

NLRB Rules That “Additional Stores” Clause Requiring Card Check Recognition for Separate Bargaining Units Is a Permissive Subject of Bargaining

October 17, 2007

In *Supervalu, Inc.*, 351 NLRB No. 41 (Sept. 30, 2007), the National Labor Relations Board (Board) held that an “additional stores” clause in a collective bargaining agreement—a provision that requires the employer to recognize the union based on a card check at nonunion locations—is a permissive, not mandatory, subject of bargaining. This decision sets an important precedent for all types of card check agreements under which the employees covered by the card check will constitute a separate bargaining unit.

More than 30 years ago, in *Kroger Co.*, 219 NLRB 388 (1975), the Board held that an employer violated Section 8(a)(5) of the National Labor Relations Act (the Act) by refusing to recognize the union based on a card check at additional stores, pursuant to an “after acquired stores” clause. Implicitly, therefore, the Board in *Kroger* held that such a clause is a mandatory subject of bargaining. *Kroger* has been followed in more recent cases involving such “additional stores” clauses, such as *Raley’s*, 336 NLRB 374 (2001).

The Board in *Supervalu* distinguished *Kroger* and *Raley’s* on the grounds that, in those cases, the employees in the additional stores were to be included in the same bargaining unit as employees in the employer’s existing stores. In *Supervalu*, by contrast, the Board found that it had not been established that employees in the additional stores would be included in the same bargaining unit as existing employees.

The “additional stores” clause in *Supervalu* was not found to be a mandatory subject of bargaining because it was not established that the clause “vitaly affects” the terms and conditions of employment of existing bargaining unit employees. There was no evidence, for example, that bargaining unit employees had expressed concern that the employer would transfer work to the additional stores. To the contrary, the Board noted that the employer had attempted to introduce testimony from an expert witness that would have shown that transfers of work, or price-driven movement of customers, between grocery stores located as far away as the additional stores does not generally occur in the grocery industry.

The Board held that since the *Supervalu* “additional stores” clause did not meet the “vitaly affects” test, it was not a mandatory subject of bargaining, and therefore the employer did not violate Sections 8(a)(5) and (1) of the Act when it refused to conduct card checks at the additional stores pursuant to that clause.

