UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

SAFEWAY, INC., Charging Party, and **TEAMSTERS LOCAL 206,** Respondent.	Cases:19--CB--168283 19--CB--178098 19--CB--192630

TEAMSTERS LOCAL 305's AMICUS CURIAE BRIEF IN SUPPORT OF SAFEWAY, INC.'s AND GENERAL COUNSEL's EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE's DECISION

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INTRODUCTION

Teamsters Local 305 is the long-time exclusive collective bargaining representative of a wall-to-wall production and maintenance unit at Albertsons, Inc.'s Portland Distribution Center ("PDC"), the workplace at issue here. The Local has been party to a series of collective bargaining agreements with Albertsons for nearly thirty years and is currently party to an agreement in effect from 2016 through September 4, 2021. *See*, *e.g.*, GC 10 (2011-2016 agreement); GC 31 (2016-2021 agreement); Tr. p. 359, l. 2-4 (since 1988).

Local 305, Teamsters Local 162, UFCW Local 555, and IAM Local 1005 worked cooperatively with Albertsons to ensure that the many challenging issues presented by the closure of Safeway's Clackamas Distribution Center ("CDC") were resolved peacefully, fairly, democratically, and to the benefit of every employee. Indeed, the contract covering the surviving PDC could serve as a model for other employers and labor organizations confronted with similar challenges. In addition to wage and benefit improvements, the Local 305 contract importantly provides for the dovetailing of the seniority of all CDC employees hired at Portland. Potentially divisive representational issues were fully resolved, with the IAM and the UFCW conceding without objection the accretion of their members into the Local 305 wall-to-wall bargaining unit, and the two Teamsters Locals and Albertsons hammering out a compromise that preserves the historical wall-to-wall bargaining unit at the PDC while simultaneously accommodating incumbent Local 162 members' legitimate interest in retaining membership in that Local. *See*, Tr. p. 185, l. 25 to p. 186, l. 13 (IUOE and UFCW); GC 31, p. 144 (current Recognition clause re: Locals 305 and 162); GC 67 (driver share agreement between Locals 305 and 162). Finally, the contract, including the Recognition clause, was submitted to the affected membership for a vote, who ratified it. *See*, Tr. p. 129, l. 9-23 (ratified).

Alone among the five unions at the CDC, Teamsters Local 206 rejected the compromise, resorting to brinksmanship instead. It pursued an agenda that will inevitably produce chaos and hardship at the PDC, including demanding that it supplant Local 305 as the representative of at least a portion of the PDC workforce, and that incumbent Local 206 members be awarded nine of every ten positions in that portion, leapfrogging more senior Local 305 members in the process.

Yet, even as it claimed exclusive representational rights, Local 206 never filed a representation petition to establish those alleged rights. *See*, Tr. p. 171, l. 21 to p. 172, l. 8. Similarly, at the hearing in this matter it presented no case, called no witnesses and introduced just four exhibits into evidence.

By this conduct, Local 206 has demonstrated that it actually has no interest in resolving representational issues in compliance with NLRB procedures or in representing the employees at the PDC; it prefers simply to stand safely on the sidelines and throw stones at the Company and Local 305. The ALJ erred when he adopted Local 206's agenda and tactics, including pointing to NLRB representational procedures never invoked by Local 206 to justify that Local's coercive grievances and illegal bargaining positions.

ARGUMENT

I.

THE ALJ's DECISION IS DEEPLY FLAWED.

Local 305 adds only the following to the points persuasively argued in the General Counsel's and Safeway, Inc.'s briefs in support of their exceptions.

A. The ALJ's Decision is Fatally Tainted by His Blithe Dismissal of the "Messy Scenario" He Concedes It Will Generate.

The ALJ's findings that Local 305's continued representation of its wall-to-wall bargaining unit at the PDC is improper and that "all the collective bargaining agreements

covering all of the merging bargaining units should be maintained in place" will generate years of turmoil at Albertsons' PDC. *See*, ALJ Decision, p. 22, l. 30-31 (emphasis in original). This turmoil will engulf Albertsons, all of its employees at the PDC, and all five unions that had contracts at the CDC. The ALJ's casual indifference to this "messy scenario," which he acknowledges causing, reflects insufficient regard for the hard reality to which he consigns Albertsons and the unions. *See*, ALJ Decision, p. 28, l. 25.

