board found "a direct, positive relationship between the wage levels of union-represented employees and the level of organization of employees of employers in the same competitive market . . ." The Ninth Circuit found the Board's determination "completely in accord with the economic realities of collective bargaining, as well as with the language and purposes of the NLRA." 307 F.3d at 769.

In a later decision also involving the chargeability of organizing expenses, Chairman Battista distinguished the decision in *Meijer* on the ground that it was based on evidence specific to the employer's industry (retail grocery stores). *Schreiber Foods*, 349 NLRB 77, 81 (2007). Member Schaumber stated that he would overrule *Meijer*. Member Liebman, dissenting in part, found that the Board's determinations in *Meijer* were not unique to that case, but applicable to union organizing efforts in general. See *id.* at 95–96. I did not participate in *Schreiber*, but I agree with Member Liebman's dissent. I also note that the industry involved in *Meijer*—as here—was the retail grocery business.

⁵ The majority goes to great lengths to point out that *Hillhaven* and *Meijer* did not involve application of the "vitally affects" test. That is true, of course, but what is important about those cases are their animating principles—that the unionization of an employer or competitor's other stores affects unit employees, and that an employee has "a personal stake in organizing his counterparts at a different employer facility." *Hillhaven*, *supra* at 649.

. . . but they are certainly enhanced in that case”). For example, just as a unionized employer might resist raising wages to rates higher than its nonunion competitors, an employer operating both union and nonunion stores might take the position at the bargaining table that it need not pay a particular wage or provide a particular benefit proposed by the union, because it is able to retain workers at its nonunion stores without doing so there. Thus, the availability of less costly labor at the nonunion stores would become a bargaining chip. Moreover, an employer could, if it chose, steer customers to one store or the other through strategic investment and customer incentives. Cf. *Real Foods Co.*, 350 NLRB 309, 312–313 (2007) (decision to close grocery chain’s most profitable store in response to union activity at that store). Whether the Respondent in the present case in fact planned to do this, or whether employees were subjectively concerned about it, is not the point. The possibility itself affects the way parties deal with one another at the bargaining table.

I therefore cannot agree with the majority’s narrow interpretation of the “vitality affects” standard. Article 2.1 stated that the Respondent would recognize the Union at all of the Respondent’s stores within a defined geographic area. That provision was a mandatory subject of bargaining, and the judge correctly found that the Respondent violated Section 8(a)(5) and (1) by repudiating it. Accordingly, I dissent from the majority’s dismissal of the complaint.

Julie R. Stern, Esq., for the General Counsel.

Christopher J. Murphy and Robert C. Nagle, Esqs. (Harvey, Pennington, Cabot, Griffith & Renneisen, Ltd.), for the Respondent.

Stephen H. Jordan, Esq. (Rothman, Gordon, Foreman & Groudine), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on February 11, 2002, in Pittsburgh, Pennsylvania. The consolidated complaint, which issued on November 15, 2001, was based upon unfair labor practice charges that were filed by Food & Commercial Workers International Union, Local Union 23, AFL–CIO, CLC, called the Union, on March 15, 29,¹ and April 5, 2001. The complaint alleges that Supervalu, Inc. (Respondent), violated Section 8(a)(1)(5) of the Act by refusing to conduct a card check at certain of its stores, as requested by the Union, and thereby refused to bargain collectively and in good faith with the Union, the collective-bargaining representative of employees at some of its stores. While admitting some of the underlying allegations in the com-

¹ This unfair labor practice charge, Case 6–CA–31988, involving the Respondent’s store in North Charleroi, which has since closed, was settled prior to the hearing herein and was severed from the instant matter.

