

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

FRED MEYER STORES, INC.,

Case No. 36-CA-10555

Employer,

and

UNITED FOOD & COMMERCIAL
WORKERS, LOCAL 555, affiliated with
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,

Charging Party.

**RESPONDENT FRED MEYER STORES, INC.'S BRIEF IN SUPPORT OF
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. STATEMENT OF THE CASE

This case arose out of the decision by United Food & Commercial Workers Union (“UFCW”) Local 555 (“Local 555” or the “union”) to unilaterally its right to visit represented employees at Respondent Fred Meyer Stores, Inc.’s (“Fred Meyer” or the “Employer”) store in Hillsboro, Oregon (the “Hillsboro Store”) on October 15, 2009. Local 555 does not have an automatic right to visit represented employees at any of the Employer’s Portland metro area stores, including the Hillsboro Store, simply because it is the employees’ exclusive bargaining representative. Instead, it has only a limited right of visitation granted by certain clauses in the parties’ contracts applicable to those stores, including the Hillsboro Store. Over the last 20 years the parties developed a practice under these visitation clauses, which served to ensure that the Union did not interfere with employees’ ability to serve customers and perform their duties on the store’s sales floor.

The Union’s attempt unilaterally change that long-established practice at the Hillsboro Store on October 15 was part of its overall bargaining strategy – the self-styled “Campaign for a Fair Contract” -- in the Fall of 2009, which included implementation of plan to unilaterally broaden its access to the Employer’s stores. In service of that strategy, the Union created a preplanned 45 minute disturbance at the Hillsboro Store, that resulted in the arrests of one UFCW International representative and two Local 555 representatives for trespass under Oregon state law.

The Regional Director for Region 19 issued a Complaint on January 29, 2010, alleging, among other things, that Fred Meyer: violated Section 8(a)(5) of the National Labor Relations Act (the “Act”) by unilaterally changing the parties’ past practice regarding Union access to Fred Meyer’s Hillsboro Store on October 15, 2009, without bargaining with the Union,

and violated Section 8(a)(1) by interfering with employees' Section 7 rights by causing the October 15 arrests of the Union representatives. As a remedy, the Regional Director requested the extraordinary remedy of ordering Fred Meyer to reward the Union for its unlawful behavior by paying the Union representatives' attorneys' fees and costs associated with their arrests for trespass.

A hearing was conducted on before Administrative Law Judge ("ALJ") Clifford H. Anderson, at which the parties presented voluminous evidence in support of their respective positions. Despite the fact that Counsel for the General Counsel ("GC") failed to carry his burden to prove any of the charges against Fred Meyer, the ALJ issued his decision on December 8, 2010, finding that Fred Meyer acted unlawfully in contacting the police to assist it in removing the Union representatives from the Hillsboro store. The Employer takes several exceptions to the ALJ's decision, but primarily it his conclusions that: 1) the Union, through representatives Jenny Reed and Brad Witt, sought visitation of represented employees at the Hillsboro Store consistent with the terms of the parties' contracts and past practice, and that Hillsboro Store Home Department Manager James Dostert denied the Union those rights in violation of Section 8(a)(1) and Section 8(a)(5) of the Act; 2) the Employer caused the arrests of the Union representatives in violation of Section 8(a)(1) of the Act and should make the Union whole for any attorneys' fees and costs incurred as a result of the arrests; 3) that Dostert made disparaging remarks about the Union in the presence of employee Alicia England in violation of Section 8(a)(1) of the Act; and 4) that Dostert violated Section 8(a)(1) of the Act by instructing Loss Prevention Officer Mike Kline to call the police on October 15.

II. CLEAR AND CONCISE STATEMENT OF FACTS

A. The Store Visitation Language in the Parties' Collective-Bargaining Agreements Provide the Union with a Limited Right to Visit with Represented Employees.

Fred Meyer is engaged in the operation of “one-stop” shopping retail stores in Alaska, Washington, Idaho and Oregon. (Tr. 1207; GC. Exs. 1(c), 1(g).)¹ Fred Meyer operates many stores throughout the Portland, Oregon metro area, including the 165,400 square foot store in Hillsboro, Oregon (the “Hillsboro Store”). (Tr. 1207; Jt. Ex. 7.) Fred Meyer owns this store and its surrounding parking lot. (Jt. Ex. 7.)

Like many of Fred Meyer’s other stores, the Hillsboro Store is organized into four different bargaining units: grocery, combined checkstand (“CCK”), meat/seafood, and non-foods. (Tr. 1211-12.) Fred Meyer and the Union are parties to four Portland-area multi-store collective-bargaining agreements that apply to the employees working in these units at the Hillsboro Store: the Grocery Agreement, the CCK Agreement, the Retail Meat Agreement (“Meat Agreement”), and the Non-foods Agreement. (Tr. 1212, 1214.) The Grocery and Meat Agreements are bargained on behalf of Fred Meyer, Safeway and Albertsons (commonly referred to as the “Big Three” employers) by the multi-employer association Allied Employers. (Tr. 734, 1210; R. Ex. 13.) Fred Meyer bargains the CCK and Non-foods Agreements separately with the Union. (Tr. 1210-11.) The UFCW International is not a party to any of these agreements, or to any other collective-bargaining agreement with Fred Meyer. (Jt. Exs. 1(a) – (c), 2.)

¹ Citations to the transcript of the hearing in this case are referred to as (Tr. __.) Citations to exhibits entered by the GC are referred to as (GC. Ex. __.); citations to those entered by the Charging Party are referred to as (CP. Ex. __.); citations to those exhibits entered by the Respondent are referred to as (R. Ex. __.); and exhibits entered jointly by the parties are referred to as (Jt. Ex. __.)

The Grocery, Meat and CCK Agreements each contain “Store Visitation” clauses that provide the Union with a limited right to visit employees working in Fred Meyer’s stores as follows:

Store Visitation. It is the desire of both the Employer and the Union *to avoid wherever possible the loss of working time by employees covered by this Agreement.* Therefore, representatives of the Union when visiting the store or contacting employees on Union business during their working hours shall first contact the store manager or person in charge of the store. *All contact will be handled so as to not interfere with service to customers nor unreasonably interrupt employees with the performance of their duties.*

(Jt. Exs. 1(a) – (c), 3 (emphasis added)).² The Store Visitation language has been in the Grocery, Meat and CCK Agreements for almost 20 years, and has remained unchanged during that time. (Tr. 1206, 1214, 1215.) Although the Grocery, Meat and CCK Agreements expired on July 26, 2008, the parties signed extension agreements so that the Agreements remained effective until new Agreements were ratified on January 23, 2010. (Tr. 108.) The parties stipulated that there was no change in the language of the Store Visitation clauses in the 2010 contracts. (Tr. 108; R. Ex. 13.)

The Union assigns field representatives to make regular visits to stores in which it represents employees, including the Hillsboro Store. (Tr. 370, 462.) Each representative is given a “route” consisting of multiple stores that he or she is expected to visit at least once in every five-week “route cycle.” (Tr. 370, 400-01, 405, 462.) The representative visits the store to talk with the members, do route work (which includes updating the membership lists and

² The Non-foods Agreement does not contain a Store Visitation clause, but the same language and practices apply to visits made to the non-foods unit employees. (Tr. 95-98; Jt. Ex. 2.)

confirming employees' addresses and schedules on "route sheets") and attend *Weingarten* meetings. (Tr. 461; R. Ex. 3.)

For almost 20 years, the representatives abided by a visitation practice that gave effect to the Store Visitation language and ensured that they did not unreasonably interrupt employees in the performance of their duties or interfere with customer service during their visits to the stores. (Tr. 1206, 1214-15.) That practice was succinctly described by Steve Erdmann, Director of Labor Relations for Safeway, in a memorandum he distributed to Safeway's Store Directors in 2002. (R. Ex. 25, pps. 2-3.) (The same Store Visitation language and visitation practice applies to visits made by Local 555 representatives to Safeway's and Albertson's stores. (R. Ex. 25 27.)) Erdmann's memorandum stated that:

First of all, the union reps are supposed to check in with the store manager when visiting the store. If they can't find the store manager, they are supposed to check in with the person in charge.

* * *

Business agents have the right to talk BRIEFLY with employees on the floor, to tell those employees they are in the store, to introduce themselves, and to conduct BRIEF conversations, as long as employees are not unreasonably interrupted. ***Such conversations should not occur in the presence of customers.***

* * *

Business representatives have the right to distribute flyers to employees on the floor AS LONG AS IT IS DONE QUICKLY, THE EMPLOYEES ARE NOT URGED TO STOP WHAT THEY ARE DOING TO READ THE MATERIALS AT THAT TIME, AND FURTHER, THAT THE MATERIALS ARE NOT PASSED OUT IN THE PRESENCE OF CUSTOMERS.

Lengthy conversations and discussions should always take place in the break room.