1. Representational Issues

Representational rights will be uncertain, forcing competing unions to claim the right (and duty) to represent the same workers. For example, the ALJ apparently contemplates that UFCW Local 555 and IAM Local 1005 will again be responsible for representing their 25 members (combined) hired at the PDC after the CDC closed. *See*, Jt. Ex. 1 (Headcount Summary). Yet, because both unions permitted their members to accrete into Local 305's wall-to-wall PDC unit, Local 305 is obliged to represent them, consistent with its status as the long-recognized exclusive collective bargaining representative for ***all*** of the employees at the PDC and as expressly required in its collective bargaining agreement with Albertsons. The upshot of the ALJ's decision is that he has placed a legal obligation upon all three unions to fight each other over who represents those 25 employees and what contract (or post-expiration status quo) governs them. Equally disruptive, to the extent that Albertsons complies with the Local 305 contract with respect to these 25 employees (rather than the Local 555 and Local 1005 status quos), the ALJ places a legal obligation on Local 555 and Local 1005 to file grievances or unfair labor practice charges, and *vice versa*. These identical problems are presented with respect to Local 162's 93 members. *Id.*

With respect to Local 206, the ALJ ignores the representational conflicts between it and

Local 305 that flow directly from the former's grievances and bargaining proposals. In particular, the ALJ fails to address the confusion that will result from the fact that there is substantial overlap between the Local 305 wall-to-wall unit at the PDC and the Local 206 produce, box and crate, and grocery units at the former CDC. At the time of the consolidation of the CDC into the PDC there were Local 305 members at the PDC doing work that was similar or identical to work formerly performed by Local 206 members at the CDC. *See*, Tr. p. 317, l. 11 to p. 320, l. 17 (functions, skills, duties of Locals 305 and 206 workers at CDC and PDC identical). Although the ALJ appears not to recognize it, Local 206's grievance (GC 46) on its face seeks to represent all employees at the PDC falling within the bargaining unit descriptions in its three expired collective bargaining agreements at the CDC, thereby sweeping long-time Local 305 members into Local 206. Specifically, the grievance cites "Article 3 (all)" as one of the bases for the grievance. Local 206 argues (mistakenly) that Article 3.7 requires that its CDC agreements be imposed on the PDC in their entirety, not excluding the recognition clause; indeed, Article 3.7 provides that Local 206 "show a majority representation" within the bargaining unit defined in the contracts.[1]

This "scenario" leaves Albertsons and Local 305 in an untenable position. To the extent that Local 206 seeks to represent Local 305 PDC workers who perform produce, box-and-crate and grocery work, both unions will (indeed, must) file grievances and unfair labor practice charges aimed at vindicating their representational and contractual (or status quo) rights. To the extent that Local 206 contrives to evade the clear implications of its grievances and bargaining positions by claiming that it seeks to represent only former Local 206 CDC members but not Local 305 PDC members, workers doing identical work will receive different wages and benefits

[1] The grievance is fully consistent with Local 206's final written proposal to the Company (GC 34), which likewise contemplates Local 206's continued representation of its CDC bargaining units at the PDC.

and be subject to different terms and conditions. This situation must inevitably result in grievances and duty of fair representation claims by the workers themselves against Albertsons and both unions, as the claimants cherry-pick the more attractive wages, benefits or terms their coworkers in the other union enjoy. The seniority disputes alone are mind-boggling. In addition, Albertsons can expect countless Section 8(a)(3) unfair labor practices charges, alleging *per se* discrimination on the basis of union membership.

2. Contractual Issues

Even assuming representational issues were clear, the ALJ's vision of contractual rights is completely unworkable. Thus, for example, if Albertsons and the unions agreed to apply contracts based solely on the individual's membership, thereby avoiding the problem of overlapping bargaining units, the employees themselves will object, as described above. Every job posting and vacancy filling will necessarily trigger seniority disputes, and every paycheck showing different wages and benefits to similarly-situated employees based solely on union membership will generate unfair labor practice charges against Albertsons. Further, although the ALJ states that "all the collective bargaining agreements…should be maintained in place," the ALJ apparently contemplates that Local 305's recently-negotiated collective bargaining agreement at the PDC will actually be voided, as a result of being supplanted by the expired CDC agreements, including its own. As a consequence, all of the workers at the PDC, including those who have been Local 305 members since before the consolidation, will lose the wage, benefit, pension, and sick leave improvements contained in the current contract. Alternatively, if the current Local 305 contract is preserved for incumbent PDC workers only, there will be two groups of Local 305 members, all doing identical work, with one covered under the PDC agreement and the other working under a status quo found in the expired CDC agreement. Unfair labor practice charges will inevitably ensue. With respect to the other four unions, the

ALJ fails to note that all of the contracts at the CDC are expired. As a consequence, arbitration will be entirely unavailable and the unions will have to file unfair labor practice charges with respect to every deviation from the status quo.

B. The ALJ's "Obliteration" Analysis is at War With Itself.

After finding that "obliteration" had given rise to a "new operation" at the PDC, the ALJ uses obliteration/new operation case law to allow Local 206 to do the very thing that law prohibits: sever its now-obliterated unit at the CDC from the historical wall-to-wall unit at the PDC and continue to represent it. The ALJ specifically finds that the CDC units were "obliterated" when they were absorbed into the pre-existing PDC wall-to-wall unit:

> 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,"....

