

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

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

Employer,

Cases: 28-CA-22836

and

28-CA-22837

28-CA-22838

UFCW LOCAL 99,

28-CA-22840

28-CA-22858

Union,

28-CA-22871

28-CA-22872

and

28-CB-7045

28-CB-7047

**KAREN MEDLEY, KIMBERLY STEWART,
ELAINE BROWN, SHIRLEY JONES,
SALOOMEH HARDY, JANETTE FUENTES
and TOMMY FUENTES**

28-CB-7048

28-CB-7049

28-CB-7058

28-CB-7062

28-CB-7063

Charging Parties.

**BRIEF OF FRY'S FOOD STORES IN OPPOSITION
TO EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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I. STATEMENT OF THE CASE

Smith's Food & Drug Stores, d/b/a Fry's Food Stores ("Fry's") and United Food and Commercial Workers Local 99 ("Local 99" or the "Union") were parties to an agreement dated October 26, 2003 (the "2003 Agreement") that included an article providing for the deduction and remittance to the Union of amounts equivalent to dues for employees who authorized such payments. The 2003 Agreement expired by its terms on October 25, 2008, but continued without interruption as a result of a series of extensions lasting through October 31, 2009. Fry's maintained the status quo during the extensions and the short hiatus preceding the parties' agreement on terms for a successor, including by continuing to deduct and remit to the Union amounts equivalent to dues. The parties' new agreement eventually was reached November 12, 2009, and was made retroactive to October 25, 2008 (the "2008 Agreement").

Prior to the 2008 Agreement employees discussed the possibility of a labor dispute, and some resigned their Union membership or submitted checkoff revocation instructions that did not effectively terminate their written authorizations. The Complaint contends that by continuing to demand that Fry's deduct amounts equivalent to dues from the wages of employees who resigned, and by rejecting untimely authorization revocation requests, Local 99 restrained and coerced employees, breached its duty of fair representation, and caused Fry's to violate Section 8(a)(3) of the National Labor Relations Act, in violation of Sections 8(b)(1)(A) and 8(b)(2). The Complaint alleges concomitant violations of Sections 8(a)(1), (2) and (3) of the Act by Fry's.

Administrative Law Judge William Kocol (the "ALJ") received evidence at a hearing on January 18, 2011, and rendered a Decision dated May 3, 2011 (the "ALJD"), dismissing it in its entirety on the basis of "clear precedent." ALJD p. 3, line ("1.") 40. Specifically, the ALJ concluded that "employees voluntarily signed checkoff authorizations that were clearly *not*

linked to union membership.” ALJD p. 3, l. 27-28. Consequently their membership resignations did not terminate their checkoff obligations under *Electrical Workers Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991) (“*Lockheed*”), and *United Steelworkers of America, Local 4671 (National Oil Well)*, 302 NLRB 367 (1991). *Id.* p. 3, l. 31-32. Additionally, the ALJ concluded that employees’ purported authorization revocations were untimely and therefore ineffective. *Id.* p. 3, l. 28-29. The Acting General Counsel’s (the “AGC”’s) theory that employees’ authorizations became revocable at will following expiration of the 2003 Agreement is “untenable” under *Frito Lay, Inc.*, 243 NLRB 137, 144 (1979). ALJD p. 3, l. 35-36.

The ALJ’s Decision correctly applies longstanding Board precedent to dismiss the Complaint in this remarkably straightforward case. Neither AGC nor Counsel for the Charging Parties (“CCP”) distinguishes the controlling precedents. Neither articulates any persuasive reason for overruling them. The ALJ’s Decision should be adopted.