(R. Ex. 25, p. 2.) (Capitalized emphasis in original; italicized emphasis added.) Local 555's leadership expressly adopted Erdmann's version of the visitation practice and instructed its representatives to follow that practice when visiting stores. (Tr. 1592, 1615-16, 1620-21; R. Ex. 25, p.1.) Then Union Secretary-Treasurer Ed Clay distributed a copy of Erdmann's memorandum to the Local's representatives with a cover memorandum in which he stated that Erdmann's memorandum "correctly outlines the procedure that should be followed when we visit stores." (R. Ex. 25, p.1.) He confirmed that:

"Conversations on the floor while members are working should be brief and not interrupt their work. If someone has numerous questions or a problem that cannot be handled with a brief conversation, they should be asked to call later or see you during their break or lunch. Such conversations should be conducted so customers are not involved and if something is being passed out they should be asked to read it later."

(R. Ex. 25, p.1.) (Emphasis added.) For almost 20 years, this was the practice that Local 555 regularly followed when visiting employees at the Hillsboro Store. (Tr. 1214-16, 1221-22.)

During this time, the Union never sent more than one or two representatives to the Hillsboro Store at one time; it believed that sending more than two representatives would violate the Store Visitation clauses because it would interfere with employees' work and or disrupt the Employer's business. (Tr. 405, 1095-96, 1099-1101, 1108-09.) Typically, there would only be a second Union representative in the store if he or she was being trained to replace the first representative. (Tr. 352, 405, 1095-96, 1220-21.) These Union representatives never brought any petitions into the store for employees to sign, and never asked employees to stop and read Union materials while they were working on the store's sales floor. (Tr. 411, 413-14.)

Union field representative Mary Spicher, who was assigned to service the Hillsboro store from approximately April 2008 through November 2009, confirmed that she

always followed this visitation practice during her visits to the Hillsboro Store.³ (Tr. 370, 365, 372, 405, 461-462.) She did not even speak to employees during most of her visits, and spent most of her time in the store reviewing employee schedules and updating the membership lists. (Tr. 368, 370, 401, 420-23; R. Exs. 3, 4-12.) Every single Hillsboro Store employee who testified at hearing, including those called by the GC, uniformly confirmed that Spicher and the other field representatives assigned to the Hillsboro Store followed the visitation practice during their visits to the Hillsboro Store. They only ever saw one or two representatives in the Hillsboro Store at one time, and testified that Spicher and other Union representatives visiting the store handed out their business cards and limited their interactions with the employees on the sales floor to one to two minutes total. (Tr. 329, 335-36, 339-41, 346-47, 349, 352, 718, 729, 1006-09, 1010.) Hillsboro Store management also testified that they themselves regularly followed the visitation practice at the store. (Tr. 1035-36, 1038-39, 1056, 1034-06, 1299, 1306.)

B. The New Union Leadership Unilaterally Changed the Parties' 20 Year Long Visitation Practice at the Hillsboro Store During its "Campaign for a Fair Contract" Against the Employer.

Although it had followed the parties' visitation practice for almost 20 years, Local 555 began to unilaterally change the practice in the fall of 2009, when the UFCW International became involved in the negotiations for the most recent Grocery, Meat and CCK Agreements. (Tr. 1104.) Negotiations for the successor Agreements had been ongoing since approximately

³ Ms. Spicher testified that she placed even stricter limitations on her interactions with cashiers because the cashiers are handling money and must be able to concentrate so that they do not make any mistakes in cash handling. (Tr. 389.) If she absolutely had to speak to a cashier, she would purchase a product, stand in line at the check stand, and then speak with the cashier very briefly as the cashier was ringing up her purchase. (Tr. 371.) If she needed to have longer conversations with cashiers, she would make the same arrangements with them as she would with other employees: she would arrange to contact them after their shifts, or by phone or email. (Tr. 365.)

July 2008. (Tr. 1104; R. Ex. 13.) In July of 2009, newly elected Union President Dan Clay requested help with bargaining the successor Agreement from the UFCW International. (Tr. 103, 732, 1101.) International representative Jenny Reed was sent to assist Local 555. (Tr. 103.) Ms. Reed's was put in charge of the Union's "Campaign for a Fair Contract." As Campaign Coordinator, she began to significantly increase the Union's activities in the Employer's stores as part of that Campaign. (Tr. 105, 209, 283, 285, 483.) Under her leadership, the Union determined to "retur[n] to being a fighting union." (Tr. 283; R. Ex. 15, p.1.) As part of this effort, the Union consulted its legal counsel to discuss "access to Fred Meyer stores, *strategy and implementation*," (R. Ex. 1 (emphasis added)), and began drumming up evidence in support of visitation-related unfair labor practice charges against the Employer. (Tr. 1222; R. Exs. 12 p.1, 15 p.3, 16.)

In the fall of 2009, the Union began sending International organizing representatives to accompany the field representatives into the Employer's stores. (Tr. 411; R. Ex. 13, p.2.) It had never done this before. (Tr. 405-06, 450.) The organizing representatives were tasked with training the field representatives to act more like organizers. (Tr. 484; R. Ex. 14(c).) Organizer Nikki Miller was assigned to accompany Mary Spicher on one of her visits to the Hillsboro Store. (R. Ex. 14(c).) After their visit, Miller criticized Spicher's reluctance to violate the parties' visitation practice, citing Spicher's failure to engage working employees in long conversations about the Union's health care petition and gather employee signatures on that petition on the sales floor. (R. Ex. 14(c).) Spicher resisted asking employees to review and sign the health care petition on the sales floor, and instead attempted to follow the parties' visitation practice by asking the employees to review the petition and solicit employee signatures during

their lunch breaks. (R. Ex. 14(c), pps. 2-3.) Spicher expressed her frustration over the Union's change in the parties' visitation practice, telling an employee: "***They're not allowing me to do my normal job.*** We have this petition we are trying to get signatures for ***They chewed my ass last night. I got it good.***" (R. Ex. 14(c), pps. 2-3 (emphasis added).)

Fred Meyer's corporate Human Resources office began to receive reports from the stores regarding the Union's unilateral change of the parties' visitation practice. (Tr. 1222, 1265, 1267.) (Reed confirmed that these issues arose after she arrived to work with the Union. (Tr. 256.)) Whereas the Union had previously only sent one or two field representatives into the store, it was now sending multiple representatives, including International organizers. (Tr. 1222.) The representatives often failed to check in with the Store Director or Person in Charge, failing to alert Store Management to the fact that there were multiple representatives in the store. (Tr. 1222.) The representatives were soliciting employee signatures on petitions and engaging employees in lengthy conversations on the sales floor. (Tr. 1222.) The representatives became confrontational if store management asked them to take their lengthy conversations to the store's breakroom. (Tr. 1222, 1266.)

This activity began to disrupt business in Fred Meyer's stores because store management had to spend time dealing with the confrontations rather than focusing on managing the store. (Tr. 1264, 1266.) Upon receiving complaints of such activity from store managers, Fred Meyer's corporate Human Resources department advised the managers to reiterate the parties' Store Visitation practice to the Union representatives and ask the representatives to comply with that practice. (Tr. 1269.)

Such a confrontation occurred at the Hillsboro Store on October 14, 2009. (Tr.

377.) Field representative Mary Spicher and International representative Joe Price had been observed blocking customer access to an aisle and interrupting an employee in the performance of his duties. (Tr. 1039.) Food Manager Josh Selch asked Price to refrain from interrupting the employee, and the discussion became “heated.” (Tr. 1039.) Selch reported this conversation to Store Director Gary Catalano, who attempted to discuss the situation with the representatives and ask them to comply with the parties’ visitation practice. (Tr. 1040, 381.) Price became angry and threatened to bring 15 to 20 more union representatives into the store the next day. (Tr. 381, 1041.) The GC never called Price to deny that he made this threat.

After Spicher and Price left the store, Catalano called Terri Robinson, Regional Human Resources Supervisor for Zone 1, and relayed to her the story of his interaction with Price and Price’s threat to return to the store the next day with 15 Union representatives. (Tr. 1042.) Catalano was advised to follow the following procedure if the Union followed through on its threat the next day: 1) reiterate the visitation practice to the Union representatives; 2) if the Union representatives refused to follow the practice they should be asked to leave the store; 3) if the Union representatives refused to leave the store, Catalano should call the Loss Prevention Manager, who should then ask the Union representatives to leave the store; 4) if the Union representatives still refused to leave the store, Catalano should consult with Robinson or Cynthia Thornton and if they advised him to do so, the police should be called to assist in escorting the Union representatives from the store. (Tr. 1042, 1044.) Knowing that he would not be present in the store the next morning, Catalano held a meeting with his department managers, including Home Department Manager James Dostert, and instructed them to follow this procedure if a large number of Union representatives returned to the store on October 15. (Tr. 104, 1037,

1039.)

That evening, the Union held a staff meeting and decided to send a team of eight Union representatives into the Hillsboro Store on October 15. (Tr. 107.) The team included: International representative Jenny Reed, Special Assistant to the President Brad Witt, Grievance Director Mike Marshall, Collective Bargaining Director Ken Spray, Jeff Anderson, Kevin Billman, Field Representative Kathy McInnis, and International Representative Joe Price. (Tr. 119-20.) Notably, this team included only Union representatives and no members, even though Reed testified that all the other teams who were sent into the Big Three employers' stores on October 15 included Union members. (Tr. __.) Reed decided to send eight Union representatives into the Hillsboro Store on October 15 because, in her view, the Hillsboro Store management had presented a "significant obstacle to being able to talk to the members," and she wanted Union representatives to "talk to every single member that was working" at the Hillsboro Store that day. (Tr. 137.) Ken Spray admitted that it was atypical for the Union to be sending such a large number of Union representatives into the Hillsboro Store. (Tr. 843.)

