

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.

**REPLY MEMORANDUM IN SUPPORT OF FRED MEYER STORES, INC.'S
EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Richard J. Alli, Jr.
Jennifer A. Sabovik
Bullard Smith Jernstedt Wilson
1000 SW Broadway, Suite 1900
503-248-1134/Telephone
503-224-8851/Facsimile
Attorneys for Fred Meyer Stores, Inc.

I. INTRODUCTION

Administrative Law Judge Clifford H. Anderson (the “ALJ”) incorrectly held that Respondent Fred Meyer Stores, Inc. (“Fred Meyer” or the “Employer”) violated the National Labor Relations Act (the “Act”) when it summoned the police to assist it in removing representatives of United Food and Commercial Workers International Union (“UFCW” or the “International Union”) and UFCW Local 367 (the “Union”) from its store in Hillsboro, Oregon (the “Hillsboro Store”) on October 15, 2009, because the representatives’ activity in the Hillsboro Store violated the Employer’s collective-bargaining agreement with the Union and the parties’ past practice under that agreement. In his Answering Brief, Counsel for the Acting General Counsel (the “GC”) attempts to bolster the ALJ’s erroneous decision, but fails to overcome the evidentiary defects that plague the ALJ’s decision.

II. ARGUMENT

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

1. **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 GC argues that the ALJ was right to credit Jenny Reed’s testimony that she sought visitation with represented employees at the Hillsboro Store consistent with the parties’ contract and past practice because the contract and past practice allow her to talk to employees on the sales floor for as long as she wanted. (Answering Brief at 5-6.) Even the ALJ disagreed with this argument and specifically found that the parties’ past practice limited such conversations to one to two minutes on the sales floor, and only under certain circumstances

should they be any longer:

[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 visitation right that Reed was claiming on October 15 was decidedly not consistent with the parties' past practice since Ms. Reed believes that has the right to visit with employees for as long as she wants. She 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 by insisting she had an unlimited right to visit employees she was attempting to unilaterally change the parties' visitation practice on October 15. This unilateral change appears to have been part of the Union's larger plan to broaden its access rights to Fred Meyer stores in the Fall of 2009. The record evidence established that upon her arrival in Portland, Reed met with the Union's legal counsel to discuss "access to Fred Meyer stores, *strategy and implementation.*" (R. Ex. 1 (emphasis added).) 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.

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 Visitation for Eight Representatives to Solicit Employee Signatures on Union Petitions Contrary to the Parties' Practice as Found by the ALJ.

The GC attempts to excuse the ALJ's failures to consider evidence that the Union was violating the parties' contract and past practices by, 1) seeking access to the Hillsboro Store for eight Union representatives on October 15, and 2) collecting employee signatures on a Union petition. By failing to consider this evidence, however, the ALJ improperly concluded that the Union was seeking visitation with represented employees consistent with the parties' past practice. These findings must be reversed.

The GC attempts to excuse the ALJ's failure to consider the fact that Reed and Witt were seeking access to the Hillsboro Store for eight union representatives on October 15 by wrongly arguing that 1) the number of representatives was not a concern for the Employer on October 15, and 2) the Union did not breach the parties' contract by sending eight representatives into the Hillsboro Store on October 15. Contrary to the GC's argument, the record evidence *does* establish that the presence of eight Union representatives in the store constituted a breach of the parties' contract and past practice and that such breach was a contributing factor to the Employer's decision to contact the police.

There is no question that the presence of eight Union representatives in the store

that day violated the parties' past practice as the ALJ himself found that the parties' practice limited the number of representatives to two. (ALJD 7:13-15.) It was a violation regardless of whether the number of Union representatives disrupted store operations that day. (Answering Brief at 9-10.) If the Union wished to change the parties' past practice regarding the number of Union representatives who could be present in the store at one time, it was obligated to bargain that change with the Employer and was not privileged to simply make the change unilaterally.

Yet, the GC argues that this unilateral change by the Union was not a concern for the Employer because Dostert did not tell Reed or Witt that there were too many Union representatives in the store. This conveniently excuses Reed and Witt's failure to inform Dostert that they were seeking visitation for eight Union representatives total. (How could Dostert have told them they could not have eight representatives in the store if they purposefully hid the fact that there were eight representatives in the store?) Dostert did eventually learn that there were additional Union representatives in the store and was clearly concerned about their presence. (Tr. 1570.) He communicated that fact to Cynthia Thornton and it thereby contributed to Employer's decision to contact the police. (Tr. 1326, 1329.) It is irrelevant whether Dostert told Reed and Witt there were too many Union representatives in the store, or whether Dostert expressed his concern regarding the number of representatives to Union Field Representative Kathy MacInnis before or after the decision to call the police had been made (Tr. 1570); his expression of concern to MacInnis simply confirms that he *was* concerned about the number. Since the evidence clearly establishes that the Union was violating the parties' past practice on October 15 and the Employer was motivated and privileged to remedy that violation, the ALJ was wrong to disregard this evidence.

