

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: October 17, 2001

TO : Gerald Kobell, Regional Director
Stanley R. Zawatski, Regional Attorney
Michael Joyce, Assistant to Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 393-6061
530-8006

SUBJECT: SuperValu, Inc. 725-6717-1200
Cases 6-CA-31960, 6-CA-31962, 725-6717-3700
6-CA-31988, and 6-CA-32004 725-6733
725-8070

These Section 8(a)(5) cases were submitted for advice as to whether the Employer¹ adopted a collective-bargaining agreement with the Union,² but then unlawfully refused the Union's request to conduct a card check and extend recognition at four stores pursuant to the "additional stores" clause of that agreement.

FACTS

The Westmoreland Store

Between August 1998 and July 2000, the Employer, a nationwide grocery wholesaler and retailer, acquired or built approximately 20 Shop 'N Save supermarkets in Western Pennsylvania. Thomi Co., which sold its Westmoreland store to the Employer, was party to a collective-bargaining agreement with the Union, effective by its terms from April 18, 1999, through April 20, 2002. That collective-bargaining agreement included the following relevant clauses:

1.2 Successorship

- (a) This Agreement encompasses the owner, operator, or lessee, and all their stores now operating or operating in the future by the Employer and shall be

¹ SuperValu, Inc.

² UFCW Local Union 23.

binding upon the parties hereto, their heirs, successors and assignees.

ARTICLE 2 - Bargaining Relationship:

2.1 Union Sole Bargaining Agent

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 [numerous counties in Pennsylvania, Ohio, and West Virginia], or which may be operated in any areas assigned to Local 23 by the United Food and Commercial Workers International Union, including employees employed in all leased departments.

(a) Exclusion From Bargaining Unit

This provision shall exclude the owners, one (1) store manager, one (1) grocery manager, one (1) front-end manager, one (1) bakery manager, one (1) produce manager, one (1) meat manager, one (1) deli manager, one (1) confidential employee, and all guards and supervisory personnel as defined in the National Labor Relations Act.

By letter dated March 21, 2000, the owner of Thomi Co. informed the Union that its sales agreement with the Employer provided that the Employer "will assume and agree to be bound by the current collective-bargaining agreement for its remaining term." Thereafter, Union area director Slivosky discussed the impending sale with Thomi Co. labor counsel Cooper. Cooper verified the information in the March 21 letter, and neither he nor Slivosky proposed any changes to the collective-bargaining agreement.³

On March 29, 2000, Slivosky mailed a proposed Recognition/Successor Agreement (RSA) to Cooper that had been signed by Union President Kean. The language of the RSA constitutes a standard form used by the Union when successor employers agree to recognize the Union. On May 10, Cooper sent a copy of the agreement to Slivosky that had been signed by an Employer representative. The only modifications, made at the Employer's request, were the insertion of the date on which the Employer would commence

³ Following the sale, Cooper represented the Employer in connection with the instant charges until June 8, 2001.

operations and changes regarding the exclusion of certain classifications from the unit.⁴ The parties did not discuss any of the changes, and Union President Kean signed the Employer's version on May 16, 2000. The RSA regarding the Westmoreland store provides, in its entirety:

RECOGNITION/SUCCESSOR AGREEMENT

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 (1) store manager, one (1) grocery manager, one (1) front-end manager, one (1) deli manager, one (1) confidential employee, and all guards and security personnel as defined in the National [Labor] Relations Act.⁵

⁴ The bakery manager, produce manager, and meat manager classifications, which are excluded from the unit in the collective-bargaining agreement, are not listed among the exclusions in the RSA, quoted below. The Employer asserts that these differences are irrelevant to the applicability of Article 2.1, and both parties agree that they were inadvertent.

⁵ The word, "security," may have been substituted inadvertently for "supervisory."

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 employee [sic] 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.