Jenny Reed conducted a training session with "the team" so that it would "be able to deal" with a confrontation with the Employer at the Hillsboro Store on October 15. (Tr. 107-08, 842.) As part of these preparations, the team discussed the fact that they were "expecting to have some access issues at the Hillsboro store" on October 15, and decided that Reed "was going to be the one that was going to take the arrest" should the police be called to the store. (Tr. 851.) Former Union President Ric Ball explained that Reed, as an International representative, would be chosen to take the arrest because the International is not a party to the collective-bargaining agreements between the Union and Fred Meyer, so her arrest would not violate the agreements.

(Tr. 1101-02.)

With their plan in place, Reed and her team carpooled to the Hillsboro Store, congregating in the parking lot around 9:30 a.m. on October 15, 2009. (Tr. 119, 866.) They were each wearing either a yellow t-shirt or a dark blue jacket with the words “UFCW” emblazoned on them. (Tr. 139.) Joining them was J. D. “Donna” Nyberg. (Tr. 932.) Ms. Nyberg works for Brad Witt, who is also a Representative in the Oregon House of Representatives, as his campaign manager. (Tr. 932.) Ms. Nyberg was at the Hillsboro Store on October 15 because Witt had called her that and advised her to be at the Hillsboro Store that day because, as he said: ***“I felt there was a potential story there. She has credentials for the labor press. And I, frankly, was hopeful that she might be able to get a story.”*** (Tr. 932-33 (emphasis added).) Ms. Nyberg’s photographs of the day’s events were subsequently used in numerous press items, including those that appeared in the labor press. (R. Exs. 17-22.)

Once assembled, the Union representatives entered the store *en masse* through the store’s two entrances. (Tr. 305.) Reed and Witt entered through the Apparel Department doors, and went directly to the Customer Service Desk, where Witt introduced himself to the employee working there. (Tr. 145-48, 651.) The rest of the Union representatives dispersed throughout the store in teams of two to talk to employees. (Tr. 137, 819-20.) Reed and Witt asked to speak to the Person in Charge, so the Customer Service Desk employee called James Dostert, Home Department Manager, who had been assigned as the Person in Charge that morning in Catalano’s absence. (Tr. 1313, 1315.)

Dostert had been the Home Department Manager at the Hillsboro Store for two months on October 15, but he had held management positions with Fred Meyer for over twelve

years. (Tr. 1296-97.) He had received extensive training regarding the parties' visitation practice during his management training: the practice was reviewed and reiterated to him during his internship period, and again during his on-the-job training with an assigned mentor. (Tr. 1302-03.) If he, or any other store manager, had questions about the visitation practice over the years, he would contact the Corporate Human Resources Department for guidance. (Tr. 1209.)

When Dostert arrived at the customer service desk on October 15 he introduced himself to Witt and Reed, who told him they were in the store to talk to employees. (Tr. 1316.) They did not mention that there were six other Union representatives in the store. (Tr. 1316-17.) Reed was carrying an excerpt of the Store Visitation language from the Grocery, Meat and CCK Agreements, a flier to be distributed to employees and the petition regarding health care for employee signatures. (Tr. 139; GC. Exs. 2-3; R. Ex. 1.) Witt had with him a sheaf of papers, on which took selective notes during the day's events. (Tr. 868; GC. Ex. 20.)

Per the instructions he had received from Catalano on October 14, Dostert explained the visitation practice, saying that the representatives had a "right to walk the floor, engage with associates for a minute or two, hand out your card; anything longer than that needs to go to the break room." (Tr. 1316.) In response, Reed held up a piece of paper and said she had a right under "federal law" to "talk to [employees] *as long as they wanted on the floor.*" (Tr. 1317.) Dostert knew that Union representatives did not have the right to talk to employees on the sales floor for as long as they wanted, so he reiterated the visitation practice to Reed. (Tr. 1317-18.) She told him that he was "violating federal law," and held out a colored piece of paper (the excerpt of the Visitation Clauses) and told Dostert that he could be arrested, and (prophetically) that he could end up in court, sitting in a chair testifying. (Tr. 1317-18.)

Dostert used his mobile phone (carried by all Hillsboro Store managers) to call Cynthia Thornton and confirm that the visitation practice had not changed. (Tr. 1313-14, 1317.) Thornton advised him that the visitation practice had not changed, reviewed the practice with him, and instructed Dostert to reiterate that practice to the Union representatives and ask them to comply with the practice. (Tr. 1223.) If they still would not comply, Thornton said, Dostert should ask them to leave the store, and if they refuse to do that, call the police for assistance removing them from the store. (Tr. 1319.) Dostert hung up and told Reed and Witt that Thornton had just confirmed that the visitation practice had not changed. (Tr. 1320.)

Reed repeated to Dostert that he was violating federal law, and insisted that she could talk to employees for as long as she wanted to; to underscore her point, she walked over to the apparel department checkstands, where she saw Cashier Alicia England working. (Tr. 1320, 1322.) England is hard of hearing and must wear hearing aids and read lips to understand what people are saying to her. (Tr. 1322, 718, 720.) England testified that she was working on a project when Reed abruptly approached her, which was not how England was used to being approached by Union representatives, so she felt “overwhelmed.” (Tr. 723, 726.) It was undisputed that England stopped working on the project when Reed approached her. (Tr. 728.) Reed said, “I have a right to speak to you, I’m from the Union,” and handed England a flier. (Tr. 724.) England testified that Dostert was on the phone during this exchange and that he did not say anything to England. (Tr. 725.)

Reed, Dostert and Witt then moved 15 feet away towards the photo-electronics department. (Tr. 726, 921, 1323.) Witt and Dostert discussed whether Union-represented employees should have to pay part of their health insurance premiums. (Tr. 1324-25.) Dostert

then suggested that the Union could offset the cost of medical insurance for employees by lowering the cost of Union dues. (Tr. 1325.) That brought an end to the conversation. (Tr. 1325.)

Dostert was receiving calls from employees notifying him that there were other Union representatives present in the store, and Dostert himself began to notice other Union representatives coming into the photo-electronics area. (Tr. 1326.) Realizing that there were more than two Union representatives in the store, called Cynthia Thornton again and informed her that there were multiple Union representatives in the store, that the situation was not going to resolve itself, and asked what he should do. (Tr. 1326-27, 1224.) Thornton said that if the Union representatives were not going to follow the visitation practice, then Dostert should ask them to leave the store, and if necessary to contact the Loss Prevention Manager, who could call the police if the Union representatives refused to leave. (Tr. 1224.)

Dostert then called Mike Kline, the store's Loss Prevention Manager. (Tr. 1327.) While they waited for Kline to arrive, Reed continued arguing with Dostert and telling him that he was violating federal law. (Tr. 1327.) Kline arrived and told Reed and Witt that they needed to leave the store. (Tr. 1328.) Dostert then received a call from Terri Robinson; while he was Robinson, Witt walked up yelled "liar!" at Dostert. (Tr. 1328.) Dostert retreated a few feet, but Witt followed him and again yelled "liar!" at Dostert. (Tr. 1328.) At Dostert's request, Kline stepped between himself and Witt so that Dostert could finish his phone call with Robinson. (Tr. 1328.)

Additional Union representatives came into the photo-electronics area, including Kathy MacInnis. (Tr. 609, 827, 1328-29.) MacInnis and Dostert knew each other; MacInnis

had been the Union representative assigned to the Employer's store in Tigard, Oregon when Mr. Dostert was a manager at that store. (Tr. 1329.) They both laughed as MacInnis walked up wearing her yellow UFCW t-shirt, and Dostert said, "Not you too!" (Tr. 1568.) MacInnis suggested that Mr. Dostert calm down a bit, and he responded, "But Kathy, there's so many people here." (Tr. 1570.)

Given the number of Union representatives that now appeared to be in the store, Dostert felt that there was nothing he could do to make the situation better. (Tr. 1329) He asked Reed and Witt once again to follow the established visitation practice, or to leave the store, but they refused. (Tr. 1329.) He called Ms. Thornton a third time to explain that the situation seemed to be out of control. (Tr. 1329.) She told him to go ahead and call the police. (Tr. 1329.) Dostert then asked Kline to call the police. (Tr. 1330.) Kline called the non-emergency number for the Hillsboro Police Department. (Tr. 1143.) While everyone waited for the police to arrive, Reed stated that she would not leave the store unless she was arrested. (Tr. 1330.) In anticipation of being arrested, handed her purse over to Witt for safekeeping before the police entered the building. (Tr. 996; Jt. Ex. 9(c) 10:11:43.)

