

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES**

TEAMSTERS LOCAL UNION NO. 206

and

SAFEWAY INC.

**Cases: 19–CB–168283
19–CB–178098
19–CB–192630**

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DECISION

STATEMENT OF THE CASE

Ariel L. Sotolongo, Administrative Law Judge. The dispute in this case stems from the events that followed the 2015 decision by the Charging Party employer (Safeway) to close its distribution center (or warehouse) in Clackamas, Oregon, and to transfer the operations and bargaining unit employees of that facility to another distribution center located in Portland, Oregon. At issue is whether Teamsters Local Union No. 206 (Respondent or Local 206), which represented certain of the employees at the Clackamas facility, violated the Act by making certain bargaining demands and filing grievances with respect to employees, or work performed by such employees, at the merged Portland bargaining unit. This case presents complex issues regarding unit accretions or mergers, and correspondingly about which union is entitled to represent—and make bargaining proposals or file grievances on behalf of—the employees of the merged bargaining unit.

I. PROCEDURAL BACKGROUND

Based on charges filed by Safeway in cases 19–CB–168283 and 19–CA–178098, the Regional Director for Region 19 of the Board initially issued a consolidated complaint on August 25, 2016, alleging that Respondent had violated Section 8(b)(3) of the Act by making certain

bargaining proposals and demands during negotiations regarding Safeway's closure of the Clackamas facility and transfer of employees to the Portland facility. Thereafter, based on an subsequent charges filed by Safeway in case 19-CB-192630, the Regional Director issued an amended consolidated complaint further alleging that Respondent had violated Section 8(b)(1)(A) and (2) of the Act by filing and maintaining grievances with regard to the issues arising out of the closure of the Clackamas facility and transfer of its employees to the Portland facility. Respondent filed timely answers to these complaints denying the substance of the allegations, and raising various affirmative defenses. I presided over this case in Portland, Oregon, on March 28-29, 2017.

II. JURISDICTION AND LABOR ORGANIZATION STATUS

Based on its answers to the complaints, Respondent admits, and I find, that at all material times, Safeway, an entity that in early 2015 merged with Albertsons (collectively called the "Employer"), has been a Delaware corporation engaged in the business of operating grocery stores and distribution support centers.¹ In conducting its business operations during the calendar year ending on December 31, 2015, a representative period, the Employer derived gross revenues in excess of \$500,000. During the same representative time period described above, the Employer purchased goods and materials valued in excess of \$50,000 directly from points outside the State of Oregon. Respondent also admits, and I find, that the Employer has been engaged in commerce within the meaning of Section(s) 2(2), (6) and (7) of the Act.

Respondent admits, and I find, that at all material times it has been a labor organization within the meaning of Section 2(5) of the Act. Respondent further admits that Teamsters Local Union No. 305 (Local 305) and Teamsters Local Union No. 162 (Local 162) are labor organizations within the meaning of Section 2(5) of the Act.²

III. FACTS

A. Background

As the parties acknowledge, and as the record shows, most of the facts in this case are not in dispute.³ For many years, Safeway and Albertsons were competitors in the grocery business, each maintaining and operating their separate stores and warehouses/distribution centers in the Portland area. As its name implies, the Clackamas distribution center (CDC) was located in Clackamas, a suburb of Portland, and was owned and operated by Safeway, whereas the Portland

¹ The complaint further alleges, and Respondent admits, that Cerberus Capital Management (Cerberus), a private equity firm, purchased Albertsons in about 2013 and Safeway in early 2015, and merged both entities in 2015. These additional facts, however, are unnecessary for purposes of asserting jurisdiction over the Employer. The record also shows that the Employer operates grocery stores and distribution centers throughout the United States, although primarily in the western states. As further discussed below, the facilities at issue in this case are all located in the Portland, Oregon area.

² The complaint also alleges, and Respondent admits, that United Food and Commercial Workers Local 555 (Local 555) and International Association of Machinists (IAM) are also labor organizations within the meaning of Section 2(5) of the Act. As further discussed below, however, these unions play only a minor and peripheral role in the facts of this case.

³ The vast majority of the facts in the record were introduced via stipulated exhibits or uncontroverted testimony.

distribution center (PDC), also known as the “Gresham” facility because of its location adjacent to that Portland suburb, was owned and operated by Albertsons.⁴ As described in footnote 1 above, Cerberus purchased Albertsons in 2013 and then Safeway in 2015, and since that time has apparently been consolidating the operations of these once separate entities. As more thoroughly discussed below, the controversy in this case arose in the wake of a decision by the Employer in early 2015 to close CDC and transfer its operations, including the bargaining unit employees working there, to PDC. CDC had existed since the late 1950s or early 1960s, servicing Safeway stores in the area, and five (5) unions had historically represented the employees there: Respondent (Local 206); Local 305; Local 162; Local 555; and the IAM. Respondent actually represented the employees of three distinct bargaining units at CDC, known as the produce, grocery, and box and crate units. Local 305 also represented the employees in three separate bargaining units at CDC, namely, frozen foods, perishable, and a portion of the drivers—whom it jointly represented along with Local 162, which represented a larger portion of the drivers unit. The IAM represented a unit of mechanics who performed maintenance work, and UFCW Local 555 represented the meat warehouse employees. All of these bargaining units were covered by separate collective-bargaining agreements between Safeway and the different unions representing the employees in each of the units. Between October 2015 and June 2016, prior to the transfer of CDC employees to PDC, between 411 and 398 employees worked at CDC. Of these, approximately between 183 to 188 were represented by Local 206; approximately between 95 and 98 were represented by Local 305; approximately between 82 and 93 were represented by Local 162; approximately 32 were represented by Local 555; and 3 were represented by IAM. Thus, the total number of bargaining unit employees at CDC during that time period was between 398 and 411. (Tr. 30–44; JX-1; GCXs 2 through 9).⁵

PDC, located about 22 miles from CDC, was built in 1988 and operated by Albertsons to supply its grocery stores in the area. Unlike CDC, with its multiple bargaining units represented by various unions, all the rank and file employees at PDC since its inception were represented by Local 305 in a single “wall-to-wall” unit. There are other differences between CDC and PDC: PDC was a considerably larger facility, with higher ceilings allowing for more vertical storage of goods, and unlike CDC it had few “compartmentalized” sections or subdivisions separated by walls or other markers. Additionally, unlike CDC, PDC had ample parking and had room for further expansion. The total number of bargaining unit employees at CDC, however, was considerably larger than at PDC. Thus, the total number of bargaining unit employees at PDC during the period between October 2015 and June 2016, prior to the arrival of the transferred CDC employees, was between 235 and 242 (versus 398 to 411 at CDC, as described above). (Tr. 33–37; 45–47; 303–304; 313–317; GCX-10; JX-1).

⁴ Throughout the record, CDC is referred to as the “Safeway” or “Clackamas” facility, whereas PDC is referred to as the “Albertsons,” “Portland,” or “Gresham” facility. For purposes of simplicity and clarity, I will use CDC or PDC to refer to them.

⁵ Transcript pages are referred to as “Tr.,” followed by the page numbers; General Counsel’s exhibits are referred to as “GCX,” followed by the exhibit number(s); Respondent’s exhibits are referred to as “RX,” followed by the exhibit number(s); and Joint exhibits are referred to as “JX,” followed by the exhibit number(s). There are no exhibits from the Charging Party. It should be noted that JX-1 lists “IUOE (referring to the Operating Engineers) Local 1005” as one of the unions at CDC. As the parties stipulated, however, this is an error—any reference to IUOE is actually IAM (Tr. 40)

It is undisputed that by letter dated March 3, 2015, the Employer notified Locals 206, 305 and 162 of its intention to consolidate its distribution centers, which would result in the closure of CDC and the transfer of its operations and the employees there to PDC.⁶ In the letter, the Employer informs the unions that this process would take about 18 months to complete and offers to bargain about the effects of this decision.⁷ (Tr. 47–49; GCX-11). As described below, the events that followed the March 3 2015 letter, through at least the end of October, 2016, gave rise to the instant controversy, and the allegations of the complaint.

B. The Bargaining Following the March 3 Letter

As with the background facts described above, most of the relevant facts about the events that followed the March 3, 2015 letter are undisputed, having been introduced into the record through stipulated exhibits or uncontroverted testimony. Doug Ruygrok, the Employer's Vice President of Labor Relations, testified that following the March 3 letter,⁸ he met with Locals 206, 305 and 162 (collectively called the Teamster Locals) to bargain about the effects of its decision to close CDC.⁹ Additionally, he advised them the Employer wanted to negotiate successor agreements with the Teamster Locals for the 3 collective-bargaining agreements then in effect at CDC, which were all expiring on April 18. These successor agreements, according to Ruygrok, were to remain in effect until CDC finally closed down, something that was not expected to occur for another 18 months. According to Ruygrok, little headway was initially made on either the effects bargaining or the successor agreement bargaining, because the Teamster Locals were all pressing the Employer regarding representation issues at PDC. Ruygrok sought help from the Teamsters' International Union (the International) to resolve the dispute between the Teamster Locals, and although the International's representative asserted that there was not much he could do about the problem, he arranged for a meeting on August 25 between the Employer and all three Locals. Prior to the August 25 meeting, however, the Teamster Locals met (without the Employer) in June to discuss the closing of CDC and the transfer of the employees to PDC. Tony Andrews, the Executive Secretary of Local 305, testified that at this meeting he floated the concept of shared representation at PDC, with each Teamster Local representing a percentage of the employees at PDC proportional to their share of their members in the over-all unit. Local 162, which had shared representation of the drivers at CDC with Local 305, was interested in the proposal. According to Andrews, however, Stan White (White), the Secretary Treasurer of Local 206, stated Respondent would not go along with such concept, asserting instead that the share of representation should be based on the number of Safeway

⁶ As will be discussed later, at the time it was uncertain whether all employees would transfer from CDC to PDC or whether some would have to be laid off, something that was not determined until about a year later. The March 3 letter also advised the unions that CDC would remain operational until construction and modifications were completed at PDC.

⁷ There are no allegations, or evidence, that the decision to close CDC was motivated by anything other than valid business-related reasons, and hence no reason to believe that the Employer was obligated to bargain about the decision itself to close CDC.

⁸ All dates hereafter shall be in 2015, unless otherwise noted.

⁹ Ruygrok's testimony, as with all of the General Counsel's witnesses, was not contradicted since Respondent did not call any witnesses to offer rebuttal testimony. Additionally, I note that his demeanor was straightforward and he appeared to be candid in his answers, and although on occasion his memory had to be refreshed with documents, his over-all recollection was good. Accordingly, I generally credit his testimony, unless I specifically indicate otherwise with regard to any particular issue.

versus Albertsons stores serviced out of PDC.¹⁰ Andrews disagreed, and there was thus no agreement between the Teamster Locals about how to proceed regarding PDC at this time.¹¹ (Tr. 52–58; 368–374)

5 As briefly mentioned above, on August 25, under the auspices of the International, the Teamster Locals met again, this time with the Employer present. The record is mostly silent on the details of what was discussed at this meeting, because all the parties agreed at the time that such discussions were “off the record.” Nonetheless, internal bargaining notes of this meeting by the Employer indicate that whereas Local 305 and Local 162 were agreeable to consider a single
10 master contract to cover PDC after the consolidation, Respondent was insistent that its collective-bargaining agreement at CDC (and its members there) would “follow the work” covered by that contract to PDC (GCX-12). In October, Locals 306 and 162 agreed to a successor contract at CDC (the prior contract had expired in April), which would remain in effect until that facility closed (GCX-13). According to Ruygrok, the Employer offered the same terms
15 to Respondent (GCX-14), which declined to accept them, insisting that “effects” bargaining regarding the closure of CDC (also referred to as “the transition agreement”) should be resolved first. (Tr. 68–74).¹²

20 According to Ruygrok, the Employer had approximately 20 bargaining sessions with Respondent over the course of the events at issue here, which spanned the time from about March 2015 to August 2016. Following the meeting in August, on October 27, Respondent proffered a written proposal to the Employer with regard to the effects of consolidation into PDC, which it termed “the Safeway Transition Agreement.” (GCX-16). The proposal, consistent with Respondent’s previously voiced position as to how PDC was to be governed following the
25 consolidation, proposed the following:

1. All current Teamsters Safeway Agreements will be applied as per Article 3, 3.7 of the Safeway Teamsters Local 206 Labor Agreements, to the new Portland Albertsons/Safeway Distribution Center.
- 30 2. The current Department Agreements including all Letters, Memorandums, Addend-ums, etc. will continue to-be the Labor Agreements.
3. The Albertsons Agreement pertaining to Grocery, Produce and Box & Crate Departments will expire in September 2016 or immediately when a common electronic system comes on line and stores begin moving to the Portland facility.