ALJ Decision, p. 20, l. 26-28. That is, the CDC units no longer possess a "separate identity," having disappeared into the PDC wall-to-wall unit, which, consistent with the undisputed facts, necessarily lives on.[2] Nonetheless, in direct contravention of his finding and the legal precedent he purports to rely upon, the ALJ opines that the obliterated CDC units should be severed from the only unit that has not been obliterated, the historical PDC unit, and the collective bargaining agreements covering those dead units should be imposed on the living unit.

Along the way, the ALJ contrives to ignore that in all of the obliteration cases he cites, the consequence of obliteration is the elimination of the pre-existing separate units, resulting in a combined bargaining unit, i.e., the very unit Local 305 and Albertsons agreed to and the precise

[2] The ALJ's implication that the PDC wall-to-wall unit has also been obliterated contradicts his own findings and is less a legal finding than a metaphysical riddle. After finding that "functional integration" at the PDC obliterated the separate CDC units, how can one find that the integration likewise obliterated the wall-to-wall unit? In the aftermath of full integration sufficient to obliterate separate units, what remains if not a wall-to-wall unit, i.e., a single unit consisting of all of the previous units, whose separate identities have been absorbed? Clearly, by this point, the ALJ had so completely bought into Local 206's point of view that logic and consistency stopped mattering.

opposite of the separate units Local 206 seeks in its grievances and bargaining. Thus, in *Martin Marrietta Co.*, 270 NLRB 821 (1984), cited by the ALJ, the obliteration of two historical units resulted in the creation of "one overall unit of all production and maintenance employees." *Id.*, at 822. Similarly, in *Panda Terminals, Inc.*, 161 NLRB 1215 (1966), the Board, while not conducting an obliteration analysis, found that the closing of a unionized freight operation followed by the transfer of its workforce to a surviving operation whose employees were represented by a different union resulted in a new operation. It therefore ordered the very thing Local 206 and the ALJ resist: an election in a single, combined unit.[3]

The ALJ repeatedly cites *Matlack, Inc.*, 278 NLRB 246 (1986), yet that case strongly undercuts his decision. The *Matlack* Board affirmed the ALJ on the basis of his finding that a small unit of the Bakers Union at a predecessor employer retained a "separate identity" within a larger unit of Teamsters at the successor – i.e., the very thing Judge Sotolongo found did not exist in our case. To rephrase *Matlack's* holding in the vernacular of obliteration analysis, the Board found in the Bakers' favor specifically because its small unit was *not* obliterated, i.e., the diametric opposite of the finding Judge Sotolongo made with respect to Local 206's units.

Trident Seafoods v. NLRB, 101 F.3d 111 (D.C.Cir., 1996), also cited by the ALJ, does not contain an obliteration/new operation analysis. Instead, it is a straightforward instance of a successor continuing the predecessor's operations essentially unchanged, such that, as the Board found, historical bargaining unit definitions and representational arrangements (with one immaterial change) should remain in place. In fact, the employer "conceded there was indeed 'substantial continuity' between [the predecessor] and [itself]". *Id.*, at 113.

The ALJ's "mouse/lion" analysis gets it wrong. The obliteration/new operation precedent he cites and quotes at pages 19-20 of his decision analyzes accretion exclusively in terms of the

[3] Both *Martin Marrietta* and *Panda Terminals* are Section 9 cases.

relative sizes of "units." *See*, *e.g.*, *Matlack*, *supra*, at 251 (quoted at ALJ Dec., p. 19, l. 21); *SEIU Local 144 v. NLRB*, 9 F.3d 218, 223 (2d Cir., 1993)(quoted at ALJ Dec., p. 19, l. 17). Nonetheless, as the ALJ labors to portray Local 305 as the mouse and Local 206 as the lion, he carefully stops using the term "unit," substituting "the total number of employees that came from CDC" or other broad terms that carelessly lump together numerous separate units and unions. *See*, ALJ Decision, p. 19, l. 27 to p. 20, l. 12; *see also*, fn. 47. By pretending that the balkanized units at the CDC (including two represented by Local 305 itself!) are actually a single unit for purposes of applying obliteration/new operation precedent, he is then able to compare their combined total to Local 305's single, wall-to-wall unit at the PDC. Lyrically arguing that an accretion requires that the surviving "lion" swallow the accreted "mouse," he proclaims on the basis of this specious aggregation that "[c]learly, CDC was the lion, PDC the mouse." *See*, ALJ Decision, p. 19, l. 33 and fn. 48. Yet, if he had done his analysis in compliance with the authority he cites and quotes, he would have compared each separate CDC unit to Local 305's pre-existing wall-to-wall PDC unit. Had he done so, he would have recognized that an accretion was appropriate, just as the Regional Director found and Albertsons and Locals 305, 162, 555, and 1005 agreed. To borrow the ALJ's metaphor, the CDC is not a lion; it is a mischief of mice, which the ALJ inexplicably mistook for a lion.