II. STATEMENT OF FACTS

A. Background Concerning Employees’ Check Off Authorization Agreements

Fry’s operates retail grocery stores in Arizona. Amended Consolidated Complaint (“Complaint”) ¶ 2(a); Fry’s Answer to the Complaint (“Fry’s Answer”) ¶ 2. Most of Fry’s hourly employees are members of a bargaining unit represented by Local 99. *See* Complaint ¶ 5(a); Fry’s Answer ¶ 5. Fry’s and the Union were parties to a 2003 Agreement that provided for the deduction and remittance to the Union of amounts equivalent to dues from the wages of employees who authorized such payments in writing. Complaint ¶ 5(b); Fry’s Answer ¶6. The Charging Parties were Union members who authorized check offs to Local 99.

At least since 1992, Local 99 has employed the same form of check off agreement to document employees’ authorization for the deduction and remittance of amounts equivalent to dues. Tr. 66, 165. First, the agreement authorizes the deduction and remittance of amounts fixed

by Local 99. *See* General Counsel Exhibit (“GC Exh.”) 10 p. 1. Second, the agreement acknowledges that the check off of such amounts is not based upon membership in the Union but rather is in “consideration for the cost of representation and collective bargaining” on behalf of the entire bargaining unit. *Id.* The check off obligation “is not contingent upon” but continues irrespective of “present or future membership in the Union.” *Id.* Third, the agreement states its duration and provides that it will automatically renew unless revoked as follows:

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. *Id.*

The undisputed evidence demonstrates that for at least 20 years the Union’s practice has been to treat an attempted revocation of this form of agreement as effective if submitted during a window period either (1) 30 to 45 days before the anniversary of the employee’s execution of the authorization agreement, or (2) 30 to 45 days before the expiration of the Union’s agreement with Fry’s. Tr. 170. The authorization agreement also requires that an effective revocation must be in writing, it must express the employee’s intention to revoke the authorization, and it must be signed. Copies of the revocation notice must be provided both to Local 99 and to Fry’s.

Check offs for Fry’s employees who authorize them are administered from a corporate payroll facility. Tr. 99. Weekly, Local 99 transmits an electronic list of employees from whose wages deductions are to be made. Tr. 99-100, 101. The payroll facility processes the Union’s electronic instructions and remits the authorized amounts to Local 99. Tr. 100.

B. Background Concerning Expiration Of The 2003 Agreement And Negotiations Leading To The 2008 Agreement

The 2003 Agreement expired by its terms on October 25, 2008. Accordingly, a window period for revocation of employees’ check off authorizations opened prior to expiration of that

Agreement on September 10, and closed on September 25, 2008. This is about a year before Fry's received the first of the attempted revocation notices that are at issue in this case.

Fry's and Local 99 negotiated a series of agreements extending the terms of the 2003 Agreement after October 25, 2008. Tr. 64. The extensions contained provisions allowing either party to terminate them with seven days notice after December 15, 2008. GC Exh. 6. Because notice of termination was not given by either party, and each extension agreement was entered prior to the expiration of the last one, the 2003 Agreement continued without interruption. *Id.* The final extension was dated October 4, 2009, and expired at midnight on October 31, 2009. *Id.*

For a short period after October 31, 2009, there was no contract in effect between Fry's and Local 99, and employees anticipated a potential strike. Tr. 125. Fry's continued to process Local 99's check off requests as it did during the 2003 Agreement including extensions. The Union continued to receive and accept those payments. GC Exh. 7, Employer's Remittance of Dues to Union, Union's Acceptance of Dues. Terms of the 2008 Agreement were agreed upon and a final retroactive extension was entered on November 12, 2009. GC Exh. 6.

C. Fry's Receives Copies Of Resignation And Checkoff Revocation Requests

From September 28 through November 12, 2009, Fry's received copies of letters from 56 employees, including five of the Charging Parties, informing Local 99 of their intention to resign, or requesting to discontinue the deduction of amounts equivalent to dues, or both. Union Exhibit ("Un. Exh.") 16. *See* GC Exh. 7, Summary of Resignations ("Resignation Summary"), Summary of Revocations ("Revocation Summary"). 11 of the letters contained short, plain statements announcing the employees' resignations. They made no reference to check off authorizations and did not request to discontinue the deduction of amounts equivalent to dues.¹

¹ *See* GC Exh. 7, Bates Nos. 950, 1301, 1345, 1463, 1546, 1757, 1897, 2151, 2165, 2240, 2262.