¹⁰ Thus, for example, if 90 percent of the stores serviced by PDC after the consolidation were “Safeway” stores (as opposed to Albertsons stores), then Local 206 should have 90 percent of the representation at PDC, since Local 206 represented the majority of employees who serviced Safeway stores out of CDC. This concept, which was a recurring theme in Respondent’s bargaining proposals, was apparently based on Respondent’s reading of Article 3.7 of its (3) collective-bargaining agreements with the Employer at CDC (GCXs-2; 3; 4), which it believed allowed its members to “follow their work” to a new (or relocated) facility.

¹¹ As with Ruygrok, Andrews’ testimony was not contradicted or rebutted by any witness. Moreover, based on his clear recollection of details and unhesitant testimony, he was a credible witness. Accordingly, unless otherwise indicated as to any particular issue, I credit his testimony.

¹² Respondent and the Employer nonetheless entered into an “extension” agreement on November 20 covering CDC, extending the terms of the Local 206 agreements which had expired on April 18, through at least December 31, 2015 and continuing thereafter until one party gave 3 days’ notice of cancellation. (GCX-18)

4.A Dovetailing will take place based upon clearly discernible volumes of work, product, store volumes and departmental manpower needs, as directed by EXE systems and the actual work/stores, that will be clearly and permanently assigned to the new Portland distribution area.

4.B Dovetail design will be determined based upon the above, and applicable portions of the Unions information requests verified responses and union site inspection.

4.C The actual tangible store volumes and manpower needs at the time of transfer will be the major deciding factors on a dovetailed design and ratio. For Example: If at the time there is roughly six (6) times as much the volume from “Safeway” stores, then one (1) former Albertsons employee by seniority would/could “dovetail” into an open departmental seniority list based on one (1) “open spot” in the first six (6) and the dovetail will continue on that ratio until all departments are filled.

4.D Current Albertsons Teamsters must have the pertinent qualifications and recent history working in Dry Grocery, Produce or Box & Crate (salvage), to bid into a current Safeway departmental seniority list.

4.E All Safeway bids will remain in effect and all necessary additional classifications, work weeks and shifts will be open to bid once the dovetail process is complete. Additional clerks, loaders, lift truck operators, sanitors, warehousemen, ripeners, inspectors, pallet repair, high rise operators, order fillers, floaters, checkers and working forepersons will be increased by the same formula used to determine the dovetail design.

4.F Following the dovetail, and any agreed upon necessary clarifications and adjustments, all permanent transfers (voluntary only), and any recalled employees will be placed at the bottom of the department seniority list to which they are recalled or transferred.

5. Annual Department bids will be immediately posted following the dovetail signups two (2) months prior to store transfers beginning.

6.A A fully negotiated severance package will be offered to any worker choosing to terminate from either of the previous distribution centers prior to and up through the completion of the dovetail, and up to ninety (90) days after physical transition in to the new Safeway/Albertsons Portland Distribution Center is complete.

6.B Employees laid off related to the transition may opt to receive forty eight (48) month recall rights rather than the negotiated severance package.

7. Training will begin immediately following adoption’ of this Transition Agreement.

8. Any disputes between the Company and the Union will be addressed within the grievance procedure time frames and steps as outlined in the current Safeway Labor Agreements. (GCX-16; Tr. 76–84)¹³

At the following bargaining session on November 20, Ruygrok, who represented the Employer in these negotiations along with Daryl Woods and Darrell Kidd, posed a number of

¹³ Article 3.7 of the 3 collective-bargaining agreements between Respondent and the Employer, referred to above on paragraph 1 of the proposal, reads as follows:

Relocation of Existing Facility. In the event the Employer moves an existing facility to any location within the jurisdiction of Joint Council 37 as defined in October 1, 2000, the terms and conditions of this contract shall continue to apply with respect to the new facility. In addition, all employees working under the terms of the Agreement at the old facility shall be afforded the opportunity to work at the new facility under the same terms and conditions and without any loss of seniority or other contractual rights or benefits.

Teamsters Union Local No. 206 will be required to show a majority representation in accordance with the controlling law. In addition, the parties agree to enter into effects bargaining in accordance with controlling law regarding the impact on employees of the movement of an existing facility. (GCX-2; 3; 4, p. 2)

questions to Respondent regarding their October 27 proposals.¹⁴ Although these questions were presented orally during bargaining, the questions asked and the answers given by Respondent (through White) are contained in writing in the bargaining notes taken by Woods (GCX-17).¹⁵ According to Ruygrok, White explained that under Respondent's proposal, its contracts should "follow the work" out of CDC and be applicable at PDC, and that Local 206 members would "take over," inasmuch there were more Safeway stores than Albertsons stores serviced out of PDC. Hence, Ruygrok testified, White asserted Local 305's contract at PDC and its representation of employees there would cease to exist once the merger was complete.¹⁶ Ruygrok rejected Respondent's proposal, which the Employer viewed as being "unlawful." (Tr. 85-93).¹⁷

In early December, according to Ruygrok, White went on an inspection tour of PDC on behalf of Respondent. About 10 days later, the parties had another bargaining session, and White pointed out certain practices and classifications he had noticed at PDC that he objected to as being contrary to those under its CDC contracts. Ruygrok replied that Respondent was trying to negotiate over the fate of employees it had no right to represent, since they were represented by Local 305. The record contains little else as to what occurred at this bargaining session, but apparently the parties maintained their previous bargaining positions (Tr. 98-100)

In an apparent response to the Employer's assertion that Respondent's bargaining proposals were unlawful, Respondent's counsel, David Rosenfeld, sent the Employer a letter on December 17, asking the Employer to explain the basis for such assertion (GCX-19). By letter dated December 23 addressed to Local 206, signed by Ruygrok, the Employer responded (GCX-20). In the letter, Ruygrok summarized the Employer's understanding of what Respondent had proposed with regard to the transition, and requested clarification if any of it was incorrect.¹⁸ Most significantly, the letter summarized how the Employer viewed its obligations with regard to

¹⁴ Woods has been the Director of Distribution at PDC since January 2015, and previously served in the same capacity at CDC. He reports to Kidd, who is the General Manager at PDC.

¹⁵ Woods authenticated the accuracy of the bargaining notes, and his testimony, like that of Ruygrok and Andrews, was not contradicted or rebutted. Nothing in his demeanor or otherwise suggested that his testimony was unreliable, and I thus credit his testimony, and conclude that his bargaining notes (GCX-17) accurately reflect what transpired during bargaining.

¹⁶ Woods' bargaining notes, however, indicate that White did not say that Local's 305's contract (or representation) at PDC would completely cease to exist, but only as it applied to the grocery, produce and box and crate employees, which were the employees historically covered by Respondent's contracts at CDC (GCX-13, p. 2). Moreover, the notes indicate that White did not state that the Local 305 contract at PDC would "cease to exist," but rather that it would naturally expire, which it was indeed going to do pursuant to its terms on September 10, 2016, as the merger was occurring (GCX-10). I credit the bargaining notes as being more accurate. Indeed, Respondent's position is correctly reflected in the Employer's December 23 letter. (GCX-20)

¹⁷ According to Woods' bargaining notes, White asserted that Respondent was relying on the language of Article 3.7 of its CDC contracts in support of its bargaining stance, while at the same time noting that Local 305 did not have such "successor language" in its contracts, which in his view was "short-sighted" on their part (GCX-17, p. 3). It is not clear what White meant, since Local 305 (as well as Local 162) had identical language in its CDC contracts (GCXs-5; 6; 7). White did not testify, so the basis for his claim remains a mystery.

¹⁸ While for the most part the summary was correct, there were some inaccuracies, as was later clarified by Rosenfeld's follow-up letter on January 10, 2016, as described below (GCX-21). The most significant mischaracterization of Respondent's position was the Employer's insinuation that Local 206 was demanding that it be recognized as the representative of all employees at PDC and that its CDC contracts be applied to them following the consolidation, as discussed below.

the competing claims by Local 206 and Local 305, and for the first time indicated how it intended to resolve the dispute as to which of them was going to represent the (merged) employees at PDC, thus stating:

5 [T]he work currently performed by the Clackamas Local-206 represented employees may be transferred over a period of months. Each individual store transfer will likely only involve an opportunity to “follow the work” of a handful of current Local 206 employees, who will sequentially be merged into the Local 305 contract and Local 305 representation. In our view, each work transfer is what counts in determining representation, not the numbers at the “end of the day,” as Local 206 has represented in our negotiations. But importantly, even the “end of the day” numbers don’t allow Local 10 206 representation, because the Local 305 single bargaining unit covers many more employees than the three Local 206 contracts, either separately or altogether. (GCX-20, p. 5 [emphasis in the original]).

15 On January 10, 2016¹⁹ Respondent, through counsel Rosenfeld, replied that Local 206 members had the right (presumably, pursuant to Article 3.7 of their contracts) to follow their work from CDC to PDC, and that Local 206 has the right to represent the employees it had historically represented in the bargaining units at CDC—the grocery, produce and box and crate unit employees (GCX-21). The letter further requests that certain specified information be 20 provided in order to evaluate the Employer’s position.

25 Before describing the subsequent meetings and bargaining proposals between the parties, it is important to note the subtext of what was occurring at the time, which provides some context to the parties’ positions and bargaining stances. At this time, in January 2016, it was uncertain whether all bargaining unit employees at CDC and PDC would be needed at PDC when the consolidation was completed, or whether some employees would be laid off. Indeed, as Ruygrok admitted during cross-examination, during this time the Employer was projecting that about 540 total employees would eventually be needed at PDC, whereas the combined total 30 of unit employees at CDC and PDC was about 629—which meant that approximately 80–90 employees might have to be laid off when the consolidation was completed. It was also uncertain whether the laid off employees would be members of Local 206, Local 305, or Local 162, or all three, and this is something the Employer conveyed to these Locals. (Tr. 253–258; RX-2; JX-1).²⁰

35 The parties met on January 15, and the Employer presented some proposals to Respondent, which it rejected (Tr. 115; GCX-23). On January 20, the parties met again, and Respondent presented the Employer with a revised proposal (GCX-24a; 24b).²¹ Although Ruygrok testified that the proposal was “more of the same,” he also testified that the proposal 40 contained some things the Employer “could work with,” although he did not specify what those

¹⁹ All dates hereafter will be in 2016, unless otherwise indicated

²⁰ As discussed below, these projections later changed, based on the Employer’s acquisition of additional stores that would be serviced by PDC, which obviated the need for layoffs. These new projections were not conveyed to Respondent until April or May.

²¹ GCX-24a is the hardcopy of the proposal; GCX-24b is a copy of the email sent by Respondent to the Employer attaching an electronic copy of the proposal, as requested by the Employer.

things were. (Tr. 116–118) A salient aspect in Respondent’s proposal is that it made it clear that it was seeking to have its CDC members “follow the work” of its “historical” bargaining units there to PDC, where Respondent would represent them.²²

5 On January 20, Ruygrok by letter replied to Rosenfeld’s January 10 letter, refuting the
latter’s assertions and legal arguments, and again indicating that all transferees from CDC to
PDC would ultimately lose their separate (unit) identities be covered by the terms of Local 305’s
wall-to-wall contract—not any of Local 206’s CDC contracts. In this regard, the letter repeated
10 the Employer’s position, which it had previously voiced during bargaining sessions, that Article
3.7 of Local 206’s CDC contracts was inapplicable to the current situation because that clause
only applied to re-location to a “new” facility, and PDC was a preexisting facility, not a “new”
one.²³ The letter also repeats the Employer’s assertion that Local 206 was attempting, through
its proposals, to cause the Employer to violate the Act by “fracturing” the wall-to-wall unit
15 which had existed for years at PDC. Finally, the letter indicates that the Employer was gathering
the information requested by the Union, which it would provide (GCX-22).