plaint, the Respondent denies having committed any violation of the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The Respondent has been engaged in the retail sale of food and grocery products. At times it builds new supermarkets, while at other times it purchases and operates existing supermarkets. The facilities involved are in the State of Pennsylvania. The complaint alleges, and the Respondent admits, that on about May 10, 2000,² the Respondent purchased the business of Thomi Co., d/b/a Westmoreland Mall Shop ‘N Save, called Westmoreland, and continued to operate the business in basically unchanged form and has employed as a majority of its employees individuals who were previously employed by Westmoreland. Respondent, however, denies the following allegation that it is a successor to Westmoreland. The complaint alleges that from about April 18, 1999, to on about May 10, the Union was the exclusive collective-bargaining representative of the Westmoreland unit, and was recognized as such by Westmoreland, and this recognition was embodied in a contract effective from April 18, 1999, to April 20, 2002. The Respondent denies this allegation, but admits that, based upon the above facts, the Union has been the exclusive collective-bargaining representative of the Westmoreland unit, and this recognition has been embodied in a Recognition/Successor agreement, called the RSA, for Westmoreland effective May 14, 2000.

The complaint further alleges, and the Respondent admits, that on about July 15, Respondent purchased the business of Butler Supermarkets, Inc., d/b/a Butler Shop ‘N Save, called Butler, and since then has continued to operate the business of Butler in basically unchanged form, and has employed as a majority of its employees individuals who were previously employed by Butler. Respondent, however, denies that it is a successor to Butler. The complaint further alleges that from June 26, 1999 until about July 15, the Union had been the exclusive collective-bargaining representative of the Butler unit and had been recognized as such by Butler, and this recognition was embodied in a contract effective from June 26, 1999, to June 29, 2002. The Respondent denies this allegation, but admits that, based upon the above facts, the Union has been the exclusive collective-bargaining representative of the Butler unit, and this recognition has been embodied in an RSA for Butler effective, July 16, 2000.

The RSA for Westmoreland states:

² Unless indicated otherwise, all dates referred to relate to the year 2000.

THIS AGREEMENT is made by and between Supervalu Holdings, Inc. d/b/a Westmoreland Mall Shop 'N Save, hereinafter referred to as the "Employer", and the United Food and Commercial Workers International Union, AFL-CIO, hereinafter referred to as the "Union", to be effective upon the purchase closing date.

WHEREAS, there is a collective bargaining agreement between the Union and "Thomi Co. d/b/a Westmoreland Mall Shop 'N Save" effective April 18, 1999 through April 20, 2002.

WHEREAS, The Employer (Supervalu) has acquired the assets of Thomi Co. d/b/a Westmoreland Mall Shop 'N Save, therefore it is agreed that:

1. Effective May 14, 2000, the Employer recognizes the Union as the sole and exclusive bargaining representative for all employees at Thomi Co. d/b/a Westmoreland Mall Shop 'N Save.

This provision shall exclude the owners, one store manager, one grocery manager, one front-end manager, one deli manager, one confidential employee, and all guards and security personnel as defined in the National Labor Relations Act.

2. The Employer and Union agree to abide by all terms and conditions of the existing collective bargaining agreement between Thomi Co. d/b/a Westmoreland Mall Shop 'N Save and United Food and Commercial Workers International Union, Local 23 through its term, April 20, 2002.

3. The Employer agrees that all employees are to be credited with all continuous service and seniority as acquired by employment with Thomi Co. d/b/a Westmoreland Mall Shop 'N Save at Supervalu Holdings, Inc., d/b/a Westmoreland Mall Shop 'N Save.

This RSA was signed by the Respondent on May 10, and by the Union on May 16.

The RSA for Butler states:

This Agreement is made by and between Supervalu Holdings, Inc. d/b/a Butler Shop 'N Save, Pullman Square, Butler, Pa 16001, hereinafter referred to as the "Employer" and the United Food and Commercial Workers International Union, Local 23, AFL-CIO, hereinafter referred to as the "Union" to be effective upon the purchase closing date.

Whereas, there is a collective bargaining agreement between the Union and Butler Supermarkets, Inc. d/b/a Butler Shop 'N Save effective June 26, 1999 through June 29, 2002, and;

Whereas, the Employer (Supervalu) has acquired the assets of Butler Supermarkets, Inc. d/b/a Butler Shop 'N Save, therefore it is agreed that:

1. Effective 7/16/00, the Employer recognizes the Union as the sole and exclusive bargaining representative for all employees at Butler Supermarkets, Inc. d/b/a Butler Shop 'N Save.

