

**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 QUASH/PETITION TO REVOKE SUBPOENA DUCES TECUM**

Counsel for the Acting General Counsel (CAGC) opposes Respondent Union’s Motion to Quash/Petition to Revoke Subpoena Duces Tecum, dated June 22, 2010, herein called the Petition. Respondent Union asserts, in essence, that Subpoena Duces Tecum B-566597, herein called the Subpoena, seeks the production of irrelevant documents to the extent that it seeks documents concerning anyone other than the seven named Charging Parties in this matter. To the contrary, and as set forth below, the Subpoena seeks documents that are relevant to the issues framed by the pleadings and to the Respondent’s defenses. Accordingly, the Respondent Union’s Petition 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 both Respondent Union and Respondent Employer, alleging, among other unfair labor practices, that Respondent Union violated Section 8(b)(1)(A) and (2) 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 and remitted to Respondent Union.

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”). 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. The last extension expired on October 31, 2009. On November 12, 2009, the parties signed a Memorandum of Understanding concerning the successor collective-bargaining agreement. 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, resigned their Union memberships and sought to revoke the check-off authorizations that they previously had executed. 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 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.

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. 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**

### **A. The Legal Framework**

Contrary to the Respondent's assertions, the Subpoena comports with Section 102.31 (b) of the Board's Rules and Regulations and also comports with the National Labor Relations Act itself. Section 11(1) of the Act specifically provides that the Board shall revoke a subpoena:

[I]f in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required.

It is well settled that when the Government or one of its agencies seeks the production of documents by subpoena, production is to be ordered as long as it is not “plainly incompetent or irrelevant to any lawful purpose.” *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943). See also *General Engineering, Inc. v. NLRB*, 341 F. 2d 367, 372 (9th Cir. 1985); *NLRB v. G.H.R. Energy Corp.*, 707 F. 2d 110, 114 (5th Cir. 1982). Moreover, courts are to enforce subpoenas issued by the Board pursuant to Section 11(1) if the court finds “that a proceeding is pending before the Board of which it has jurisdiction and the evidence sought relates to or touches the matter under investigation.” *NLRB v. Dutch Boy, Inc.*, 606 F.2d 929, 932 (10th Cir. 1979). Additionally, a subpoena is proper when it is designed to produce material concerning a defense, even if that defense may never arise. *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005, 1009 (9th Cir. 1996), citing *NLRB v. Dutch Boy, Inc.*, 606 F.2d at 933 n. 4.

B. The Subpoena Requests Relevant Documents.

The Subpoena generally seeks documents relating to employees who sought to revoke their check-off authorizations and who resigned their Union memberships after July 1, 2008, and to Respondent Union’s responses to these revocation requests. Such documents are relevant because the Complaint alleges, among other things, that Respondent Union violated the Act by refusing to honor the revocations of the check-off authorizations of the named Charging Parties and of any other employees of the Respondent Employer who revoked them between June 28, 2009, and November 12, 2009. Not only are these documents relevant, they are also indispensable to determine the basis on which Respondent Union relied to refuse to honor their check-off revocations. The answer to this question is crucial to the Acting General Counsel’s case.

For example, CAGC is unaware as to whether Respondent Union honored any requests to revoke employees' check-off authorizations, and if it did so, how many it honored and on what basis. Assuming that Respondent Union did refuse to honor at least some check-off revocation requests, a showing that Respondent Union always informed employees that they could revoke 30 to 45 days before the anniversary of their execution of the check-off authorization, but never informed employees that they could revoke at the termination of a collective-bargaining agreement, would support the Acting General's Counsel's position that Respondent Union ignored or misrepresented the requirements imposed by Section 302(c)(4) of the Act, supporting findings that the check-off authorizations became revocable at will and Respondent Union coerced and restrained employees by refusing to honor these valid revocations.<sup>1</sup>

More specifically, Respondent Union itself asserted, without any documentary evidence, in correspondence to Region 28 that it honored the revocations of the check-off authorizations of several employees who revoked 30 to 45 days before the 2003 CBA expired on October 25, 2008. If Respondent Union's assertion were false, this would undermine Respondent Union's defense that it adhered to Section 302(c)(4) of the Act. Without knowing how many employees revoked their check-off authorizations, when they revoked them, and Respondent Union's response to the revocation requests, it is impossible to fully assess the merits of the case with respect to the unnamed employees in the Complaint.

Stated differently, the Subpoena seeks documents that are necessary to the Acting General Counsel in the litigation of the merits of the issues framed by the pleadings.

Moreover, deferring litigation concerning the unnamed employees in the Complaint to the

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<sup>1</sup> See Acting General Counsel's Opposition to Respondent Union's Motion to Dismiss or to Strike Portions of the Complaint, filed on June 25, 2010.

compliance stage of the proceedings would prejudice the Acting General Counsel's prosecution of the case. The Board has stated that a "prerequisite for the finding and remedying of an unfair labor practice is that the unfair labor practice either be alleged in the complaint or fully and fairly litigated." See, e.g., *Postal Service*, 345 NLRB 1203, 1203 (2005), enfd. 254 Fed.Appx. 582 (9th Cir. 2007). Here, although the unnamed class is described in the Complaint, as previously noted, it would not be possible to litigate the unfair labor practices alleged against the unnamed employees on the merits, either fairly or fully, without knowing Respondent Union's response to the requests to revoke their check-off authorizations. Furthermore, the instant case involves potentially large sums of backpay as a remedy for the alleged unfair labor practices. In a similar situation, the Board stated that certain "matters that can be litigated at the unfair labor practice stage must be litigated at that stage and cannot be deferred to compliance." *FES*, 331 NLRB 9, 14, 17 (2000) (litigation of issues such as number of available vacancies, whether the alleged discriminatees had the experience and training relevant to the position, and whether the respondent would have selected better-qualified applicants even absent the alleged discriminatees' union status should not be deferred to compliance).

Finally, Respondent Union argues that the entire Subpoena should be quashed because, in essence, Respondent Union does not agree with the Acting General Counsel's theory of the case. Respondent Union argues that the Board does not have jurisdiction to enforce the technical requirements of Section 302(c)(4) of the Act. Such an assertion is without merit. For example, the Board has relied on Section 302(c)(4) of the Act to find that the union violated the Act by preventing employees from exercising their statutory right to revoke their check-off authorizations. *Atlanta Printing Specialties*, 215 NLRB 237, 237

(1974), enfd. 523 F.2d 783 (6th Cir. 1975). In addition, the Board has approvingly cited the *Atlanta Printing Board's* consideration of Section 302(c)(4) of the Act. *Electrical Workers IBEW Local 2088 (Lockheed Space Operations Co.)*, 302 NLRB 322, 325 n.8 (1991).

### **III. CONCLUSION**

For the reasons described above, Respondent's Petition should be denied, and the Respondent should be required to produce all subpoenaed documents to CAGC no later than the beginning of the hearing on June 29, 2010.

Dated at Phoenix, Arizona, this 28th day of June 2010.

/s/ Johannes Lauterborn  
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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 QUASH/PETITION TO REVOKE SUBPOENA DUCES TECUM 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 28<sup>th</sup> day of June 2010, on the following:

Via E-Gov and E-Mail:

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National Labor Relations Board  
Administrative Law Judges Division  
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