 On January 22, the Employer filed an unfair labor charge against Respondent in case 19–
CB–168283, alleging that Respondent was bargaining in bad faith and thus violating Section
8(b)(3) of the Act by its conduct as described above (GCX-1(a)). On February 9 Rosenfeld, on
20 behalf of Respondent, replied to the Employer’s January 20 letter, refuting the Employer’s
assertions, accusing the Employer of committing unfair labor practices, and requesting additional
bargaining dates (GCX-25). John L. Zenor, an attorney for the Employer, responded by letter to
Rosenfeld on February 12, citing the Employer’s legal arguments and again asserting—as the
Employer has steadfastly maintained throughout these proceedings—that Respondent was
25 attempting to “fracture” the bargaining unit at PDC represented by Local 305. The letter also
informs Respondent that the Employer was about to begin negotiations with Local 305 regarding
a renewal of the collective-bargaining agreement covering the employees at PDC, which would
impact its bargaining with Respondent regarding the “Clackamas” negotiations (GCX-26).²⁴

²² Thus, Respondent, based on its belief that 90 percent of the “volume” of work to be performed at the consolidated PDC facility would be “Safeway” work formerly performed by its members at CDC, would be entitled to have 9 of its members “dovetail” into those units at PDC for every 1 “open spot” filled by someone else—presumably a Local 305 member already working at PDC. It is not clear on what basis Respondent believed the 90 percent volume ratio was accurate. I note that in the appendix of Respondent’s posthearing brief, counsel refers to RXs-5 and 6 in support of its volume (of business) arguments—but those exhibits were not admitted because they lacked a proper foundation (Tr. 335–336), and thus are not part of the record. Even if true, however, it is not clear how Article 3.7 of the CDC contracts would support the dovetailing ratios proposed.

²³ As will be discussed below, this interpretation of the language of Article 3.7, apparently adopted by the General Counsel as well, appears unnatural and contorted. At minimum, there is ample reasonable room for doubt as to the exact meaning of the clause, a doubt that in ordinary circumstances would—or should—have been left for an arbitrator to resolve.

²⁴ The Local 305 PDC agreement was set to expire in September, as briefly mentioned above.

The next bargaining session between Respondent and the Employer did not take place until April 15.²⁵ At this session, the Employer rejected Respondent’s prior proposals regarding severance pay, primarily on the basis that it now appeared that there would be no layoffs in the wake of the CDC closure. This was the first time Respondent had received notice that the Employer anticipated that all CDC bargaining unit employees would be relocated to PDC.²⁶

The parties met again for bargaining on May 3–5. On May 5, Respondent proffered a modified “transition” proposal which provided that the “historical” contracts covering its CDC members remain in place at PDC “until such time as the representational issues in the facility are decided,” and that dovetailing would occur according to “clearly discernible volumes of work...” (GCX-27).²⁷ With regard to this proposal, White, speaking for Respondent, stated that he expected the Board to hold an election at PDC to determine the representational rights of the bargaining unit employees there.²⁸

On or about June 6, the Employer and Local 305 executed a new collective-bargaining agreement, effective by its terms from the first Sunday after the transfer of the first Safeway store (from CDC) to PDC or September 4, 2016, whichever comes first, through September 4, 2021. In this contract, the Employer explicitly recognized Local 305 as the exclusive collective-bargaining representative of all employees in a “wall-to-wall” unit at CDC, whether those employees had been PDC all along or came from CDC (GCX-31).²⁹ In effect, by entering into this agreement, the Employer had cast its lot, deciding that Local 305 was the sole

²⁵ In the meantime, Respondent had filed a charge in Case 19–CA–170967 against the Employer, alleging that the Employer had unlawfully recognized Local 305 as the representative of all PDC employees, including those to be relocated from CDC. The charge was dismissed by the Region on April 29, primarily on the basis that relocation had not yet occurred, and hence it was premature to make any determinations regarding post-relocation representation questions (Rx-1).

²⁶ This re-calibration was due to the fact that the Employer had re-acquired a number of stores it had previously sold, and its decision that these new stores were going to be serviced by PDC, which would require more bargaining unit employees (Tr. 243–244; 254; 292–293)

²⁷ This appears to differ from its earlier proposals, which simply stated that its historical CDC contracts would be applicable to PDC, without apparent time limitations, and providing that there would be a 9-to-1 dovetail ratio favoring Respondent’s CDC members.

²⁸ Respondent’s stated expectation, pursuant to its May 5 proposal, that representational issues would ultimately be decided by a Board election are not only supported by Ruygrok’s testimony, but also by Woods’ bargaining notes as well. (Tr. 216; 222; GCX-15(j)). The Employer also explicitly acknowledged the changes in Respondent’s proposals in Ruygrok’s follow-up letter(s) to White on June 9, as discussed below (GCX-28).

²⁹ Indeed, in drafting the contractual recognition language, the parties appear to have gone out of their way to express their view that the bargaining unit at PDC was a “*single, indivisible*, bargaining unit for all classifications,” language that did not exist in the prior contract. (GCX-31, p. 1. Emphasis supplied) Moreover, the language appears to expand the territorial reach of the recognition of Local 305 to include any distribution center within the jurisdiction of Teamsters Joint Council No. 37, including any operation merged into PDC. It is reasonable to infer that this was a deliberate response to Respondent’s bargaining proposals with regard to the employees it had historically represented at CDC. The agreement’s recognition language additionally contained language pursuant to which Local 305 appointed Local 162 as its “bargaining agent with respect to representation responsibilities for bargaining unit members in the driver classification.” (GCX 31. P. 1; Tr. 131). This arrangement appears to have been a variation of a similar arrangement Locals 305 and 162 had at CDC, where they shared representation of the drivers. The main difference appears to be that at CDC both Locals were jointly recognized as the representative of different groups of drivers, whereas at PDC Local 305 was the recognized representative of all, but appointed Local 162 as its “agent” for representational purposes involving the drivers.

lawful collective-bargaining representative of the employees at PDC, regardless of whether some of them had previously been represented by other labor organizations at the CDC facility that was being merged into PDC. This result had been signaled, as discussed above, as early as December 23 (2015), when the Employer informed Respondent by letter (GCX-20) that “at the end of the day” Local 305 would be representing all the workers at PDC.

On June 9, the Employer (Ruygrok), sent Respondent 3 letters. In the first letter, the Employer rejects Respondent’s May proposal(s), again asserting that they were unlawful and constituted bad-faith bargaining because, inter alia, Respondent was still attempting to seek representational rights over bargaining unit employees represented by Local 305. The letter advises that the Employer would be filing a new unfair labor practice charge, and asserts that the Employer had no obligation to bargain with Respondent in light of its illegal proposals (GCX-28).³⁰ The second letter was in response to information that had been requested by Respondent, and informing Respondent that it had no obligation to provide the information in light of the Regional’s Director’s finding that Respondent had violated the Act (GCX-29).³¹ In the third letter, the Employer informs Respondent of the new collective-bargaining agreement it had entered into with Local 305 to represent all employees at PDC. It also asserts that Respondent cannot show majority status at PDC, and urges Respondent to accept the “legal and practical reality” that its CDC units will be an “accretion” to the PDC bargaining unit. (GCX-30).

On June 13, Respondent sent the Employer a letter, in essence questioning the correctness and lawfulness of the Employer’s decision to recognize Local 305 as the exclusive collective-bargaining agent for the employees at PDC. Respondent also offers to drop its proposal that the “historic” bargaining units from CDC be maintained at PDC, but asserts that the issue of representation at PDC be determined by an election (GCX-32). On June 20, the Employer responded by letter, in essence questioning the lawfulness of Respondent’s proposals, and again asserting that it had the right to recognize Local 305 as the representative of employees at PDC, because the consolidated PDC facility was not an “entirely new operation,” and hence an accretion (GCX-33).

The parties met again for bargaining on June 23 and 24. On June 23, Respondent proffered a new, or modified, “work transition” proposal, as follows:

1. All the Teamsters employed in the Clackamas Grocery, Produce and Box & Crate departments will get to move to the Portland D.C. with full company seniority for benefits as Clackamas work begins to transition to the Portland Distribution Center.
2. All transferring employees from these departments be guaranteed work without layoff for a year.
3. The above mentioned transitioning employees will continue and remain on Teamsters 206 Employers Trust, Plan DDVR health and welfare including retiree benefits for a year from the date the last Safeway store transfers. This

³⁰ Indeed, the Employer filed a charge in case 19–CB–178098 on June 10, a charge that is part of the instant complaint.

³¹ The Employer nevertheless provided some information.

cost will be paid by Safeway. Should they be covered by equivalent health and welfare including the retiree coverage, the obligation to provide health end welfare shall end.

5 4. All Clackamas Grocery, Produce and Box & Crate employees transitioning will continue in their current or equivalent position, on their current shift, in their current work weeks, and with no loss or reduction of wages.

10 5. Maintain all current extended Clackamas Collective Bargaining Agreements including Letters of Understanding, Memorandums, and Addendums will continue for a year. They will govern Clackamas for one year after transition to the Portland Distribution Center.

15 6. Transitioning employees will receive all necessary training.

20 7. The Company will move transitioning Clackamas employees from each C.B.A. proportionally with the work moving over, i.e. in Produce and Grocery Loaders, Replenishment LTO's, Order Fillers, Put away LTO's, Shipping Clerks, Receiving Clerks, Checkers, Inspectors, Ripeners, Janitors: ratios will be based on store volumes of Clackamas Produce, Grocery and Salvage as the work transitions, (e.g. If 10% of work transitions, a minimum of 10% will transfer to the Portland Distribution Center).

25 8. With new production time measurements being prepared at the Portland D.C., transitioning Clackamas employees on standards will be disciplined at no more than ninety-five percent (95%) for the first year.

30 9. Transitioning Grocery, Produce and Box & Crate employees will be assigned to the same equipment if available.

35 10. Vacations for transitioning Grocery, Produce and Box & Crate employees will be honored as currently scheduled.

40 11. Attendance Policy for Clackamas will remain in effect for all transitioning Grocery, Produce and Box & Crate employees for one year.

45 12. Union Severance Proposal.³²

13. Any disputes over this Agreement will be resolved by the grievance and arbitration provisions of the Agreements which governed the employees at the Clackamas facility. (GCX-34)

At the same meeting on June 23, the Employer proffered the Union its own proposal (GCX-35), which does not appear to have been a "counter-proposal" (to Respondent's proposal) as such, since the proposals were exchanged within a short time of one another, as reflected by

³² Paragraph 12 of the proposal referenced an attached severance wage package for those employees that were not transferred or voluntarily quit as the result of the closure of CDC.

