West Coast Cintas Corporation *and* California Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO Case 21-CA-25860

September 30 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND HIGGINS

On July 14 1988 Administrative Law Judge James S Jenson issued the attached decision The Charging Party filed a limited exception requesting a broad cease and desist order The Respondent filed an opposition to the exception and a request for sanctions against the Charging Party

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

The Board has considered the decision and the record in light of the limited exception and opposition and has decided to affirm the judge s rulings findings and conclusions and to adopt the recommended Order [1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent West Coast Cintas Corporation Pico Rivera California its officers agents successors and assigns shall take the action set forth in the Order

[1] The Charging Party s request for a broad cease and-desist order is denied There is no showing that the Respondent has a proclivity to violate the Act nor that the Respondent s misconduct is so egregious or widespread as to demonstrate a general disregard of employees fundamental rights See *Hickmott Foods* 242 NLRB 1357 (1979)

The Respondent s request for sanctions against the Charging Party for filing an allegedly frivolous exception is also denied

Brian J Sweeney of Los Angeles California for the General Counsel

Stephen P Pepe and *Craig A Horowitz Esqs (O Melveny & Meyers)* of Los Angeles California for the Respondent

David A Rosenfeld Esq (Van Bourg Weinberg Roger & Rosenfeld) of San Francisco California for the Charging Party

DECISION

STATEMENT OF THE CASE

JAMES S JENSON Administrative Law Judge On a charge filed by California Joint Board Amalgamated Clothing and Textile Workers Union AFL-CIO (the Union) the General Counsel for the National Labor Relations Board by the Regional Director for Region 21 issued a complaint against West Coast Cintas Corporation (the Respondent) alleging that it had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the Act The complaint alleges in substance (1) that following an affirmative deauthorization vote and prior to certification of the results of the election Respondent notified employees that those who wanted to continue having their dues deducted pursuant to checkoff authorizations should so inform Respondent but that Respondent would not continue deducting dues if the employees did not want it to and (2) since May 1 1987 Respondent has failed to comply with the checkoff provisions contained in the collective bargaining agreement with the Union The General Counsel seeks an order requiring the Respondent to cease soliciting checkoff revocations when they are not permitted by contract or operation of law and to honor the contract checkoff provisions and the valid checkoff authorizations and remit dues to the Union pursuant to the employees valid checkoff authorizations The Respondent filed an answer admitting most of the allegations and denying it had refused to comply with the checkoff provisions or otherwise violated the Act

Respondent also asserts as affirmative defenses that (1) the instant unfair labor practice charge is barred because the Union failed to file a grievance pursuant to the collective bargaining agreement (2) the charge is barred by the doctrine of laches in that the Union unreasonably delayed filing the charge until after the certification of the deauthorization election results and failed to call the matter to the attention of Respondent (3) the charge is precluded because the Union failed to mitigate its damages by either requesting that employees be terminated for failure to pay dues or calling the conduct about which they complain to the attention of Respondent (4) the complaint is barred by the doctrine of laches in that the Board engaged in an inordinate and unexcusable delay by taking over 5 months to overrule the Union s objections to the May 1 1987 deauthorization election and certify the election results (5) the complaint lacks merit because the dues checkoff provision is part and parcel of the union security that was invalidated by the deauthorization election (6) an employer may make unilateral changes after an election prior to certification of the results but does so at its own peril if the Union ultimately prevails on its objections (7) compelling employees to pay union dues after they have voted to repeal the union security clause and such vote has been certified by the Board violates the public policy of Section 7 of the Act which provides that [e]mployees shall also *have the right to refrain from any and all [union] activities* (8) the remedy sought by the Board violates the due process clause of the fifth amendment in that deduction of union dues after the employees voted 64-10 to repeal the union security clause and such vote has been certified by the Board amounts to a taking of property without dues process

On April 19 22 and 25 all parties agreed to waive a hearing and moved to transfer these proceedings to an administrative law judge for decision In lieu of hearing the parties agree that the charge the complaint the answer and a stipulation of facts with exhibits attached

shall constitute the entire record and that no oral testi mony is necessary or desired by any of the parties The parties further asked that a time for filing briefs be set

By an order issued on April 27 1988 I was designated as the administrative law judge and a date for filing briefs was set

On the basis of the stipulation and the entire record including the briefs of the Respondent the Union and the General Counsel I make the following[1]

FINDINGS OF FACT

I JURISDICTION

The Respondent a Washington corporation is en gaged in the rental and sale of industrial work uniforms and operates a facility in Pico Rivera California It an nually purchases and receives goods and products valued in excess of $50 000 directly from suppliers located out side the State of California It is admitted and found that at all times material the Respondent has been engaged in commerce and is a business affecting commerce within the meaning of Section 2(6) and (7) of the Act