C. The Representational Proceeding Contemplated by the ALJ Will Likely Be Futile.

The ALJ fails to consider additional legal principles that will inevitably surface in the (as yet nonexistent) representational proceeding he envisions, which should inform his analysis. In representational terms, Local 206 seeks via its grievances to sever produce, box and crate, and grocery employees from Local 305's historical wall-to-wall PDC unit. To accomplish this result, it must meet the standards set forth in *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966).

Yet, given the integration of the PDC's operations, Local 206 cannot even arguably satisfy those standards. "Produce," "box and crate," and "grocery" are not distinct and homogeneous crafts, but convenient warehouse labels derived from the particular products the CDC warehouse workers were handling, and walls and dividers at the CDC, which created separate work areas that are not, and never have been, present at the PDC. Indeed, at the PDC the labels have never existed and the workers have always been in a single classification: warehouse worker. *See*, GC Ex. 31, p. 33. In addition, the history of bargaining at the PDC relates exclusively to a wall-to-wall production and maintenance unit.

Likewise, the ALJ fails to consider the likely availability of a contract bar under the principles announced in *General Extrusion Company, Inc.*, 121 NLRB 1165 (1958). There, the Board stated that, "a mere relocation of operations accompanied by a transfer of a considerable proportion of the employees to another plant, without an accompanying change in the character of the jobs and the functions of the employees in the contract unit, does not remove a contract as a bar." *Id.*, at 1167-68. The *General Extrusion* Board specified that where more than 30% of the unit in place on the hearing date was employed at the time the contract was signed, and the number of job classifications on the hearing date were not at least double those on the contract execution date, a contract bar remains in effect. *Id.* Both of these contingencies are unquestionably met in our case.

Finally, under anyone's math, Local 206 does not represent the 30% of the wall-to-wall unit necessary to get an election in that unit. *See*, Jt. Ex. 1 (Headcount Summary).

D. By Punishing Albertsons For Its Conciliatory Behavior, the ALJ, as a Policy Matter, Incentivizes Employers to Be Intransigent.

Under the ALJ's rationale, Albertsons would have been better off if it had been less reasonable and cooperative in its dealings with Safeway's unions. The ALJ's perpetuation of

balkanized bargaining units at the PDC, with attendant representational and contractual chaos, is inseparable from Albertsons' voluntary decision to place laid off CDC workers seamlessly into jobs at the PDC. After all, it is this decision that permits the ALJ to associate identifiable groups of PDC hires with their previous unions and old CDC contracts. Suppose instead that Albertsons agreed to seamless transfers from the CDC to the PDC for Local 305 members only. Suppose, at the same time, it declined to enter into a similar agreement with the other four unions and simply closed the CDC and laid off the balance of the employees, inviting them to apply at the PDC. It could then pick-and-choose those it wanted and those it didn't. Assuming a substantial number of bona fide new hires, Local 206 would not even arguably have a claim that its CDC unit had somehow survived or that its contract should be imposed on the PDC.

The ALJ's decision encourages this and similar tactics. If upheld by the Board, any employer reading the decision will quickly arrive at the conclusion that Albertsons' mistake was to work cooperatively with all five labor unions at the CDC, including Local 305, which sought protection for all employees, regardless of local affiliation. This result is inconsistent with the Board's mission.

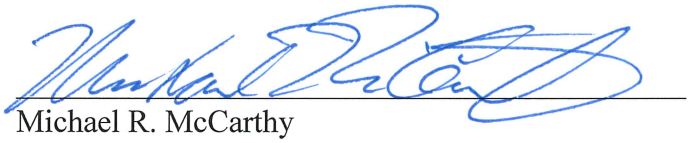
CONCLUSION

For all of these reasons, Local 305 requests that the Board sustain the exceptions filed by the General Counsel and Safeway, Inc. and find that Local 206 committed unfair labor practices when it insisted on bargaining proposals and pressed a grievance seeking to compel the employer to recognize it as the representative of PDC employees it had no legal right to represent. Failing that, Local 305 requests that the Board make clear that the ALJ's opinions regarding the permissibility of Local 305's continued representation of a wall-to-wall production and maintenance unit at the PDC are unnecessary to his dismissal order and go beyond his authority,

and are therefore vacated.

Dated this 15 day of February, 2018.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of February, 2018, he caused the original of the foregoing **Teamsters Local 305 Amicus Curiae Brief In Support of Exceptions** be served electronically to the following recipients:

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