Woods' bargaining notes for that date (GCX-15(k)).³³ In essence, the Employer proposed that transfer rights or protocols, wages, benefits, seniority, etc., be subject to, and consistent with, Local 305's agreement. Nonetheless, it is notable that there appears to be convergence, if not actual agreement, with some of Respondent's proposals. For example, Respondent proposed that "company" seniority rights be applicable to transferees from CDC, which is consistent with the Employer's June 23 proposal that "Safeway" seniority would be applicable with regards to benefits, vacation and sick leave, job selection, layoff and recall priority, and vacation scheduling (GCXs-34; 35). Additionally, I would note that the bargaining notes reflect that with regard to its proposal in paragraph 3 (above), dealing with health & welfare benefits, Respondent stated that it was proposing that its members coming from CDC keep their existing plan for a 1-year period, because of concerns about their "co-pays" (referring to their health benefits) which had been already paid up for the year. The Employer replied that it was working with "OTET" (presumably, the health plan administrator under Local 305's contract) to give some consideration for the payments already made under Respondent's plan, with the Employer requesting that payments already made by transferring employees be credited (GCX-15 (l), p. 10). Finally, it is also worth noting that the bargaining notes for the negotiations on June 23 and 24 reflect much give-and-take, with Respondent asking many questions about how Local 305's contract would be implemented and impact CDC transferees, and searching for areas of common agreement.³⁴

By letter dated June 27, which was also sent via an email attachment on the same date, Respondent requested additional bargaining dates from the Employer (GCX-36). The Employer responded via email on the same day (GCX-37). In the email, Ruygrok asked whether there had been any change in Respondent's position and proposals, which it deemed "illegal," and conditioned the response to the request for bargaining dates upon Respondent's answers to his questions.³⁵ On July 6 Respondent replied by letter (also emailed), specifically asking which of its proposals were "illegal" and why; stating that its proposals are still on the table awaiting an appropriate counter from the Employer; states that Respondent is not conditioning bargaining on acceptance of any of its proposals; makes information requests; and again asks for bargaining

³³ I credit Woods' contemporaneous bargaining notes as accurately reflecting what transpired at these as well as other bargaining meetings, although I recognize that at times the notes appear truncated, given the fact that human speech is usually faster than an individual taking notes can type. In this regard, I note that during his testimony regarding the events of June 23–24, Ruygrok, claiming that he independently recollected what had been said, tended to summarize rather than repeat what was actually said by the parties. For example, Ruygrok testified that Respondent (White) was "trying to impose their contracts on the Albertson facility," that is, PDC (Tr. 142–143). As will be discussed in more detail below, that is not what the notes reflect was actually said or occurred. I thus credit the accuracy of the bargaining notes over Ruygrok's testimony when they conflict.

³⁴ These types of exchanges are important in determining, as discussed below, if and when impasse occurred. In this regard, I find an exchange on June 24 revealing. Speaking for Respondent, White states: "[W]e made huge adjustments to the transition agreement you need to recognize that," to which the Employer (Ruygrok) replies "[Local] 206 does not have representation at the Portland DC." (GCX-15(l), p. 9).

³⁵ Ruygrok asked whether there had been any change in Respondent's position on "special seniority and preferences" for its members; whether there had been any change in its position on "dividing up a single Portland bargaining unit into four separate units" without the Employer's or Local 305's "consent;" whether there had been any change in its position that it must continue to represent CDC members who transferred to CDC; and whether there had been any change in its position(s) which would require the Employer "to violate" Local 305's contract covering CDC. (GCX-37).

dates (GCX-38).³⁶ On July 12 the Employer replied by letter, explaining in detail its position as to why it believed Respondent's proposals and positions were illegal. The letter also advises that the Employer will not agree to the Union's unlawful proposals, and warns that if Respondent does not withdraw these proposals, the Employer will consider negotiations to be at impasse. 5 Nonetheless, the letter also advises that the Employer is willing to agree to Respondent's proposal number 1, with certain provisos attached, and is also willing to agree to proposals 6 and 10 with slight modifications. Finally, the letter also advises that the first employee transfers from CDC to PDC would begin on August 18, and proposes a bargaining session on August 2 "in a final attempt to reach agreement." (GCX-39)

10 The parties met again on August 2, which was admittedly the last time they met to bargain about the "transition." On that date the parties exchanged proposals; the employer handed Respondent its proposal (which was dated July 18)(GX-40), and Respondent proffered its proposal to the Employer, which was only about severance pay (GCX-41). The Employer 15 rejected Respondent's severance pay proposals, claiming that there would be no need for such, in light of the fact that it believed all CDC employees would be needed at PDC. Even at this stage, however, it appears that the Employer was not completely certain whether in fact some employees in certain classifications would actually make it over to PDC, as reflected by the bargaining notes for the meeting (GCX-15 (m)). In light of these and other developments, as 20 discussed below, it is far from clear that Respondent had completely rejected all of the Employer's proposal(s) at this point in time, as suggested by the General Counsel and the Employer.³⁷

25 On August 5, the Employer sent Respondent a letter informing that it was rejecting the Union's last proposals, which had been proffered at the meeting on June 23, but according to the letter not discussed on August 2, which the Employer in the letter interprets as a sign that these proposals had not been withdrawn (GCX-42). The Employer further states that it is rejecting these proposals, and because Respondent has allegedly maintained positions and proposals that

³⁶ Respondent's letter contained an attachment, which was a copy of Respondent's June 23 proposal (Tr. 150).

³⁷ Ruygrok testified that the parties did not reach agreement at this meeting (Tr. 155–157). Although this statement is technically accurate, it fails to describe the extent or nature of the discussions that took place on this date, and how the possibilities appear to have been left open for further discussions and compromise. As reflected in the bargaining notes (GCX-15(m)), Respondent asked many questions and sought clarifications from the Employer with regard to its proposals and how such proposals would practically work and be implemented. For example, the parties appear to have agreed to previously proposed "company" seniority for transferring CDC employees, but there were lingering questions about the seniority dates reflected in a list provided by the Employer to Respondent. The Employer agreed that this issue "still needs to be worked out." There were also many questions as to how different classifications of employees from multiple units coming from CDC—which had numerous different classifications—would be fitted into the single over-all unit at PDC, which only had a few. Finally, there were discussions about how to dovetail the different health and pension plans from CDC into the ones at PDC, an issue that had been raised by Respondent in the prior meeting and which the Employer had promised to try to get answers about and resolve. Indeed, the Employer stated that it had a meeting set up with the Plan Administrators (OTET) for the following day to resolve this issue.

the Employer deems unlawful and unacceptable, it considers the negotiations to be at an impasse.³⁸ Curiously, while maintaining that an impasse existed, the Employer in the letter describes efforts that it was undertaking which contradict or undermine the very existence of an impasse. Thus, it describes how it had approached the Trustees of the Local 305 health plan (OTET) and persuaded them to “respect the deductibles and out-of-pocket costs incurred so far in 2016 by Clackamas Local 206 employees,” as Respondent had requested in order for it to accept that health plan for its (former) members at PDC. The letter also informs Respondent, in response to its request during negotiations, that an updated seniority list be provided in order to understand how the CDC transferees would be integrated into the PDC work force. Finally, the letter advises that in light of the proclaimed impasse, that the Employer would implement its “final offer” on August 14.

On August 6, Respondent (White) sent the Employer (Ruygrok) an email asserting that the parties were not at impasse, that issues still existed regarding the seniority list, severance pay, and other matters, and requesting further meetings (GCX-44). The Employer replied on August 8 by email, again asserting impasse but also requesting that Respondent submit any modifications to the seniority list it believed was necessary, along with explanations for such modification, which the Employer would consider (GCX-45).

C. *The Transfer of CDC Employees to PDC*

It is undisputed that the Employer began moving its operations and transferring the employees from CDC to PDC on or about August 15, a process that was completed in November. As briefly described before, the physical plant at PDC was considerably larger than CDC, both in its footprint as well as in its cubic foot capacity.³⁹ Inside the facility, PDC had far fewer partitions or subdivisions than CDC, with its floor space being more contiguous. Uncontroverted testimony by Woods established that at PDC, where a wall-to-wall unit of warehouse employees existed prior to the transfer of CDC employees, all incoming employees from CDC were integrated into that single unit, regardless of the particular unit from which they originated at CDC. In other words, the employees from the produce, grocery, and box & crate units at CDC (who were represented there by Respondent), were joined together at PDC with the incoming employees from the frozen foods, perishable, and driver units represented there by Local 305 (as well as Local 162 in the case of drivers). Additionally, the employees from CDC represented there by Local 555 (UFCW) and those represented there by IAM also were transferred to PDC and joined the wall-to-wall unit. At PDC they were joined with the already existing workers in the wall-to-wall unit there, essentially all becoming “warehouse employees,” as opposed to “frozen foods,” or “box & crate,” employees, etc. According to Woods, all their

³⁸ The letter asserts, among other things, that Respondent had maintained its position that it should remain as representative of its members at PDC, and maintain its CDC contracts in place at PDC. This is simply not accurate, as the record shows Respondent’s proposals evolved over time, as will be further discussed below. The letter also asserts that at the August 2 meeting Respondent stated that there would be “no deal” unless the Employer agreed to severance pay and to carry over Respondent’s health insurance plan into CDC. This is contradicted not only by the bargaining notes (taken by the Employer), but by the language of paragraph 3 of the June 23 proposal, as well as by the Employer’s own negotiations—as described below—with the OTET Trustees, undertaken at Respondent’s request.

³⁹ A briefly mentioned above, and discussed below, however, CDC had considerably more employees than PDC.

jobs were functionally integrated, and all shared the same supervision and equipment (Tr. 304–313; 317–321).⁴⁰

5 Records show that when the transfer of employees from CDC to PDC was completed in November, a total of 574 employees were joined there. Of these, 340 came from CDC, 220 were at PDC previously, and there were 14 new hires. Out the 340 employees who came from CDC, Respondent represented 162 of them; Local 305 represented 85; Local 162 represented 68; UFCW represented 22; and IAM represented 3. Thus, at the time these employees were merged together at PDC with those who were there previously, the percentage breakdown of employees
10 represented by the different labor organizations were as follows:

- Local 305: 220 (pre-existing at PDC) + 85 (coming from CDC), totaling 305: 54.46%⁴¹
- Local 206 (Respondent): 162 (all coming from CDC): 28.93%
- 15 • Local 162: 68 (all coming from CDC): 12.14%
- Local 555 (UFCW): 22 (all coming from CDC): 3.93%
- IAM: 3 (al coming from CDC): 0.54% (JX-1, p.6)

20 On November 23, the Employer sent a letter advising Respondent that CDC was closed as of November 21, and that there were no employees represented by Respondent left, since they had all been moved to PDC, and were now represented by Local 305. The letter also advised that the Employer no longer had a collective bargaining relationship with Respondent (GCX-59).⁴²

25 *The Grievances Filed by Respondent*

On August 8, 3 days after the Employer declared by letter that an impasse existed (GCX-42), Respondent, by letter, filed a grievance against the Employer. The grievance cites a number of articles in the CDC collective-bargaining agreements which the Employer allegedly violated,
30 but appears to primarily rely on Articles 3.2 and 3.7 of the agreements (GCX-46).⁴³ In the grievance letter, Respondent asserts the Employer failed to adhere to the provisions of the articles cited by, inter alia, failing to permit Respondent’s members to follow their work, maintain their contracts, and maintain their seniority. It also asserts that the Employer violated

⁴⁰ Although not specifically testified about, it is reasonable to infer that the possible exception to this functional integration were the drivers, whose function was to deliver goods to/from the facility, as opposed to moving and storing goods inside the facility—although they still were part of the wall-to-wall unit.

⁴¹ This does not include the 14 new hires, which the record does not show what date(s) they were hired.

⁴² Respondent filed a charge with the Regional Director in case 19–CA–176758 alleging that the employer had unlawfully recognized Local 305 as the exclusive collective-bargaining representative of the employees at PDC, including all those coming from CDC, and entered into a collective-bargaining agreement with Local 305 reflecting such recognition. The Regional Director dismissed the charge on August 26, on the basis that the incoming CDC employees were an “accretion” to the preexisting unit at PDC which was already represented by Local 305—even though the transfer of the employees into PDC had barely begun a few days earlier. (GCX-65)

⁴³ Article 3.2 reads as follows: “In the event that the Employer absorbs the business of another Company, or is party to a merger, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Union involved” (see, e.g., GCX-2, p. 2). The language of Article 3.7, related to relocation of facilities, is previously quoted in fn. 13, above.

the contract(s) by recognizing Local 305 as the representative of the affected employees. By letter dated August 11, the Employer responded to the grievance filed by Respondent, in essence asserting that such grievance was nothing more than a rehash of the unlawful bargaining demands Respondent had made during negotiations, and asserting that the grievance was itself unlawful, but offering to meet to discuss the grievance nonetheless (GCX-47).

