

UNITED STATE OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28

Fry's Food Stores, Employer,

and

UFCW Local 99, Union,

and

28-CB-7045, 28-CB-7047

28-CB-7048, 28-CB-7049

28-CB-7058, 28-CB-7062

28-CB-7063

Karen Medley, Kimberly Stewart,
Elaine Brown, Shirley Jones,
Saloomah Hardy, Janette Fuentes and
Tommy Fuentes, Charging Parties.

**CHARGING PARTIES' OPPOSITION TO UFCW
LOCAL 99'S PETITION TO REVOKE SUBPOENA**

Charging Parties hereby file this reply in opposition to UFCW Local 99's Petition to Revoke the General Counsel's Subpoena.

ARGUMENT

POINT 1: The union's Section 302 argument is fallacious. UFCW Local 99 dredges up Salant & Salant, 88 NLRB 816 (1950), a 60-year old case, for the proposition that the NLRB has no jurisdiction to enforce Section 302(c) of the NLRA, 29 U.S.C. § 186(c). However, the General Counsel's Complaint does not seek to enforce Section 302. Indeed, Section 302 is not mentioned in the General Counsel's Complaint or the Amended ULP charges that led to the issuance of the Complaint. Rather, the General Counsel's Complaint seeks to enforce the NLRA's prohibition against restraint and

coercion of nonmembers by a union seizing money illegally and without proper authorization. NLRA, 29 U.S.C. § 158(b).

Indeed, it is UFCW Local 99 that is raising Section 302 as a defense to the General Counsel's Complaint. Here, the union is taking money from nonmembers in a Right to Work State, Arizona,¹ which is illegal under Section 8(b) of the Act because the contract between Fry's and UFCW Local 99 contains no compulsory unionism clause as authorized by Section 8(a)(3) of the Act. The union's primary defense for seizing this dues money is that there exists a dues deduction agreement that is allegedly valid under Section 302(c).

In contrast, the Charging Parties and General Counsel assert that such a defense is groundless, since the union's continuing seizure of dues is invalid under §§ 8(a)(3) and 8(b) given: 1) the expiration of the collective bargaining agreement; and 2) the employees' attempts to revoke their dues deduction authorizations at the expiration of the collective bargaining agreement, which were uniformly denied by the union. See, e.g., Atlanta Printing Specialities, 215 NLRB 237 (1974). In short, the validity of the dues check off language under Section 302(c) is the union's defense, not the General Counsel's allegation.

In many cases, the Board has analyzed and adjudicated such defenses under Section 302(c), even while recognizing that it may lack jurisdiction to directly enforce

¹ See Ariz. Const. art. XXV; Ariz. Stat. § 23-1301 et seq.

that statute. See, e.g., Quality House of Graphics, Inc. Local One-1, 336 NLRB 497

(2001), where the Board stated:

While the Board is not charged by the statute with responsibility for enforcing Section 302, the Board has held that it is appropriate to consider the applicability of Section 302 as a possible defense to unfair labor practice allegations, in order to avoid placing a party in the position of being required to comply with two conflicting statutory mandates. BASF Wyandotte Corp., 274 NLRB 978 (1985), enfd. 798 F.2d 849 (5th Cir. 1986).

Similarly, in OXY USA, Inc., 329 NLRB 208, 212 (1999), the Board stated:

Authority to restrain violations of Section 302 is vested in the United States district courts by Section 302(d) and (e). The Board has no authority to enforce Section 302. Nevertheless, the Board has held that it would, if necessary, decide whether contract provisions violated Section 302 in deciding whether an unfair labor practice has been committed. National Fuel Corp., 308 NLRB 841, 843 (1992). It is therefore appropriate here to decide the merits of the General Counsel's claim that the Respondent's proposals are unlawful under Section 302 in determining whether its insistence to impasse on its bargaining proposal violated Section 8(a)(5).

See also Oklahoma Fixture Co., 331 NLRB 1116, 1120-22 (2000), enforcement denied, 295 F.3d 1143 (10th Cir. 2002).

The union cites NLRB v. Cameron Iron Works, Inc., 591 F.2d 1, 3 (5th Cir. 1979), but the Fifth Circuit did not directly address the Section 302 issue raised here:

Pointing out that enforcement of that section is the responsibility of the Department of Justice, the company cites Salant & Salant, 1950, 88 NLRB 816, 817, in which the Board stated that "the limitations on checkoff in Section 302 were intended neither to create a new unfair labor practice, nor even to be considered in determining whether checkoff violates § 8 of the Act." Since we find that, regardless of whether § 302 vests the Board with authority to act, the company and the union committed no unfair labor practices, we decline to add any gloss to that statute.