The Butler Store

The Union also had a collective-bargaining agreement with Butler Supermarkets, Inc. d/b/a Butler Shop 'N Save that was effective from June 26, 1999, through June 29, 2002. The agreement contains the same language in Sections 1.2(a) and 2.1 of the Westmoreland contract, but its exclusions are somewhat different:⁶

(a) Exclusions From Bargaining Unit

This provision shall exclude the owners, the owners' immediate family, one (1) store manager, five (5) assistant managers, (1) grocery manager, one (1) night crew manager, one (1) meat manager, one (1) produce manager, one (1) floral manager, one (1) seafood manager, one (1) food court manager, one (1) front end manager, one (1) deli manager, one (1) 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.

Shortly before the Employer acquired the Butler store, the predecessor's owner, Joseph Ferraccio, and the Employer's corporate counsel told Union President Kean that

⁶ Another difference is that, unlike the Westmoreland collective-bargaining agreement, the initial paragraph of Section 2.1 does not include the phrase, "including employees employed in all leased departments."

the sale would not occur unless the Union agreed to sign a successor agreement with the Employer adopting each and every clause of the predecessor's collective-bargaining agreement. Although the Union wanted to negotiate with the Employer, presumably regarding enhanced wages and benefits,⁷ the Union conceded on this point and agreed to the Employer's demand that the contract remain unchanged. Shortly after the Employer purchased the Butler store, the parties signed the following agreement:⁸

RECOGNITION/SUCCESSOR AGREEMENT

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 (1) store manager, five (5) assistant managers, (1) grocery manager, one (1) night crew manager, one (1) meat manager, one (1) produce manager, one (1) floral manager, one (1) seafood manager, one (1) food court

⁷ The wage rates of the Butler contract are significantly lower than those at Westmoreland for the most senior employees, but somewhat higher for other employees.

⁸ SuperValu Vice President/General Manager Triffo signed the RSA on July 15, 2000, and Union President Kean signed it on July 25, 2000.

manager, one (1) front end manager, one (1) deli manager, one (1) 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.

By letter dated September 15, 2000, the Employer responded to a request from the Union to negotiate wage and benefits increases. The letter states, in part,

Prior to the acquisition of Butler Shop 'n Save, SUPERVALU acquired Westmoreland Mall Shop 'n Save where Local 23 had an existing labor agreement. SUPERVALU retained the workforce and assumed the existing terms of the labor agreement to expiration. Likewise, when Butler Shop 'n Save was about to be acquired, SUPERVALU made it clear in written communications to Local 23 that it would retain the workforce and assume the existing terms of the labor agreement to expiration. These written communications to Local 23 specifically stated that SUPERVALU would meet its legal obligations to negotiate a replacement labor contract at the expiration of the current contract at Butler. Therefore, SUPERVALU has been and will remain consistent in its policy regarding this matter.

Demands for Card Checks and Recognition

Throughout the relevant period, the Union has been attempting to organize other stores owned by the Employer, and the Employer has been opposing those efforts. Union assistant director of organizing Toner sent letters dated November 1, 9, and 13, 2000, and March 16, 2001, to the Employer stating that the Union possessed signed and dated authorization cards from a majority of employees working at four stores. Citing Article 2.1 of the collective-

bargaining agreements,⁹ the letters also demand recognition on a store-by-store basis¹⁰ and offer to permit a third party to conduct a card check. The Employer promptly responded to each of those letters by rejecting the demands and stating its position that Article 2.1 does not require that it participate in a card check because it was implicitly replaced by the absence of "after acquired" language in the subsequently signed RSAs. In addition, on February 26, 2001, the Employer refused to process grievances alleging violations of Article 2.1 of each of the collective-bargaining agreements.¹¹

Of the four stores where the Union demanded a card check and recognition, evidence of majority status is clear only with respect to the North Charleroi location. Although that store ceased operations about a week after the Union's recognition demand, the Union's status is not moot there, being significant with respect to effects bargaining or other issues. Moreover, because the Employer operates approximately 20 stores in Western Pennsylvania, the issues raised in the instant cases are of continuing importance to the parties.

