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Raley's *and* United Food and Commercial Workers' Union, Local 588, United Food and Commercial Workers, AFL–CIO. Cases 20–CA–24837 and 20–CA–25166

7September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On October 22, 1998, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel and Charging Party each filed exceptions[1] and supporting briefs,[2] and the Respondent filed briefs in opposition to the General Counsel's and Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The General Counsel maintains that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to honor the terms of section 1.1 of its collective-bargaining agreement with Local 588. The General Counsel contends that this provision obligates the Respondent to recognize the Union as the bargaining representative for the grocery employees at the Yuba City and Grass Valley stores on the Union's demonstration of majority support. The judge found that the Respondent did not have any obligation under the bargaining agreement to recognize Local 588 at those stores in the absence of a Board-conducted election and dismissed the complaint.

Having considered the judge's decision in light of the exceptions and briefs, we find, for the reasons discussed below, that: (1) section 1.1 of the parties' bargaining agreement waives the Respondent's right to insist on a Board-conducted election; (2) the two disputed stores are within the scope of section 1.1; and (3) the Respondent was therefore obligated to recognize Local 588 on its demonstration of majority support at those stores. Accordingly, we will remand this proceeding to the judge for him to allow the parties to litigate the Union's claim of an authorization card majority at these two stores and any other remaining issues relevant to Respondent's obligation to recognize Local 588.

I. FACTS

At all times relevant to this case the Respondent and Local 588 were parties to a multiemployer, multiunion collective-bargaining agreement known as the Master Food Agreement. The agreement, which was effective from March 1, 1992, until February 28, 1995, covered the Respondent's grocery employees and contained the following provisions:

Section 1. RECOGNITION AND CONTRACT COVERAGE

> 1.1 RECOGNITION: The Employer hereby recognizes the Union as the sole collective bargaining agency for an appropriate unit consisting of all employees working in the Employer's retail food stores within the geographical jurisdiction of the union covering Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Nevada, Placer, Plumas, Sacramento, San Joaquin, Sierra, Stanislaus, Sutter, Shasta, Siskiyou, Tehama, Trinity, Tuolumne, Yolo and Yuba Counties, California, Southwestern Washoe County, Nevada (Tahoe Basin) and Northwestern Douglas County, Nevada (Tahoe Basin), except meat department employees and supervisors within the meaning of the National Labor Relations Act, as amended.
>
> 1.13 NEW STORES AND REMODELS: During any three (3) consecutive days preceding the reopening of an old food market . . . persons not in the bargaining unit may perform any work in such store.
>
> Notwithstanding any language to the contrary contained in this Agreement between the parties, it is agreed this Agreement shall have no application whatsoever to any new food market or discount center until fifteen (15) days following the opening to the public of any such new establishment. Neither shall this Agreement have any application whatsoever to any food market or discount center which is reopened after it has been closed for a period of more than thirty (30) days until the fifteenth (15) day following the date of such reopening to the public.

Local 588 and the Respondent have been parties to a series of collective-bargaining agreements for over 30 years. The language of section 1.1 has been included in every agreement since 1970 and has remained the same through the 1995 agreement, except for the addition of new territories whenever the geographic jurisdiction of

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Local 588 expanded. The language of section 1.13 has remained the same in every agreement since 1980.

In March 1989, Local 916 of the United Food and Commercial Workers' Union merged into Local 588. This merger brought the Respondent's existing stores in Redding, Chico, Grass Valley, Yreka, and Yuba City, California, which had previously been in the geographical jurisdiction of Local 916, into the geographical jurisdiction of Local 588. At the time of the merger these stores were nonunion, except for meat department employees who were covered under a separate bargaining agreement.

A new collective-bargaining agreement between the Respondent and Local 588 went into effect on March 1, 1992. The Respondent continued to operate the grocery departments of the above-mentioned stores on a nonunion basis through mid-1992. In June of that year, Local 588 claimed that a majority of the grocery employees at the Yreka store and the two Redding stores had signed authorization cards, and Local 588 requested recognition as representative of those employees. The parties met in July to discuss the Union's recognition demands and to try to reach a settlement. Concurrently, the parties attempted to negotiate a "global agreement" that would cover any future demands for recognition by Local 588. They subsequently signed two separate agreements under which the Respondent recognized Local 588, pursuant to a card check, as the representative of its employees at the Yreka store and at one of the Redding stores. The Union withdrew its request for recognition at the other Redding store. However, the parties failed to reach agreement on how to deal with future demands for recognition.

In July 1992, shortly after it had requested recognition at the Yreka and Redding stores, the Union also requested recognition at Yuba City, one of the two stores involved here. Later, in November 1992 and again in April and May 1993, the Union also requested recognition at Grass Valley, the other store involved here. The Respondent refused these requests, notwithstanding that both of the stores are located in counties identified by section 1.1 of the 1992 collective-bargaining agreement as being within the geographical jurisdiction of Local 588.[3]

II. DISCUSSION

The General Counsel contends that section 1.1 constitutes a waiver of the Respondent's right under the Act to insist that the Union's representative status be determined by a Board election, and that the Respondent is therefore required to recognize Local 588 as the bargaining representative for the grocery employees at Yuba City and Grass Valley on the Union's demonstration of majority support. The Respondent disputes these contentions. In addressing this dispute, the judge characterized the issue as being whether the provision in dispute was an "after acquired stores" clause, a term often used to describe such voluntary recognition provisions. Although the judge did not rule directly on the issue of whether section 1.1 is an after acquired stores clause, he found that even if it was such a clause, it did not apply to the Yuba City and Grass Valley stores because they were "preexisting" and not "after acquired" stores. In making this finding, the judge relied on evidence that these stores were in existence at the time that the 1992 collective-bargaining agreement became effective. For the reasons set forth below, we reverse.

A. The Legal Framework

The leading case in this area is *Kroger Co.*, 219 NLRB 388 (1975). The parties in *Kroger* had included a recognition clause in their collective-bargaining agreement under which the employer agreed to recognize the union as the bargaining agent of designated employees at all of the employer's stores in the State of Texas operated by its Houston Division. A dispute arose as a result of the employer's administrative transfer of two of its stores from the Dallas to the Houston Division. After the transfer, the union obtained majority support from employees at each store and then requested recognition as the bargaining agent of the employees, offering authorization cards as proof of its majority status. The employer refused to grant the union's request.

The Board interpreted the recognition provision to be an agreement under which the employer had waived its right to demand a Board-conducted election at the disputed stores. Although the clause contained no specific declaration that the employer had consented to such a waiver, the Board found that:

> Interpreting these clauses to mean that an employer can voluntarily recognize a union or demand an election renders them totally meaningless and without effect, for unions need no contract authorization to establish their representation status in a Board-conducted election. However, these clauses can be read to require recognition upon proof of majority status by a union.

Id. at 389. The Board concluded that the only way to save the clause from meaninglessness was to read it as a waiver of the employer's right to an election, thereby requiring the employer to recognize the union on a showing of majority support. Consequently, the Board found that the employer

[3] The Yuba City store is located in Sutter County, and the Grass Valley store is located in Nevada County.

had violated Section 8(a)(5) by failing to recognize the union as required by the clause in the agreement.