In short, UFCW Local 99 is wrong to assert that this case must be dismissed because the NLRB has “no jurisdiction” to provide a remedy under the facts of this case.

POINT 2: The General Counsel has the right to seek a remedy for, and subpoena information about, the many similarly situated discriminatees. The union’s Petition to Revoke argues at page 2 that virtually all of the Document Requests “should be quashed or revoked as to any member or person not specifically named as a charging party.” This assertion is laughable.

This case arose when the union declared an unpopular statewide strike against Fry’s Food Stores. According to media reports, the statewide bargaining unit is in excess of 10,000 employees. See <http://www.azbiz.com/articles/2009/11/11/news/doc4afaf0640dfcb909746073.prt> (copy attached as Exhibit 1). It is likely that hundreds (or thousands) of employees chose to exercise their rights to resign from the union and revoke their dues check-offs in the days leading up to the strike, especially once the contract expired and a strike was imminent. See *Pattern Makers v. NLRB*, 473 U.S. 95 (1985) (policy of federal labor law is “voluntary unionism”). In fact, some unhappy Fry’s employees picketed *the union* to show their disapproval of the strike. <http://www.youtube.com/watch?v=xVjzZg6Elj4>. Indeed, the Charging Parties know of many other Fry’s employees who suffered the same violations as they did. (See e.g., Exhibit 2, correspondence between UFCW Local 99 and one such similarly situated discriminatee, Fry’s employee Lauree Aguilar).

The union argues that the General Counsel cannot seek a “similarly situated” remedy in this case, but that notion is fanciful. The Board has frequently recognized that where a widespread pattern of unlawful activity has occurred in the context of §§8(b)(1)(A) or 8(b)(2) violations, the appropriate relief should include a remedy for the named discriminatees and all other individuals “similarly situated.” Ironworkers Local 433, 298 NLRB 35, 36 (1990) (“Where the General Counsel has alleged and proven discrimination against a defined and easily identified class of employees, the Board, with court approval, has found it appropriate to extend remedial relief to all members of that class, including individuals not named in the complaint.”); see also Grand Rapids Press, 325 NLRB 915, 915 (1998) (“In a variety of contexts, where discrimination has been alleged and found against a defined and easily identifiable class, the Board, with court approval, has found it appropriate to extend remedial relief to all members of that class.”).

In short, the General Counsel has every right to pursue a complete remedy for all similarly situated employees, and the union is not shielded from the General Counsel’s subpoena because it seeks information about the many other discriminatees.

XXX

XXX

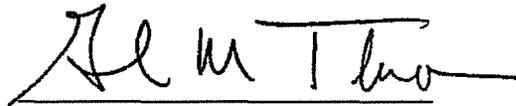
XXX

XXX

XXX

CONCLUSION: For these reasons, the Petition to Revoke should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Glenn M. Taubman". The signature is written in a cursive style with a horizontal line underneath the name.

Glenn M. Taubman, Esq.
c/o National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
gmt@nrtw.org

Attorney for Charging Parties

CERTIFICATE OF SERVICE

Pursuant to Section 102.114 of the Board's Rules and Regulations, I hereby certify that a true and correct copy of the foregoing Charging Parties' Opposition to the Petition to Revoke was E-filed with the NLRB Division of Administrative Law Judges, and was sent as follows to the other parties:

via E-filing with Region 28 and via e-mail to:

Johannes Lauterborn, Esq.
NLRB Region 28 (Counsel for the General Counsel)
Johannes.Lauterborn@nlrb.gov

and via e-mail to:

Adam Zapala, Esq.
Davis Cowell & Bowe (Counsel for UFCW Local 99)
az@dcbsf.com

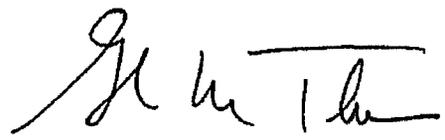
and via e-mail to:

Steve Stemmerman, Esq.
Davis Cowell & Bowe (Counsel for UFCW Local 99)
stem@dcbsf.com

and via e-mail to:

Frederick C. Miner, Esq.
Littler Mendelson (Counsel for the Employer)
Fminer@littler.com

this 24th day of June, 2010.



Glenn M. Taubman



Union preparing for strike against Safeway, Fry's

By Joe Pangburn, Inside Tucson Business
Published on Wednesday, November 11, 2009

The United Food and Commercial Workers Local 99 is meeting today in Phoenix to begin training picket captains and assemble picket signs for a potential strike it may call Friday night.

Fry's Food and Safeway are currently engaged in labor negotiations with the UFCW Local 99. The current labor contract expired last year, and a recent extension expired on October 31. The organization has set a deadline for negotiations with the grocers of Friday at 6 p.m. If an agreement on a new contract is not met, the union will call for more than 20,000 employees between both companies to go on strike.