ACTION

We conclude that the Region should issue a complaint alleging that the Employer violated Section 8(a)(5) by refusing to submit to a card check with respect to the North Charleroi store, pursuant to Article 2.1 of the Butler store collective-bargaining agreement.

"It is well settled that the Board has the authority to interpret collective-bargaining agreements in the course

⁹ The Union's November 9, 2000, letter demanding recognition at the Noblestown, Pa., store relies on the Westmoreland store collective-bargaining agreement. The other recognition demand letters refer to the Butler store agreement.

¹⁰ The Union's attorney informed the Regional Office by letter dated June 12, 2001, that it "does not seek an overall wall-to-wall bargaining unit."

¹¹ Neither party contends that this matter should be deferred to arbitration under Collyer Insulated Wire, 192 NLRB 837 (1971), as the Employer has refused to arbitrate the Union grievances involving Section 2.1.

of deciding unfair labor practice cases."¹² To determine the parties' actual intent underlying the contract language, the Board examines the language itself as well as any relevant extrinsic evidence.¹³ Where extrinsic evidence is lacking, the Board attempts to determine the parties' intent in light of the ordinary meaning of the contract language,¹⁴ the realities of labor relations, and considerations of federal labor policy.¹⁵

Furthermore, if two or more documents such as the RSAs and the collective-bargaining agreements in these cases are made at the same time and relate to the same subject matter, they may be read together as one contract.¹⁶ Where it is possible to reconcile two provisions that may be viewed as conflicting, a court is required to do so and thereby give effect to both.¹⁷ Contracts should be read to minimize conflicts, and one clause should yield to another only where the two are unmistakably inconsistent.¹⁸

¹² Mining Specialists, 314 NLRB 268, 268 fn. 5 (1994).

¹³ Id. at 268-69.

¹⁴ J.R.R. Realty Co., 301 NLRB 473, 474-75 (1991), enfd. mem. 955 F.2d 764 (D.C. Cir.), cert. denied 506 U.S. 829 (1992).

¹⁵ Mining Specialists, above at 269, citing Electrical Workers IBEW Local 1395 v. NLRB, 797 F.2d 1027, 1033 (D.C. Cir. 1986).

¹⁶ North American Savings Bank v. Resolution Trust Corp., 65 F.3d 111, 114 (8th Cir. 1995); Missouri Savings Assn. v. Home Savings of America, 862 F.2d 1323, 1325 (8th Cir. 1988).

¹⁷ See Sayers v. Rochester Telephone Corp. Supplemental Management Pension Plan, 7 F.3d 1091, 1095 (2d Cir. 1993); Supreme Sunrise Food Exchange, 105 NLRB 918, 920 (1953).

¹⁸ McKeown Distributors, Inc. v. GYP-Crete Corp., 618 F.Supp. 632, 640-41 (D.Conn. 1985). See also Supreme Sunrise Food Exchange, 105 NLRB at 920 (contract must be construed to give "reasonable meaning [to] all its terms").

Furthermore, each word of the contract should be given effect whenever possible.¹⁹

In the instant cases, the language of the RSAs and collective-bargaining agreements establish the parties' intent that the Employer would recognize the Union at its other stores if and when the Union could establish that a majority of the unit employees desired Union representation. The initial paragraph of Article 2.1 is a "Kroger"-type clause,²⁰ under which the signatory employer agrees that as to its other locations, the employer will recognize the signatory union and apply the contract to that operation when the union demonstrates its majority by means of a card check.²¹ The Board consistently has held that such a clause waives the employer's statutory right to a Board-conducted election,²² and the courts have approved of this approach.²³

The Employer does not dispute these principles, but instead contends that the recognition language in the RSAs supersedes and constitutes a rejection of the Kroger language in the collective-bargaining agreements. It argues that the single store scope of the RSAs should be

¹⁹ Ohio Calculating, Inc. v. CPT Corp., 846 F.2d 497, 500 (8th Cir. 1988); Fitch v. Duke, 532 F.2d 115, 117 (8th Cir. 1976); Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1131 (3d Cir. 1969).