Officers Daniel Mace and Victor Kamenir entered the store at 10:12 a.m. (Jt. Ex. 9(C): 10:12:18.) They consulted with Kline, who advised them that the Union representatives were refusing to leave the store after having been asked to do so. (Tr. 1332.) Officer Mace then approached Reed and told her that she had to leave the store. (Tr. 1425.) Reed responded that she had a right to be in the store and attempted to show Officer Mace the excerpt of the Store Visitation language that she was carrying. (Tr. 1425.) Officer Mace informed her that under Oregon trespass law she is obliged to leave the property when the property owner asks her to

leave. (Tr. 1425.) Officer Mace testified that he asked her several times to leave the store because he didn't want to have to arrest her. (Tr. 1425.) Ms. Reed asked what level of crime she would be charged with – was it a misdemeanor or a felony? (Tr. 1149.) When she was informed that trespass is a misdemeanor she said that she could take a misdemeanor and had been authorized to be arrested. (Tr. 1467.) She then stuck her hands out in front of her to be cuffed. (Tr. 1425.) Officer Mace reluctantly handcuffed her and escorted her out to his patrol car. (Tr. 1427, 1433.) On the way to his patrol car in the parking lot, Donna Nyberg asked him to stop so that she could take a picture of Reed being arrested. (Tr. 1427.)

Although he stood by Reed the entire time they were in the store together, Mt. Witt was not arrested that day. As part of their prearranged plan, Witt promptly obeyed the Police officers' instructions to leave the store and left with Reed's purse safely in tow. (Tr. 1660-61.) The rest of the Union representatives also exited the store, including Mike Marshall who went to Jeff Anderson's car in the parking lot since he had ridden to the store in Anderson's car. (Tr. 830, 1334.) Marshall could not get into the car because Anderson had the key. (Tr. 1334.) Police Sergeant Shannon (who had arrived on the scene shortly after Officers Mace and Kamenir) saw Marshall and made "shooing" motions towards him, asking him to leave the property. (Tr. 1468.) Instead of complying with the Sergeant's instruction, Marshall became "agitated" and "tried to engage the sergeant," telling him that he had to retrieve the car keys from Anderson. (Tr. 618, 830.) Officer Mace observed Marshall arguing with Sergeant Shannon. (Tr. 1428, 1468.) At this point, Officer Mace testified that things were "starting to get a little hairy," as a lot of Union representatives were milling about the parking lot, bystanders were gathering around to watch the show – some of whom were yelling at the police – and there were

only three officers present. (Tr. 1429-30.) As Officer Mace observed Marshall continue to argue with Sergeant Shannon, he instructed Officer Kamenir to arrest Marshall. (Tr. 1431.) Kathy MacInnis, who was standing within five feet of Marshall the whole and was also unable to gain access to Anderson's car, was not arrested that day. (Tr. 1585-86.)

Union President Dan Clay arrived at the scene on the heels of Marshall's arrest. (Tr. 736.) Clay walked up to Sergeant Shannon that said that if anyone was going to be arrested that day it should be Clay because he had sent the Union representatives to the store. (Tr. 738.) Clay told Sergeant Shannon about the National Labor Relations Act and asked the Sergeant to "look at Federal law before he arrest people (*sic*)." (Tr. 738.) Sergeant Shannon responded that the owner of the property had asked the Union representatives to leave so they needed to leave. (Tr. 739.) Clay reiterated that the Union had a right to be on the property under federal law and the National Labor Relations Act. (Tr. 739.) Sergeant Shannon said: "[A]nother word and you're done." (Tr. 739-40.) Ignoring this unequivocal warning, Clay again tried to talk to the Sergeant about federal law and the National Labor Relations Act. (Tr. 740.) At that point, Sergeant Shannon instructed Officer Kamenir to arrest Clay. (Tr. 1469.) Eventually all of the Union representatives left the property without any further arrests being made.

Fred Meyer did not plan, nor did it ask, for the Union representatives to be arrested on October 15, 2010. (Tr. 1143, 1226, 1330, 1444-45.) This result was absolutely contrary to the Employer's expectations since it was contrary to the parties' past practice. Anytime there had been a dispute over an issue such as visitation in a store, the Union would usually leave the store and then contact Carl Wojciechowksi or Cynthia Thornton in Human at the Employer's corporate offices to resolve the issue. (Tr. 640-43.) If the Union representatives

did not leave the store, the Employer would contact the police for assistance in removing the representatives. (Tr. 1226-27.) Without exception, the representatives left before the police arrived, or would voluntarily leave once the police had arrived. (Tr. 1227.) Before this case, the Union had never taken exception to Fred Meyer's right to call the police in these circumstances, as shown by the total lack of evidence presented by the GC and the Union – no letters of protest, grievances and/or unfair labor practice charges filed – objecting to Fred Meyer's actions previously.

Ms. Thornton did receive a phone call from UFCW International Union representative Shaun Barclay before the police arrived at the Hillsboro Store on October 15. (Tr. 1224.) Thornton described how Barclay refused her attempts to resolve the issue pursuant to the parties' past practice:

Q. [By. Mr. Alli] Would you describe the nature of your telephone conversation with Mr. Barclay?

A. [By Ms. Thornton] He called me and said to me, I understand that you are ordering the union reps out of the store at Hillsboro, and calling the police to have them arrested. And I said, we have multiple union reps at the store and they're being disruptive, and we've asked them to leave. He said that he had sent those union reps in there and I asked him why he sent so many union reps in there, and he said because of something that happened the day before, and I said, if something happened the day before, why didn't you just call and talk about it, and he said that the union reps had a right to be there and this is how he handled things, and I said, well, they weren't there just servicing the store. They're being disruptive and he said he had trained the union reps and that they were trained to not interfere with their work, and that they could talk to the employees as long as they didn't interfere, and that they were trained to walk away if a customer walked up and to smile. And I said, well, I appreciate that, Shawn, except that that's not our practice. Our practice is they just come in, given them their card and longer conversations take place in the lunchroom, and that while you may tell them to be nice and to step back from a customer, customers aren't going to approach people that are talking to someone else, and he said, well, they had a right to be there and that if this is how I was going to handle things, he could have 15 reps

there, and I said to him, I can tell you're getting very upset, and I said this really doesn't have to happen this way. We should just sit down and talk about it but now it's disruptive at the store and they need to leave, and he said, well you do things, or he said, you do what you have to do and I'll do what I have to do. And that was the end of the conversation.

(Tr. 1225-26.) Thornton had also suggested that the Union could use the grievance procedure provided for in the parties collective-bargaining agreements, or that the parties' could just sit down together to discuss the issue. (Tr. 1226.) Yet Barclay did not advise the Union representatives to leave the Hillsboro Store.

In all, the Union was able to create a 40 – 45 minute event at the Hillsboro Store on October 15. (Tr. 931.) During that time, neither Witt nor Reed made any attempt to speak to any employees in the store other than Alicia England, nor did they leave the photo-electronics area and attempt to walk the sales floor. (Tr. 165, 931, 1325.) Nor did they attempt to deescalate the situation by simply leaving the store, by contacting anyone at Fred Meyer's corporate office per the parties' established practice for resolving such situations, by leaving the store when asked to do so by Dostert and filing a grievance later, or by simply following the police officers' requests to leave the store, and filing a grievance later. Instead, Reed called the Union's attorney to report that an unfair labor practice was occurring "right there and then," and called Shaun Barclay at the International, who ended up threatening to send even more representatives to the Hillsboro Store during his call with Ms. Thornton. (Tr. 154, 471, 1245.)

The Union lost no time in trying to garner as much publicity about the Hillsboro Store arrests as possible, with the aid of Nyberg's photographs. (Tr. 623-24; R. Exs. 19-21.) Apparently unphased by their brush with the law, the Union leadership reconvened on October 16 to discuss how best to spread the word about the incident at the Hillsboro store. (Tr. 492-94,

771-77; GC Exs. 4, 10, 14; R. Exs. 17-22.) Although the standard release restrictions placed on Reed, Marshall, and Clay as a result of their arrests for trespass forbade them from contacting one another, they attended the October 16 staff meeting together, and continued to work together on the Union's Campaign for a Fair Contract against the Employer. (Tr. 492-94, 771-77; GC Exs. 4, 10, 14; R. Exs. 17-22.)

III. QUESTIONS PRESENTED

1. Did the ALJ err in finding that on October 15, 2009, the Union, through Jenny Reed and Brad Witt, sought Union visitation of represented employees at the Hillsboro store consistent with the terms of the parties' contract and past practice, and that Home Department Manager James Dostert denied the Union those rights in violation of Section 8(a)(1) and Section 8(a)(5) of the Act? (Exception Nos. 1, 6; ALJD 33:11-14, 42:15-28, 42:51-43:3.)

2. Did the ALJ err in finding that the Employer caused the arrests of Union representatives Jenny Reed, Mike Marshall and Dan Clay in violation of Section 8(a)(1) of the Act and by ordering the Employer to make the arrested Union whole for any attorneys' fees and costs incurred as a result of the arrests? (Exception Nos. 2 -5; ALJD 33:36-38, 42:43-45, 34:15-17, 42:43-45, 42:47-49, 43:35-39.)

3. Did the ALJ err in finding that Dostert made disparaging remarks about the Union and Union representatives in the presence of employee Alicia England in violation of Section 8(a)(1) of the Act? (Exception No. 7; ALJD 37:24 – 38:54; 42:15-19, 30-33.)

4. Did the ALJ err in finding that the Employer violated Section 8(a)(1) of the Act when Dostert instructed Loss Prevention Officer Mike Kline to contact the police, regardless of whether the instruction was given in the presence of employees? (ALJD 39:40-46.)