This provision shall exclude the owners, the owners' immediate family, one store manager, five assistant managers, one grocery manager, one night crew manager, one

meat manager, one produce manager, one floral manager, one seafood manager, one food court manager, one front end manager, one deli manager, one bakery manager, all pharmacists and pharmacist technicians, confidential employees, and all supervisory personnel as defined in the National Labor Relations Act.

2. The Employer and the Union agree to abide by all terms and conditions of the existing collective bargaining agreement between Butler Supermarkets, Inc. d/b/a Butler Shop 'N Save and United Food and Commercial Workers International Union, Local 23, through its term, June 29, 2002.

3. The Employer agrees that all employees are to be credited with all continuous service and seniority as acquired by employment with Butler Supermarkets, Inc. d/b/a Butler Shop 'N Save, Pullman Square, Butler, Pa 16001.

This RSA was effective July 16. For the purposes here, the first paragraph of article 2.1 of the collective-bargaining agreements are identical in the Westmoreland and Butler agreements. It states:

The Employer recognizes the Union as the sole and exclusive bargaining representative for all employees in the retail stores presently operated by the Employer or which may be operated in the Counties of [ten in Pennsylvania and forty six in West Virginia],³ or which may be operated in any areas assigned to Local 23 by the United Food & Commercial Workers International Union.

Subparagraph (a) of article 2.1 of the Westmoreland agreement, the exclusions from the bargaining unit, states:

This provision shall exclude the owners, one store manager, one grocery manager, one front-end manager, one bakery manager, one produce manager, one meat manager, one deli manager, one confidential employee, and all guards and supervisory personnel as defined in the National Labor Relations Act.

Subparagraph (a) of article 2.1 of the Butler agreement, also the exclusions from the bargaining unit, states:

This provision shall exclude the owners, the owners' immediate family, one store manager, five assistant managers, one grocery manager, one night crew manager, one meat manager, one produce manager, one floral manager, one seafood manager, one food court manager, one front end manager, one deli manager, one bakery manager, all pharmacists and pharmacist technicians, confidential employees, and all supervisory personnel as defined in the National Labor Relations Act. Further, department heads in the store not otherwise excluded from the union shall be selected by the employer in its sole discretion and without regard to the seniority provisions of this Agreement.

By letter dated March 21, Ray Charley, the owner of Westmoreland, notified the Union that he entered into an agreement

³ There is no dispute that the stores in question are located in these counties.

to sell Westmoreland to the Respondent, which, according to him, agreed to retain the bargaining unit work force and agreed to be bound by the existing contract with the Union. By letter dated March 29, James Slivosky, the Union's co-director of collective bargaining, wrote to Daniel Cooper, counsel for Respondent, saying that they were notified that Respondent was acquiring Westmoreland. The letter enclosed the RSA and asked him to return two signed copies. Cooper wrote to Slivosky by letter dated May 10, stating that he changed the RSA to specify the date that the Respondent was assuming operation of Westmoreland and enclosed signed copies of the RSA and asked that one signed copy be returned to him, which was done by Slivosky by letter dated May 16. There was no request by the Union to alter any of the terms of the Westmoreland contract, although Slivosky testified that in about the middle of 2001, he realized that the executed RSA that Cooper returned to him on May 10, contained some changes in the job classifications that differed from the one he sent to Cooper on March 29, although he made no attempt to change the agreement or the RSA.