Unlike the judge and our dissenting colleague, we find *Kroger* to be controlling here. The language of section 1.1, the recognition clause, is similar to that of the recognition clause in *Kroger* in all essential respects. Here, as in *Kroger*, the Respondent has agreed to recognize the Union as the sole bargaining representative for all of its employees working at its stores within a designated geographical territory, which in this case is the geographical jurisdiction of Local 588.

Contrary to the judge's finding, there is no factual basis for distinguishing *Kroger* from this case on the basis that the two disputed stores here were preexisting. Indeed, contrary to the judge's finding that the stores in *Kroger* were acquired after the date of the bargaining agreement, the *Kroger* decision indicates that these stores had merely been transferred from the employer's Dallas to the Houston Division. Thus, like here, the employer in *Kroger* had been operating the stores prior to the events at issue.

Contrary to the judge and our dissenting colleague, we also do not find it significant that the stores in this case were already within the Union's geographical jurisdiction prior to the 1992–1995 contract. It is true that this was not the situation in *Kroger*. However, it is a difference without significance. As indicated above, *Kroger* upheld the legality of these types of clauses, finding them to be valid contractual waivers of an employer's right to demand a Board-conducted election at a particular store on proof of majority status. There is nothing in *Kroger* indicating that such clauses would become unlawful or unenforceable if they were not construed as being limited to "new" stores that were not previously within the union's geographical jurisdiction. Nor do we perceive any policy considerations compelling or warranting such a finding.

We also find no basis in *Kroger* or other cases for the weight the judge and our dissenting colleague give to the terminology used in denominating contract clauses like that involved here. As indicated above, the judge concluded that a clause that can be characterized as an "after acquired stores clause" cannot apply to *preexisting* stores. However, the Board in *Kroger* characterized the contractual provision in question as an "additional stores clause," rather than as an "after acquired stores clause." It is clear that the terms are essentially interchangeable. In some cases, the Board uses "after acquired." See *Pall Biomedical Products Corp.*, 331 NLRB No. 192, slip op. at 2 (2000). In other cases, the Board uses "additional." See *Goodless Electric Co.*, 332 NLRB No. 96, slip op. at 4 fn. 8 (2000). And in some cases, the Board uses both. See *S. B. Framingham, Inc.* 221 NLRB 506, 507 (1975). In short, "after acquired" can also mean "additional," and vice versa.[4] And regardless of which term is used, *Kroger* makes clear that such clauses may apply to preexisting stores.

Our dissenting colleague contends that the term "additional stores clause" also cannot refer to a store that had existed within the Union's geographical jurisdiction prior to the 1992–1995 contract. As indicated above, we find no support for this interpretation in *Kroger* or other cases. Nor is there any support for it in section 1.1 itself, which by its terms states, without limitation, that the Respondent recognizes the Union as representative of all employees within the relevant geographical jurisdiction. Nothing in the language of that section limits its application to stores that are new to either the employer or the geographical jurisdiction encompassed by the 1992–1995 contract. In effect, our colleague would rewrite the parties' agreement to impose such a limitation. We decline to do so.

It is true, as our colleague notes, that the Respondent contends that section 1.13 limits any waiver in section 1.1 to "new" or "remodeled" stores. However, our colleague concedes that this argument is without merit, and we also reject it for the reasons set forth below.

In support, the Respondent cites the Board's holding in *Alpha Beta Co.*, 294 NLRB 228 (1989). *Alpha Beta* involved a dispute over the application of the 1980–1983 Food Store Agreement, which, like the 1992–1995 Master Food Agreement, was the product of multiemployer, multiunion bargaining between the Food Employers Council (of which the Respondent is a member) and the United Food and Commercial Workers' Union. Although the Respondent and Local 588 were not parties to *Alpha Beta*, the relevant language of sections 1.1 and 1.13 in the 1980–1983 agreement was similar to that in the 1992–1995 agreement between the Respondent and Local 588. The General Counsel contended that section 1.13, the "New Stores and Remodels" clause, required the employer to grant recognition to the union at the newly opened store in that case, and the Board agreed. The Respondent argues that the Board's finding in *Alpha Beta* that section 1.13 is an additional stores clause applicable to the newly opened store in that case precludes us from now finding that section 1.1 has independent applicability to the two preexisting stores in this case.

We reject the Respondent's argument. There is nothing on the face of section 1.13 indicating that it is a limitation on the scope of section 1.1. We agree with the

[4] For the sake of internal consistency, we will use the term "additional stores clause" to describe the provisions in dispute in this case.

General Counsel that section 1.13 is more appropriately read as placing certain procedural limitations on section 1.1 with respect to new or remodeled stores, rather than as limiting the scope of section 1.1 generally. Further, we find nothing in *Alpha Beta* suggesting otherwise. As indicated, the General Counsel and the Board in that case focused on section 1.13 because the store at issue was a newly opened store and the provisions of section 1.13 clearly apply to "new" stores. However, in addressing the employer's obligation to recognize the union at the new store, the Board also clearly recognized the applicability of section 1.1. Indeed, a careful examination of that decision indicates that the Board construed section 1.1, the recognition clause, as the foundation for section 1.13. Thus, the Board stated that:

> Section 1.13 of the Food Store Agreement *delays application of the other provisions of the Food Store Agreement, including section 1.1, the recognition clause*, to new stores for a period of 15 days after the new store opens. We find that, after the 15-day window period, the Respondent was contractually obligated to recognize Local 1179 and extend the current collective-bargaining agreement to the new Pinole store on Local 1179's showing of majority status. [Emphasis added.]

Id. at 229. It is clear to us from this language that the Board did not solely rely on section 1.13 in finding a waiver of the employer's right to demand an election, but rather found that section 1.13 incorporated section 1.1 and applied it to new stores only after they had been opened for 15 days. Thus, we find that *Alpha Beta* supports the General Counsel's position in this case that section 1.1 has independent applicability apart from section 1.13.

B. The Parole Evidence

In finding that the Respondent has waived its right to a Board conducted election under section 1.1, we rely on the clear and unambiguous language used in this section of the agreement.[5] However, we also find that the parole evidence does not compel a different conclusion.

The record indicates that in 1983 the Respondent and Local 588 were involved in several disputes concerning bargaining units other than for the grocery employees. As part of an agreement to settle these disputes, the Respondent collaterally agreed to extend recognition to Local 588 as the exclusive representative of the grocery employees at its new stores once the Union proved it had obtained a majority of authorization cards.[6] Since that time, the Respondent has recognized Local 588 as the representative of employees at new stores after it confirmed the Union's majority status by means of a card check.

The Respondent cites this agreement and practice as evidence that the parties understood the Respondent had not separately waived its right to demand an election under section 1.1 to preexisting stores. However, the Respondent's argument is undermined by statements it made in an August 1992 memorandum to employees suggesting that the Respondent had waived its right to an election under the collective-bargaining agreement. The memorandum was distributed to employees at three of the Respondent's preexisting stores, including Grass Valley, as part of an antiunion campaign at those stores. In referring to the card majorities obtained by Local 588 at the Yreka and Redding stores, the Respondent told employees in the memo that "*Under our contract with Local 588 elsewhere*, this gives them the right to represent those employees." (Emphasis added.) The Respondent further stated, "[S]igning an authorization card gives the Union the right to represent you. IT HAS NO OTHER PURPOSE. If you sign a card, you vote to go union."