IV. ARGUMENT

A. The ALJ Erroneously Concluded that Fred Meyer violated Sections 8(a)(1) and (5) of the Act by Denying the Union Visitation with Represented Employees at the Hillsboro Store on October 15, 2009.

The ALJ concluded that Fred Meyer violated Section 8(a)(1) of the Act by denying the Union, through Reed and Witt, visitation with represented employees pursuant to the parties' Store Visitation clauses and their past practice under those clauses at the Hillsboro Store on October 15, 2009, and this denial was also a unilateral change in violation of Section (a)(5) and (1) of the Act. (ALJD 42:51-43:3.) The ALJ based this conclusion on his erroneous finding that the Union, through Reed and Witt, sought visitation of represented employees at the Hillsboro Store consistent with the terms of the Store Visitation clauses and the parties' past practice under those clauses, and that Dostert unlawfully denied them such visitation. (ALJD 33:11-14.)

1. The ALJ's Description of the Parties' Visitation Practice at the Hillsboro Store.

As the ALJ stated in his decision, in the end there was surprisingly little dispute between the parties' as to their visitation practice. Safeway Labor Relations Director Steve Erdmann (R. Ex. 25), former Union Assistant Bargaining Director and Organizing Director Ric Ball, (Tr. 194-95, 1274), former Union Secretary-Treasurer Ed Clay, (Tr. 1590-91, 1595, 1598; R. Ex. 25 p.1), current Union President Dan Clay (Tr. 755, 761-62), former Hillsboro Store Field Representative Mary Spicher, (Tr. 365, 372, 405, 455), every single Hillsboro Store employee who testified, and every Employer representative who testified all provided essentially the same description of the parties' 20 year old store visitation practice. Based on their evidence, the ALJ described the parties' visitation practice as follows:

[U]nion agents should limit their store floor visits with represented

employees to a reasonable time and, if further communication and time was necessary to complete or followup (*sic*) on such a visitation, the employee and Union agent could go to the employee breakroom, arrange to meet when the employee was off duty, or make other arrangements. * *
* [T]he parties simply viewed the time allowed as a minute or two or possibly longer depending on the circumstances.

(ALJD 26:9-19.) The ALJ further found that “[t]here [was] no doubt that union practice typically involved one agent at a time [visiting stores], with two agents occasionally performing their in store functions when one agent was training or introducing a newer agent to the facility.”

(ALJD 7:13-15.) The Employer does not take exception to these descriptions by the ALJ of the parties’ visitation practice. (As explained below, however, this description is incomplete and the Employer does take exception to that incompleteness.) It does, however, take exception to the ALJ’s findings that Reed and Witt sought visitation with represented employees consistent with that visitation practice.

2. The ALJ’s Finding that Reed and Witt Sought Visitation with Represented Employees Consistent with the Parties’ Visitation Practice is Erroneous because they were Seeking Unlimited Visitation with Employees Contrary to the Parties’ Practice as Found by the ALJ.

The ALJ found that the GC sustained his burden of establishing that Reed and Witt sought visitation with represented employees consistent with the parties’ visitation practice, stating that the GC had proved that “the Union through its agents Witt and Reed, sought and announced to Dostert, as they testified, a desire and an intention to do no more than (*sic*) talk briefly with employees with the Union’s represented employees on the shop floor and did not directly or indirectly state or suggest otherwise that they commanded the right or intended to undertake to talk to those employees on the shop floor without limit as to time.” (ALJD 31:29-34.) The Board will overrule an administrative law judge's credibility resolutions if the clear

preponderance of all the relevant evidence convinces it that the resolutions are incorrect.

Standard Dry Wall Products, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). A clear preponderance of the evidence in this case demonstrates that the ALJ's resolution in this regard is incorrect.

At hearing, Jenny Reed unequivocally claimed that the parties' visitation practice allowed her to visit with employees on the sales floor for as long as she wanted, testifying as follows:

Q. [By Mr. Alli] * * * [T]he questions I'm about to ask you are based on what you believe the contract rights are that 555 has in this situation. Is there a limit as to how much time a 555 representative can talk to a Fred Meyer employee on the floor on working and paid time?

A. [By Ms. Reed] No.

(Tr. 245-247.) Her description of the visitation practice is patently wrong and indicates that Reed was the only person who wrongly described the parties' visitation practice on October 15. Even the ALJ rejected the idea that visitations on the sales floor could go on without limit and found that they should generally last only one to two minutes.

Reed's testimony proves that either she simply did not know what the parties' practice was on October 15, or that she did know and was attempting to unilaterally change that practice on October 15. The latter view is supported by the record evidence, which established that upon her arrival in Portland, Reed met with the Union's counsel to discuss "access to Fred Meyer stores, *strategy and implementation.*" (R. Ex. 1 (emphasis added).) By the Union's own description, they were implementing a strategy of unilateral changing its access rights to Fred Meyer stores in the Fall of 2009. As part of that strategy, Reed unilaterally changed the parties' 20 year old visitation practice by insisting that Union representatives could spend an unlimited

amount of time talking to employees on the sales floor.

Dostert responded to Reed's unilateral change on October 15 by correctly informing her that she did not have a right to talk to employees for as long as she wanted and that, pursuant to the practice correctly described by the ALJ, lengthy conversations with employees had to take place in the break room. The ALJ's finding to the contrary must be reversed.

3. The ALJ's Finding that Reed and Witt Sought Visitation with Represented Employees Consistent with the Parties' Visitation Practice is Erroneous because they were Seeking Visitation for Eight Representatives Contrary to the Parties' Practice as Found by the ALJ.

The ALJ wrongly failed to consider the fact that Reed and Witt were seeking access for eight Union representatives in the Hillsboro Store on October 15. (ALJD 11:19-24.) There is no dispute that seeking access for such a large number of representatives violated the parties' visitation practice as the ALJ unequivocally stated that "[t]here [was] no doubt that union practice typically involved one agent at a time [visiting stores], with two agents occasionally performing their in store functions when one agent was training or introducing a newer agent to the facility." (ALJD 7:13-15.) The ALJ should therefore have concluded that Witt and Reed were not seeking visitation rights consistent with the parties' practice and that the Employer was permitted to ask them to leave the store as a result of their breach of the parties' contract.

Outrageously, the ALJ found that the Union's undisputed breach of the parties' contract and visitation practice was irrelevant because "there was no dispute that Dostert denied Witt and Reed visitation rights before he ever knew there were more agents than those two in the store at the time," that "Dostert never invoked the excessive number of agents to Witt or Reed as

a basis for asking the agents to leave,” and that “Dostert made it very clear that the only reason for his denial of the Union’s visitation rights was the question of the duration of floor visitation.” (32:45-33:5.) The ALJ’s findings in this regard are clearly contradicted by the record evidence.

Even if Dostert did not know that there were eight representatives in the store when he first met with Reed and Witt, he quickly became aware of that fact, and it is simply not true that he never invoked the excessive number of representatives to Witt or Reed as a basis for asking the representatives to leave. During his conversation with Reed and Witt, Dostert became aware that there were additional representatives in the store when he started receiving calls from employees notifying him of that fact. (Tr. 1326.) Dostert himself began to see that additional Union representatives were coming into the area where he was standing with Reed and Witt. (Tr. 1326.) Once he became aware that there were additional representatives in the store, he specifically expressed his concern over the number of representatives to the Union, telling Representative Kathy MacInnis “there’s so many people here.” (Tr. 1570.) He also reported the number of representatives to Cynthia Thornton, and that report formed the basis for her advice that he should call the police if they would not leave the store when asked to do so. (Tr. 1329.) Thus, Dostert’s decision to contact the police was clearly motivated not only by Reed’s insistence that she could talk to employees for as long as she wanted on the sales floor, but also by the fact that there were eight representatives in the store.

The ALJ ignored all of this evidence by limiting his consideration of the facts to just the initial interaction between Dostert, Reed and Witt, wherein he erroneously found that Reed and Witt announced a desire to briefly visit with employees on the sales floor and Dostert told them “they must limit their interactions on the store floor to identification and introductions

only with all additional communication between employee and agent required to be off the floor in the breakroom.” (ALJD 31:29-34, 31:36-40.) In the ALJ’s view, Dostert’s initial response was unlawful, and everything that the Employer did after that point was unlawful as a result. This improperly ignores all intervening acts by both parties. Even assuming for argument’s sake that Dostert’s initial response was unlawful, that does not excuse the Union’s breach of the parties’ contracts and visitation practice. Once Dostert learned of that breach he – and the Employer by extension - was permitted to remedy that breach by asking the Union to comply with the parties’ visitation practice or leave the store. The ALJ erred by not considering this evidence of the Union’s breach when he found that Reed and Witt had sought visitation consistent with the parties’ practice and his finding in this regard must therefore be reversed.

4. The ALJ’s Finding that Reed and Witt Sought Visitation with Represented Employees Consistent with the Parties’ Visitation Practice is Erroneous because they were Seeking Visitation for the Purpose of Soliciting Employee Signatures on a Union Petition Contrary to the Parties’ Practice.

The ALJ erred in failing to even address the evidence that the eight Union representatives were seeking visitation of represented employees working in the Hillsboro Store on October 15 for the purpose soliciting employee signatures on a Union health care related petition. (Tr. 139, 867, 868; GC. Exs. 2-3.) It is undisputed that this action was directly contrary to the parties’ visitation practice in the Hillsboro Store.