There was testimony of Ronald Kean, president of the Union, that in about June he learned that the Butler store was about to be sold to the Respondent. He directed Jack Lewis, the Union's director of collective bargaining, to send a recognition successor agreement to the Respondent, and Lewis did so by letter dated June 30, to Cooper saying that they understood that the Respondent was acquiring Butler, and asked that Respondent return two signed copies of the RSA. When Kean saw this letter he told Lewis that the June 30 letter was mistaken, that he wanted to open up the contract and try to negotiate some different items. Lewis then wrote another letter to Cooper, this one dated July 14, stating that the prior letter was being revoked, and enclosed copies of a revised recognition agreement for their signature. This revised recognition agreement recites the existence of the contract between the Union and Butler, that the Respondent had acquired the assets of Butler and recognized the Union as the exclusive bargaining representative of the employees at Butler, with the exception of confidential employees and supervisory employees as defined by the Board. This proposed agreement does not contain paragraph 2 as set forth above for both Butler and Westmoreland. On July 14, Cooper responded to Lewis expressing uncertainty about the purpose of his latest letter, saying that a representative of the Respondent had already executed the RSA attached to the original letter. Cooper's letter concluded: "If Local 23, for whatever reason, intends to refuse to accept the executed Recognition/Successor Agreement you sent on June 30, 2000 with your signature, please advise immediately." That afternoon, Kean spoke to Cooper and told him that he would like to open up certain items in the contract, such as the 401K plan. Cooper responded that it was his understanding that the Respondent wanted the contract exactly as it was and had no intention of negotiating anything, but that he would contact his client. Shortly thereafter, Kean spoke to the former owner of Butler, who told him that if the Union did not sign the RSA as it had been originally sent out, the Respondent would not go ahead with the purchase of the store and he would be in financial trouble if he couldn't sell the store. He asked Kean to sign it,

and Kean said that he would. The next morning, July 15, the RSA was faxed to the Union's office, Kean signed and dated it, and faxed it back to the Respondent. The "hard copy" of the RSA for Butler is identical, but was signed by Kean on July 25.

The Noblestown store was purchased by the Respondent on August 17, 1998, the Lawrenceville store was purchased by the Respondent on April 11, 1999, and North Hills was built by the Respondent and opened in June 1999. Neither Noblestown nor Lawrenceville were purchased from the former owners of Butler or Westmoreland. Noblestown is approximately a 1-hour drive from Westmoreland; Lawrenceville and North Hills are approximately 30 and 45 minutes from the Butler store.

By letter dated November 9, Justin Toner, assistant director of organizing for the Union wrote to Gary Triffo, vice president and general manager of the Respondent. The letter states that pursuant to the RSA, Respondent agreed to be bound by the terms of the Union's contract covering Westmoreland; the letter then sets forth the terms contained in article 2.1 of the Westmoreland agreement, and continues:

Local 23 currently possesses signed and dated authorization cards from a majority of your employees at the Noblestown Road, Pennsylvania store in which they have indicated their desire to be represented by Local 23 for collective bargaining purposes. Local 23 is prepared to turn over these cards to a neutral third party for review and confirmation of our majority status if you question the majority status.

By virtue of Article 2.1 and Local 23 having obtained majority support, Local 23 is hereby demanding that you recognize it as the collective bargaining representative of your employees at the Noblestown Road, Pennsylvania location.⁴

Toner wrote virtually identical letters to the Respondent regarding the Lawrenceville store on November 13, and the North Hills Village store on March 16, 2001; the only substantive difference is that the latter two letters referred to the Butler, rather than the Westmoreland agreement. By letters dated November 13, 17, and March 26, the Respondent denied the Union's requests for card check at these locations, and stated that it was the Respondent's position that article 2.1 does not require it to conduct a card check of the Union's status, or to otherwise recognize the Union.