By letter dated October 14, Respondent filed a second grievance. It alleged that certain work that belonged to the box and crate unit was still being performed at the CDC facility, by a third-party contractor, and other work also associated with that unit was being performed at CDC by Local 305 members (GCX-50). On October 27, by letter, the Employer responded to the new grievance, asserting that Respondent had erroneous information, and that the allegations of the grievance were factually incorrect (GCX-51). In the ensuing exchange of communications between Respondent (White) and the Employer (Ruygrok) with regard to this grievance, it is fairly apparent that Respondent repeatedly claims that the Employer is still performing (or subcontracting) work covered by the CDC contracts at the CDC facility, a claim that the Employer repeatedly denies, asserting that that facility was closed and all its work transferred to PDC (GCX-51; 52).⁴⁴ This is significant, because on November 23, the Employer sent Respondent a letter taking the position that inasmuch the CDC facility was closed and no work covered by the CDC contracts was still being performed there, Respondent's grievance "in reality concern [the Employer's] operations at a different facility and under a different collective bargaining agreement and different union representation," referring to PDC. (GCX-53). As discussed below, this is a position that appears to have been adopted by the General Counsel in paragraph 11 of the complaint, which alleges that Respondent's August 8 *and* October 14 grievances were unlawful.⁴⁵

IV. DISCUSSION AND ANALYSIS

As briefly touched upon in the preamble of this decision, and as reflected in the facts discussed above, the issues in dispute in this case emanate from the employer's decision to close the CDC facility and to transfer the operations and employees of that facility to the PDC facility. In turn, such event(s) gave rise to questions as to which union had the right, or obligation, to represent the employees of the soon-to-be merged unit—and at which point in time. In my view, the answer to these questions and issues pivots around the issue of whether the merger of the bargaining units coming from CDC with the preexisting unit at PDC constituted an "accretion" to the PDC bargaining unit, or whether such merger created a "new operation." The General Counsel and Charging Party allege that the merged unit at PDC was an accretion to the existing unit there, which would mean the Local 305 was the exclusive collective-bargaining representative of the accreted unit, since they appeared to represent a simple majority of the

⁴⁴ While the language of the October 14 letter-grievance may be imprecise or even ambiguous, Respondent's intent is apparent not only in the exchanged letters between the parties, but in the bargaining notes of a meeting held on November 22, 2016, to discuss the grievances (GCX-54). The notes reflect that at this meeting, White clearly states "you still have continuing work in Clackamas that is our work," a claim against denied by the Employer.

⁴⁵ The General Counsel's position is not only deduced from the pleadings, but also from its post-hearing brief, where it argues that Respondent's October 14 grievance had an unlawful purpose, despite the unambiguous evidence contained in the letters and notes introduced as General Counsel's exhibits as to what Respondent was claiming.

employees in the merged unit.⁴⁶ If so, they argue, Respondent was unlawfully attempting to bargain on behalf of, and apply its CDC contracts to, employees it did not represent, as alleged in the complaint. Respondent, on the other hand, argues that the merged unit at PDC constituted a “new operation,” and that a question concerning representation (QCR) thus existed when the consolidation occurred, since no union represented a sufficiently predominant majority of the employees in the merged unit. If so, Respondent argues, it had the right to bargain on behalf of, and to assert that the employer should apply the terms and conditions of the CDC contracts to, employees Respondent still represented—at least until the QCR was resolved by the Board through an election or some other means.

For the reasons discussed below, I conclude that Respondent has the better argument, and as a result, the allegations of the complaint lack merit.

A. Was the Merged PDC Bargaining Unit a New Operation or an Accretion?

When employers with multiple bargaining units merge or restructure, the Board will generally maintain the existing “historical” bargaining relationships. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 114, 119 (D.C. Cir. 1996); *Matlack Inc.*, 278 NLRB 246, 251–252 (1986). “The Board is reluctant to disturb units established by collective bargaining so long as those units are not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act.” 101 F.3d at 114 (internal quotations omitted). If two or more historically separate units “retain their separate identity,” the Board will continue to find separate representation appropriate, even if it would not have found separate units appropriate in the context of a new certification. *Id.* at 118, 120; 278 NLRB at 251-52. The Board begins its analysis by asking whether the historical units can be preserved or whether they have become so integrated as to create a “new operation” and thus a new, consolidated bargaining unit. Sufficient functional integration between the units will “obliterate” the old historical units and create a “new operation consolidating two previously separate units of employees.” *Martin Marietta Co.*, 270 NLRB 821, 822 (1984); *Trident Seafoods*, *supra*. If a community of interest does not exist, or if one of the merging bargaining units do not show sufficiently predominant majority, employers usually have an obligation to continue to recognize and bargain with the separate unions involved. *See Matlack*, at 251–252; *Panda Terminals, Inc.*, 161 NLRB 1215 (1966). Thus, when an employer merges two separately represented work forces, the employer may not choose between the competing representational claims, unless one of the merged groups constitutes such a large proportion of the combined work force that there is no reason to question the continued majority status of that group’s bargaining representative. *Dr. Pepper Snapple Group*, 357 NLRB 1804, 1812 (2011); *Metropolitan Teletronics Corp.*, 279 NLRB 957 (1986), *enfd. mem.* 819 F.2d 1130 (2d Cir 1987); *Boston Gas Co.*, 221 NLRB 628, 629 (1975).

The Board does not look at a change in physical location, work product, work methods, but looks at the numbers merging, presuming their original union preferences. *See e.g., F.H.E. Services, Inc.*, 338 NLRB 1095, 1096 (2003). For example, in *Martin Marietta*, *supra*, at 822, the Board found a new operation had been created by the employer because the operation was physically consolidated under common management and administration with centralized labor

⁴⁶ This simple majority would be based on adding the total number of members Local 305 had at CDC with those they represented at PDC prior to the merger of the units.

relations and an interchange of employees. Changed circumstances, and not a new location, was what constituted the “new operation” as previous and distinctly separate identities of the two units were obliterated. *Id.* Both units were employed by the same employer and performed similar functions under common terms and conditions of employment, constituting a “sole appropriate unit.” *Id.*

On the other hand, for an accretion to be possible, different factors are required. Under prevailing Board precedent, the Board accretes one unionized bargaining unit into another if the relative number of employees in the receiving unit is pronounced. *See U.S. West Communications, Inc.*, 310 NLRB 854 (1993) (one unit consisting of 500 employees was accreted into another without an election because the latter was “overwhelmingly predominant with 35,000 employees). Thus, the Board has defined an accretion as “the addition of a *relatively small* group of employees to an existing unit where these additional employees share a community of interest with the unit employees *and* have no separate identity.” *Safety Carrier, Inc.*, 306 NLRB 960, 969 (1992) (emphasis supplied). *See also Progressive Service Die Co.*, 323 NLRB 183 (1997). An employer may accordingly incorporate a small unit into an already existing larger collective-bargaining unit without conducting elections, if “the added employees (1) do not constitute a separate bargaining unit, and (2) do not outnumber the employees who belong to the existing unit.” *SEIU Local 144 v. NLRB*, 9 F.3d 218, 233 (2nd Cir. 1993). As the Board explains in *Matlack*, *supra.*, in pertinent part:

Simply stated, an accretion is the incorporation of employees into an already existing *larger unit* when such a community of interest exists among the entire group that the additional employees have *no separate unit identity* [and thus are] properly governed by the larger group's choice of bargaining representative. (emphasis supplied).

In other words, for an accretion to be possible, assuming a community of interests exists, the lion must swallow the mouse, not the other way around. It is puzzling that in support of their argument that an accretion existed in the present case, both the General Counsel and the Charging Party cite the exact above-cited passage from *Matlack*, while ignoring the “elephants” in the room present in the above-emphasized portions of the citation. In the present case, the total number of employees that came from CDC into PDC significantly outnumbered the number of preexisting employees at PDC. Clearly, CDC was the lion, PDC the mouse, and the lion additionally had an historical separate identity.⁴⁷ In these circumstances, both because the incoming group of employees from CDC was larger, and because such employees historically constituted separate bargaining units and had separate identities, their accretion into PDC is not possible—or valid. In so concluding, I specifically reject the Employer’s contention that because

⁴⁷ As described earlier, the total number of incoming CDC employees was almost twice the number that preexisted at PDC. I would note that in considering the appropriateness of an accretion, the Board considers a number of factors that define a community of interests, such as integration of operations, common supervision and control of labor relations, geographical proximity, integration of operations, similarity of working conditions, etc. *See e.g., Ryder Integrated Logistics, Inc.*, 329 NLRB 1493, 1495 (1999). Nonetheless, the size of the incoming unit relative to the receiving unit, and the existence of separate collective-bargaining histories and separate identities are threshold factors that must first be examined, since such criteria define whether an accretion is possible, according to the cases cited above. Thus, if the incoming unit is bigger, and has a separate identity and collective-bargaining history, accretion is improper and the remaining factors are moot and need not be examined. The issue in such case is then whether a “new operation” has been created.

the transfer of employees from CDC to PDC was accomplished over a period of 4 months, each separate small batch of CDC employees transferred at a time constituted an independent “accretion” into the “larger” PDC unit. To accept such argument would mean that employers could manipulate or artificially engineer the creation of accreted units to their advantage by intentionally using the “slow drip” method of siphoning employees away from historical bargaining units, thus depriving these employees of their choice of representative.⁴⁸ In this regard, I note the Board has long been restrictive in its application of the accretion doctrine in deference to the central statutory policy of employee free choice. *Super Valu Stores*, 283 NLRB 134, 136 (1987); *Safeway Stores, Inc.*, 276 NLRB 944, 948 (1985). Indeed, neither the Employer nor General Counsel cite any cases supporting the proposition that sequential transferring of an entire historical bargaining unit, as opposed to doing it all at once, would allow an accretion under these circumstances.⁴⁹

Applying the previously discussed criteria to the issue of whether a “new operation” existed at PDC when the CDC bargaining units were merged there, it appears that such criteria fit the facts of this case. There were 9 separate historical bargaining units at CDC, which predated the single “wall-to wall” PDC unit by at least 20 to 30 years. These separate bargaining units at CDC were primarily defined by the specific tasks the employees performed and the type of products they handled, which in turn dictated which union represented them. Moreover, the separateness of these units was further enhanced or magnified by the physical partitions that existed at CDC, with its highly compartmentalized plant. When the CDC bargaining unit employees arrived at PDC, they found themselves in a plant that had few partitions, either physical or functional, and where all duties and jobs of “warehouse” employees were functionally integrated under common facility-wide supervision. In these circumstances, it would be very difficult, if not impossible, to maintain the separate identities of the historical bargaining units, which the Board first considers. The functional integration of the historical CDC units with the preexisting PDC unit must therefore be concluded to have “obliterated” these units, resulting in a “new operation,” as defined in the above-cited cases. Indeed, it is ironic that both the General Counsel and Charging Party employer repeatedly accuse Respondent of unlawfully attempting to “fracture” the PDC bargaining unit by proffering bargaining proposals that would have allowed Respondent to still represent its incoming CDC members at PDC, at least for the time being. It is ironic because the word “fracture” does not properly convey or define what occurred to the PDC bargaining unit when the CDC units were fused into PDC. “Shattered” or “obliterated,” the term preferred by the Board, more accurately conveys what truly occurred, but such obliteration did not occur as a result of anything Respondent did or attempted to do. Rather, it was the direct and proximate result of the Employer’s decision to close CDC and transfer its operations and employees to PDC, valid as such decision may have been.

⁴⁸ The employer had as early as December 23, 2015, informed Respondent by letter that it intended to do just that, by “sequentially” accreting a “handful” of CDC employees into PDC at a time, so that the final numbers “at the end of the day” did not matter. (GCX-20). Ironically, by slicing up the “lion” unit into bite-size pieces the “mouse” unit could swallow, the Employer was essentially doing what it accused Respondent of trying to do: “fracturing” an existing historical unit.