Steve Erdmann’s memorandum stated that Union representatives “have the right to distribute flyers to employees on the floor AS LONG AS IT IS DONE QUICKLY, THE EMPLOYEES ARE NOT URGED TO STOP WHAT THEY ARE DOING TO READ THE MATERIALS AT THAT TIME, AND FURTHER, THAT THE MATERIALS ARE NOT PASSED OUT IN THE PRESENCE OF CUSTOMERS.” (R. Ex. 25, p. 2.) (Emphasis in

original.) This is the only written evidence regarding the parties' visitation practice in the record, and it was not disputed by the GC or the Union. On the contrary, Field Representative Mary Spicher testified without contradiction that she had never before taken a petition into the Hillsboro Store and that she never asked employees to stop working in order to read any Union materials while they were on the sales floor.

Both parties agreed that the parties' visitation practice is violated if an employee stops working to talk to a Union representative during a visit, since doing so clearly contravenes the Union's contractual covenant to avoid wherever possible the loss or working time by unreasonably interfering with employees' performances of their job duties. Spicher testified that 75% of the employees in the Hillsboro store stopped what they were doing to read the Union's petition and that reading the petition "took some time." (Tr. 414.)

Yet the ALJ failed to consider this evidence of the Union's breach of parties' visitation practice, due no doubt to his view that since Dostert's initial response was unlawful, everything the Employer did after that point was unlawful as a result regardless of whether the Union was breaching the parties' visitation practice. Again, even assuming for argument's sake that Dostert's initial response was unlawful, the Union's breaches of the parties' contracts and visitation practice cannot be excused. The Employer was entitled to remedy the Union breaches by asking the Union to comply with the parties' visitation practice or leave the store. The ALJ erred by not considering the evidence of the Union's breaches when he found that Reed and Witt sought visitation consistent with the parties' practice and his finding in this regard must also be reversed.

5. The ALJ Erroneously Found that Dostert Unlawfully Denied the Union Visitation Rights.

The ALJ erred in finding that Dostert denied the Union visitation rights. (ALJD 33:13-14.) This error is based on his finding that when Reed and Witt sought to visit with employees, Dostert “simply announced in answer to that request/intention to visit with employees on the floor that the two agents must limit their contact with employees on the store floor to identification and introductions only with all additional communication between agent and employee required to be off the floor in the breakroom.” (ALJD 31:36-40.)

There is no support in the record for this finding, and it is inconsistent with the allegations made by the GC and the testimony of Reed and Witt, upon which the ALJ claimed to be relying. The ALJ specifically stated that he credited the testimony of Reed and Witt over that of Dostert to reach his finding that Dostert unlawfully denied the Union visitation rights, (ALJD 29:8-9), but this is impossible because Reed and Witt never testified that Dostert “simply announced in answer to that request/intention to visit with employees on the floor that the two agents must limit their contact with employees on the store floor to identification and introductions only with all additional communication between agent and employee required to be off the floor in the breakroom.” (ALJD 31:36-40.) To the contrary, both Reed and Witt adamantly testified time and again that Dostert never gave them the option of talking to employees on the sales floor at all and only ordered them to immediately “go to the breakroom” and told them they could “only speak with [their] members in the breakroom.” (Tr. 149, 872, 1488, 1515.) Their testimony aligned with the GC’s allegations in the Amended Complaint that Dostert “promulgated and enforced a new Store-Visitation policy restricting conversations between Union representatives and employees to the employee break room,” and in his post-

hearing brief to the ALJ that Dostert stated “immediately that they would have to meet with employees only in the breakroom.” (GC Ex. 1(c), ¶ 14(a); Acting General Counsel’s Brief to the Administrative Law Judge (“GC’sBrief”), p. 10.) It is not possible, then, that the ALJ relied on the testimony of Reed and Witt to make his finding in this regard. If the ALJ’s findings are totally contrary to the GC’s allegations and his evidence in support of those allegations, the ALJ cannot find that the GC sustained his burden on this point.

The ALJ relies in large part on *Turtle Bay Resorts*, 355 NLRB No. 147 (August 27, 2010), *adopting* in full the earlier set aside decision reported at 353 NLRB No. 127 (2009) to find that Dostert unlawfully denied the Union representatives visitation at the Hillsboro Store. That case, however, dealt with an employer who denied union representatives total access to its premises and represented employees in violation of the parties’ past practice. *Id.* at 52-53. Here, Dostert did not tell the Union representatives that they could not visit with employees at all. According to the ALJ, he did not even tell them that they could not talk to employees on the sales floor, as Reed and Witt claimed. What Dostert did do was tell them that they could walk the sales floor, introduce themselves to employees, handout business cards and if their conversations with employees would take more than a couple of minutes, they needed to continue the conversations in the breakroom. (ALJD 31:36-40; *see also* R. Ex. 36.)

Further, Dostert’s instruction was consistent with the parties’ visitation practice *as described by the ALJ himself*. Again, the ALJ described the past as follows:

[U]nion agents should limit their store floor visits with represented employees to a reasonable time and, if further communication and time was necessary to complete or followup (*sic*) on such a visitation, the employee and Union agent could go to the employee breakroom, arrange to meet when the employee was off duty, or make other arrangements. * *
* [T]he parties simply viewed the time allowed as a minute or two or possibly longer depending on the circumstances.

(ALJD 26:9-19.) He described Dostert's instruction to the Union representatives as follows: "the two agents must limit their contact with employees on the store floor to identification and introductions only with all additional communication between agent and employee required to be off the floor in the breakroom." (ALJD 31:36-40.) Dostert testified that he understood the parties' past practice to mean that the Union representatives contact with employees on the sales floor could last one to two minutes. (Tr.1304.) His instruction then bears almost no material difference from the ALJ's description of the parties' practice, so where is the denial of visitation rights?

Dostert's instruction to Reed and Witt might have been unfortunately inartful. The ALJ himself suggested that Dostert may have failed to articulate the fine distinction between "1) a visitation policy which allows Union agents to identify themselves to represented employees, but no more, with any additional conversation to take place off the floor such as in the breakroom, and 2) a visitation policy which allows Union agents to identify themselves to represented employees and to talk to those employees on the floor for an additional period of time – perhaps one or two minutes depending on the circumstances." (ALJD 31:13-17,) But inartfulness does not constitute an unlawful denial of visitation rights and a unilateral change in practice.

It is also more than likely that the dispute that arose between Dostert and Reed was due to Reed's inaccurate description of the parties' visitation practice at the Hillsboro Store, and not to Dostert's inartfulness. Reed was insisting that she had an unlimited right to talk to employees on the sales floor. Dostert knew that wasn't true, and the two simply argued over that point for 45 minutes.

Dostert clearly had a greater working knowledge of the parties' visitation than did Reed. He had been a manager with Fred Meyer since 1996, had specifically been trained on the parties' visitation practice, had that practice reiterated to him by Catalano on October 14, and had never before had a dispute with the Union regarding visitation when he was the Person in Charge of the store. (Tr. 1297, 1302-03.) Union representative Kathy MacInnis confirmed that Dostert had often been the Person in Charge when she was assigned to the Employer's Tigard, Oregon store and that he never ordered her to the lunchroom or told her that she could not talk to employees on the sales floor, and that he never stopped her from talking to employees on the sales floor. (Tr. 1577.) Had this dispute over access happened between MacInnis, Witt and Dostert without Reed's involvement, there probably would not have been a dispute at all since it would have involved two parties who perfectly understood the parameters of the visitation practice.

Reed bears much of the blame for the October 15 dispute, as it was fueled by her insistence that she did not have to go to the breakroom because she could talk to employees on the sales floor for as long as she wanted. She could have ended the dispute by simply walking away and undertaking her visitation with employees. She did not do that; she wanted to argue with Dostert and to insist on unilaterally changing the parties' practice until Dostert was forced to call the police to remove her.

In sum, Reed and Witt did not seek Union visitation of represented employees at the Hillsboro Store consistent with the terms of the parties' contract and past practice, and Dostert did not unlawfully deny the Union those rights. (ALJD 33:11-14.) As a consequence, the Employer did not violate Sections 8(a)(1) or (5) of the Act by unilaterally changing the

parties' past practice under the Visitation Clauses at the Hillsboro Store on October 15, 2009, without affording the Union notice and an opportunity to bargain. (ALJD 42:51-43:3.) The ALJ's findings and conclusions to the contrary should be reversed, and those portions of the Amended Complaint relating to these charges should be dismissed.

B. The ALJ Erroneously Found that the Union Representatives' Arrests Violated Section 8(a)(1) of the Act and Erroneously Ordered the Employer to Make the Union Representatives Whole for any Attorneys' Fees and Costs they Incurred as a Result of the Arrests.