Cooper has been an attorney practicing labor law since about 1970; he represented unions during the first 15 years of his practice and has represented management since about 1985. Interestingly, as a representative of unions he represented the Union and predecessor unions, and as a representative of management, he has represented the Respondent. I allowed some limited testimony on the Union's prior actions, if any, regarding article 2.1. Cooper testified that during his representation of the Union, and thereafter, the term "after acquired clause" was never used to describe article 2.1. In addition, he knew of no situation where the Union took the position that article 2.1 con-

⁴ It should be noted that the complaint alleges that "certain of . . . the employees . . ." [emphasis added] at these stores designated the Union as their collective bargaining representative.

stituted a waiver of the Board's election process, or required an employer to conduct a mandatory card check upon demand of the Union. There was rebuttal testimony from R. George Yurasko, secretary treasurer of the Union regarding an employer named JoViJo which operated two Shop 'N Save stores. Yurasko testified that JoViJo operated two stores, Olympia Shop 'N Save and Norwin Shop 'N Save, both of which had a collective-bargaining agreement with the Union. At a subsequent time, another store operated by JoViJo, Irwin Shop 'N Save, became covered by this contract as a result of article 2.1 and a card check by the employer that showed that a majority of the unit employees at the Irwin store signed authorization cards for the Union, although Yurasko testified that he does not have direct knowledge of the card check, recognition of the Union, or negotiation of the contract to include the Irwin location. Cooper testified for the Respondent on surrebuttal. He testified that JoViJo was one of his first employer clients and the contract covering the Olympia and Norwin store was negotiated early and was effective for the period March 4, 1984 through February 28, 1987. The Irwin store had been operated by Krogers, but they ceased operations in the area in about March or April 1984, and the owners of JoViJo acquired the store in midsummer or early fall of 1984. The Union approached the owners in order to sign up employees to "get the store." The employer agreed to give the Union access to the Irwin store to sign up the employees and the "quid pro quo" was that the parties agreed to extend the contract (including the Irwin store) for an extra 6 months to August 28, 1988.

IV. ANALYSIS

The sole issue here is whether the Respondent violated Section 8(a)(1)(5) of the Act by refusing the Union's request for card checks at the North Hills, Lawrenceville, and Noblestown Road stores. Counsel for the General Counsel argues that the RSAs obligated the Respondent to recognize the Union as the collective-bargaining representative of the employees at the Westmoreland and the Butler stores and to comply with the terms of the Westmoreland and Butler agreements. As article 2.1 of these agreements is an "after acquired clause," the Respondent was obligated to recognize the Union upon a showing of majority status at these stores. Respondent's principal defense involves the alleged conflict between paragraph 1 of the RSAs and article 2.1 of the agreements. Counsel for the Respondent, in his brief, argues that article 2.1 of the agreements

... was modified and/or superseded by the language of the RSAs. The language of Paragraph 1 of the RSA, which was prepared by the Union and proposed long after the execution of either of the CBAs, specifically supercedes the language of Paragraph 1 of Article 2.1 ... the difference between them cannot be denied—one expresses a broad, multi-state geographical scope of recognition and the other defines recognition on a store-specific basis. SuperValu's principal contention is that the old, broad recognition clause (Article 2.1) simply was overwritten by the new, narrow recognition clause (the RSA).

Because the General Counsel's case is built upon the alleged after acquired clause contained in the Westmoreland and Butler

agreements, that theory deserves some discussion. In *Retail Clerks Local 455 v. NLRB*, 510 F.2d 802, 805 (D.C. Cir. 1975), the Court, in reversing and remanding *Kroger* to the Board, stated:

If the "additional store clauses" involved in these cases do not constitute a "waiver" of the employer's right to a Board-conducted election, what do they mean? The Board's opinion in the *Kroger* case suggests that an "additional store clause" would be permissible if it specifically described a recognition procedure other than a Board ordered election. But this simply restates the question. What ambiguity is there in the present clauses which suggests that present clauses do not specify that some, indeed, any method other than a Board ordered election of recognition is agreeable to the parties?

The answer to the question is that the "additional store clause" can have no purpose other than to waive the employer's right to a Board ordered election. If the clause is "interpreted" to permit the employer to petition for a Board election, then the clause means nothing to the union. The Union and the employer have under the NLRA a right to seek an election. They do not need a contract clause to grant them that right.

Accepting the remand, and reconsidering the case in light of the Court decision, in *Houston Division of the Kroger Co.*, 219 NLRB 388, 389 (1975), the Board, in finding a violation, stated:

... these clauses can be read to require recognition upon proof of majority status by a union. As stated above, there is no need to hold these clauses totally invalid simply because they do not contain an explicit condition that unions must represent a majority of the employees in a new store, inasmuch as the Board will impose such a condition as a matter of law.