II THE LABOR ORGANIZATION

It is admitted and found that the Union is a labor orga nization within the meaning of Section 2(5) of the Act

III THE ISSUES

1 Whether following a decertification election but prior to certification of its results Respondent violated the Act by telling employees it would no longer deduct union dues from employees paychecks unless employees came forward and notified Respondent of their desire to continue having Respondent do so

2 Whether Respondent violated the Act by refusing to adhere to the checkoff provisions in the collective bar gaining agreement both before and after the results of the deauthorization vote were certified

IV THE ALLEGED UNFAIR LABOR PRACTICES

Since about September 1 1985 the Union has been recognized as the collective bargaining representative of Respondent s employees in the following appropriate unit

> All employees employed by Respondent at its facili ty excluding all executives administrative and pro fessional employees office clerical employees driv ers guards and supervisors as defined in the Act

The most recent bargaining agreement between Re spondent and the Union covering employees in that unit is effective by its terms from September 1 1985 to August 31 1988 Article 2 Section (b)(1) of the agree ment contains a standard union security clause and arti cle 6(a) covering checkoff provides in pertinent part that

> The Company shall from the first pay of each month deduct from the wages of its employees when authorized by the employees in writing Union dues and initiation fees The amounts deduct ed pursuant to such authorization shall be transmit ted at monthly intervals to the Secretary Treasurer of the Union together with a list of names of em ployees from whom the deductions are made on forms provided by the Union

The dues deduction authorization form signed by unit employees states in pertinent part

> I hereby authorize my employer (the above named company) to deduct from my wages my ini tiation fees dues and assessments due to said union This authority to make such deductions shall be ir revocable for the period of one year or until the termination date of the collective bargaining agree ment between my Employer and the Union which ever occurs sooner and I agree and direct that this authorization shall be automatically renewed and shall be irrevocable for successive periods of one year each or for the period of each succeeding col lective bargaining agreement between my Employer and the Union whichever shall be shorter unless written notice is given by me to the Employer and the Union not more than twenty (20) days and not less than ten (10) days prior to the expiration of each period of one year or of each collective bar gaining agreement between my Employer and the Union whichever occurs sooner

On March 19 1987 a petition was filed in Case 21-UD-301 seeking to rescind the authority of the Union to require under its collective bargaining agreement with Respondent that membership in the Union be a condi tion of employment Pursuant to a Decision and Direc tion of Election dated May 1 1987 a deauthorization election was conducted on April 16 with 64 voting for deauthorization and 10 against The Union filed objec tions to the election on May 8 They were overruled and the election results certified by the Regional Director on October 30 1987 The Union s request for review was denied by the Board on April 13 1988

On May 15 1987 while the Union s objections to the election were pending Plant Manager Michael Stadler a supervisor and agent of Respondent and plant secretary Alice Terrazas Respondent s agent verbally notified em ployees that as a result of the deauthorization election Respondent would no longer deduct union dues from

[1] Appended to the Respondent s brief as Appendix A is a declaration by its attorney in which he declares that if called as a witness he would testify to certain information about which I am asked in the first footnote on p 18 of his brief to take judicial notice The General Counsel has moved to strike the declaration the first footnote on p 18 and the argu ment relating thereto on the grounds they make reference to facts not contained in the record and are irrelevant The General Counsel s motion to strike is granted The signed agreement of the parties was that the Charge Complaint and Notice of Hearing the Answer to the Complaint and the Stipulation of Facts including the exhibits attached thereto *shall constitute the entire record* in these proceedings and that *no oral testimony is necessary or desired* The declaration contains facts not included in the agreed-on record and in any event could not have affected Respondent s alleged unlawful conduct that occurred in May 1987 a year prior to the receipt of the data

their paychecks unless they came forward and notified Terrazas that they wanted Respondent to continue deducting dues No employee has notified Terrazas that he or she wanted dues deductions to continue and as a consequence Respondent ceased deducting dues on June 1 1987 and has not remitted any to the Union for any of the months following April 1987 The instant charge was filed by the Union on November 23 1987 The parties stipulated that the Union neither filed a grievance regarding the dispute underlying this matter nor requested the Respondent terminate those employees who failed after April 30 1987 to submit dues to the Union