The ALJ was also wrong to disregard evidence that the eight Union representatives were soliciting employee signatures on a Union petition. Remarkably, the GC argues that this evidence was properly disregarded because there was no evidence that the Union was soliciting signatures at the Hillsboro Store on October 15 or that any employees stopped working in order to read the petitions. This is contrary to the ALJ's findings since the ALJ specifically found that Reed arrived at the Hillsboro Store on October 15 "carrying . . . a petition concerning health care she intended to offer to represented employees for signature. . . ." (ALJD 12:31-32.) GC witness and Union Field Representative Mary Spicher had been soliciting employee signatures on that same petition on October 15 and that 75% of the employees she approached stopped what they were doing to read the petition and that it took some time to read the petition. (Tr. 411, 413-414, 450-51; R. Ex. 14(c).)

Interrupting employees in their work by soliciting their signatures on a Union petition was clearly a violation of the plain language of the contract and contrary to the parties' visitation practice. The visitation clause in the parties' contract unequivocally obligates Union representatives to handle their contact with represented employees so as not to "unreasonably interrupt employees with the performance of their duties." (Jt. Exs. 1(a) – (c), 3.) In compliance with that language, Spicher testified without contradiction that before the International became involved in the Fall of 2009, 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. (Tr. 413-14.) Since the Union was not seeking visitation consistent with the parties' contract and past practice on October 15 because it was seeking access for the purpose of soliciting employee signatures on its petition in violation of the parties' contract, the

ALJ's conclusion to the contrary must be reversed.

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

The GC is unable to bolster the ALJ's erroneous finding that Dostert denied the Union visitation rights. (ALJD 33:13-14.) The ALJ's 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.) Respondent maintains that there is no record evidence to support that finding because it is completely contradicted by the testimony of Reed and Witt themselves – testimony the ALJ was purporting to be crediting when he made his finding.

The GC's arguments in support of the ALJ's finding (Answering Brief at 12-12) largely ignore the finding's central flaw: the ALJ found that Dostert said one thing to Reed and Witt but Reed and Witt both repeatedly testified that he said something different. The ALJ found that Dostert told Reed and Witt they could walk the sales floor to identify themselves and hand out their business cards to employees. Reed and Witt, however, testified that Dostert never said that to them and instead simply ordered them to immediately "go to the break room." So, if the ALJ is crediting Reed and Witt, as he claims he did, how can he find that Dostert said something different than what Reed and Witt say he said? The GC offered no answer to this question in his Answering Brief.

The fact of the matter is that Dostert's alleged "denial" of visitation rights did not happen. He never told Reed and Witt that they had to immediately go to the breakroom as Reed,

Witt and the GC alleged. (Tr. 149, 872, 1488, 1515; GC. Ex. 1(c) ¶10(c).) Instead, he told them consistent with the past practice described by the ALJ that “they could approach associates and hand out their card and they would be in the breakroom for further information.” (ALJD 26:9-19; R. Ex. 36.) 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. His instruction contains no time limit on the representatives’ interaction with employees on the sales floor, nor does it deny them visitation outright. (Tr.1304.) His instruction then bears almost no difference from the past practice described by the ALJ. (ALJD 26:9-19.) The ALJ’s finding to the contrary is unsupported and must be reversed.

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

Since the ALJ erroneously found that Dostert unlawfully denied the Union representatives visitation rights on October 5, his finding that the Employer violated Section 8(a)(5) by unilaterally changing the parties’ past practice regarding visitation must be reversed. The GC’s answer to this argument simply illuminates the flaw in the ALJ’s finding. The GC claims that “the undisputed evidence demonstrates that Dostert prohibited Reed and Witt from communicating with employees on the floor for any time whatsoever.” (Answering Brief at 20.) But it does not demonstrate such a thing, of course, because Dostert did not issue any such prohibition. Even the ALJ’s finding is contrary to that argument, since he found that Dostert told Reed and Witt they could walk the sales floor to let employees know they were in the store and hand out their business cards. Consistent with the parties’ past practice as described by the ALJ, and his lengthy experience as a Fred Meyer manager, Dostert understood that his instruction meant that the Union representatives would spend a few minutes talking to employees and

lengthier conversations would be held in the break room. Since his instruction was consistent with the parties' past practice, there was no unilateral change and the ALJ's finding to the contrary must be reversed.