Unlike the judge, we do not dismiss these statements as propaganda. Rather, we find that they clearly weigh against the Respondent's assertion that the parties did not interpret section 1.1 to be an additional stores clause, and undermine the inferences that the Respondent asks us to draw from the separate 1983 agreements in which it agreed to consider employee card majorities in new stores.

The Respondent also contends that the July 1992 agreements regarding card checks at the Yreka and Redding stores and the parties' failed attempts to negotiate a global agreement covering future recognition disputes demonstrate that the parties understood that the Respondent did not waive its right to an election under section 1.1. We disagree.

That the parties engaged in settlement negotiations indicates nothing more than that they attempted to resolve their disagreement over the meaning of section 1.1 without litigation before the Board. Such settlement discussions are commonplace, and the Board encourages them. The unsuccessful attempt to reach a global agreement did not alter the legal effect of the existing bargaining agreement provisions. The record indicates that the parties reserved their respective legal positions during the settlement negotiations and that these negotiations were

[5] An agreement to waive a statutory right must be expressed in a manner that is explicit, clear, and unmistakable. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

[6] The circumstances and terms of the 1983 agreement are set forth more fully in the judge's decision.

intended to be "off the record" in the event they were unsuccessful. Furthermore, the text of the agreements does not indicate that Local 588 acknowledged that the Respondent had no underlying contractual obligation to agree to a card check at Redding or Yreka. We will not read such a provision into the agreements.

Accordingly, we find that by agreeing to the provisions of section 1.1, the Respondent waived its right to demand a Board-conducted election and is required to extend recognition to Local 588 at all stores within the Union's geographical jurisdiction on a demonstration of majority support, regardless of whether the stores are preexisting. Further, because the list of counties in section 1.1 includes the counties in which both Grass Valley and Yuba City are located, we find that those stores are within the Union's geographical jurisdiction and the voluntary recognition provisions in section 1.1 are therefore applicable to those stores.

C. Proof of Majority Status

Although section 1.1 does not explicitly require Local 588 to prove it has the support of a majority of employees at a store before the Respondent extends recognition to the Union for that particular store, as discussed above the Board has read such a requirement into additional stores provisions as a matter of law. See *Kroger*, 219 NLRB at 389.[7] Consequently, Local 588 must prove that it had majority status among the grocery employees at Yuba City and Grass Valley before the Respondent can be found to have violated Section 8(a)(5) by refusing to recognize the union as the exclusive representative of those employees.

Local 588 maintains it had obtained authorization cards from a majority of the grocery employees at both stores at the time it made its demands for recognition. The Respondent, however, contests the validity of the cards and argues that the Union did not have majority support when it made its recognition demands. Because the judge found that the Respondent had not waived its right to an election for those stores, he did not allow the parties to litigate the issue of whether Local 588 had majority support. In the absence of factual findings on this issue, we are unable to determine whether the Respondent has engaged in the unlawful conduct alleged in the complaint. We therefore remand this case to the judge for further proceedings necessary to rule on the underlying complaint allegations.[8]

ORDER

This case is remanded to the judge for further consideration consistent with this Decision and Order. Thereafter, pursuant to the applicable provisions of Section 102.45(a) of the Board's Rules and Regulations, the judge shall prepare and issue a supplemental decision containing findings of fact, conclusions of law, and a recommended Order as appropriate on remand. Following service of this supplemental decision and Order on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. September 28, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting.

The issue here is whether the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize Local 588, United Food and Commercial Workers' Union (Local 588 or the Union) as the exclusive collective-bargaining representative of its grocery employees at two of its stores, the Yuba City and the Grass Valley, California stores, after the Union presented the Respondent with authorization cards signed by a purported majority of the unit employees at each store. The resolution of this issue turns on whether section 1.1 of the parties' collective-bargaining agreement, the recognition clause, requires the Respondent to forgo a Board-conducted election and to recognize the Union as the collective-bargaining representative of the unit employees based solely on a card showing of majority support.

Finding that section 1.1 of the parties' contract did not require the Respondent to recognize the Union based on a purported card majority, the judge dismissed the complaint without reaching the issue of whether the Union had, in fact, such evidence of majority support. My colleagues reverse the judge and find that under section 1.1 the Respondent was obligated to recognize the Union as the bargaining representative of the unit employees at

[7] It is well established that it is an unfair labor practice for an employer to recognize a union as the representative of its employees when only a minority of employees had authorized the union as its representative at the time of recognition. *Ladies Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731 (1961).

[8] This would also include other material issues raised by the parties. For example, the judge noted that he also did not permit litigation of the "timeliness" of Local 588's demand at the Grass Valley store.

both the Yuba City and Grass Valley stores on presentation of majority support. Accordingly, they remand the case to the judge for litigation of the issue of whether the Union had, in fact, majority support when it demanded recognition at the two stores. For the reasons set out below, I would dismiss the complaint.

The facts, in brief, are as follows. The Respondent and Local 588 have been parties to a series of collective-bargaining agreements for over 30 years. The language of section 1.1, the "Recognition" clause of the contract, has remained unchanged since 1970, except for the addition of new territories whenever the geographic jurisdiction of Local 588 expanded. Such an expansion occurred in March 1989, during the term of the parties' 1989–1992 collective-bargaining agreement, when Local 916 of the United Food and Commercial Workers' Union merged into Local 588. This merger brought the Respondent's existing stores in Yuba City and Grass Valley stores, the stores at issue here, as well as its stores in Redding, Chico, and Yreka, California, all of which had previously been in the jurisdiction of Local 916, into the geographical jurisdiction of Local 588. As of the time of the merger, these stores were nonunion, with the exception of the meat department employees who were covered under a separate contract.

Thus, the Yuba City and Grass Valley stores were already within the jurisdiction of Local 588 when the Respondent and Local 588 became parties to a successor agreement, which was effective from March 1, 1992, until February 28, 1995. The counties in which these stores were located, Sutter (the Yuba City store) and Nevada (the Grass Valley store), were included in the jurisdictional scope of the Union as defined in section 1.1 of the 1992–1995 contract. Section 1.1 of the parties' 1992–1995 contract reads:

> 1.1. RECOGNITION: The Employer hereby recognizes the Union as the sole collective bargaining agency for an appropriate unit consisting of all employees working in the Employer's retail food stores within the geographical jurisdiction of the union covering Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Nevada, Placer, Plumas, Sacramento, San Joaquin, Sierra, Stanislaus, Sutter, Shasta, Siskiyou, Tehama, Trinity, Tuolumne, Yolo and Yuba Counties, California, Southwestern Washoe County, Nevada (Tahoe Basin) and Northwestern Douglas County, Nevada (Tahoe Basin), except meat department employees and supervisors within the meaning of the National Labor Relations Act, as amended.[1]

As discussed, the Yuba City and Grass Valley stores came within the geographic jurisdiction of the Union during the term of the 1989–1992 contract, and they were within that jurisdiction when the successor contract (1992–1995) was executed. However, the Union did not request recognition as the exclusive representative of the unit employees at the two stores until a time during the 1992–1995 contract. Thus, the stores remained nonunion both before and after the effective date of the 1992–1995 contract. In July 1992, the Union requested recognition as the exclusive collective-bargaining representative of the Yuba City employees. In November 1992, and again in April and May 1993, the Union requested a card check and recognition at the Grass Valley store. The Respondent denied recognition because of its concern that authorization cards had been obtained by misrepresentation. It therefore believed that a Board-conducted election would be a better way to determine whether the Union had achieved majority status at the two stores.