Discussions

The Respondent contends that the vote to deauthorize *immediately* invalidated both the union security clause and the dues checkoff provisions in the collective bargaining agreement and therefore its discontinuance of the dues checkoff provision only after no employee requested them to do otherwise is consistent with the congressional purpose of Section 9(e)(1) not to impose a union security agreement on an unwilling party Respondent cites *Penn Cork & Closures* 156 NLRB 411 (1965) as authority for the proposition that a vote to deauthorize also immediately voids the dues checkoff provision It is argued that special circumstances prevent this case from falling within the general rule that union security provisions in a collective bargaining agreement remain in effect until certification of the results of the election Thus given the extreme delay in certification the Union s improper stalling tactics the decisive employee vote in favor of deauthorization and the fact that none of Cintas employees requested it to continue deducting dues from their paychecks Cintas properly honored its employees request to cease dues checkoff prior to certification of the election results It is also argued that the decision in *Albert Van Luit & Co* 234 NLRB 1087 (1978) enfd 597 F 2d 681 (9th Cir 1979) a case on which the General Counsel relies is inconsistent with prior Board law and should be rejected

The Act requires bargaining over the issue of dues checkoff and permits the inclusion in any collective bargaining agreement of a dues checkoff provision obligating the employer to deduct union dues and fees of each consenting employee and to remit them directly to the Union To protect the rights of employees Section 302(c)(4) of the Act requires that each employee who desires to take advantage of such an arrangement must provide the employer with a voluntarily executed written assignment or dues checkoff authorization which shall not be irrevocable for a period of more than one year or beyond the termination date of the applicable collective bargaining agreement whichever occurs first

The Act also requires bargaining over the issue of union security and the first proviso to Section 8(a)(3) permits the inclusion of a union security clause in a collective bargaining agreement [2] Union security therefore places a limit on the Section 7 rights of employees [3] Section 8(a)(3) also provides that a majority of unit employees can rescind the authority of the union to maintain a union security provision by following the procedures set forth in Section 9(e)(1) of the Act which includes the filing of a petition a Board conducted election and Board certification of the results [4]

As seen above the Act generally reflects a congressional emphasis on Board certification as a critical step in creating or dissolving statutory obligations Thus Section 8(a)(3) does not provide for the recission of the Union s statutory authority to negotiate a union security provision unless following an election *the Board shall have certified* that at least a majority of the employees desire recission (Emphasis added) Similarly Section 8(d) provides that various specific bargaining obligations imposed on employers employees and labor organizations during the term of a contract *shall become inapplicable upon* an intervening *certification* of the Board under which the labor organization or individual which is a party to the contract has been superseded as or ceased to be the representative of the employees involved (Emphasis added) Section 9(e)(1) directs that in deauthorization elections the Board shall take a secret ballot of the employees in [the] unit and certify the results thereof to [the] labor organization and to the employer Similarly Section 9(c)(1) directs that where formal recognition of or formal withdrawal of representative status from a bargaining agent is sought the Board shall direct an election by secret ballot and shall certify the results thereof

The procedures rules and regulations governing deauthorization elections are similar to those governing representation elections and in each instance the general rule is that the date of certification is the date of effectiveness of any basic change in the relationship of the parties resulting from the election Thus Section 9(c) does not re

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[2] Sec 8 of the Act provides in pertinent part

(a) It shall be an unfair labor practice for an employer—

(3) by discrimination to encourage or discourage membership in any labor organization *Provided* That nothing shall preclude an employer from making an agreement with a labor organization to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is the later (i) if such labor organization is the representative of the employees as provided in section 9(a) in the appropriate collective bargaining unit covered by such agreement when made and (ii) *unless following an election held as provided in section 9(e)* within one year preceding the effective date of such agreement *the Board shall have certified* that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement [Emphasis added]

[3] Sec 7 of the Act provides

Employees shall have the right to self organization to form join or assist labor organizations to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and *shall also have the right to refrain* from any or all such activities *except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)* [Emphasis added]

[4] Sec 9(e)(1) provides

Upon the filing with the Board by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and labor organization made pursuant to section 8(a)(3) of a petition alleging they desire that such authorization be rescinded the *Board shall take a secret ballot* of the employees in such *unit and certify the results thereof to such labor organization and to the employer* [Emphasis added]

quire that an employer begin contract negotiations prior to certification of the results Once certification issues however an employer acts at its peril in refusing to honor the certification and bargain on request even where postcertification challenges to the Union s status are still pending before the Board E g *NLRB v Louisville Chair Co* 385 F 2d 922 926 928 (6th Cir 1967) cert denied 390 U S 1013 (1968)