27 of the letters were prepared using a common form asserting that the employee's check off authorization was not effective following his or her resignation, citing *Lockheed*.² Eight letters used an alternative form that referred to the existence of a "hiatus" between contracts and claimed the right to revoke during a new "window period" measured by reference to it.³ Several other letters included at least an arguable request to discontinue check offs.⁴

The Union promptly accepted the resignation notices. *See* GC Exh. 7, Resignation Summary and Revocation Summary. It denied, however, untimely requests to revoke check off authorizations. *Id.* The Union's letters to employees included the beginning and ending dates of the next occurring window periods during which they could revoke their authorizations, or stated that the dates may be obtained by contacting the Union. *Id.* All of the window periods preceded the anniversary of the employee's written authorization. At the time of the Union's letters, the window period preceding expiration of the 2003 Agreement had passed, and the new 2008 Agreement had not yet been reached. As a result, it would not have been possible to foresee a window period opening upon expiration of the new agreement in October 2012.⁵

The Union's responses were correct, as illustrated in each of the Charging Parties' cases:

- Ms. Stewart signed her authorization agreement on July 29, 2007. Tr. 110; GC Exh. 8. As a result, her annual window period for revocation was between June 14 and 29. Fry's received a copy of her purported revocation dated November 9, 2009, on about November 16, 2009. Tr. 112, 121.

² GC Exh. 8, 11, 13; GC Exh. 7, Bates Nos. 7, 13, 84, 189, 343, 361, 394, 403, 410, 742, 1051, 1184, 1311, 1573, 1679, 1728, 1805, 1813, 1943, 2134, 2174, 2190 and 2511.

³ *See* GC Exh. 8, p. 5; GC Exh. 9, p.3; GC Exh. 11, p. 6; GC Exh. 12, p. 4; GC Exh. 13, p. 2; Un. Exh. 16; GC Exh. 7, Bates Nos. 43, 63, 85, 109, 1821, and 2116.

⁴ *See* Un. Exh. 16; GC Exh. 7, Bates Nos. 46, 713, 807, 883, 1142, 1156, 2123, and 2469.

⁵ AGC and CCP argue that the letters refute that the authorizations incorporate a window period upon contract expiration. AGC Brief p. 9; CCP Brief p. 7. For the reasons above, and as the ALJ concluded, this is a nonissue and a "mere distraction." ALJD p. 9, l. 17-18.

- Ms. Jones signed her authorization agreement on November 15, 2000. Tr. 137; GC Exh. 10. As a result, her annual window period for revocation was between October 1 and October 16. Fry's received a copy of her purported revocation dated November 10, 2009, on about November 12, 2009. Tr. 134.
- Ms. Brown signed her authorization agreement on October 25, 2003. Tr. 141; GC Exh. 11. As a result, her annual window period for revocation was between September 10 and September 25. Fry's received a copy of her purported revocation dated November 10, 2009, on about November 16, 2009.
- Ms. Hardy signed her authorization agreement on October 6, 2004. GC Exh. 12. As a result, her annual window period for revocation was between August 22 and September 6. Fry's received a copy of her purported revocation dated November 9, 2009, on about December 4, 2009. Tr. 153.
- Ms. Medley signed her authorization agreement on October 11, 1999. Tr. 154. As a result, her annual window period for revocation was between August 26 and September 11. Fry's received a copy of her purported revocation dated November 13, on about November 16. Tr. 155; GC Exh. 13.
- Fry's did not receive a revocation request from Ms. Fuentes or Mr. Fuentes.