As explained above, the issue here is whether section 1.1 of the parties' 1992–1995 collective-bargaining agreement requires the Respondent to forgo a Board-conducted election and to recognize the Union based on evidence of a card majority. The resolution of this issue turns on whether section 1.1 is an "after acquired stores clause" or an "additional stores clause" within the meaning of *Kroger Co. (Kroger II)*, 219 NLRB 388 (1975), and, if so, whether such a clause is applicable here. Accordingly, a brief overview of the Board's decisions in *Kroger* is required as background to the further discussion below of the issue presented here.

In *Kroger Co.* (*Kroger I*), 208 NLRB 928 (1974), the Board considered whether certain provisions in the employer's contract with two unions constituted after acquired stores clauses or additional stores clauses. Kroger's contract with Retail Clerks Local 455 stated that:

> A. The Union shall be the sole and exclusive bargaining agent *for all employees employed by the Houston Division of Kroger Food Stores in stores operating in the state of Texas*, excluding all persons in the meat departments . . . .[2]

[1] For purposes of this discussion, I agree with my colleagues that sec. 1.1 of the contract is the relevant provision here in that it defines the scope of the bargaining unit. I also agree with my colleagues that sec. 1.13 of the contract, which concerns new stores and remodels, places certain procedural limitations on the application of sec. 1.1 to new stores and remodels, but that it does not limit the scope of sec. 1.1. Accordingly, I agree with my colleagues that the Respondent's argument, to the effect that sec. 1.13 is the recognition provision at issue here, is without merit. Finally, since sec. 1.13 of the contract is not relevant to the resolution of the issue presented, it is not further discussed here.

[2] Id. (emphasis added).

The contract between Kroger and the Meat Cutters Local stated that:

> A. The Employer recognizes Meat Cutters Local No. 408 as the exclusive and collective-bargaining agent for all employees in the meat department *in all of Employer's retail stores located in the state of Texas operated by the Houston Division of the Kroger Co.*
>
> B. The parties agree that this contract shall cover and the Union which is a party hereto shall have jurisdiction over all meat department employees *in retail stores that are, or will be, owned leased or operated by the Employer*.[3]

The Board explained that:

> Although there are obvious differences in language between the two contracts, they both purport to add after-acquired stores to the existing multistore units of the Respondent's Houston Division. We shall characterize this type of clause as an additional-store clause.

In *Kroger I*, a dispute arose as to the application of these clauses after the employer transferred two of its stores from its Dallas Division to its Houston Division. The clerks had been unrepresented at both stores and the meatcutters had been unrepresented at one of them. Relying on the contract language set out above, the respective unions demanded recognition from the employer at the two stores. It was undisputed that the unions also possessed cards signed by a majority of the employees at the time of these demands. The employer rejected the demands and petitioned the Board for separate elections at the two stores. The unions then filed charges alleging that the employer violated Section 8(a)(5) by refusing to recognize and bargain with them.

The Board found no violation. It reasoned that the additional stores clause language set out above could not be read as "tantamount to an advance agreement to honor a card majority" because "the contract language omit[ted] all reference to the question of majority support obtained by any means." Id. at 929. In the absence of such an advance agreement to honor a card majority, the Board found that "surely access to NLRB procedures cannot be said to have been consciously waived." Id. at 929 fn. 8.

The United States Court of Appeals for the District of Columbia Circuit reversed the Board's decision and remanded the case to the Board.[4] On remand, the Board, in *Kroger II*, supra, found that the employer had violated Section 8(a)(5) by refusing to recognize and bargain with the unions. In reaching this conclusion, the Board reasoned that:

> Interpreting these clauses to mean that an employer can voluntarily recognize a union or demand an election renders them totally meaningless and without effect, for unions need no contract authorization to establish their representation status in a Board-conducted election. However, these clauses can be read to require recognition upon proof of majority status by a union. . . . [Thus,] there is no need to hold these clauses totally invalid simply because they do not contain an explicit condition that unions must represent a majority of the employees in a new store, inasmuch as the Board will impose such a condition as a matter of law. Id. at 389.

Accordingly, after reconsideration, the Board adopted the court's view that the clauses at issue constituted a waiver by Kroger of its right to demand an election. The Board then summarized its position:

> As we have interpreted them, these clauses are contractual commitments by the Employer to forgo its right to resort to the use of the Board's election process in determining the Union's representation status in the *new* stores. Id. at 389 [emphasis added].

In the present case, the judge found, as relevant here, that even assuming section 1.1 were an "after acquired stores clause" within the meaning of *Kroger II*, section 1.1 did not require the Respondent to recognize the Union based on evidence of majority support at the Yuba City and Grass Valley stores because those stores were not "after acquired," but "preexisting" stores, i.e., they were already within the jurisdiction of Local 588 at the time that the 1992–1995 contract went into effect. The judge reasoned that since the Union did not demand recognition at the Yuba City and Grass Valley stores during the term of the 1989–1992 contract when they came within the jurisdiction of Local 588, and since those stores remained nonunion when the 1992–1995 contract went into effect, those stores could not be said to be "after acquired" within the meaning of *Kroger II* when the union finally did request recognition. Accordingly, the judge found that the employer had not waived its right to a Board-conducted election and dismissed the complaint.

My colleagues reverse. Asserting that section 1.1 is an after acquired stores clause, they find that *Kroger II* is controlling here. Close scrutiny reveals the fallacy of my colleagues' argument.

[3] Id. (emphasis added).
[4] *Retail Clerks Local 455 v. NLRB*, 510 F.2d 802 (1975).

The *Kroger* case represents a situation where there are stores that are not within the geographical coverage of the contract at the time of the execution of the contract. The stores come into that geographical coverage during the contract. This may occur by reason of the creation of a new store, the acquisition of a store from another company, or the administrative transfer of a store from one administrative-geographic division to another (e.g., in *Kroger*, the stores were transferred from the employer's Dallas Division to the Houston Division where the contract applied). In these circumstances, the contract clause is referred to as an "after acquired" clause or an "additional stores" clause. The salient point is that these stores are not in the geographic coverage of the contract when the contract is signed. The parties essentially provide for a possible contingency that may arise during the contract, i.e., additional stores. They agree that, if that contingency occurs, the stores will be covered by the contract if majority status is shown.