²⁰ Kroger Co., 219 NLRB 388 (1975).

²¹ We have applied such "after acquired" or "additional stores" clauses to pre-existing unrepresented locations. See Raley's Supermarkets, 20-CA-25166, Advice Memorandum dated May 11, 1993.

²² See Central Parking System, 335 NLRB No. 34, slip op. at 1 (2001); Pall Biomedical Products Corp., 331 NLRB No. 192, slip op. at 2 fn. 4 (2000); Joseph Magnin Co., 257 NLRB 656, 656-57, enfd. 704 F.2d 1457 (9th Cir. 1983), cert. denied 465 U.S. 1012 (1984); Kroger, 219 NLRB at 389.

²³ E.g., Hotel & Restaurant Employees Local 2 v. Marriott Corp., 961 F.2d 1464, 1468 (9th Cir. 1992); Food & Commercial Workers Local 400 v. Great Atlantic & Pac. Tea Co., 480 F.Supp. 88, 95 fn. 9 (D.Md. 1979).

viewed as specific recognition language that controls the general recognition language of Article 2.1.

We conclude, however, that the language in the RSAs requiring both parties "to abide by all terms and conditions of the existing collective bargaining agreement[s]"²⁴ preserves Article 2.1 and is not inconsistent with the recognition language in the RSAs. First, the quoted phrase should be given its ordinary meaning.²⁵ Furthermore, the recognition language in each of the RSAs simply shows the parties' understanding that the Union represents a majority of the employees at those two stores. That language is not inconsistent with Article 2.1 of the collective-bargaining agreements, which governs the parties' intentions regarding other stores owned by the Employer, where the Union did not represent a majority when the RSAs were signed. There is no inherent inconsistency between the Employer's granting recognition at two specific stores and its agreement to recognize the Union in the future based on card checks at other locations. Absent any explicit language in the RSAs regarding the parties' relationship at other stores, there is no reason to conclude that the parties intended to delete Article 2.1.

In addition, the Employer's argument would require us to ignore the language adopting the collective-bargaining agreements, in violation of the principle that each word of the contract should be given effect whenever possible.²⁶ If the parties had intended to delete or modify the additional stores clause, they could have done so with simple and clear language. Having failed to do so, their intention to abide by Article 2.1 and all other clauses of the collective-bargaining agreements is clear.²⁷

²⁴ The Employer ignores this language in its position statements.

²⁵ Supreme Sunrise Food Exchange, 105 NLRB at 920 ("the grammatical and ordinary sense of particular words" should be applied).

²⁶ Ohio Calculating, 846 F.2d at 500; Fitch, 532 F.2d at 117.

²⁷ Neither party argues that this matter should be governed by cases concerning unilateral mistake. That doctrine is "reserved for those instances where the mistake is so obvious as to put the other party on notice of an error." Apache Powder Co., 223 NLRB 191 (1976). Furthermore, where

Under these circumstances, there is no ambiguity regarding the parties' intent as shown in the language of the RSAs and the collective-bargaining agreements. The only interpretation of the RSAs and the collective-bargaining agreements that gives meaning to all of their terms and avoids conflicts is that stated above, i.e., the RSAs grant recognition at two stores where the Union represented a majority and the parties adopted Article 2.1, which governs their relations at other stores.

Furthermore, assuming *arguendo* that the language of the RSAs and the collective-bargaining agreements does not resolve the matter completely, the extrinsic evidence supports a finding that they intended to be bound by Article 2.1. First, there is no evidence that the parties discussed the possible modification of Article 2.1. Therefore, the Employer's current contention that it viewed the recognition language in the RSAs as superseding Article 2.1 is not supported by any evidence that it expressed that view to the Union before the RSAs were signed.