III. EMPLOYEES WHO RESIGNED MEMBERSHIP IN THE UNION DID NOT EFFECTIVELY REVOKE THEIR CHECK OFF AUTHORIZATIONS

The Complaint alleges, in pertinent part, that Local 99 failed to honor certain members' resignations when it continued to accept dues that Fry's deducted from their wages and remitted to it pursuant to written check-off authorizations.⁶ In doing so, the Union allegedly received unlawful assistance from Fry's, Complaint ¶ 15(a), breached its fiduciary duty to bargaining unit employees, *id.* ¶ 15(b), restrained and coerced employees in the exercise of Section 7 rights, *id.* ¶ 18, and attempted to cause and caused Fry's to discriminate against its employees. *Id.* ¶ 19.

The Complaint contains corresponding allegations against Fry's. Although it does not allege that Fry's had notice of any employee's Union resignation, the Complaint nevertheless states that Fry's failed to honor those resignations by continuing to deduct and remit money from

⁶ Complaint ¶¶ 6(a), 6(d), 7(a), 7(d), 8(a), 8(d), 9(a), 9(d), 10(a), 10(d), 11(a), 11(d), 12(a), 12(d), 13(a), 13(d).

the employees' wages pursuant to their check-off authorizations.⁷ In doing so, Fry's allegedly rendered unlawful assistance and support to the Union and encouraged employees to join or assist the Union. *Id.* ¶¶ 14(a), (b), 16, 17.

The pertinent paragraphs of the Complaint have no merit because the Union accepted, and Fry's in no way interfered with the acceptance of any employee resignations. The resignations simply did not include, and were in no way tantamount to, requests to revoke dues checkoff authorizations. The fact that an employee resigned his or her membership was irrelevant to the continuing obligation specifically stated in their authorization agreements.

Under the test announced in *Lockheed*, 302 NLRB at 328 ("We recognize that paying dues and remaining a union member can be two distinct actions") the employees' authorizations continued post-resignation until revoked in accordance with their terms. The Board's *Lockheed* test was applied, in circumstances identical to those here, in *Steelworkers Local 4671*, 302 NLRB at 368 ("Because there is explicit language within the check-off authorization clearly setting forth an obligation to pay dues even in the absence of union membership, dues were still owing under [the employee's] check-off authorization after his resignation of membership."). As in that case the authorizations signed by employees here are not linked to union membership.

In *Lockheed*, 302 NLRB at 328, the Board ruled that an employee may be bound to continue paying dues pursuant to a check-off authorization even in the absence of a membership obligation in a labor agreement, and even after resigning his or her membership. Under the new test it articulated, the Board employs the *clear and unmistakable waiver* standard to determine whether, in a given case, the check-off authorization is conditioned upon a continuing obligation to pay dues in the first place. It stated:

⁷ Complaint ¶¶ 6(f), 7(f), 8(f), 9(f), 10(f), 11(f), 12(f), 13(f).

Explicit language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership will be required to establish that the employee has bound himself or herself to pay the dues even after resignation of membership. *If an authorization contains such language, dues may properly continue to be deducted from the employee's earnings and turned over to the union during the entire agreed-upon period of irrevocability, even if the employee states he or she has had a change of heart and wants to revoke the authorization.* *Id.* at 329 (emphasis added).

In *Lockheed*, the charging party's authorization did not waive, clearly and unmistakably or otherwise, his right to refrain from assisting the union during periods when he chose not to be a member. To the contrary, the authorization to his employer to pay, on his behalf, "membership dues" to the union required deductions to continue only so long as he remained a member and continued to be obligated to pay the dues. By contrast, in *Steelworkers Local 4671*, decided the same day as *Lockheed*, the authorization expressly provided that the check-off of dues would continue "irrespective of [the employee's] membership status in the Union." 302 NLRB at 367 n. 2. As in *Lockheed*, the case arose in a Right to Work state and in the absence of any obligation in an effective collective bargaining agreement to support the union. Nevertheless, the check-off authorization became the source of the signer's continuing obligation to remit amounts equivalent to dues even after his resignation:

We find that [the charging party] clearly authorized the continuation of his dues deduction even in the absence of union membership. Because there is explicit language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership, dues were still owing under [the] checkoff authorization after his resignation of membership. *Id.* at 368.

