

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

**SMITH’S FOOD & DRUG CENTERS, INC.
d/b/a FRY’S FOOD STORES**

and

Case 28-CA-22836

KAREN MEDLEY, an Individual

and

Case 28-CA-22837

KIMBERLY STEWART, an Individual

and

Case 28-CA-22838

ELAINE BROWN, an Individual

and

Case 28-CA-22840

SHIRLEY JONES, an Individual

and

Case 28-CA-22858

SALOOMEH HARDY, an Individual

and

Case 28-CA-22871

JANETTE FUENTES, an Individual

and

Case 28-CA-22872

TOMMY FUENTES, an Individual

**UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 99**

and

Case 28-CB-7045

KIMBERLY STEWART, an Individual

and

Case 28-CB-7047

ELAINE BROWN , an Individual

and

Case 28-CB-7048

KAREN MEDLEY , an Individual

and

Case 28-CB-7049

SHIRLEY JONES, an Individual

and

Case 28-CB-7058

SALOOMEH HARDY, an Individual

and

Case 28-CB-7062

JANETTE FUENTES, an Individual

and

Case 28-CB-7063

TOMMY FUENTES, an Individual

**ACTING GENERAL COUNSEL’S OPPOSITION
TO RESPONDENT UNION’S MOTION TO DISMISS
OR TO STRIKE PORTIONS OF THE COMPLAINT**

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board (the Board), Counsel for the Acting General Counsel (CAGC) files this opposition to Respondent Union’s Motion to Dismiss or to Strike Portions of the Complaint (Union’s Motion), dated June 16, 2010. Respondent Union erroneously asserts that twenty Complaint allegations referring to employees’ resignations of their Union memberships should be dismissed or stricken because, as a matter of law, such resignations do not cancel or invalidate any lawful limits agreed to by an employee and the Union on a check-off authorization’s revocability where “explicit language within the check-off authorization clearly set[s] forth an obligation to pay dues even in the absence of union membership.” *Electrical Workers IBEW Local 2088 (Lockheed Space Operations Co.)*, 302 NLRB 322, 329 (1991).

CAGC agrees that *Lockheed*, supra, has relevance to the facts of this case, and that the language regarding the separate obligations related to check-off and union membership, on the face of the check-off authorization forms used by Respondent Union -- as opposed to other language also at issue in the instant case -- meets the threshold of explicitness and clarity regarding that separate obligation required by *Lockheed*. Contrary to Respondent Union's position, however, the analysis begins, rather than ends, at this point.

As explained in more detail below, employees who resigned their Union membership after Respondents' collective-bargaining agreement expired in October 2008 and before Respondents signed a successor collective-bargaining agreement in November 2009 were no longer bound to pay Union dues to Respondent Union, notwithstanding the check-off authorizations that they had executed. Therefore, while Respondent Union's Motion may be a statement of its legal theories and anticipated defenses, it does not present any legitimate grounds upon which to dismiss or strike any part of the Complaint. To the contrary, the Complaint allegations sought to be dismissed or struck appropriately describe the factual and legal predicates to the Complaint's conclusions that Respondent Union violated Section 8(b)(1)(A) of the Act. For these reasons, Respondent Union's Motion should be denied in its entirety.

I. Background

On March 31, 2010, an Amended Consolidated Complaint and Notice of Hearing ("Complaint") issued in the above-captioned cases against Respondent Union and Respondent Employer alleging, in part, that Respondent Union violated Section 8(b)(1)(A) of the Act by, among other actions, refusing to honor the resignations of Union memberships and the revocations of check-off authorizations of the seven Charging Parties and similarly situated

employees by continuing to receive, accept, and retain monies that Respondent Employer had deducted from their wages and then remitted to Respondent Union.¹

Respondents were parties to a collective-bargaining agreement that was in effect by its terms from October 26, 2003, to October 25, 2008 (“2003 CBA”).² Between approximately October 25, 2008, and October 4, 2009, Respondent Union and Respondent Employer entered into at least eight written agreements that extended the 2003 CBA for durations of between 28 and 62 days.³ The last extension expired on October 31, 2009, and the parties signed a Memorandum of Understanding concerning the successor collective-bargaining agreement on November 12, 2009.⁴ Between the 2003 CBA’s expiration on October 25, 2008, and the execution of its successor agreement on November 12, 2009, the seven Charging Parties, as well as a currently unknown number of similarly situated employees, sought to revoke the check-off authorizations that they previously had executed.⁵ These check-off authorizations state:

This Check-Off Authorization and Agreement is separate and apart from the Membership Application and is attached to the Membership Application only for convenience.