By contrast, the stores in the instant case were within the geographic coverage of the contract at the time when the contract was signed. Indeed, my colleagues concede that the stores here were "preexisting." In no sense can it be said that, during the contract, they became "after acquired" or "additional." Notwithstanding this, my colleagues equate the terms "after acquired" and "additional" with the term "preexisting." Neither language nor logic will support this verbal legerdemain. The only change was that, during the contract, the Union allegedly achieved majority status. However, that change does not make the stores "after acquired" or "additional." And, under NLRA principles, that alleged change does not mandate recognition; the Respondent is entitled to an NLRB election.[5]

My colleagues accuse me of "rewrit[ing] the parties' agreement" by imposing, on section 1.1, a limitation of its application to stores that are new to either the Employer or the geographic jurisdiction encompassed by the 1992–1995 agreement. However, I am not the one who has rewritten the contract. The agreement on its face is incorrect. It states that the Respondent "recognizes" the Union at stores within the Union's jurisdiction. In fact, there were stores within that jurisdiction (e.g., the two involved herein) where recognition had not been granted. Thus, I am not the one who is rewriting the contract.

If there is any rewriting, it is my colleagues' rewriting of *Kroger*. My colleagues engage in verbal revisionism in their attempt to render nugatory the decisive fact of *Kroger II*—and the fact which informs *Kroger II's* analytical framework—i.e., that an employer's contractual waiver of its right to a Board-conducted election applies only to stores that are *newly added* to the geographical coverage of the contract during the term of the contract in which the employer has agreed to such a waiver. Unable to reconcile the fact that *Kroger II* applies only to newly added stores, whether termed "after acquired" or "additional," with the fact that the stores at issue here were "preexisting" stores, my colleagues simply say that this difference " is a difference without significance." For the reasons set out above, my colleagues' analysis cannot survive scrutiny.

Finally, at the very least, it is unclear whether the instant clause, as applied, is essentially the same as the clause in *Kroger*. Thus, my colleagues err when they say that the clause is "clear and unambiguous."

For these reasons, I would dismiss the complaint.

Dated, Washington, D.C. September 28, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

Boren Chertkov, Esq., for the General Counsel.

Patrick W. Jordan, Stephen N. Yang, and *Neil O. Andrus, Esqs. (Jeffer, Mangels, Butler & Marmaro),* of San Francisco, California, for the Respondent.

Barry S. Jellison, Esq. (Davis, Cowell & Bowe), of San Francisco, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard these cases in trial at San Francisco, Sacramento, Yuba City, and Marysville, California, on various dates, between April 21 and July 6, 1998. On August 19, 1992, United Food and Commercial Workers' Union, Local 588, United Food and Commercial Workers, AFL–CIO (the Union) filed the charge in Case 20–CA–24837 alleging that Raley's (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On October 2, 1992, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent. The charge in Case 20–CA–25166 was filed by the Union on February 10, 1993. On August 16, 1995, the Regional Director issued a complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed timely answers to the complaints, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine wit-

[5] *Summer & Co. v. NLRB,* 419 U.S.301 (1974). Contrary to the contention of my colleagues, I am *not* saying that the clause here is unlawful under *Kroger II*. However, I am saying that it is unenforceable under *Kroger II*, i.e., that it cannot waive the Respondent's right to an election.

nesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a corporation with offices and a principal place of business located in West Sacramento, California, where it is engaged in the operation of over 60 retail grocery stores in California and Nevada, including Yuba City and Grass Valley, California. During the calendar year ending December 31, 1991, Respondent derived gross revenues in excess of $500,000. During that same time period, Respondent purchased and received goods and products valued in excess of $5000 directly from sellers or suppliers located outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Union and Respondent have been parties to a series of collective-bargaining agreements for over 30 years. Since 1970, Respondent and the Union have been party to multiemployer, multiunion bargaining between the Food Employers Council, representing grocery chain employers in Northern California, and a coalition of local unions of the United Food and Commercial Workers' International Union. The collective-bargaining agreement at issue in this case is the 1992–1995 agreement, known as the master food agreement, covering the grocery or food employees employed by Respondent.[2] The complaints allege that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to grant recognition to the Union at its stores in Grass Valley and Yuba City, California. The General Counsel and the Union contend that the collective-bargaining agreement between Respondent and the Union contains an "after-acquired stores clause" waiving the Respondent's right to insist on a Board-conducted election when confronted with the Union's documented claim of majority status. Respondent contends that the after acquired stores clause applies to new stores and remodels and does not apply to stores such as Grass Valley and Yuba City which had been nonunion stores for years prior to the execution of the last contract. More specifically, Respondent contends that it had an agreement with the Union which provided for voluntary authorization card checks for new stores and, if a majority was established, to include the new store in the multistore bargaining unit. However, Respondent contends that the parties never were able to reach an agreement as to historically nonunion stores which came under the expanded jurisdiction of the Union when the Union's jurisdiction within the Food and Commercial Workers' International Union expanded through mergers with other local unions.

As mentioned above, the collective bargaining here was conducted on a multiemployer, multiunion basis. However, after agreement was reached, a bargaining agreement was signed by the Food Employers Council with each local union. The 1992–1995 agreement between the Food employers Council (including Respondent) and the Union contains the following recognition clause:

> Section 1. Recognition and Contract Coverage
>
> 1.1 RECOGNITION: The Employer hereby recognizes the Union as the sole collective bargaining agency for an appropriate unit consisting of all employees working in the Employer's retail food stores within the geographical jurisdiction of the Union covering Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Nevada, Placer, Plumas, Sacramento, San Juaquin, Sierra, Stanislaus, Sutter, Shasta, Siskiyou, Tehama, Trinity, Tuolumne, Yolo and Yuba Counties, California, Southwestern Washoe county, Nevada, (Tahoe Basin), and Northwestern Douglas County, Nevada (Tahoe Basin), except meat department employees and supervisors within the meaning of the National Labor Relations Act, as amended.

The language of section 1.1 remained the same from 1970 to 1995. The only change was that the jurisdictional area of the Union increased from time-to-time. Prior to March 1989, the Union's jurisdiction did not include Sutter County (the Yuba City store) and Nevada County (the Grass Valley store). As noted earlier, the General Counsel and the Union contend that section 1.1 of the agreement is an after acquired stores clause requiring Respondent to agree to a card check, instead of a Board election, when confronted with the Union's documented claim of majority status. Respondent claims. relying upon *Alpha Beta Co.*, 294 NLRB 228 (1989), that section 1.13 of the bargaining agreement is the effective after acquired stores clause. Section 1.13, entitled NEW STORES AND REMODELS, reads in pertinent part as follows:

> Notwithstanding any language to the contrary contained in this agreement between the parties, it is agreed that this agreement shall have no application whatsoever to any new food market or discount center until fifteen (15) days following the opening to the public of any such establishment. . . .
>
> The Employer shall staff such new or reopened market with a combination of both current employees and new hires, in accordance with current industry practices of staffing such stores with a cadre of current employees possessing the necessary skills, ability and experience, plus sufficient new hires to meet staffing requirements.

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[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

[2] There was a separate multiemployer, multiunion collective-bargaining agreement for a bargaining unit of meat department employees between the same employers and same unions. That agreement known as the "master meat agreement" is not at issue in this case.