On the union's website, they said leaders of the UFCW International Union, presidents of UFCW local unions from across North America, and representatives of our many union allies in the Food & Drug Council will also be attending the meeting today.

"The message we are receiving is emphatic: Whatever happens on Friday, we will not be alone," said the note on the website.

The key issues in the contract negotiations include disputes over wage increases and employee contributions to health-care premiums. Employees don't contribute to health-care premiums now, but the employers' offer included contributions from newly hired workers of \$5 to \$15 per pay period.

Yesterday, Fry's and Safeway entered into a "mutual strike assistance and lockout agreement" which allows, but does not require, either Safeway or Fry's to force union members into a strike if members strike at the other employer. The agreement does not preclude either Fry's or Safeway from independently entering into a settlement with UFCW Local 99.

Fry's has 120 stores in Arizona and employs 17,000 people, 12,000 of which are union members. Safeway employs 10,000 union members in its 116 stores around the state.

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Exhibit 1

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*****
*** FAX TX REPORT ***
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TRANSMISSION OK

JOB NO.                4434
DESTINATION ADDRESS    96022510459
PSWD/SUBADDRESS
DESTINATION ID
ST. TIME              11/10 17:36
USAGE T               00'15
PGS.                  1
RESULT                OK

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November 10, 2009

SEQ Chapter Secretary-Treasurer Paul Rubin
UFCW Local 99
2401 North Central Avenue, 2nd Floor
Phoenix, AZ 85004

Dear Mr. Rubin:

Effective immediately, please accept my resignation from UFCW Local 99.

Now that there is a contract "hiatus" and there is no longer a collective bargaining agreement in effect between the union and my employer, Fry's, you must cease deducting any further union dues from my salary. In the absence of a collective bargaining agreement, there is a new "window period" for revocation of dues deduction authorizations. I hereby revoke and rescind any dues deduction authorization I may have signed.

Please notify me promptly if you believe this dues revocation is inadequate or untimely in any way.

Sincerely,

Lauree Aguilar
Name (Print)

Lauree Aguilar

Exhibit 2

7008 7740 0810 0617

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Package	\$ 0.44	043J
Certified Fee	\$2.80	
Return Receipt Fee (Endorsement Required)	\$2.30	
Registered Delivery Fee (Endorsement Required)	\$0.00	
Total Package & Fees	\$ 5.54	



Sent to

Street, Apt. No.
or PO Box No.

City, State, ZIP+4

US Form 3800, August 2005 See Reverse for Instructions



a VOICE for working America

www.ufcw99.com

JAMES J. McLAUGHLIN - President, International Vice President

PAUL RUBIN - Secretary / Treasurer

November 10, 2009

Ms. Lauree Aguilar
1121 N. Steele St.
Mesa, AZ 85207

RE: Request for Membership Withdrawal Received

Dear Ms. Aguilar:

Please be advised that your request for withdrawal of membership from United Food and Commercial Workers Local 99 is accepted, and you will no longer be eligible for Members Only Benefits, or participate in union meetings or activities.

However, the dues check-off authorization which is separate and apart from the membership application states that request for withdrawal must be made in writing not less than thirty (30) days not more than forty-five (45) days prior to the anniversary date of the execution of the agreement.

Only when you send your request at the appropriate time may we honor your request for withdrawal from the dues check-off authorization. If you would like these dates, please contact us in writing requesting this information. In addition, enclosed is a copy of the dues authorization you signed.

If you have a contractual question or grievance with which this Local Union may assist you, please contact me (602) 254-0099.

Sincerely,

Kathy Stephens
Union Representative

KS/jr

cc: Stan Chávira

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 99

2401 North Central Avenue, 2nd Floor, Phoenix, Arizona 85004-1331 • Main: (602) 254-0099 • TF: (800) 997-0099 • F: (602) 251-0459
827 South Alvernon Way, Suite 100, Tucson, Arizona 85741-5259 • Main: (520) 994-0746 • TF: (800) 997-0099 • F: (520) 994-0888



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www.ufew99.com

JAMES J. McLAUGHLIN - President, International Vice President

PAUL RUBIN - Secretary / Treasurer

December 9, 2009

Ms. Lauree Aguilar
1121 N. Steele St.
Mesa, AZ 85207

RE: Request for Membership Withdrawal Received

Dear Ms. Aguilar:

Please be advised that your request for withdrawal of membership from United Food and Commercial Workers Local 99 is accepted, and you will no longer be eligible for Members Only Benefits, or participate in union meetings or activities.