In this case, each of the Charging Parties signed an authorization stating that it was "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.*" See, e.g., GC Exh. 8, p. 1; GC Exh. 11, p. 1; GC Exh. 12, p. 1. The authorizations are in no way conditional upon the employees' continued membership in the Union to be effective. It cannot reasonably be disputed

that those who signed authorization agreements clearly and unmistakably waived the right to refrain from providing financial support to the Union, including during times when they elected to resign their membership or refrain from supporting it in other ways. The Board's decisions in *Lockheed, USWA Local 4671*, and similar cases are dispositive of the pertinent paragraphs in the Complaint. See *American Tel. and Tel. Co.*, 303 NLRB 944, 945 (1991) (“[W]e find that...the dues-checkoff authorization signed by the Charging Party obligated her to pay dues after her effective resignation from membership.”); *Schweizer Aircraft Corp.*, 320 NLRB 528, 532 (1995) (“[We] find that [the charging party] remained liable for the payment of dues irrespective of his membership status in the Respondents, and that his resignation from membership in the Respondents did not make the continued effectuation of his checkoff an infringement of his Section 7 right to refrain from union support.”).

AGC has not disputed the application of *Lockheed* to this case. In fact, AGC concedes that the language of the authorizations is “sufficiently explicit and clear to set forth an employee’s obligation to pay dues even in the absence of Union membership.” AGC Brief p. 12.

Nevertheless, AGC and CCP both argue that *Lockheed* somehow limits the effectiveness of the authorization forms. In particular, they argue that *Lockheed* prohibits the authorization’s automatic renewal following the signer’s membership revocation, *notwithstanding the signer’s agreement in the authorization to the contrary*. AGC Brief p. 13; CCP Brief p. 5. Thus, AGC argues that “employees who resigned nonetheless were not required to continue paying dues after their resignations because there no longer existed any ‘agreed-upon period of irrevocability.’” AGC Brief p. 13. In AGC’s and the Charging Parties’ view, the agreed upon period of irrevocability ended upon expiration of the 2003 Agreement.

This argument directly contradicts the automatic renewal provision in the authorizations,

and the conceded, uniform prior history of effective annual renewals. The argument also distorts the holding of *Lockheed* based upon a truncated reading of the Board's decision. The Board's complete statement, that "dues may properly continue to be deducted from the employee's earnings and turned over to the union during *the entire agreed-upon period of irrevocability*, even if the employee states he or she has had a change of heart and wants to revoke the authorization," simply reiterates its holding. 302 NLRB at 329 (emphasis added). *Lockheed* makes it clear that an employee's check-off authorization may continue until it is revoked in accordance with the procedure prescribed in the agreement itself. As the Board explained, "there is *no reasonable basis* for precluding an employee from individually agreeing that he will pay dues to a union whether or not he is a member of it...*Neither is there a reasonable basis for precluding enforcement of such a voluntary agreement.*" *Id.* at 328 (emphasis added). See *Allied Prod. Workers Un. Local 12*, 337 NLRB 16, 18-19 (2001) ("There is *no reasonable basis* for precluding any of the charging parties from individually agreeing to pay dues to a union whether or not she is a member and to pay such dues through a checkoff") (emphasis added); *Auto Workers Local 788*, 302 NLRB 431 (1991) ("an employee may voluntarily agree to continue dues deductions pursuant to a checkoff authorization that remains effective even after that employee resigns from union membership").

Employees agreed to continue financially supporting the Union notwithstanding their membership status, in clear and unambiguous terms. As a result, the employees' authorizations continued notwithstanding their resignations in accordance with the terms of the authorizations themselves. As the ALJ concluded, and as described more fully below, the authorizations in this case continued unless timely revoked during a window period preceding the anniversary of the employee's authorization, or expiration of the parties' collective bargaining agreement.