The Board has held that an employer may agree in advance of a card count to recognize a union on the basis of a card majority [citing *Snow & Sons*, 134 NLRB 709 (1961)] and we can perceive of no reason why it may not contract with the union to do so in advance of the time the union has commenced organization.

Since *Kroger II*, supra, numerous cases such as *Joseph Magnin Co.*, 257 NLRB 656 (1981) and *Alpha Beta Co.*, 294 NLRB 228 (1989) have affirmed this principal. *Alpha Beta* stated rather succinctly: "Once an employer has waived its right to insist on a Board election by entering into a contract containing an after acquired stores provision, it is obligated to recognize the Union if the Union presented it with concrete evidence of support by a majority of the employees in the group to be added to the existing unit."

There can be no question that article 2.1 constitutes an "after acquired" clause. It is almost *verbatim* the after acquired clauses of the cited cases as well as *Raley's*, 336 NLRB 1 (2001). The only difference between the instant matter and most of the above cited cases is that the instant matter involves a refusal to test the Union's majority status in the three stores, rather than the next step, the Respondent's refusal to recognize

the Union after acknowledging the Union's majority status. Although the Noblestown Road, Lawrenceville, and North Hills stores were being operated by the Respondent prior to the execution of the RSAs and the agreements covering Westmoreland and Butler that does not alter the determination as the Board in *Raley's* made clear that when parties have agreed to an after acquired clause, such a clause applies to existing as well as new stores. Additionally, *Raley's* also reiterated that the Union must prove its majority status among the employees in the appropriate unit before an employer can be found to have violated Section 8(a)(5) by refusing to recognize the union. The obvious corollary to this proposition is that in these circumstances the employer must give the Union an opportunity to prove its majority status. The Respondent refused to allow the Union to prove its majority status here.

The evidence establishes that the RSAs were signed with virtually no discussion or negotiation; in other words, they stand on their own. At first glance there is an apparent conflict between the terms of article 2.1 of the agreements and paragraph 1 of the RSAs. Article 2.1 states that the employer recognizes the Union as the exclusive bargaining representative for all employees in the retail stores presently operated by the Employer or which may be operated in specified counties in Pennsylvania and West Virginia. Paragraph 1 of the Westmoreland RSA, however, states that the Respondent recognizes the Union as the exclusive bargaining representative of the employees at Westmoreland, and the Butler RSA states that the Respondent recognizes the Union as the exclusive bargaining representative of the employees at Butler.

As stated above, counsel for the Respondent alleges that with this conflict in the scope of the recognition agreements, the later agreement supercedes the prior agreement so that the RSA recognition language, the single store recognition, therefore prevails over the Westmoreland and Butler agreements containing the broad after acquired clause language. It has long been accepted that the Board has the authority to interpret collective-bargaining agreements in the course of deciding unfair labor practice cases. *Redway Carriers*, 274 NLRB 1359, 1376 fn. 22 (1985). In *Supreme Sunrise Food Exchange, Inc.*, 105 NLRB 918, 920 (1953).

The Board stated, inter alia:

A primary principle of contract construction is that the contract be read as a whole, and that every part therein be interpreted in relation to the entire instrument. Other fundamental rules require (a) that the contract be construed, if possible, so that its provisions are valid rather than invalid; (b) that a reasonable meaning be accorded to all its terms; . . .