Special considerations have led to exceptions to the date of certification rule in both the representation election and deauthorization contexts In the representation context for example an employer acts at his peril even prior to certification by making unjustified unilateral changes for such changes might so destroy the effectiveness of the union as a bargaining representative as to render its ultimate certification futile E g *Mike O Connor Chevrolet Buick GMC Co* 209 NLRB 701 (1974) enf denied on other grounds 512 F 2d 684 (8th Cir 1975) In *Lyons Apparel* 218 NLRB 1172 (1975) the Board recognized an exception to its date of certification rule in a deauthorization context holding that a union could not enforce its union security clause so as to exact initiation fees the price of membership and dues from *newly hired* employees pending certification This holding was compelled by equitable considerations the Board view being that it would be unconscionable to exact so high a price of new employees during a period when prima facie the unit employees had withdrawn the union s right to negotiate membership as a condition of employment This result is consistent with the prohibition expressed in Section 8(b)(5) of the Act against exacting initiation fees which the Board finds excessive or discriminatory under all the circumstances As the Board stated in *Albert Van Luit & Co* supra at 1087

> There is a substantial difference between compelling new employees to join the union in circumstances of *Lyons Apparel* and the enforcement of existing dues checkoff authorizations which may or may not have resulted from a union security clause
>
> In the latter instance however continued deduction of dues pursuant to the employees own authorizations forces nothing on employees Rather pending certification employees are required only to maintain a dues paying status that resulted not only from the collective bargaining contract negotiated by their representative but also from their own specific authorizations
>
> Prior to rescinding a union s authority to negotiate a union security clause Section 9(e)(1) of the Act mandates both a secret ballot election for the employees and certification of the results for the labor organization Implicit is the right of either party to have its objections heard before the finality of certification Further absent the equitable considerations present in *Lyons* enforcement of the union security provision under the general rule that it is effective until certification of an affirmative deauthorization vote lends more certainty and stability to the collective bargaining process than would ensue from a contrary rule

The Respondent s contention that the vote to deauthorize *immediately* invalidates both the union security clause and the dues checkoff provisions in the collective bargaining agreement is contrary to established Board and court cases In *Albert Van Luit* the employer relied as Respondent does here on *Penn Cork & Closures Inc* 156 NLRB 411 (1965) for the proposition that deauthorization under Section 9(e)(1) is immediately effective In *Penn Cork* however the Board explained The deauthorization election however had the effect *when certified* by the Regional Director of immediately suspending the *union shop provision* of the contract [Emphasis added] 156 NLRB at 414 Likewise in *Presbyterian Hospital City of New York* 241 NLRB 996 998 (1979) *Trico Products Corp* 238 NLRB 1306 (1978) *Bedford Can Mfg Corp* 162 NLRB 1428 1432 fn 2 (1967) *Monsanto Chemical Co* 147 NLRB 49 51 (1964) *Andor Co* 119 NLRB 925 929 (1957) Thus contrary to Respondent *Albert Van Luit* is not inconsistent with Board law

Respondent argues further that since *Presbyterian Hospital* recognizes that an affirmative deauthorization vote *permits employees to revoke* their dues checkoff authorization but does not automatically cancel such authorization that that decision recognizes that employers may cancel dues checkoff prior to certification when employees ask them to revoke dues checkoff between the election and certification which is precisely what Cintas did in the instant case However the above cited cases support the General Counsel s position 'that by failing to withhold and transmit dues to the Union pursuant to valid checkoff authorizations between the election and certification dates Respondent unilaterally modified its contract with the Union thereby engaging in conduct violative of Section 8(a)(1) and (5) *Penn Cork* holds that when there has been an affirmative deauthorization vote outstanding checkoff authorizations executed under a union shop provision become vulnerable to revocation by employees regardless of their terms In *Bedford Can* the Board pointed out that such affirmative vote does not automatically cancel existing authorizations for the checkoff of dues or alone require an employer to cease deducting dues in the face of a contractual checkoff provision Further in *Albert Van Luit* the Board held that so far as outstanding checkoff obligations were concerned the deauthorization vote had no immediate effect on the rights of the company the union or the employees and that *only after certification* of the results of the election did the employees gain the right to revoke their prior authorizations This case is similar in some respects to *Sunshine Biscuits Inc* 165 NLRB 167 (1967) There following a deauthorization election which the union lost and certification of results the employer notified employees it would no longer deduct dues and that those wishing to retain membership and pay dues should contact the union No employees contacted the union either to resign his membership or revoke his checkoff authorization Citing *Penn Cork* and *Bedford Can* the Board found a violation of Section 8(a)(5) and (1) based on the employer s unilateral modification of its contract with the union In the instant case the checkoff authorizations remained in effect between the date of the deauthoriza

tion vote and the certification of the results and until timely revoked by the employees Therefore Respondent violated Section 8(a)(1) by telling employees it would no longer deduct union dues pursuant to checkoff authoriza tions unless the employees reaffirmed the authorizations Respondent also violated Section 8(a)(5) and (1) by repu diating the checkoff provisions in the parties collective bargaining agreement by failing to make prompt remit tance of authorized dues deductions to the Union all as alleged in paragraphs 13 and 14 of the complaint [5] *Shen Mar Food Products* 221 NLRB 1329 (1976) *Sunshine Bis cuits* supra