In the *Alpha Beta* case, involving sections 1.1 and 1.3 of the 1980–1983 multiemployer, multiunion bargaining agreement, the administrative law judge found that there had been no after acquired stores clause and no waiver of a Board election in the collective-bargaining agreement. The Board reversed the judge and found that section 1.13 did constitute a waiver of a Board election. The Board concluded that the only reasonable interpretation of the clause was that the parties had agreed to a card check to establish union majority status at a new store and that once majority was established, the new store would be an accretion to the existing multistore bargaining unit. The Board found that after the 15-day window period, *Alpha Beta* was contractually obligated to recognize the charging party union and to extend the then current collective-bargaining agreement on a showing of majority status.

The parties to the multiemployer, multiunion bargaining did not discuss changing the language of either section 1.1 or section 1.13 after 1980. Prior to 1980, whenever, Respondent added a new store in the jurisdiction of the Union, Respondent and the Union added the new store as an accretion to the existing multistore bargaining unit. In 1983, Respondent and the Union were involved in several disputes involving other nonfood employee bargaining units. In an effort to avoid further litigation and, expense, Patrick Jordan, Respondent's attorney, proposed to Wynn Plank, the Union's president, that the Union (1) withdraw as joint petitioner from the pending representation proceeding; and (2) agree not to attempt to organize Raley's Drug Center employees or office clerical employees in the future. In return, Respondent would agree not to open nonunion stores in Local 588's jurisdiction and would apply the existing collective-bargaining agreement to new stores on a showing of a card majority.

In late summer or early fall of 1983, Plank agreed to the compromise. Jordan requested that the agreement be memorialized in writing but Plank, concerned about the possible political ramifications from his agreement not to organize certain groups of employees, insisted that the parties' oral promises were sufficient. Jordan agreed that a written document was not necessary.

Prior to this agreement, it was Raley's practice to voluntarily grant recognition to Local 588 and apply the existing collective-bargaining agreement to the grocery department employees at newly opened stores without a showing of majority status. As a result of the 1983 agreement, the practice of automatic accretion was discontinued, and voluntary recognition was only granted after majority support for the Union had been verified through a card check.

Pursuant to the 1983 agreement between Plank and Jordan, the first card check with Local 588 was held in November 1983 involving the Lodi store. Subsequent card checks were held with respect to stores in West Sacramento (Yolo County), Woodland (Yolo County), Folsom (Sacramento County), Turlock (Stanislaus County), Roseville 412 (Placer County), North Highlands (Sacramento County), Roseville 227 (Placer County), Manteca (San Joaquin), Elk Grove (Sacramento County), and Loomis (Placer County). In each case, the store was newly opened, and was within the Union's jurisdiction at the time the Jordan-Plank agreement was made.

Jack Loveall replaced Plank as President of Local 588 in December 1984. Sometime shortly after Loveall became president, he had a conversation with Jordan in which he stated that Plank had advised him of the agreement. Loveall requested Jordan to convey to James Teel, then-vice president of Raley's, that Local 588 would continue to adhere to the agreement during his presidency of the Union.[3]

In 1988, Respondent was apparently involved in certain disputes with other locals of the Food and Commercial Workers' Union. Handbilling and leafletting, urging consumers not to shop at Respondent's stores, took place in the jurisdiction of the Union. In February 1988, Henry Telfian, an attorney representing Respondent, called Jack Loveall, the Union's president. Telfian informed Loveall that Respondent believed it had a "peace pact" with the Union. Telfian said that Respondent expected that pursuant to the peace pact the Union would not engage in, or assist, any boycott of Raley's within the Union's jurisdiction. If the Union would continue with the peace pact and not seek to represent Respondent's office employees nor seek to represent Respondent's drug center employees, Respondent would continue to agree to card checks at new stores, particularly a new store in Turlock, California which was scheduled to open in February 1988. Respondent agreed to continue to grant the Union access to its new stores in order for the Union to solicit union authorization cards. Loveall agreed to this arrangement with Telfian but would not agree to put in writing that the Union would not seek to represent the office or drug center employees. Telfian then proposed that he write a letter to James Teel, a vice president of Respondent, setting forth the understanding, with a copy to Loveall. Telfian sent his letter to Teel setting forth the arrangement with Loveall, with a copy to Loveall on March 8, 1988. Loveall testified that Telfian's letter was accurate and, therefore, in 1988, he made no response to Telfian's letter. Thereafter, Respondent recognized the Union at the Turlock store, after a card check, and extended the then existing multistore agreement to the Turlock store. Respondent had no nonunion stores in the geographic jurisdiction of the Union in February or March 1988.

Respondent did operate nonunion or "union-free stores" in Redding, Chico, Grass Valley, Yreka, and Yuba City, California. These stores were in the geographic jurisdiction of Local 916 of the Food and Commercial Workers' Union. When the 1989 agreement was negotiated these stores were not covered by the multiemployer, multiunion agreement. Thereafter, in March 1989, Local 916 merged into the Union and ceased to exist. The nonunion stores in Redding, Chico, Grass Valley, Yreka, and Yuba City, California, continued to operate their

[3] My findings regarding the 1983 agreement for card checks is based on the credited testimony of Patrick Jordan, Respondent's counsel. While the General Counsel and Union sought to challenge this testimony, documentary evidence corroborates Jordan's testimony. Further, Loveall's conversations with Henry Telfian in 1988 establish that an agreement, consistent with Jordan's testimony, existed prior to 1988. Jordan's testimony is the only credible explanation in the record for the arrangement between the parties for the voluntary card checks by Respondent and the agreement to refrain from organizing the two groups of employees by the Union.

grocery departments on a nonunion basis.[4] The employees at the nonunion stores did not receive the wages and benefits of the collective-bargaining agreement. Rather, these employees continued to receive a nonunion wage and benefit package which differed from that provided under the bargaining agreement.

When the 1992 multiemployer, multiunion negotiations concluded, Respondent's "union free" stores continued to operate nonunion, notwithstanding the language of section 1.1 that the Union represented all grocery employees at all stores within its jurisdiction. However, after the 1992 agreement was reached, the Union sought to use the new collective-bargaining agreement as a tool to organize the previously nonunion grocery departments.

In June 1992, the Union obtained what it believed was a card majority at the Yreka store and at two stores in Redding. In support of their case that Respondent had agreed to card checks for both new and existing stores, the General Counsel and the Union presented evidence that Respondent granted recognition at two of these stores based on card checks and, with certain addendum, added the stores to the existing multistore contract. However, the evidence reveals that Respondent granted these recognitions as part of an attempt to settle or compromise current and future union demands for recognition at new and existing stores in the Union's expanded jurisdiction and future expansions of the Union's jurisdiction. The evidence establishes that at a meeting, in July 1992, to settle claims at the Yreka store, two Redding stores and future disputes, the parties agreed to reserve their respective legal positions and attempt to reach a settlement to cover existing and future disputes.

As a result of this meeting, three written agreements were drafted. In the first agreement, Respondent agreed to a card check at the Yreka store (although not included in the written agreement was an agreement that the wages of southern Oregon, rather than the wages of the master food agreement, would apply). After recognition was granted, an addendum of lower base wages but with the negotiated wage increases of the multistore agreement was executed. In the second agreement, Respondent agreed to a card check with regard to one Redding store and the Union agreed to withdraw its demand for recognition at the other Redding store. Respondent had suggested that it could prove that the card majority had been obtained by misrepresentations. Without conceding wrongdoing, the Union withdrew its demand for recognition at the second Redding store. The written agreement recites no reason for this withdrawal.[5] The third document was a draft of an agreement, referred to as "the global agreement", to cover future demands of recognition by the Union in its original jurisdiction and in areas of expanded jurisdiction (the 1989 expansion and future expansions).