IV. EMPLOYEES' FAILURE TO COMPLY WITH THE REVOCATION REQUIREMENTS IN THEIR AUTHORIZATION AGREEMENTS JUSTIFIED CONTINUATION OF THEIR CHECK OFFS

The Complaint alleges that Local 99 failed to honor certain employees' written requests to revoke their check off authorizations by continuing to accept amounts that Fry's deducted from their wages.⁸ In doing so, the Union allegedly received unlawful assistance from Fry's, Complaint ¶ 15(a), breached its fiduciary duty to bargaining unit employees, *id.* ¶ 15(b), restrained and coerced employees in the exercise of Section 7 rights, *id.* ¶ 18, and attempted to cause and caused Fry's to discriminate against its employees. *Id.* ¶ 19.

The Complaint also alleges that Fry's received certain written revocation requests from employees,⁹ but failed to honor those requests by continuing to deduct and remit payments from the employees' wages pursuant to their check-off authorizations.¹⁰ In doing so, Fry's allegedly rendered unlawful assistance and support to the Union and encouraged employees to join or assist the Union. Complaint ¶¶ 14(a), (b), 16, 17.

As the ALJ concluded, the Complaint allegations have no merit. Employees entered authorization agreements with the Union that require written notice of revocation both to Fry's and Local 99, and that further require notice of revocation must be timely. The authorization agreements provide two window periods for revocation, one occurring prior to expiration of the parties' collective bargaining agreement, and one annually prior to the anniversary of the authorization agreement itself. The ALJ correctly concluded that "None of the Charging Parties submitted their resignations during the window periods set forth in the checkoff authorizations."

⁸ Complaint ¶¶ 6(b), 6(e), 7(b), 7(e), 8(b), 8(e), 9(b), 9(e), 10(b), 10(e), 11(b), 11(e), 12(b), 12(e), 13(b), 13(e).

⁹ Complaint ¶¶ 6(c), 7(c), 8(c), 9(c), 10(c), 11(c), 12(c), 13(c).

¹⁰ Complaint ¶¶ 6(f), 7(f), 8(f), 9(f), 10(f), 11(f), 12(f), 13(f).

ALJD p. 6, l. 32-33. Accordingly, their attempted revocations were ineffective.

AGC concedes that “it is true that the revocations were ‘untimely’ in the sense that no employee revoked during the anniversary-date window period.” AGC Brief p. 7. However, he argues that the authorizations became revocable at will upon expiration of the 2003 Agreement. As the ALJ concluded, the Board’s rule is to the contrary.

In *Frito-Lay*, 243 NLRB at 137, the Board rejected the claim that check-off authorizations become revocable at will following expiration of the collective bargaining agreement between the employer and employees’ representative. The Board further held that providing employees an opportunity to revoke their authorizations during window periods preceding the anniversary of their authorizations, and preceding expiration of the applicable collective bargaining agreement, is permissible and does not conflict with Section 302(c)(4):

[T]here is no violation of Section 302(c)(4) if checkoff authorizations are irrevocable for stated periods and automatically renewed for like periods, so long as employees are accorded an opportunity to revoke their authorizations at least once a year and at the termination of any applicable collective-bargaining agreements. And the limiting of the opportunity to revoke to a reasonable escape period, such as between 20 and 10 days before the expiration of either of these periods, does not require a different result. *Id.* at 138.

The authorizations in the instant case specifically state that they are “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.” That language closely tracks the language of Section 302(c)(4), which states that a written assignment “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 sooner.” 29 U.S.C. § 186(c)(4). In particular the reference in Local 99’s form of authorization agreement to “the termination date of the agreement between the Employer and Local 99,” appears to be designed specifically to

incorporate the language in Section 302(c)(4) pertaining to “the termination date of the applicable collective bargaining agreement.”