⁴⁹ In dismissing Respondent’s charge against the Employer for unlawfully recognizing Local 305, the Regional Director apparently accepted the employer’s accretion theory (GCX-65). As discussed below, I am not bound by that decision in determining the validity of Respondent’s affirmative defense or the merits of the complaint.

In concluding that the fusion of the historical—and larger—bargaining units at CDC with the smaller preexisting bargaining unit at PDC created a “new operation” at PDC, I specifically reject the General Counsel’s arguments, advanced in its post-hearing brief, that in order for a “new operation” to be found, the combined bargaining units must be merged at an entirely “new” location. In other words, the General Counsel argues that for a “new operation” to exist, the bargaining units from location “A” must be combined with bargaining units from location “B” at a new, if perhaps not newly built, facility at location “C.” Nothing in the above-cited Board cases directly or indirectly suggests such to be the case, an interpretation which appears to stem from the General Counsel’s misreading or misunderstanding of the term “new operation.” Indeed, nothing of the sort was the situation that occurred in *Martin Marietta*, for example. Rather, as described above, a “new operation” is created when historical units are fused together, at any location, in a manner that their functional integration obliterates their former separate identities. *Panda Terminals*, supra.

B. The Bargaining Obligations by the Employer at the New Operation

Having concluded that the fusing of the historical bargaining units at CDC with the preexisting smaller unit at PDC brought about a “new operation,” I now turn to the issue whether any labor organization among those involved here had a “sufficiently predominant majority” among the employees in the new operation so as to avoid a question concerning representation (QCR) and be entitled to automatic recognition by the Employer. The Board has never set an exact numerical figure or percentage of a bargaining unit in defining what a “sufficiently predominant majority” is. Nonetheless, Board precedent strongly suggests that such figure needs to be *above* 66 percent in order to eliminate a question concerning representation. *Martin Marietta*, supra (66 percent deemed insufficient to represent a predominant majority); *National Carloading Corp.*, 167 NLRB 801 (1967) (62 percent insufficient).⁵⁰

Applying these principles to the facts at hand, it is clear that Local 305, which never represented more than 54 percent of the merged employees at PDC, did not possess a sufficiently predominant majority at the new operation at PDC to avoid a QCR and thus warrant recognition by the Employer.⁵¹ Thus, I conclude that the recognition of Local 305 by the Employer at the merged PDC bargaining unit was both premature and improper. As discussed above, this improper recognition was signaled by the Employer as early as December 23, 2015, and

⁵⁰ In this regard, it should be noted that in *Metropolitan Teletronics Corp.*, 279 NLRB 957 (1986), the Board *appears* to endorse a figure of 63 percent as a sufficient threshold. This figure is misleading, however, because it simply represented the percentage that the predominant union represented previously, as compared to 5 percent by the competing union. Left out of these figures were new employees, which the Board presumes support the competing unions by the same ration as existing employees. Thus, when new employees are added to the equation, the predominant union represented well over 90 percent of the entire bargaining unit.

⁵¹ This figure does not include the 14 new hires at PDC, who are presumed to support the competing unions by the same percentages, which would not significantly alter the figure. Indeed, even if all 14 were presumed to favor Local 305, its percentage would still remain significantly below 60 percent. In finding that Local 305 never enjoyed a predominantly sufficient majority, I specifically reject the Employer’s contention that since Local 162 agreed to join with Local 305 as its “agent” for representational purposes of the drivers under the new PDC collective-bargaining agreement, those employees represented by Local 162 should be added to the totals of Local 305 for determining whether it had a predominant majority. Simply put, the representational rights of employees do not belong to unions (or employers) to be traded or given away; only employees get to choose who represents them. Such principle lies at the heart of the concept of industrial democracy, which the Act was enacted to promote.

formalized when the Employer and Local 305 entered into a collective-bargaining agreement embodying such recognition. In so concluding, I am very much aware that the General Counsel weighed on this issue when it decided to dismiss Respondent's charge against the Employer alleging that such recognition was unlawful, thus agreeing with the Employer's view that the combined CDC and PDC units were an "accretion." I am not bound in any way by the General Counsel's prosecutorial discretion in refusing to issue complaint, however, in determining whether Respondent's affirmative defenses to the allegations of the complaint in this matter have merit. *Chicago Tribune Co.*, 304 NLRB 259 (1991); *South Alabama Plumbing*, 333 NLRB 16 (2001).

I conclude that Respondent's affirmative defense that the Employer improperly recognized Local 305 in these circumstances has merit. This conclusion, as discussed below, fatally undermines the main theory espoused by the General Counsel in support of its allegation that Respondent was bargaining in bad faith, or otherwise acting unlawfully when it filed grievances to uphold the rights of its bargaining unit members. Where merged bargaining units form a new operation and none of the competing unions have a sufficiently predominant majority, as has occurred here, an employer must continue to recognize and bargain with all of the unions involved, until the Board resolves the question concerning representation. *Matlack, supra.*, at 251–252; *Innovative Communications Corp.*, 333 NLRB 665 (2001). Presumably, then, the status quo ante must be maintained until the Board steps in and resolves the question concerning representation. An issue then arises as to what occurs to the collective-bargaining agreements that were in place at the time that the historical bargaining units were merged at PDC, creating a "new operation" and triggering a question concerning representation, as I have found occurred here. While *Matlack, supra.*, at 251–252; *Innovative Communications Corp.*, *supra.*, indicate that an employer must continue to recognize and bargain separately with the various unions involved until the Board resolves the question concerning representation, I have found no Board case that directly addresses the issue as to the fate of the contracts in place. In light of the Board's long-standing policy of preserving the status quo ante in these type of circumstances, however, it is reasonable to presume that at least initially, until the question concerning representation is resolved by the Board, all the collective-bargaining agreements covering all of the merging bargaining units should be maintained in place. To hold otherwise would in essence mean that the Employer could unilaterally impose the initial hours, wages, and working conditions on all merging bargaining unit employees, an outcome that would arguably be destructive of their Section 7 rights and of the representational rights of the unions involved.⁵²

As discussed below, these conclusions have significant ramifications when analyzing the propriety or unlawfulness of the conduct that Respondent allegedly engaged in.

⁵² As a practical matter, the reality is that as the result of the General Counsel's dismissal of the charges filed by Respondent alleging that the Employer unlawfully recognized Local 305 as the representative of all employees at PDC, the collective-bargaining agreement between Local 305 and the Employer is in place and currently dictates what their wages, hours and working conditions are. If the Board agrees with my conclusion that a new operation resulted from the merger (as opposed to an accretion), and that a question concerning representation exists, an interesting issue might arise as to whether the imposition of Local 305's agreement on all might give that labor organization an unfair "leg up" or advantage in any future representation proceedings. Such issue, however, is not before me.

C. The Allegations of Bad Faith Bargaining by Respondent

Paragraph 10 of the complaint alleges that during the bargaining sessions concerning “successor collective bargaining agreements” and the “transfer of work” to PDC, which took place between October 2015 and August 2016, Respondent sought to have the Employer agree to the following:

1. Withdraw recognition from Local 305 with respect to warehouse employees at PDC, and instead recognize Respondent, a “minority union;”
2. “Fracture” the existing “wall-to-wall” unit at PDC into four separate units;
3. Negotiate with Respondent about wages, hours and working conditions for employees represented by Local 305 at PDC;
4. Negotiate only with Respondent (and not Local305) regarding the transfer of work from CDC to PDC; and
5. Violate the seniority and job bidding rights of employees represented by Local 305 at PDC.

Paragraph 10 further alleges that by engaging in the above-described conduct, Respondent sought to condition the renewal of its collective-bargaining agreement(s) at CDC on the Employer’s acceptance of the above-described conditions, therefore causing an impasse. Paragraph 12 of the complaint further alleges that by engaging in the conduct alleged in paragraph 10, Respondent engaged in bad faith bargaining in violation of Section 8(b)(3) of the Act. For the reasons discussed below, I conclude that these allegations of the complaint are factually incorrect and legally without merit.

First, I would again note that my conclusion, as described above, that there was no accretion at PDC and thus that the Employer’s recognition of Local 305 as the exclusive collective-bargaining representative of all employees at the “new operation” at PDC was invalid, fatally undermines the principal theory underpinning the allegations of the complaint. The entire premise of the General Counsel’s case depends on the conclusion that Local 305 became the sole and exclusive representative of all employees coming from CDC into PDC the second they arrived there. If so, Respondent’s attempts to negotiate on behalf of employees it did not represent, or no longer represented, let alone “insist” on its proposals with regards to these employees to the point of impasse, could reasonably be deemed as unlawful. As discussed above, however, Local 305 was not the exclusive representative of all the employees at the merged new operation at PDC, a representation that was instead shared among several unions who had represented the historical bargaining units at CDC, including Respondent. Such shared representation must remain in place until the Board resolves the question concerning representation that resulted from the “new operation” at PDC. *Matlack, supra.*, at 251–252; *Innovative Communications Corp.*, *supra*.

Moreover, and perhaps just as importantly, the above-enumerated allegations in the complaint are factually incorrect regarding what Respondent was attempting to do, and with regards to whom Respondent was attempting to negotiate on behalf of. A perfect illustration of one of these factual inaccuracies is the allegation that Respondent held a “successor agreement” at CDC hostage to its demands regarding the “transfer of work” negotiations with the Employer.

From the outset, Respondent made clear that its priority was negotiating about the “effects” of CDC’s closure on its members, which was called the “transition agreement” by the parties. This was not an unreasonable, let alone unlawful, tactical or strategic decision by Respondent. After all, CDC was doomed to be closed in the near future, and under such circumstances it was not unreasonable to consider any prolonged negotiations about a “successor agreement” at CDC to be a colossal waste of time, akin to negotiating about the arrangement of the deck chairs on the *Titanic*. Respondent was faced with a much more immediate and important task, which was the fate of about 162 of its CDC members, a fate that was uncertain when negotiations started and even not fully addressed until the end of negotiations and the beginning of the transfers to PDC. Respondent thus entered into an “extension” agreement with the Employer in November 2015 (GCX-18), extending the terms of the CDC contracts, which had expired in April, through the end of December 2015—and continuing thereafter, unless either party gave 3 days’ notice. Neither Respondent nor the Employer gave such notice, so the CDC contracts remained in place until the facility closed. Accordingly, Respondent did not “condition” the renewal of a “successor” agreement at CDC upon the Employer’s agreement to anything in the transition negotiations; it simply chose to extend the contracts at CDC, making a “successor” agreement unnecessary, in order to devote its time and energy to negotiations it reasonably deemed more important.⁵³

Factual inaccuracies such as described above also taint many, if not all, of the other allegations of paragraph 10 of the complaint regarding Respondent’s bargaining tactics and proposals. For example, with regard to the allegation that Respondent sought to have the Employer “withdraw recognition from Local 305” with regard to warehouse employees at PDC (¶ 10 (a)(i) of the complaint, summarized at No. 1, above), no such intent can be read or inferred from the proposals by Respondent over the course of negotiations. What is clear from Respondent’s proposals, as they evolved over the course of negotiations, is that Respondent maintained that it should retain representation rights over its members coming to PDC from the

⁵³ Locals 305 and 162, on the other hand, had agreed to “successor” agreements for CDC in October 2015, agreements that in essence came to an end about a year later, when CDC closed. How Locals 305 and 162 chose to conduct their business does not in any way reflect on how Respondent chose to conduct its affairs, because their circumstances and interests may have been different. Perhaps the General Counsel does not believe that an “extension” agreement at CDC was good enough, especially when compared to the “successor” agreements negotiated by Locals 305 and 162—which resulted in slight wage increases for their members. What is “good enough” for Respondent’s members, however, is up to Respondent—not the General Counsel—to decide.

historical bargaining units at CDC—and that the terms of the collective bargaining contracts at CDC be applied at PDC until the QCR was resolved by the Board.⁵⁴ This is what I have concluded Board precedent requires, and there is nothing factually accurate or legally valid about this allegation of the complaint as phrased.