CHECK-OFF AUTHORIZATION

To: Any Employer under contract with United Food and Commercial Workers Union, Local 99, AFL-CIO

You are hereby authorized and directed to deduct from my wages, commencing with the next payroll period, an amount equivalent to dues and Initiation fees as shall be certified by the Secretary-Treasurer of Local 99 of the United Food and Commercial Workers Union, AFL-CIO, and remit same to said Secretary-Treasurer.

This authorization and assignment is voluntarily made in consideration for the cost of representation and collective bargaining and is not contingent upon my present or future membership in the Union. This authorization and

¹ See Complaint ¶¶ 6(d), 6(e), 7(d), 7(e), 8(d), 8(e), 9(d), 9(e), 10(d), 10(e), 11(d), 11(e), 12(d), 12(e), 13(d), 13(e), 15(a), 15(b), and 18.

² See Respondent Union’s Motion, Exhibit A.

³ See Respondent Union’s Motion, Exhibit B.

⁴ See Respondent Union’s Motion, Exhibit B at 8, 9.

⁵ See Respondent Union’s Motion at 6, ¶ 5.

assignment shall be irrevocable for a period of one (1) year from the date of execution or until the termination date of the agreement between the Employer and Local 99, whichever occurs sooner, and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and Union written notice of revocation bearing my signature thereto.

The Secretary-Treasurer of Local 99 is authorized to deposit this authorization with any Employer under contract with Local 99 and is further authorized to transfer this authorization to any other Employer under contract with Local 99 in the event that I should change employment.⁶

Respondent Union admits that it refused to honor the revocations of the check-off authorizations of any of its members, including the charging parties, who did not revoke between 30 to 45 days before the anniversary of the employees' executions of the check-off authorizations.⁷ Respondent Union also alleges that it refused to honor the revocations of the check-off authorizations of any of its members, including the charging parties, who did not revoke between 30 to 45 days before "the expiration of the applicable collective bargaining agreement in October of 2008." Id.

II. Argument

By refusing to honor its members' revocations of their check-off authorizations between October 2008 and November 12, 2009, Respondent Union violated Section 8(b)(1)(A) of the Act. See, e.g., *United Food & Commercial Workers Local I (Big V Supermarkets)*, 304 NLRB 952 (1991), *enfd.* 975 F.2d 40 (2d Cir. 1992) (Union's refusal to honor revocation of check-off authorization violative where language in check-off authorization did not include limits on its revocation).

According to Section 302(c)(4) of the Act:

The provisions of this section shall not be applicable . . . with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on

⁶ See Respondent Union's Motion, Exhibit C.

⁷ Respondent Union's Motion at 6, ¶ V.

whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner;

29 U.S.C.A. § 186(c)(4). The Board has interpreted Section 302(c)(4) of the Act to “guarantee[s] an employee two distinct rights when he executes a checkoff authorization under a collective-bargaining agreement: (1) a chance at least once a year to revoke his authorization, and (2) a chance upon the termination of the collective-bargaining agreement to revoke his authorization.” *Atlanta Printing Specialties*, 215 NLRB 237, 237 (1974), *enfd.* 523 F.2d 783 (6th Cir. 1975) CAGC will argue that the irrevocability language contained in the check-off authorizations is so vague that it could not reasonably be construed to convey to an employee that he or she would have the right to revoke his or her check-off authorization upon the termination of any collective-bargaining agreement other than the agreement, if any, in effect at the time the employee executed the check-off authorization.

CAGC will further argue that Respondent Union’s course of conduct in responding to employees who sought to revoke their check-off authorizations -- including the plain text of letters that it sent to employees who attempted to revoke their check-off authorizations -- demonstrates that Respondent Union construed and applied the language of the check-off authorizations in such a way as to bar employees from revoking their check-off authorizations at any time other than during the window period 30 to 45 days before each anniversary of the employee’s execution of the check-off authorization. By so doing, Respondent Union conveyed to its members and the employees of Respondent Employer that they did not have the right to revoke at any time other than during the window period 30 to 45 days before each anniversary of the employee’s execution of the check-off authorization. Although Respondent Union allegedly interpreted the check-off authorization’s language precluding its revocability

“until the termination date of the agreement between the Employer and Local 99” to mean that employees could revoke the authorization only during the 15-day period 30 to 45 days before October 25, 2008, the expiration date of the 2003 CBA, Respondent Union to this day has failed to provide any evidence to support this claim.