Patrick Jordan, Respondent's attorney, drafted an agreement reflecting what he believed was the settlement for future demands involving stores in the Union's expanded jurisdiction, the "global agreement" reached at the June 1992 meeting. Steven Stemerman, the Union's attorney, on August 5, 1992, wrote back taking issue with Jordan's understanding of their agreement. On July 30, 1992, Lance Reginato, vice president of the Union, and Ken Collings, on behalf of Respondent, executed a copy of Jordan's draft. However, Reginato and Collings indicated that there were two areas of disagreement which needed to be resolved by the parties and that the agreement they signed was subject to approval by Jack Loveall, the Union's president. Loveall never did approve the agreement signed by Reginato. Loveall testified that Jordan's draft of the global agreement was totally inconsistent with the agreement reached. The global settlement negotiations broke down over disagreement as to employer neutrality and union access for organizing.

Jordan testified that while the global agreement was not executed, Respondent followed through with recognition at the Yreka and Redding stores as a show of good faith.

Respondent does not contend that agreement was reached but rather argues that this evidence reveals that Respondent did not recognize the Union at these two stores pursuant to section 1.1 of the contract but rather as an attempt to settle an existing dispute at three stores and to settle future disputes at other stores.

In July 1992, the Union requested recognition as the exclusive bargaining representative of the grocery employees at the Yuba City store. In November 1992, and again in April and May 1993, the Union requested a card check and recognition for the grocery employees at the Grass Valley store. Respondent denied recognition at these stores on the ground that it had concerns that the authorization cards were obtained through misrepresentations and that a Board election would be a better means for determining the Union's majority status.

The Yuba City store opened in August 1983 and the Grass Valley store opened in April 1988. Both stores were in the geographic jurisdiction of Local 916 until March 1989 when Local 916 merged into the Union. Both stores have operated on a "union free" basis during their entire existence. As stated earlier, the issue is whether Respondent waived its right to a Board conducted election at these stores.

The Union and the General Counsel argue that Respondent has admitted on numerous occasions, in communications to its employees, that if a majority of a store's employees signed union authorization cards, Respondent is required by contract to recognize the Union and extend the master food agreement to their store.

To support this argument, the General Counsel presented evidence that in 1984, Respondent stated in a document entitled "Raley's Answers Your Questions About The Union"

> We expect that in the near future the Retail Clerks Union will make an effort to get you to sign authorization cards. The Union might tell you to believe that the only purpose of an authorization card is to obtain a vote to de-

[4] Local 916 represented the meat department employees at the Redding, Yreka, Grass Valley, Chico, and Yuba City stores. After the merger, Respondent recognized the Union as the bargaining representative of meat department employees formerly represented by Local 916. The master meat agreement was applied to these employees.

[5] The testimony of Respondent's counsel and the Union's counsel reveals that the Union proposed that Respondent agree to a card check and recognition at one Redding store and that the Union agree to withdraw its demand for recognition at the other Redding store. Respondent agreed to this offer of a compromise.

termine whether you want the Union to be your representative. But, the fact is that in Northern California the Retail Clerks have refused to allow employees to vote for themselves. Rather, they use the authorization cards to force the company to recognize the Union without a vote. No matter what the Union tells you, these cards can be used to obtain recognition without there ever being a vote.

By letter dated October 4, 1991, to its employees at a Redding, California store, Respondent stated the following:

> It is our understanding that UFCW Local 588 is asking you to sign union authorization cards. By signing such a card, you are choosing the Union to represent you.
>
> If a majority of the supermarket employees (excluding meat) in this store sign such cards, we fully expect that the Union will demand that Raley's recognize the Union *without an election*. We also expect that the Union would demand that Raley's apply the existing union contract to you. . .
>
> You should also be aware that you will no longer be able to deal with the company as an individual. The Union will be your representative, and the company must deal with the Union.

In a letter dated October 7, 1991, Respondent stated:

> Because the UFCW already has a contract with Raley's at some stores, the union might contend that Raley's is required to recognize it without a government conducted election. However, you should be aware that by signing a union card you may be giving up your right to vote. Otherwise, if the union gets enough cards, the union contract might be applied to your store without an election.

In August 1992, Respondent wrote to employees at Grass Valley, Chico, and Redding stores:

> If the Union obtains signed cards from a majority of employees within your store, and the cards were signed by the employee knowing the true purpose of the card, then Raley's must recognize Local 588 as your representative. Contrary to what the Union is telling many employees, the signing of a card does not merely signify an interest in the Union. You are making a decision which means, among other things, that you must pay union dues, your health and welfare pension plans change, you will not be able to make contributions to the Company's 401(k) plan and you will lose the fifty cent per hour retirement supplement. This is precisely what happened at stores 246 and 247.[6]
>
> For everyone's information, and so there can be no misunderstanding, signing an authorization card gives the Union the right to represent you. *IT HAS NO OTHER PURPOSE!* If you sign a card, you vote to go union.

In a memorandum dated September 29, 1992, to all Raley's nonunion employees, Respondent stated:

> Unfortunately, the NLRB has interpreted the UFCW contract to require Raley's to recognize the UFCW in any store where the Union obtains authorization cards from a majority of the employees. Moreover, as you have seen at Yreka and Redding, we are forced to apply the UFCW contract service with Raley's to the employees of those stores, and lose the fifty cent an hour bonus, Raley's pension plan, and the 401(k) plan.

I find that these communications from Respondent to its employees were intended as propaganda in Respondent's effort to keep its nonunion stores "union free." Respondent used the Union's expected or anticipated positions to campaign against union solicitation of authorization cards. I do not find the campaign materials to constitute an admission that section 1.1 of the master food agreement was an after acquired stores clause or that either section 1.1 or section 1.13 applied to Respondent's nonunion stores located in the geographic area that previously belonged to Local 916.

Analysis and Conclusions

The General Counsel and the Union contend that by describing the bargaining unit in terms of the Union's jurisdiction, the recognition clause of the contract is an after acquired stores clause requiring Respondent to submit to a card check on the Union's demand. They further argue that the after acquired stores clause applies to stores that existed prior to the execution of the contract in addition to new stores and remodels. The General Counsel and the Union argue that the Board in *Alpha Beta*, supra, did not find that section 1.1 the recognition clause, was not an after acquired stores clause but, rather that section 1.13 was an after acquired stores clause. According to this argument, once the Board reached that conclusion it had no need to go further. The store in the *Alpha Beta* case was a new store.

Respondent contends that the Board decided in *Alpha Beta* that section 1.13 of the contract was the after acquired stores clause. The Board emphasized that the clause applied to new stores and remodels. The Board referred to section 1.1 as the recognition clause which was triggered under section 1.13 when the conditions set forth in section 1.13 were met. Respondent argues that the parties are bound by the *Alpha Beta* case. Respondent's strongest argument is that the parties had an agreement as to card checks for new or after acquired stores but were unable to reach agreement as to procedures for handling preciously existing nonunion stores. That problem did not arise until after the contract had been executed in 1992, and the parties were never able to reach agreement. Thus, Respondent argues that having never reached an agreement on card checks for preexisting nonunion stores, it has not waived its right, nor the rights of its store employees, to a Board election in such stores.