However, the dues check-off authorization, which is separate and apart from the membership application states that request for withdrawal must be made in writing not less than thirty (30) days and not more than forty-five (45) days prior to the anniversary date of the execution of the agreement.

Only when you send your request at the appropriate time may we honor your request for withdrawal from the dues check-off authorization. If you would like these dates, please contact us in writing requesting this information. I have also enclosed a copy of the dues authorization you signed.

If you have a contractual question or a grievance with which this Local Union may assist you, please contact me at 602-254-0099.

Sincerely,

Kathy Stephens
Union Representative

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MembWith
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UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 99

2401 North Central Avenue, 2nd Floor, Phoenix, Arizona 85004-1331 • Main: (602) 254-0099 • TF: (800) 997-0099 • F: (602) 251-0459
877 South Alhambra Way, Suite 100, Tucson, Arizona 85711-5352 • Main: (520) 884-9716 • TF: (800) 997-0099 • F: (520) 884-9023

FRYS FOOD & DRUG STORES
2700 EAST 4TH STREET
HUTCHINSON

KS 67501

LAUREE E
FRHR

DESCRIPTION	DATE	HOURS	EARNING	YEAR TO DATE	TAXES/DED.	YEAR TO DATE
REGULAR EARNING	10720	2925	31356	120528	FEDERAL TAX 491	2670
PERSONL HOLIDAY			00	4288	SOCIAL SEC TAX 1944	25630
SUNDAY PAY			00	60568	MEDICARE TAX 454	5894
VACATION PAY			00	28011	ARIZONA 131	709
					UNION DUES 1	14714
					ACH NET CHRG 27285	363678

CURRENT	DEBIT	TOTAL	DEDUCTIONS	NET PAY	PAY PERIOD	CHECK NO.	AMT OF CURRENCY
31356	-	3020	-	27285	04-04-2010	1055	27285
413395	-	35003	-	363878	04-10-2010		

A SATISFIED CUSTOMER MADE THIS CHECK POSSIBLE.



4 Key Initiatives

- 1) Our People Are Great!
- 2) The Shopping Experience Makes Me Want to Return!
- 3) I get the Products I Want Plus a Little!
- 4) Our Prices Are Great!



HUGHES FCU

ACH NET CHKG

DATE	Advice No.
04-15-2010	1055

ADVICE AMOUNT
272.85

FR HR 04 023 SFRT
LAUREE E AGUILAR
1121 N. STEELE ST.
MESA AZ 85207

VOID

REMOVE SIDE EDGES FIRST THEN FOLD, CREASE AND TRIM ALONG PERFORATION
PRIMERO QUTE LOS BORDES LATERALES, LUEGO DOBLE, PUEDE
LADRE AGUILAR, LADRE TAJON POR LA PERFORACION

BOTH COPIES TO BE RETURNED TO LOCAL UNION OFFICE

POOLER



United Food and Commercial Workers International Union
 Membership Application
 UFCW Local 99 - Phoenix, Arizona

ENTERED
 10/1/07

Please print or type Aguilar

Last Name <u>Aguilar</u>	First Name <u>Lauree</u>	Initial <u>E.</u>	Sex <u>F</u>	Date of Birth <u>01/01/00</u>	Social Security Number <u>000-00-0000</u>	
Mailing Address <u>8738 E. Fairfield St.</u>		Apt. or S.P.# <u></u>		City <u>Mesa</u>	State <u>AZ</u>	Zip Code <u>85207</u>
Area Code <u>(480)</u>	Home Phone <u>629-8774</u>	E-Mail Address <u></u>		Married <input type="checkbox"/> Single <input type="checkbox"/>	Date of Hire <u>11-06</u>	Full Time <input type="checkbox"/> Part Time <input checked="" type="checkbox"/>
Company Name <u>Fry's</u>		Store # <u>023</u>	Business Address <u></u>			
Type of Work Performed <u>Cashier</u>		Previous Affiliation, Local Number <u></u>		Average Weekly Hours <u>120</u>		
<small>I hereby make application for the membership in the UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION and affirm that I am above 18 years of age, and I agree that all monies, paid by me shall be taken from my earnings and I agree that I may not sue, I sue with the UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION for representation for the purpose of collective bargaining and handling of grievances, state directly or through such local union as I may duly designate.</small>				Applicant's Signature <u>Lauree Aguilar</u>		Date Signed <u>4/30/07</u>
				Local Union Executive Officer's Signature <u>[Signature]</u>		Affiliation Date <u>01/07</u>

F23

9.05

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.

4-30-07
 Date Signed
0000-00-0000
 Social Security Number

Lauree Aguilar
 Signature
Lauree Aguilar
 Name Printed