5 Likewise, the allegations that Respondent sought to have the Employer negotiate with it regarding wages, hours and working conditions of employees at PDC represented by Local 305 ((¶ 10 (a)(iii) of the complaint, summarized at No. 3, above), or sought to have the Employer negotiate exclusively with Respondent regarding the proposed transfer of work from CDC to PDC (¶ 10 (a)(iv) of the complaint, summarized at No. 4, above), are equally inaccurate and misleading. Again, Respondent’s proposals, particularly as they evolved from May 2016 forward, made it patently clear that it was bargaining for, and making proposals on behalf of, those employees it represented at CDC which were being transferred to PDC, employees that I have concluded it had the right to represent until such time as the Board resolved the existing question concerning representation.⁵⁵ Indeed, in its proposals and comments during negotiations, Respondent specifically disavowed any notion that it was attempting to negotiate for those employees represented by Local 305 (or any other union), either at CDC or PDC. The General Counsel’s and Employer’s misreading of Respondent’s proposals appear to stem from, and be defined by, their erroneous assumption that the merger of units at PDC was an accretion and that hence Local 305 was the exclusive representative of all PDC employees, regardless of where they originated or whether they were represented by a different union. Looking at events through this tainted prism, it’s easy to understand their outlook. Thus, if Local 305 was, or became, the exclusive representative of all PDC employees, *any* proposal by Respondent with respect to any PDC employees was arguably unlawful. Taking this conclusion to its next logical step begs the question: Was there anything left for Respondent to lawfully bargain about? Thus, while the General Counsel and the Employer concede that Respondent was lawfully entitled to negotiate about the “effects” of the closure of CDC on its members, it is difficult to conceive of

⁵⁴ I find it curious that the General Counsel, apparently adopting the Employer’s position, would argue in its posthearing brief that Article 3.7 of the CDC contracts between Respondent and the Employer, cited by Respondent as justification for its proposals, is not applicable in this situation. As fully cited in footnote 13, Article 3.7 provides that if an existing facility (covered by the contract) is moved... “[t]o any location (within the jurisdiction of the Joint Council)... the terms and condition of this contract shall apply with respect to the new facility...” (emphasis provided). The General Counsel (and Employer) argue that the term “new facility” as used at the end of the cited language, means that the facility must be “new,” as in newly constructed or created, as opposed to a “pre-existing” facility such as PDC. Such interpretation of the contractual language cited above makes absolutely no sense, providing an unnatural and even tortured reading of what appears to be quite straightforward language. The initial use of the term “any location” at the beginning of the sentence clearly defines and modifies the term “new facility” at the end, which obviously refers to a “relocated” facility. Thus, the controlling phrase “any location” means just that, and it’s disingenuous to argue that such “location” must be “new.” In any event, if a bona fide dispute exists as to the interpretation of contractual language, such dispute properly belongs before an arbitrator to resolve. In these circumstances, the General Counsel should not be choosing sides in this dispute, particularly in view of the woeful lack of evidence regarding the intent of the parties and bargaining history that resulted in such language.

⁵⁵ In its posthearing brief, Respondent argues that in its proposals after May 2016, it no longer sought recognition as a representative of any employees at PDC. I disagree, since its proposals can reasonably be interpreted to mean that it was still demanding bargaining rights concerning its members coming from CDC, subject to the Board resolving the QCR, an interpretation supported by the bargaining notes. Nonetheless, I have concluded there was nothing unlawful about such demands, since Respondent was entitled to continue to represent its members at PDC until the Board resolved the QCR.

any topic it could have bargained about that did not intrude into Local 305's exclusive rights—that is, the wages hours or working conditions of all employees that ended up at PDC.

5 It would thus appear, in accordance to the General Counsel's (and the Employer's) theory, that Respondent's only lawful bargaining posture, when trying to negotiate on behalf of its departing members, would have been to agree to anything that had already been agreed to or approved by Local 305. Indeed, most of the Employer's counter-proposals in essence reflected this position. Respondent's acceptance of such proposals, however, could not properly be called "bargaining." "Abdication," or perhaps "surrender" would be a far more appropriate term, but 10 such abdication is never required by the Act—under any circumstances.⁵⁶ I also would note, with regards to Respondent's right to negotiate about effects the closure of CDC and the transfer of its employees and work, that the Board has ruled that "effects" bargaining includes the right to bargain about the initial wages and working conditions of at the new location, including the issue as to whether employees represented at the previous location would be continued to be 15 represented—and, presumably, by whom. *Dodge of Naperville*, 357 NLRB 2252, 2253–2254 (2012), and cases cited therein. This is exactly what Respondent did—bargain about the initial terms and conditions of employment at PDC for those unit employees it had traditionally represented, at least until the Board resolved the representation issue.

20 With regard to the allegation that Respondent was attempting, through its proposals, to have the Employer violate the seniority and job bidding rights of employees represented by Local 305 (¶ 10 (a)(v) of the complaint, summarized at No. 5, above), this allegation is not so much factually inaccurate as it is conceptually so—and legally flawed.⁵⁷ It is true that Respondent repeatedly proposed that its members receive favorable treatment, in ratios of 9 to 1 25 or more, when it came to transfer rights to PDC (endtailing), or job-bidding opportunities once at PDC, although many of these proposals were modified in its latter proposals. There is nothing unlawful, however, about a labor organization proposing terms, or agreeing to terms, that favor individuals in a certain bargaining unit it represents over those in other bargaining units, even if the individuals in the disfavored units are unrepresented or represented by others. Thus, the 30 Board has held that a union has the right—and responsibility—to represent the interests of the members of the bargaining units it represents over those outside those units. *Riser Foods, Inc.*, 309 NLRB 635 (1992). See, also, *NLRB v. Whiting Milk Corp.*, 342 F.2d 8 (1st Cir., 1965). Although *Riser Foods* involved alleged violations of Section 8(b)(1)(a) and (2) of the Act, which were dismissed, the same principles are applicable to Section 8(b)(3), as alleged here. Thus, if a 35 union does not unlawfully "discriminate" in violation of Sections 8(b)(1)(a) and (2) of the Act by entering into collective-bargaining agreements that favor members of a unit it represents over those in other units, the inescapable conclusion is that it cannot violate Section 8(b)(3) by *proposing* such terms during collective-bargaining negotiations, as Respondent did here. Simply put, in light of the planned closure of CDC, Respondent was faced with a possibly dire situation, 40 where many of its members faced potential lay-offs or faced being forced to accept reduced

⁵⁶ Respondent could not even bargain about severance, another traditional topic in "effects" bargaining, since the Employer took the position that it was too costly, and in any event, contrary to what was originally anticipated, no employees were laid off in the end.

⁵⁷ The same holds true for the allegation that Respondent was attempting to "fracture" the wall-to-wall unit that existed at PDC (¶ 10 (a)(ii) of the complaint, summarized at No. 2, above). As previously discussed, what occurred at PDC was not a "fracture" of the unit, but rather an "obliteration," courtesy of the Employer's actions—not Respondent's.

seniority, less desirable working conditions, or even representation by a labor organization they had not chosen. In such situation, it is not improper, let alone unlawful, for a union to attempt to bite, scratch and claw its way into obtaining the best possible deal for those employees in the units it represented. Indeed, for a union to do anything less in such circumstances would arguably betray its fiduciary duty toward its members.

Finally, there is one additional factor that further undermines the General Counsel's theory that Respondent insisted on unlawful terms to the point of impasse, as alleged in the complaint. It is well-settled that in order to be found guilty of bad faith bargaining, a party must rigidly and consistently "insist" on terms that are unlawful, unreasonable or unacceptable in light of all of the circumstances, or only permissible, as opposed to mandatory, subjects of bargaining. As Respondent correctly argues, however, establishing unlawful *insistence* is a high bar, because not only must the General Counsel establish that Respondent proffered unlawful or inherently unacceptable terms, but also establish that it conditioned an agreement upon acceptance of such terms. *National Maritime Union (Texas Co.)*, 78 NLRB 971, 981–982 (1948), *enfd.* 175 F.2d 686 (2d Cir. 1949), *cert. denied* 338 U.S. 954 (1950); *Thill, Inc.*, 298 NLRB 669, 672 (1990), *enfd. in relevant part* 980 F.2d 1137 (7th Cir. 1992); *Teamsters Local 20 (Seaway Food Town, Inc.)*, 235 NLRB 1554, 1558 (1978).

To begin with, Respondent did not make any unlawful bargaining demands, contrary to the assertions of the General Counsel and the Employer, as I have found that in this situation Local 305 was improperly recognized as the exclusive representative of the "wall-to-wall" unit at PDC, a unit that no longer existed because it had been obliterated when a new operation was created at PDC. Until the question concerning representation created by said new operation is resolved by the Board, Respondent remains the representative of certain of the employees that were transferred to PDC. As their representative, Respondent is entitled to bargaining about the wages, hours and working conditions of such employees, terms which are mandatory—not permissive—subjects of bargaining. Moreover, Respondent did not "insist" on its terms as a prerequisite to reaching any agreement, and certainly not to impasse. While Respondent was correctly persistent in its view that it had the right to represent its unit members coming from CDC into PDC and to bargain on their behalf, it significantly modified its proposals throughout the course of negotiations. For example, it conditioned application of the terms of its CDC contracts to its members at PDC on the Board holding an election and finding that Respondent had majority support in the merged operation—as required by Article 3.7 of its CDC contracts.⁵⁸ Likewise, in the last set of negotiations, it signaled that it was willing to accept its members at PDC being covered by Local 305's health benefits plan, so long as its terms were equivalent to the health plan they previously enjoyed. Indeed, Respondent asked the Employer to inquire whether the calendar year out-of-pocket expenses already incurred by its members under Respondent's plan could be credited under Local 305's plan. Respondent in fact made such inquiry with the plan administrators, was informed that such credit could be given, and so

⁵⁸ Assuming that a question concerning representation (QCR) at PDC were to be resolved by the Board in favor of Respondent, I see nothing intrinsically unlawful about the Employer being required to apply the terms of the CDC agreements at PDC, per its obligation to maintain the status quo ante, and as required by Article 3.7 of said agreements, at least until a new collective bargaining contract could be negotiated. Moreover, before the existing QCR is resolved by the Board, pursuant to the principles espoused in *Matlack*, the Employer is obligated to continue to bargain with all the unions involved in the merger, and presumably, in order to preserve the status quo, maintain their separate collective-bargaining agreement in place until the QCR is resolved.

informed Respondent. Shortly thereafter, however, before Respondent could signal an acceptance of some of these terms, the Employer declared an impasse and broke off negotiations. In short, Respondent showed some flexibility and willingness to compromise on some proposals, a stance that in my view precludes the finding of a true and valid impasse. It may reasonably be argued that Respondent’s bargaining stance was unrealistic, hard-nosed and even bull-headed in light of all the circumstances. It was not unlawful, however, since such “hard bargaining” is not “bad faith” bargaining.⁵⁹

Indeed, the record strongly suggests that the Employer declared an impasse in early August not because the negotiations had become hopelessly bogged down, but rather because the transfer of employees from CDC to PDC was about to begin, and it needed a final—and perhaps tidy—resolution to the merger issue. In my view, it was ironically the Employer that in the final analysis was rigid and unwavering in its approach to negotiations, having decided early on that Local 305 was going to be the exclusive representative at the merged PDC facility. The Employer’s bargaining proposals reflected this pre-ordained scenario, and thus it offered Respondent terms and conditions that would be agreed to—or had already been agreed to—by Local 305, which left Respondent with little room to maneuver—and ultimately little, if anything, to bargain about. I ascribe no bad faith, however, and certainly no unlawful motivation to the Employer. It gambled on the legal conclusion that there was an accretion at PDC, with the blessing of the General Counsel, a conclusion I have found to have been incorrect and legally flawed. Nonetheless, I cannot help but imagine that dealing with one single union at PDC, representing a single wall-to-wall unit, must be far simpler, far more efficient, and certainly far tidier than dealing with multiple unions representing multiple bargaining units, as was the case at CDC. In that regard, I am very much aware that my decision in this matter may be upsetting the apple cart, and potentially creating a complicated or messy scenario. Industrial democracy, which is the goal of the Act, however, is not necessarily about simplicity, or efficiency or tidiness. As with democracy at large, industrial democracy can sometimes get messy, and this is one of those occasions.