In *Kroger Co. (Kroger I)*, 208 NLRB 928 (1974), the retail clerks contract clause at issue stated:

> A. The Union shall be the sole and exclusive bargaining agent *for all employees employed by the Houston Division of Kroger Food Stores in stores operating in the State of Texas,*

[6] Stores 246 and 247 are the Yreka and Redding stores at which the Union was granted recognition in July 1992.

excluding all persons employed in the meat department. [Emphasis supplied].

The language in the meat cutters contract was as follows:

B. The Employer recognizes Meat Cutters Local No. 408 as the exclusive and collective bargaining agent for all employees in the meat department, *in all of Employer's retail stores located in the state of Texas operated by the Houston division of the Kroger Co.*

C. The parties agree that this contract shall cover and the Union which is a party hereto shall have jurisdiction over all meat department employees *in retail stores that are, or ill be, owned, leased, or operated by the Employer.* [Emphasis supplied].

Although there were obvious differences in language between the two contracts, the Board treated both clauses as after acquired stores clauses. The dispute arose in the *Kroger I* case after the employer transferred two of its stores from outside the Houston Division into the Houston Division. This transfer placed the two stores within the operation of the employer (the Houston Division) for the first time. The stores had previously been operated as nonunion stores. The unions demanded recognition under the after acquired stores clauses and accompanied the demands with offers to prove majority status through union authorization cards. The Board held that it did not view these clauses as an advance agreement to honor a card majority.

However, in *Kroger Co. (Kroger II)*, 219 NLRB 388 (1975), after a remand from the United States Court of Appeals for the District of Columbia Circuit,[7] the Board held that the only reasonable interpretation, which saves after acquired store clauses from meaninglessness, is a waiver of the employer's right to a Board-ordered election. Thus, the Board interpreted the clauses in *Kroger II* to require, on proof of majority status by a union, recognition and extension of the multistore contract to the new operations. The Board also held that it would not permit the parties to automatically incorporate a single store into the multi-store unit without a proper assessment of employee sentiment as to representation. Therefore, the Board required a card check or other proof of majority notwithstanding that the after acquired stores clauses made no mention of a card check.

In *Alpha Beta*, the administrative law judge found that the contract did not contain a waiver of a Board election and that specifically section 1.13 did not contain such a waiver. The Board found that section 1.13 was a waiver of a Board election as to new stores and remodels. The Board referred to section 1.1 as the recognition clause which, like the other provisions of the contract, did not apply to new stores or remodels until 15 days after a new store or remodel opens. The question of existing stores was not an issue in the *Alpha Beta* case.

Turning to the instant case, if section 1.13 is the after acquired stores clause, as found by the Board in *Alpha Beta*, the clause would not apply to Grass Valley and Yuba City, the stores at issue here. These stores were in existence prior to the multiemployer, multiunion bargaining but were not covered by the contract. When the Union's jurisdiction expanded in 1989 to include the geographic areas in which the stores were located, the stores were still not covered by the contract. No demand was made to apply the new or after acquired stores clause to these stores. Thereafter, when the 1992 agreement was negotiated, no attempt was made to include these stores.[8] When the Union finally made a demand for recognition for these stores, the stores were no longer "new" or "after acquired stores." These stores had been "new" or "after acquired" for collective-bargaining purposes when the Union's jurisdiction expanded and the stores fell within the language of the bargaining unit. Logically, a new store can be "new" only once. Similarly, a store is an "after acquired store" if it is acquired after the contract becomes effective rather than before. The contract language of the recognition clause which referred to all employees working in Respondent's grocery stores did not apply to the employees working in these pre-existing nonunion stores. The contract did not apply to these employees prior to 1992 and there was no request nor agreement to apply recognition or the contract to these employees. When the contract was placed in effect, the employees at the nonunion stores were not in the bargaining unit and were not covered by the contract. The Union negotiated for the 1992–1995 agreement without bargaining for future inclusion of these stores. Without proof of majority, the parties could not include the nonunion stores in the multistore bargaining unit. See *Alpha Beta*, supra, and *Kroger II*, supra.

Assuming arguendo, that section 1.1 was an after acquired stores clause, it does not follow that the clause applies to previously existing stores. While the stores involved in *Kroger* were previously existing stores, they were acquired after the effective date of the bargaining agreement at issue in the case and thus, were "new" to the bargaining unit at the time of the charging party-unions' demands for recognition. In the instant case, the union free stores existed at the time the collective-bargaining agreement was executed and, therefore were not acquired after the agreement. Logically, they were not after acquired stores.

Further, the record does not support a finding that Respondent agreed through section 1.1 or section 1.13 to card checks for its existing nonunion stores. The nonunion stores continued to operate on that basis after the contract was signed. The prior practice of card checks concerned new stores and not stores with a history of operating "union free." It would be a fiction to assume that Respondent agreed to allow its nonunion stores to be organized without a Board election in the absence of any evidence of such an agreement. Thus, even if section 1.1 is an after-acquired stores clause, I would find such a clause does not apply to stores which existed (in the geographic territory of the Union) prior to the execution of the contract, were historically nonunion and were not covered by the contract at the time the multi-store collective-bargaining agreement was executed.

[7] *Retail Clerks Local 455 v. NLRB*, 510 F. 2d 802 (D.C. Cir. 1975).

[8] The language of secs. 1.1 and 1.13 has remained unchanged in every bargaining agreement since 1980. When the parties negotiated the 1992–1995 agreement, the Union knew that the Board had held in *Alpha Beta* that sec. 1.13, New Stores and Remodels, was an after acquired stores clause. However, there was no attempt to enlarge the scope of either sec.1.1 or sec.1.13.

Further, I find no evidence of any agreement, arrangement or practice between the Union and Respondent to apply either section 1.1 or section 1.13 to existing stores. The evidence clearly establishes that Respondent agreed to card checks for new stores in 1983. That agreement was reaffirmed in 1988. When these agreements were reached in 1983 and in 1988, there were no nonunion stores in the Union's geographic jurisdiction. The question of recognition of previously existing non-union stores in the Union's jurisdiction was not raised until 1992, and at that time, the parties were unable to reach a final agreement. I find no legal or factual basis to conclude that Respondent has agreed to a card check for the Grass Valley and Yuba City stores. Finally, I note that nothing in this decision prejudices the Union's right to file a petition with the Board to represent the employees at the stores in issue here.

In view of these findings, I did not permit the parties to litigate the issue of whether the Union had valid authorization cards from a majority of the grocery unit employees at either of the stores. Similarly, I did not permit litigation of the issue of the timeliness of the Union's demand at the Grass Valley store.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(a)(5) and (1) of the Act as alleged in the complaint.

ORDER

Based on the above findings of fact and conclusions of law, I issue the following recommended Order[9]

The complaints herein are hereby dismissed in their entirety.

Dated at San Francisco, California, October 22, 1998

[9] All motions inconsistent with this recommended order are hereby denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.