C. 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 GC argues that simply because the Union representatives were arrested for trespass their arrests were the result only of the Employer's actions and not as a result of the representatives' own actions. Regardless of the charge on which they were arrested, Police Officers Mace and Kamenir clearly explained how the representatives' individual actions resulted in their arrests. (Tr. 1425-1431, 1433, 1468-69.) Those individual actions had nothing to do with the Employer. Nor were they, as the GC baldly states, the "clearly the foreseeable result of Respondent summoning the police." (Answering Brief at 16.) The GC makes this statement without addressing any of the Employer's arguments on the point. Unfortunately for

the GC, simply stating that B is the foreseeable result of A does not make it so.

For the extensive and thorough reasons given in the Respondent's Brief in Support of its Exceptions, the ALJ's conclusion in this regard is erroneous and should be reversed.

D. There is No Evidence that Dostert Made Any Disparaging Remarks About the Union in Employee Alicia England's Presence and the ALJ's Finding to the Contrary Must be Reversed.

The GC says that the ALJ's finding in this regard is proper because he was crediting Reed's testimony that "Dostert stated in the presence of employees that the Union and its representatives 'were only here for people's dues money, that people – these members did not need a union. He asked me how much money we'd stolen from these members. That he didn't believe in unions, that we didn't need unions . . .'" (Answering Brief at 18.) The ALJ does appear to believe that this portion of the alleged conversation between Reed, Witt and Dostert took place in England's presence. (ALJD 37:37-44.) There is a glaring issue with this particular finding: Reed never said this conversation took place in front of England. Instead, she testified that it took place away from England, in front of two employees in the "home electronics" department. (Tr. 160-161.) Reed actually meant the photo electronics department, and it was established at hearing that one of the two employees she was referring to was actually a manager; the other employee was never called to testify that he heard Dostert make any such statements. (Tr. 924; GC. Ex. 20, p. 3.) The ALJ's finding cannot then be based upon Reed's "credible" testimony.

The actual evidence establishes that even if Dostert did make any of the allegedly disparaging remarks about the Union, they were not made in England's presence and could not have been heard by England. Again, the GC himself admits that the interaction between Reed,

Dostert and England at the apparel check stand began at 9:48:20 a.m. and lasted, at most, for 55 seconds, ending when Reed turned away from England and began talking on her phone. (GC's Post Hearing Brief, p. 34.) Witt testified that he and Dostert then moved 15 feet away from England, towards the photo-electronics department. (Tr. 921.) The surveillance video in evidence confirms that once Reed turned away from England, Dostert and Witt moved away from England and at that point 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 read lips to hear properly heard a conversation that was occurring 15 feet away from her, behind her back, while she was assisting a customer. Although he carried the burden on this issue, the GC failed to meet it and the ALJ's finding to the contrary must be reversed.

III. CONCLUSION

The GC has failed to offer record evidence to support the ALJ's erroneous findings. The National Labor Relations Board should conclude that the ALJ erred in finding that: 1) the Union, through Jenny Reed and Brad Witt, sought Union visitation of represented employees at the Hillsboro Store on October 15, 2009, consistent with the terms of the parties' contract and past practice; 2) 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; 3) 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; 4) 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; and 4) 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. The Board should overrule the ALJ's findings on these issues and dismiss the Amended Complaint in its entirety.

DATED: February 1, 2011.

BULLARD SMITH JERNSTEDT WILSON

By /s/ Richard J. Alli, Jr.

Richard J. Alli, Jr.

Jennifer A. Sabovik

503-248-1134/Telephone

503-224-8851/Facsimile

Attorneys for Fred Meyer Stores, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2011, I served the foregoing **REPLY MEMORANDUM IN SUPPORT OF FRED MEYER STORES, INC.'S EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE** on:

John Fawley
NLRB, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174-1078
(206) 220-6326
john.fawley@nrb.gov

John S. Bishop
McKanna Bishop Joffe & Sullivan
1635 NW Johnson Street
Portland, OR 97209
jbishop@mbjlaw.com

- 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.

/s/ Richard J. Alli, Jr.

Richard J. Alli, Jr.

Jennifer A. Sabovik

Attorneys for Fred Meyer Stores, Inc.