The ALJ concluded that Fred Meyer threatened, then caused, the arrests and subsequent criminal prosecutions of Union representatives Reed, Marshall and Clay in violation of Section 8(a)(1) of the Act. (ALJD 42:35-49.) The ALJ based that conclusion on his erroneous finding that the Employer was liable for the arrests because, in the case of Reed, she was properly exercising her right to visit represented employees in the store, (ALJD 33:37-39), and in the case of Marshall and Clay, because he improperly applied Board precedent to find their arrests were the "proximate and foreseeable" result of the Employer contacting the Hillsboro Police department to assist in removing the Union representatives from the store. (ALJD 36:15-17.) The ALJ's conclusion is erroneous and should be reversed. Even if the Board finds that the ALJ's conclusion is not erroneous, the Board should refuse to enforce his recommended order that the Employer should make the Union whole for any costs related to the arrests because it would not effectuate the purposes of the Act to do so. (ALJD 43:35-44:1-2.)

1. The ALJ Erroneously Found that Fred Meyer Caused the Union Representatives' Arrests.

The ALJ found that the Employer was caused Reed's arrest because she was properly exercising her right to visit represented employees in the Hillsboro Store on when she was arrested. (ALJD 33:37-39.) This finding is wrong because, as explained above, Reed was

not properly exercising her right to visit employees on October 15 so the Employer lawfully contacted police for assistance in removing her from the store. The ALJ's finding to the contrary must be reversed.

The ALJ found that the Employer caused the arrests of Marshall and Clay because their arrests were the "proximate and foreseeable" result of the Employer contacting the Hillsboro Police department to assist in removing the Union representatives from the store. In making this finding, the ALJ relied on *Wild Oats*, 336 NLRB 179 (2001) to fashion the proposition that employers "who commit unfair labor practices [are] responsible for the proximate [and foreseeable] results of their actions." (ALJD 35:41-47.) The ALJ's reliance on *Wild Oats* is misplaced for two reasons. First, the finding of liability in *Wild Oats* was grounded on the fact that the employer did not have a property interest that entitled it to expel the union picketers from its store's parking lot because the employer merely leased its property. It is undisputed in this case that Fred Meyer owns the Hillsboro Store and its surrounding parking lot. Secondly, the Board was in *Wild Oats* was forced to rely upon the "proximate and foreseeable" consequences standard in order to find liability because the employer had not taken any *direct* action in that case. In other words, it had not contacted the police itself. Thus, the "proximate and foreseeable" consequences standard is properly applied to find liability only when an employer has taken some indirect action that resulted in the unlawful expulsion of union representatives.

In this case, Fred Meyer directly called the Hillsboro Police department itself. The appropriate standard to be applied in this case is found in *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977), under which the Board will hold an employer liable for the arrest of a

union representative when that arrest “stem[s] solely from the [employer’s] persistent effort to maintain and enforce its unlawful policies and to thwart the protected organizational activities of its employees.” When the arrest is not solely the result of an employer’s unlawful conduct, however, but is warranted by the representative’s conduct, the Board will not find the Employer liable for such an arrest. *Id.* at 46 fn. 10. The ALJ failed to distinguish, or to even address, this binding Board precedent, under which Fred Meyer is not liable for the Union representatives’ arrests.

The Union representatives’ arrests did not stem solely from Fred Meyer’s persistent effort to maintain and enforce its unlawful policies and to thwart the protected organizational efforts of its employees. Fred Meyer was not maintaining and enforcing an unlawful policy; it was lawfully enforcing the parties’ visitation practice in the face of the Union’s numerous breaches of that practice. The Union breached that practice by seeking an unlimited right to visit employees on the sales floor, by sending eight representatives into the store, and by gathering employee signatures on petition on the sales floor. Due to these breaches, the Employer was lawfully permitted to have the trespassing representatives removed from the store.

Even if Fred Meyer did unlawfully deny the Union representatives visitation at the Hillsboro Store on October 15 (which it did not), the Union representatives’ arrests were not solely the result of that unlawful conduct, but were warranted by the representatives’ own conduct that day. Their arrests were the result of their individual refusals to comply with the police officers’ instructions to leave the premises, and were part of the Union’s plan to provoke an arrest as part of their plan to create an event at the Hillsboro Store.

a. Reed's Conduct Warranted her Arrest.

First of all, as a UFCW International representative, she did not even have a right under the parties' contract or visitation practice, to be in the store to visit employees. The UFCW International is not a party to the contracts between Fred Meyer and the Union. On top of that, Reed was not even seeking visitation consistent with the parties' contracts and practice. She was there to insist that the Union representatives be granted an unlimited right to visit with employees on the sales floor in contravention of the parties' visitation practice, and she planned to be arrested if she was not granted that right. Reed even informed Dostert that she would not leave the store unless she was arrested. (Tr. 1330.) Once the police had been called, she prepared for her arrest by giving her purse to Witt for safekeeping because both she and Witt knew that he would not be arrested once the police arrived. Once the police arrived, she gave them no choice but to arrest her and went so far as to stick her hands out in front of her to be handcuffed and Donna Nyberg was right there to capture the arrest on film for use in the Union's publicity materials.

b. Mike Marshall's Conduct Warranted his Arrest.

The ALJ wrongly suggests that Marshall was arrested because he "did not with sufficient speed [exit] the parking lot." (ALJD 36-1-3.) Marshall was arrested in the parking lot because he was arguing with Sergeant Shannon about whether he could leave the parking lot without Jeff Anderson's keys. Marshall testified that he had extensive experience with law enforcement officials, and knew or should have known what would result from arguing with the police. (Tr. 616, 628.) Certainly his arrest was avoidable, since no other Union representative who had been in the store that day was arrested (Reed excepted for obvious reasons). In fact, Union representative Kathy MacInnis was standing only five feet away from Marshall during his

entire confrontation with the police and his subsequent arrest. Like Marshall, she was not able to gain access to Jeff Anderson's car. Like Marshall she had been told by the police to leave the premises. Yet McInnis was *not* arrested. She did not turn around and start heading back to the store and did not argue with the police when they asked her to leave. Marshall could have, and should have, done the same. Fred Meyer is not responsible for his decision not to do the same.

c. Dan Clay's Conduct Warranted his Arrest.

Dan Clay was not present at the Employer's store that day seeking visitation with employees, so his arrest does not have anything to do with whether the Employer unlawfully denied him visitation under the parties' practice and cannot be evaluated alongside the arrest of Reed and Marshall. Clay showed up after the fact for the sole purpose of arguing with the police about federal labor law. Clay wanted the police to "look at Federal law before [arresting people]." (Tr. 738.) Clay was apparently expecting the police officers to review and evaluate the National Labor Relations Act and the parties' contracts to make the legal determination of whether the Union was lawfully seeking access to the Employer's store. Why Clay should have thought that the police officers should make such a determination, or were even qualified to do so, is unclear, and just plain unreasonable. The officers are not experts in federal labor law; they are trained in criminal law. Sergeant Shannon made that clear to Clay and yet Clay continued to argue with him. At that point, Sergeant Shannon very clearly told Clay: "[A]nother word and you're done." (Tr. 739-40.) Clay very clearly understood that this meant he would be arrested if he continued arguing with the Sergeant, yet he chose to continue the argument and get himself arrested. (Tr. 739.)

2. The Union Representatives' Arrests were not the Proximate and Foreseeable Consequences of the Employer's Call to the Police.

Even if the Board agrees with the ALJ that the “proximate and foreseeable” consequences standard should be applied in this case pursuant to *Wild Oats*, 336 NLRB 179 (2001), (ALJD 35:41-47), it should still reverse the ALJ’s conclusion that the Union representatives’ arrests were the foreseeable and proximate consequences of Fred Meyer’s call to the police.

Marshall’s arrest was not a foreseeable result of Dostert’s call to the police. It was not possible to anticipate that once he had left the store he would argue with the police about whether or not he could leave the parking lot. How could that result be foreseeable when no other Union representative was arrested because he or she was not “sufficiently rapid” in leaving the parking lot – not even Kathy MacInnis, who was standing next to Marshall the entire time and could not get into Anderson’s car for the very same reason. Marshall’s decision to argue with the police instead of complying with their instruction to leave the premises is an intervening act for which Fred Meyer is not responsible.

Dan Clay’s arrest likewise was not foreseeable. He wasn’t even present when Dostert called the police -- how could Fred Meyer have anticipated that he would show up at the store and argue with the police? His decision to come to the parking lot and argue with the police was similarly an intervening act for which Fred Meyer is not responsible.

The fact that any arrests occurred at all on October 15 was not foreseeable result. Cynthia Thornton and Dostert did not think that anyone would be arrested at the Hillsboro store that day. (Tr. 1143, 1226, 1330, 1444-45.) Every other time the Employer called the police in similar circumstances, the Union representatives left before the police arrived or would

voluntarily leave once the police arrived. (Tr. 1227.) Disputes were usually resolved between The Employer's corporate office and Union leadership, and the Union would file grievances if they were not resolved to the Union's satisfaction. (Tr. 1226-27.) Shaun Barclay had the opportunity to resolve the October 15 incident pursuant to the practice, but he did not do so. He refused Thornton's offer to resolve the issue through bargaining or through the grievance procedure and re refused to instruct the Union representatives from the Hillsboro Store, contrary to the parties' past practice of resolving such disputes that way. Based on the parties' history, the only foreseeable result of the Employer's contacting the police on October 15, 2009, was the peaceful departure of the Union representatives and resolution of the dispute at the corporate level. The ALJ's finding to the contrary should be reversed.

3. Even if the Board Finds that the Employer Somehow Caused the Union Representatives' Arrests, the Board Should Not Order it to Make the Union Representatives Whole for Costs Incurred as Result of those Arrests.