Mining Specialists, Inc., 314 NLRB 268 (1994) stated: "In contract interpretation matters like this, the parties' actual intent underlying the contractual language in question is always paramount, and is given controlling weight." In *McKeown Distributors, Inc. v. Gyp-Crete Corp.*, 618 F.Supp. 632 (D.C. Conn. 1985), the Judge stated: "The law requires that, whenever reasonably possible, courts should interpret contract language so as to reconcile arguably contradictory clauses . . . Contracts should be read to minimize conflicts, and one clause

should yield to another only when the two are unmistakably inconsistent." [citations omitted]

A reading of the RSAs for Westmoreland and Butler establishes that the parties' actual intent was that the Respondent would recognize the Union as the exclusive bargaining representative at the Westmoreland and the Butler stores, and would abide by *all* terms and conditions of the Westmoreland and Butler agreements [emphasis added]. This is the most "reasonable meaning [that can] . . . be accorded . . ." to the terms of these agreements. Further, a careful examination of article 2.1 of the Westmoreland and Butler agreements establishes that there is not necessarily a conflict between its terms and Paragraph 1 of the RSAs as alleged by counsel for the Respondent. Paragraph 1 of the RSAs states that the Respondent recognizes the Union as the representative of certain employees at Westmoreland and Butler. This is all that the Union could have expected at that time because, apparently, it did not represent a majority of the employees in an appropriate unit at any other of the Respondent's stores in the designated area. Article 2.1 of the Westmoreland and Butler agreements, on the other hand, states, under the *Kroger II* line of cases, that if the Union obtains authorization cards from a majority of Respondent's employees in an appropriate unit in any of Respondent's stores in the designated area, then the Respondent is obligated to perform a card check and, if the Union has majority status in the unit, it is bound to recognize and bargain with the Union. I therefore find through the RSAs, the Respondent agreed to recognize the Union as the exclusive representative of the employees at Westmoreland and Butler and, by article 2.1 of the agreements, agreed to the after acquired clause contained therein. By refusing to conduct card checks at Noblestown Road, Lawrenceville, and North Hills pursuant to the Union's requests dated November 9, 13, and March 16, 2001, the Respondent violated Section 8(a)(1)(5) of the Act.

At the hearing, I allowed some limited testimony regarding the lack of union action directed toward article 2.1. Although I found Cooper to be a totally credible and believable witness, a more thorough examination of article 2.1 and the Board and Court cases, has convinced me that there is insufficient ambiguity regarding that provision so that this extrinsic evidence need not be considered.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to conduct a card check for the unit employees at its Noblestown Road, Lawrenceville, and North Hills stores, between about November 9, 2000 and March 16, 2001, to determine whether the Union represented a majority of the employees in each of those units, the Respondent violated Section 8(a)(1)(5) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1)(5) of the Act, I shall recommend that it be ordered to cease and desist there-

from and that it take certain affirmative action designed to effectuate the policies of the Act. In that regard, I shall recommend that, upon request, the Respondent shall agree to conduct a card check, or any other method agreeable to both parties, to determine whether the Union represents a majority of the employees in an appropriate unit at each of the three stores.⁵ If the

⁵ At the commencement of the hearing counsel for the Respondent moved for dismissal of the complaint alleging that the Union did not represent a majority of the employees at the three stores in question. The basis of his motion was that while the Union's letters to the Respondent requesting the card checks alleged that it represented a majority of these employees, the complaint alleged only that the Union represented "certain of" these employees. I denied that motion and the Respondent reasserts that defense in its brief. There is not necessarily a conflict between the Union's claim of majority status and the Board's allegation that the Union represents certain of these employees. However, if the Union is unable to establish its majority status at the card check for any or all of these stores, the Respondent is not obligated to

card check, or other method, determines that the Union does represent a majority of the employees at any or all of these stores, the Respondent shall recognize and bargain with the Union as the representative of the employees at those stores. There is a minor difference in the unit exclusions between the Westmoreland RSA and the Westmoreland agreement; if those exclusions are determinative of the Union's majority, or the lack thereof, the later agreement, the RSA, shall prevail. There are also differences between Westmoreland and Butler regarding unit exclusions. The Union's card check request, refused by the Respondent, related Noblestown Road to Westmoreland and Lawrenceville and North Hills to Butler. The exclusions stated shall apply to those card checks.

[Recommended Order omitted from publication.]

recognize the Union as the exclusive representative of the employees at these stores.