We also reject the Employer's argument that its opposition to the Union's organizing campaign is inconsistent with its alleged intention to bind itself to an after acquired stores clause. Article 2.1 merely waives the Employer's right to insist on a Board-conducted election; it does not affect the Employer's right to persuade employees to reject Union representation. Because the Employer is not required to recognize the Union in any unit in which the Union fails to attain majority support, there is no inconsistency between the Employer's agreement to recognize the Union without an election if it achieves majority status, on the one hand, and its efforts to prevent the Union from gaining support, on the other.

Other extrinsic evidence concerning the parties' intent includes the Employer's rejection of the Union's attempt to negotiate with it regarding the Butler store collective-bargaining agreement and the Employer's insistence, regarding both the Westmoreland and Butler stores, that the Union agree to adopt the predecessors' contracts in their entirety. In other words, the bargain struck by the parties was that the Employer obtained stability in labor costs with experienced employees and the Union obtained the retention of each workforce,

a unilateral mistake negates a finding that the contract resulted from a meeting of the minds, the result is rescission of the contract. Id.

recognition, and a complete collective-bargaining agreement with a Kroger clause. "To permit the Employer to claim the very right which it has forgone, perhaps in return for concessions in other areas, would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements."²⁸

The Employer also argues that the Union's failure to invoke Article 2.1 of the Westmoreland collective-bargaining agreement to obtain recognition at the Butler store negates any claim that the Kroger clause was adopted by the parties. This argument ignores pre-sale statements by the Employer and the predecessor that the sale would not take place unless the Union agreed to adopt the *entire* Butler collective-bargaining agreement. If the Union had blocked the sale by insisting on the adoption of the Westmoreland contract, the Butler store employees' future employment status could have been jeopardized by a potential sale to a different purchaser that may not have agreed to hire all of the employees. Similarly, the Union's representative status at the Butler store could have been jeopardized by a sale to a different purchaser. In addition, even if the Union had invoked the Westmoreland after-acquired clause without blocking the sale, the Butler employees' wage rates would have changed, some for the better and some for the worse. Therefore, at the Employer's insistence, the Union waived its contractual right to the Westmoreland wage rates in exchange for voluntary recognition and the continued employment of the Butler unit employees. That voluntary waiver does not contradict the Union's position that the parties adopted the after-acquired provisions of the Westmoreland and Butler contracts, and that the Union may rely on those provisions at other locations.

In addition, Vice President/General Manager Triffo's September 15, 2000, letter to the Union also constitutes extrinsic evidence that the parties intended to adopt both

²⁸ Central Parking System, 335 NLRB No. 34, slip op. at 1 (quoting Kroger, 219 NLRB at 389). See also Verizon Information Systems, 335 NLRB No. 44, slip op. at 4 (2001) (dismissing RC petition where petitioner had agreed to resolve unit scope issues through negotiation or arbitration; "[T]he issue is whether the Petitioner -- having elected to proceed under the Agreement and derived benefits from it -- should be permitted to pick and choose which provisions it wishes to invoke and which it prefers to avoid. The question, then, is really one of estoppel.")

collective-bargaining agreements in their entirety, and that both parties made concessions leading to that result. Thus, the letter twice states that the Employer retained the workforce at each store and "assumed the existing terms of the labor agreement to expiration," in the context of rejecting the Union's attempt to negotiate for better wages and benefits. This letter constitutes an admission that the Employer intended to be bound by the collective-bargaining agreements in their entirety, and not merely to certain portions of them.

Accordingly, we conclude that the parties are bound Article 2.1 of the Butler store collective-bargaining agreement pursuant to which the Union demanded a card check and recognition at the North Charleroi store, and a Section 8(a)(5) complaint should issue, absent settlement.

B.J.K.