Even if the Board agrees with the ALJ finds that Fred Meyer somehow acted improperly in these circumstances, it should decline to enforce his order that the Employer pay the representatives' attorneys' fees and costs. (ALJD 43:35-44:2.).

The request for attorney's fees is an extraordinary one, and the Board ordinarily limits the award of attorneys' fees to only those cases in which an employer has engaged in frivolous litigation, *Wellman Industries*, 248 NLRB 325 (1980), or where there has been a long history of blatant disregard of prior Board Orders. *J.P. Stevens, Inc.*, 244 NLRB 407 (1979). In keeping with this principle, the Board will order attorneys' fees in cases such as this only where the employer acted egregiously in having a union representative arrested for trespass (for example, the union representative was arrested even though he was on public property), the

union representative's conduct did not warrant such arrest, and where the employer actively pursued criminal or civil litigation against the union representative. *See Hearn Construction*, 354 NLRB No. 37, slip op. at 1 n. 3 (June 30, 2009); *Macerich Property Management Company*, JD(SF)-07-99, 1999 Westlaw 33452912, slip op. at 8-10 (Feb. 5, 1999) (not reported in Board volumes); *Baptist Memorial Hospital*, 229 NLRB at 46.

Here, Fred Meyer did not act egregiously by removing the Union representatives from its private property. It called the police only as a last resort when the Union representatives disrupted store operations for almost 45 minutes about whether they could talk to employees for as long as they wanted and by sending eight representatives into the store. Ms. Thornton did not direct Dostert to contact the police until the third time he called her, and they did not discuss having the Union representatives arrested. Fred Meyer did not intend for or ask that any Union representatives be arrested that day, and certainly did not anticipate such a result when it contacted the police. Based on past experiences in such circumstances, Fred Meyer reasonably assumed that the Union representatives would peacefully leave the store once the police arrived as they had voluntarily done in the past. Thornton attempted to resolve the situation with Barclay when he called her that morning by offering the use of the grievance procedure in the Portland Contracts and further offered to sit down and discuss the issue. (Tr. 1226.) Instead of trying to resolve the situation, Barclay threatened to send even more representatives to the Hillsboro Store. (Tr. 1226.)

The Union representatives certainly did not leave peacefully, since doing so was not part of the plan they developed on October 14. The evidence in this case make it clear that the October 15 incident was a set up by the Union and that when the Union representatives

entered the store on October 15 they were determined to force the Employer into arresting at least Jenny Reed as part of the Union's plan to create an event at the store that day. There is simply no other way to interpret Ken Spray's and Stuart Fishman's statements that Jenny Reed planned to take the arrest that day. Nor is there any other way to interpret Brad Witt's testimony that he called Donna Nyberg to come and take photographs that day because he hoped she would get a story out of it. The only conclusion that can be drawn from this overwhelming evidence is that it did not really matter what Dostert, or Fred Meyer, did or said on October 15; Jenny Reed and Brad Witt were determined find a way to provoke the Employer into calling the police and it was ultimately successful in reaching the pre-arranged goal. Once the police were called, the Union representatives still had ample opportunity to leave the premises without being arrested, both before and after the police officers arrived. Instead of leaving peacefully, they chose to flagrantly refuse to comply with the Officers' instructions, leaving the Officers no choice but place them under arrest. Thus, the Union representatives' own conduct, as described above, warranted their arrests. The Union simply should not be permitted to benefit from its disruptive and unlawful conduct in the store on October 15 by having its attorneys' fees and costs paid for by the Employer. Particularly where there is no evidence in the record that Fred Meyer actively pursued criminal or civil litigation against the arrested Union representatives.

Since Fred Meyer did not act egregiously in calling the police to assist it in removing the Union representatives from its store and took no action to further the prosecution of those representatives once they caused their own arrests by refusing to comply with the police officers' repeated requests that the representatives, Fred Meyer respectfully requests that the Board decline to enforce this portion of the ALJ's order.

C. The ALJ Erroneously Found that the Employer Violated Section 8(a)(1) of the Act when Dostert Made Disparaging Remarks About the Union in the Presence of Employee Alicia England and Instructed Kline to Contact the Police.

The ALJ concluded that the Employer violated Section 8(1)(a) of the Act because:

1) Dostert made disparaging remarks about the Union in the presence of employee Alicia England (ALJD 38:49-50), despite the fact that there was no evidence that Dostert had made any such statements in England's presence, and 2) because Dostert instructed Kline to contact the police, regardless of whether that instruction was made in the presence of employees as alleged in the Amended Complaint. (ALJD 39:40-46.)

1. There is No Evidence that Dostert Made Any Disparaging Remarks About the Union in England's Presence.

The ALJ concluded that Dostert made certain disparaging remarks about the Union and its representatives in violation of Section 8(a)(1) of the Act. (ALJD 38:49-50.) He based this conclusion on his finding that Dostert disparaged the Union in England's by stating that:

- Union representatives are jerks;
- Unions are outdated and ridiculous;
- Union dues are ridiculous;
- Union representatives and the Union are stupid.

It is not possible, however, that England heard any of these comments, even if Dostert did make them (and the Employer denies that he did).

The ALJ correctly found that England is hearing impaired, wears a hearing aid,

hears best when facing the speaker and augments her hearing with lip reading. (ALJD 38:17-19.) The GC himself admits that Reed and Dostert's interaction with England at the apparel check stand began at 9:48:20 a.m. lasted, at most, for 55 seconds and ended when Reed turned away from England and began talking on her phone. (GC's Brief, p. 34.) Witt testified that he and Dostert moved 15 feet away from England, towards the photo-electronics department. (Tr. 921.) The surveillance video in evidence shows very clearly that once Reed turned away from England, Dostert and Witt moved away from England and England *turned her back* to Dostert and Witt. (Jt. Ex. 9(a), 9:49:07 a.m.) At 9:50:51 a.m., England was busy assisting a customer at the checkstand. (Jt. Ex. 9(a).) England's back remained turned to Dostert and Witt the entire time. (Jt. Ex. (a).) It is impossible that a woman who wears a hearing aid and must reads lips to hear properly heard a conversation that was occurring 15 feet away from her, behind her back, while she was assisting a customer.

The GC bore the burden of establishing that England heard Dostert's alleged remarks in those circumstances, but he presented no evidence to meet that burden. England did not even testify that she heard any such remarks by Dostert. The ALJ seeks to excuse the GC's evidentiary failure by saying no one asked England if she heard such statements. (ALJD 38:2-4.) This is utterly improper; it was the GC's burden to ask such questions of England, and he failed to carry to his burden by failing to ask the necessary questions at hearing. The ALJ cannot fabricate evidence to assist the GC. The GC utterly failed to carry his burden in this regard, and the record evidence establishes unequivocally that, despite the ALJ's fabrication, it was impossible for England to have heard Dostert make any of the alleged statements. The ALJ's finding in this regard must be reversed and the related allegations of the Amended Complaint

should be dismissed outright.

2. Dostert Lawfully Instructed Kline to Contact the Police, and Even if He did not, this Allegation is Cumulative of The Amended Complaint Allegations.

The ALJ found that the Employer violated Section 8(a)(1) of the Act when Dostert instructed Loss Prevention Officer Mike Kline to contact the police, regardless of whether the instruction was given in the presence of employees. (ALJD 39:40-46.) As discussed above, the Employer did not violate the Act when it contacted the police for assistance in removing the Union representatives from the Hillsboro Store, so this finding should likewise be reversed and this portion of the Amended Complaint dismissed.

If the Board does find, however, that the Employer acted unlawfully in contacting the police, it is unnecessary to also find that the Employer violated Section 8(a)(1) of the Act, since such a finding would be cumulative and would not materially affect the remedies ordered in this case. *See Strand Theater of Shreveport Corp.*, 346 NLRB 523 fn.2 (2006), *enfd.* 493 F.3d 515 (5th Cir. 2007). The Board should therefore decline to enforce those portions of the ALJ's recommended Order regarding this allegation.

V. CONCLUSION

For all of the foregoing reasons, the ALJ's conclusion that the Employer violated Sections 8(a)(1) and 8(a)(5) and (1) of the Act should be reversed, and the Amended Complaint should be dismissed in its entirety. In addition, the ALJ's proposed remedy, recommended order, and proposed notice posting should not be followed.

DATED: January 5, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2011, I served the foregoing RESPONDENT
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- by **electronic** means through the Court's Case Management/Electronic Case File system, which will send automatic notification of filing to each person listed above.
- by **mailing** a true and correct copy to the last known address of each person listed. It was contained in a sealed envelope, with postage paid, addressed as stated above, and deposited with the U.S. Postal Service in Portland, Oregon.
- by causing a true and correct copy to be **hand-delivered** to the last known address of each person listed. It was contained in a sealed envelope and addressed as stated above.
- by causing a true and correct copy to be delivered **via overnight courier** to the last known address of each person listed. It was contained in a sealed envelope, with courier fees paid, and addressed as stated above.
- by **faxing** a true and correct copy to the last known facsimile number of each person listed, with confirmation of delivery. It was addressed as stated above.
- by **emailing** a true and correct copy to the last known email address of each person listed, with confirmation of delivery.

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