Accordingly, and in light of the above, I find that allegations of paragraph 10 of the complaint, and paragraph 12 as it relates to paragraph 10, have no merit, and that Respondent did not violate Section 8(b)(3) of the Act in these circumstances.

⁵⁹ Respondent was arguably unrealistic because it apparently failed to grasp the reality that the “new operation” at PDC had not only obliterated the historical bargaining units, but obliterated past practices regarding the handling of work as well. Thus, employees at the merged PDC facility were in essence no longer handling “Safeway” or “Albertsons” products, because those traditionally separate companies were now jointly owned by the same entity (Cerberus), which decided to merge their distribution centers and jointly handle their products. Thus, Respondent’s proposals that reflected its expectation that its members would handle all the “Safeway” products at PDC (which was apparently the majority of the work at the merged PDC facility), and its corresponding expectation that its proportion of employee representation at PDC would reflect the volume of “Safeway” products handled there, was plainly unrealistic and untethered to the reality on the ground. Such unrealistic expectations, however, did not make Respondent’s proposals unlawful, since it did retain the right to represent its members at PDC until the Board resolved the question concerning representation, as discussed above.

D. The Grievances Filed By Respondent

Paragraph 11 of the complaint alleges that on August 8 and October 14, 2016, Respondent filed grievances against the Employer with respect to work performed at PDC, work alleged to be performed by employees represented by Local 305. Paragraph 11 further alleges that the grievances are intended by Respondent to impose its CDC contracts on work performed at PDC, with the object of coercing the Employer to do as follows:

1. Recognize Respondent as the representative of “warehouse employees” at PDC represented by Local 305;
2. “Fracture” and otherwise modify the “wall-to-wall” unit at PDC represented by Local 305;
3. Interfere with the representational rights of the “warehouse employees” at PDC represented by Local 305;
4. Discriminate against warehouse employees at PDC with respect to their terms and conditions of employment; and/or
5. Agree to (Respondent’s) bargaining demands (as described in paragraph 10) which Respondent was unable to achieve through collective bargaining.

In paragraphs 13 and 14, respectively, the complaint alleges that by the conduct alleged in paragraph 11, Respondent violated Section 8(b)(2) and 8(b)(1)(a) of the Act. For the following reasons, I find that the allegations of paragraphs 11, 13 and 14 of the complaint lack merit.

First, I note that most of the alleged “objectives” by Respondent as enumerated in 1-5 above are almost identical to the ones described in paragraph 10, with respect to Respondent’s bargaining tactics, which I have found to be factually inaccurate and legally without merit. These same objectives alleged in paragraph 11 are equally inaccurate and without merit, for the same reasons I have previously discussed, to wit:

1. Respondent was not attempting to gain recognition of employees represented by Local 305 at PDC; it was attempting to maintain recognition of those employees it has historically represented at CDC, which in the absence of a valid accretion at PDC, it had the right to do;
2. Respondent was not attempting to “fracture” anything; the existing operation and hence the “wall-to-wall” unit at PDC was obliterated by the Employer-caused merger, creating a “new operation” at PDC that raised a QCR which must be resolved by the Board;
3. Respondent was not attempting to interfere with the representational rights of Local 305-represented employees; it was attempting to maintain representation over its members (see #1 above); Local 305 was invalidly recognized by the Employer as the representative of all employees at the merged PDC unit;
4. Respondent was not attempting to get the Employer to “discriminate” against “warehouse employees” at PDC with regards to their terms and conditions of employment; it was attempting to secure or preserve terms and conditions of

employment for employees in the units it represented at CDC, as it has the right to do under *Riser Foods*, supra;

- 5 5. Respondent was not attempting to force Respondent to accept its bargaining proposals, which I concluded were not unlawful and had valid goals. Moreover, as discussed below, Respondent had colorable valid grievances under the terms of its collective bargaining agreements with the Employer.

10 Both the General Counsel and the Charging Party Employer cite multiple cases that stand for the proposition that it is unlawful for a union to use the grievance-arbitration mechanism of a collective-bargaining agreement to force an employer to recognize that union as the representative of employees other than those covered under said agreement, or to compel an employer to apply the terms of the agreement to employees in other bargaining units not covered by the agreement. This is well-settled law. See, for example, *IBEW Local 323 (Active Enterprises, Inc.)*, 242 NLRB 305 (1979); *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB 904 (1986); *Service Employees Local 32B-32J (Allied Maintenance)*, 258 NLRB 430 (1981). What distinguishes such cases from the case at hand, however, is that none of those cases involved the merger of separately represented bargaining units into a “new operation,” where a question concerning representation exists that still needs to be resolved by the Board, as I have found occurred here. Such distinction, in my view, is crucial, a distinction that undermines the foundation of the General Counsel’s (and Employer’s) theory of a violation.

25 To be sure, this case appears to represent a novel situation, for the parties have not cited, nor have I found, any Board precedent that exactly fits the circumstances and facts of this case. Nonetheless, there are cases that offer guidance. For example, the Supreme Court has affirmed the right of arbitrating representational disputes. See *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964) (holding that where there was a dispute between employer and two unions as to whether certain employees in one union were doing the work of employees in another union, the arbitration procedure under collective-bargaining agreement was available, whether the dispute was a work assignment dispute or one concerning representation; if it was a work assignment dispute, arbitration filled a gap and avoided the necessity of a strike to bring the matter to the National Labor Relations Board; if it was a representative matter, resort to arbitration could have a pervasive, curative effect even though one union was not a party). Thus, an arbitrator may adjudicate the dispute, even though the superior authority of the Board can be invoked at any point. Additionally, a determination on whether a party violates the Act through the grievance arbitration procedure is analyzed under the framework of the Supreme Court’s decision in *Bill Johnson’s Restaurant v. NLRB*, 461 U.S. 731, 737 fn.5, 743–744 (1983) and *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 531–532 (2002), which note that a grievance will not be deemed unlawful unless it is baseless, filled with a retaliatory motive, or has an illegal objective. I have already concluded that Respondent did not have an illegal objective in its bargaining proposals, as discussed above. I have also concluded, as previously discussed, that the same holds true for the grievances, in that the alleged intent of the grievances is not what is alleged in the complaint.

45 I note that other Board cases in which grievances by unions have been found to be unlawful are distinguishable from the instant case. For example, in *Teamsters Local 952 (Pepsi Cola Bottling Co.)*, 305 NLRB 268 (1991) the Board found that the union had acted unlawfully

by filing grievances because the grievances were retaliatory in nature, seeking to punish employees who had successfully filed a decertification petition, and because the grievances sought to undermine the Board’s prior decisions in two representation cases. Neither of those factors is present here. There is no evidence of any retaliatory intent on the part of Respondent, whom I have found was attempting to preserve its rights under its collective-bargaining agreements—rights that were threatened by the Employer’s improper and premature recognition of Local 305 as the representative of all employees at the merged PDC facility. Nor is there any “undermining” of any Board decision regarding the representational rights of employees at PDC because there is none—indeed, as I have found, a question concerning representation exists in this case that needs future Board resolution. The same holds true for *New York New Jersey Regional Joint Board (Brooks Brothers)*, 365 NLRB No. 61 (2017) and *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832 (1991), where the Board had already made representation case determinations (resolving unit clarification petitions) which the grievances sought to undermine.

Notably, there is also an important distinction between the grievance filed by Respondent on August 8, 2016 (GCX-46) and the one filed on October 14, 2016 (GCX-50). The August 8 grievance alleges that the Employer violated the CDC agreements by not complying with Article 3.7 of those agreements when transferring employees and their work from CDC to PDC. As such, the intent and effect and thus the lawfulness of that grievance is the proper subject of review in this case, although I have already found its intent to be lawful, as discussed above. The October 14 grievance, on the other hand, alleges that work that is covered by the CDC agreements was still being performed at CDC by individuals who were not part of the bargaining units there. The Employer denied the allegations of the grievance, claiming Respondent had its facts wrong—and accusing Respondent of an ulterior motive. The General Counsel, apparently accepting the Employer’s position as gospel, in essence alleges that since Respondent’s claim is “false” and lacks merit it must therefore have an ulterior and thus unlawful purpose in filing this grievance. I find the General Counsel’s position to be untenable, and facially invalid. There is clearly a factual dispute underpinning this particular grievance, which is whether work covered by the CDC contracts is still being performed at CDC, and it is thus not the General Counsel’s job in these circumstances to decide what the facts are and whether the grievance has merit. To the contrary, this is the perfect example of a factual and contractual dispute that belongs before an arbitrator. If indeed work covered by the CDC contracts is still surreptitiously being performed by nonunit employees in a plant that was supposedly closed (which in essence is what is alleged in the grievance), such dispute would be a bona fide one, and should be resolved by an arbitrator. Respondent may have its facts wrong, but such factual dispute is ultimately up to an arbitrator to resolve in his/her capacity a fact-finder. For this reason alone, the allegation of paragraph 11 of the complaint, as it pertains to the October 14 grievance, lacks merit.⁶⁰ Nonetheless, for the reasons discussed above, I find that even if Respondent’s grievance had to

⁶⁰ Even assuming that it was within the General Counsel’s discretion to intrude into this factual dispute, it bears the burden of proof in this case, which means that by the preponderance of the evidence, it had the burden of establishing that indeed no work covered by Respondent’s CDC contracts was still being performed at CDC—and hence that the true intent behind the grievance was unlawful. The General Counsel did not come close to meeting this burden, as the Employer’s bare denial of Respondent’s assertions was inherently insufficient to meet this burden. On the other hand, I reject Respondent’s argument that even assuming that the grievance had an unlawful purpose no violation should be found because no “remedy” was sought before the arbitrator, other than vindication of the validity of its claim. Arbitration is costly, and imposing such costs on a party should suffice to make such conduct unlawful in those circumstances, in my view.

do with employees other than those historically represented by Respondent performing the disputed work at PDC, the grievance would not be unlawful. In this unique situation, where historical units have been fused together to create a new operation, thus triggering a question concerning representation among several completion unions, the status quo ante must be preserved until the Board resolves the representational issue. It stands to reason that preserving such status quo not only means maintaining the separate bargaining agreements in place, but also the grievance-arbitration mechanisms under such agreements. As discussed earlier, this unique situation would not be one of indefinite duration, but only until the Board resolves the existing dispute regarding representation in the new operation. Once the Board makes a ruling in this regard, maintaining or pursuing any grievances that directly or indirectly sought to undermine the Board's ruling would be unlawful. *Teamsters Local 776, supra.*⁶¹

In light of the above, I conclude that the allegations in paragraphs 11, 12, 13 and 14 of the complaint, which relate to the filing of grievances by Respondent, lack merit. Furthermore, in light of my previous findings, I conclude that Respondent has not violated the Act as alleged and that the complaint should be dismissed in its entirety.

Conclusions of Law

1. Safeway is an employer engaged in commerce within the meaning of Section 2(2), (6), and 7 of the Act.

2. Respondent Teamsters Local Union No. 206 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and based on the entire record in this case, I issue the following recommended⁶²

ORDER

The complaint is dismissed in its entirety.

Dated: Washington, D.C. October 31, 2017



Ariel L. Sotolongo
Administrative Law Judge

⁶¹ I note that Respondent offered to hold the August 8 and October 14 grievances, as well as a third grievance not alleged in the complaint, in abeyance until the question concerning representation could be resolved by the Board (GCX-56). The Employer refused, and filed the unfair labor practice charge alleged in the complaint (GCX-57).

⁶² If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.