Conclusions of Law

1 The Respondent is an employer engaged in com merce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act

2 The Union is a labor organization within the mean ing of Section 2(5) of the Act

3 By notifying employees that had signed valid check off authorizations that it would no longer deduct union dues unless they notified Respondent of their desire to continue doing so Respondent violated Section 8(a)(1) of the Act

4 By repudiating and failing and refusing to comply with the checkoff provisions in its collective bargaining agreement with the Union Respondent violated Section 8(a)(5) and (1) of the Act

5 The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act

Remedy

Having found that Respondent has engaged in certain unfair labor practices I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act

Having found that Respondent has failed to comply with the checkoff provisions in its collective bargaining agreement with the Union I shall recommend that it make the Union whole for any dues it would have re ceived but for the Respondent s failure to comply with the collective bargaining agreement together with inter est as computed in *New Horizons for the Retarded* 283 NLRB 1173 (1987) *J F Swick Insulation Co* 247 NLRB 626 (1980) *Ogle Protection Service* 183 NLRB 682 (1970) [6] The dates on which employee checkoff authori zations are revoked or become ineffective for other lawful reasons can best be determined at the compliance stage

On these findings of fact and conclusions of law and on the entire record I issue the following recommend ed[7]

ORDER

The Respondent West Coast Cintas Corporation Pico Rivera California its officers agents successors and as signs shall

1 Cease and desist from

(a) Failing and refusing to check off union dues pursu ant to valid checkoff authorizations and to remit same to the Union pursuant to the collective bargaining agree ment in effect between the parties

(b) Notifying employees that it will no longer deduct union dues pursuant to signed valid checkoff authoriza tions unless employees notify Respondent of their desire for it to continue doing so

(c) In any like or related manner interfering with re straining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

2 Take the following affirmative action necessary to effectuate the policies of the Act

(a) Honor the contract checkoff provisions and the valid dues checkoff authorizations filed with it and make the Union whole for any dues it should have checked off and remitted to the Union pursuant to the collective bar gaining agreement in the manner set forth in the remedy section of this decision

(b) Preserve and on request make available to the Board or its agents for examination and copying all pay roll records social security payment records timecards personnel records and reports and all other records nec essary to analyze the amount of backpay due under the terms of this Order

(c) Post at its Pico Rivera California place of business copies of the attached notice marked Appendix [8] Copies of the notice on forms provided by the Regional Director for Region 21 after being signed by the Re spondent s authorized representative shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted Reasonable steps shall be taken by the Respond ent to ensure that the notices are not altered defaced or covered by any other material

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Re spondent has taken to comply

[5] I have considered each of the affirmative defenses asserted by Re spondent and reject those not already considered in this decision as lack ing any merit

[6] Execution of a checkoff authorization constitutes a tender of dues re quired under Sec 8(a)(3) *Ferro Stamping & Mfg Co* 93 NLRB 1459 (1951) Consequently Respondent s employees have fulfilled their con tractual obligations The loss of dues to the Union has resulted from the Respondent s unfair labor practices Therefore the financial responsibility for making the Union whole for dues it would have received but for Re spondent s unlawful conduct rests entirely on the Respondent and not the employees

[7] 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 pur poses

[8] If this Order is enforced by a judgment of a United States court of appeals the words in the notice reading Posted by Order of the Nation al Labor Relations Board shall read Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice

WE WILL NOT fail or refuse to check off union dues pursuant to valid checkoff authorizations and to remit same to the Union pursuant to our collective bargaining agreement

WE WILL NOT notify our employees that we will no longer deduct union dues pursuant to signed valid check off authorizations unless they notify us of their desire for us to continue doing so

WE WILL NOT in any like or related manner interfere with restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act

WE WILL honor the contract checkoff provisions and the valid dues checkoff authorizations filed with us and WE WILL make the Union whole for any dues we should have checked off and remitted to it pursuant to our collective bargaining agreement together with interest

WEST COAST CINTAS CORPORATION