Moreover, during the approximately twelve-month period between the expiration of the 2003 CBA and the execution of the successor agreement, Respondents extended the old agreement at least eight times, each time for a different duration so that it was impossible, in some cases, to determine the applicable window period during which to revoke the check-off authorization. Under these circumstances, check-off authorizations became revocable at will during the period that the extensions were in effect: October 2008 to November 2009. See *Murtha v. Pet Dairy Products Company*, 314 S.W.2d 185, 189-190 (Tenn. App. 1957) (authorizations were revocable at will during the period where an old agreement was extended day-to-day until a new agreement was reached).

CAGC also submits that once the check-off authorizations became revocable at will, an employee’s resignation of union membership also effectively revokes his or her check-off authorization. The Board’s policy of voluntary unionism-- across the board, though in particular in a right-to-work state -- would not be served by extending *Lockheed* to hold that where (and when) check-off authorizations are revocable at will, employees who resigned their union membership nonetheless would be forced to continue paying union dues forever until they revoked their check-off authorizations, especially where, as here, the Union’s conduct was responsible for keeping employees misinformed about the dates on which they could revoke their check-off authorizations. *Lockheed* should not be read as jettisoning the policy of voluntary unionism. The onus should be on the union, rather than on the employee, to

demonstrate that employees who resigned their union membership -- during a period of time when their check-off authorizations were revocable at will, including periods when such revocability results from a union's unlawful actions -- intended to continue paying union dues to a union from whose membership they had resigned.

Furthermore, it should be presumed, absent evidence to the contrary, that employees who had resigned their Union memberships also would have revoked their check-off authorizations during this period if they had known that they could have done so. Because employees thus effectively revoked their check-off authorizations by resigning their Union memberships during the period after the expiration of the 2003 CBA, including when the contract extensions were in effect, the language in the check-off authorizations that explicitly and clearly "set[s] forth an obligation to pay dues even in the absence of union membership" also was revoked. *Lockheed*, 302 NLRB at 329. The check-off authorization having been revoked -- or made a nullity -- by the resignation of membership during such period and in the circumstances described above, Respondent Union could no longer avail itself of the check-off revocation language as a basis to continue to collect Union dues from those who had resigned membership. Stated differently, without the effective existence of a check-off agreement containing such language, Respondent Union acted without authorization when it continued to collect Union dues in the particular circumstances presented by the facts and pleadings in the instant case.

III. Conclusion

Respondent Union's Motion seeks to reward Respondent Union for its unlawful actions. Respondent Union maintained vague revocation language in its check-off authorization forms and misleadingly informed employees that they could revoke their check-

off authorizations only during each anniversary period 30 to 45 days preceding the execution date of the employee's check-off authorization. Respondent Union said and did nothing to inform employees who attempted to revoke their check-off authorizations between October 2008 and November 2009 that they could revoke their authorizations at the termination of any applicable collective-bargaining agreement.

As a result of Respondent Union's unlawful actions, check-off authorizations became revocable at will during the period from October 2008 to November 2009, and employees who resigned their Union memberships during the same period also effectively revoked their check-off authorizations. A contrary result would endanger the Board's carefully crafted balance between its policy of voluntary unionism and contract principles. See *Lockheed*, 302 NLRB at 327-28. Accordingly, the General Counsel requests that the Administrative Law Judge deny Respondent Union's Motion in its entirety.

Dated at Phoenix, Arizona, this 25th day of June 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT UNION'S MOTION TO DISMISS OR TO STRIKE PORTIONS OF THE COMPLAINT in *SMITH'S FOOD & DRUG CENTERS, INC. d/b/a FRY'S FOOD STORES*, Case 28-CA-22836, was served by E-Gov, E-Filing, and E-Mail on this 25th day of June 2010, on the following:

Via E-Gov and E-Mail:

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