The authorizations also state that following the defined period of irrevocability, they will renew “from year to year thereafter”, provided that they may be revoked at the end of any “subsequent yearly period,” a period that necessarily is defined by reference *either* to the anniversary date of the authorization (“one (1) year from the date of execution”) *or* by “the termination date of the agreement between the Employer and Local 99.” In particular, the authorization agreement states an employee may revoke his or her agreement by giving “the Employer and Union written notice of revocation bearing by signature thereto,” provided it is furnished “not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period.” This language incorporates the requirement that the authorization provide a revocation opportunity annually or at the expiration of the applicable collective bargaining agreement, and meets the requirements of *Frito-Lay*. 243 NLRB at 138 (“the limiting of the opportunity to revoke to a reasonable escape period, such as between 20 and 10 days before the expiration of either of these periods, does not require a different result.”).

The ALJ correctly applied these principles and dismissed the Complaint in pertinent part.

He explained as follows:

Applying the checkoff-authorization form in the context of the October 26, 2003, to October 25, 2008 collective-bargaining agreement, every employee who signed an authorization during that contract could revoke the authorization during the window periods preceding the yearly anniversary date that the employee signed the authorization. In addition, employees who signed authorizations during the last year of the contract could revoke their authorizations upon the expiration of that contract.

ALJD p. 6, l. 24-29. The ALJ also correctly concluded as follows:

I have already concluded [that] the authorizations were sufficiently clear to allow each employee who signed an authorization during the 2003-2008 contract the opportunity to revoke the authorization during the window periods preceding the

yearly anniversary date that the employee signed the authorization. In addition, employees who signed authorizations during the last year of the contract could revoke their authorizations upon the expiration of that contract.

ALJD p. 10, l. 7-13.

AGC nevertheless contends that the ALJ somehow overlooked employees' right to revoke "after the expiration of the applicable collective-bargaining agreement, in this case, after October 25, 2008." AGC Brief p. 6. But the ALJ in no way overlooked that issue; as AGC points out in his brief, the ALJ specifically addressed the subject of revocation upon expiration of the applicable agreement and found that the employees' authorizations encompassed a window period for revocation preceding that date. AGC simply advances a different interpretation of the authorizations, one that would restrict the window period for revocation to an annual anniversary date. But as described above, there is nothing in the authorization form precluding the Union's interpretation, approved by the ALJ, to the effect that the window period opens at recurring periods which are measured by reference *either* to an anniversary date *or* expiration of the parties' agreement. In no way can this construction be considered "belated," "tortured," an "after-thought," "totally incorrect" or "tautological[]" as the AGC's Brief breathlessly contends. AGC Brief pp. 1, 6-7. It is supported by the Union's practice over decades of applying the window period for revocation to expiration of its agreements with Fry's.

The Charging Parties also incorrectly argue that employees' authorizations became revocable as a result of a series of extensions entered by Fry's and the Union during the good faith negotiations that lead to the 2008 Agreement. CCP Brief p. 13. CCP's citation to *Murtha v. Pet Dairy Products Co.*, 314 S.W.2d 185, 189-190 (Tenn. App. 1957) simply is not controlling; and in any event, *Murtha* involved circumstances that were entirely different from this case. The state court found that the authorizations there became revocable by the rather straight-forward application of their terms: where the employees' authorizations were revocable

during a window period defined by reference to expiration of the collective bargaining agreement, and that agreement was extended on a day to day basis during bargaining, the authorizations became revocable day to day as well. By contrast there is no reasonable interpretation of the extension agreements in this case that would defeat the normal operation of the authorizations or render them revocable at will. Nothing in the bargaining history warrants finding that the authorizations employees signed became revocable contrary to their terms.

AGC's and the Charging Parties' efforts to argue that the revocation requirements of the authorization agreements were somehow canceled by operation of law, or by the Union's conduct, demonstrates that there simply is no reasonable interpretation of that language under which the employees' attempted revocations were timely. The employees here failed to comply with the revocation language in the authorization agreements, and as a result those agreements continued. That result is the necessary consequence of the employees' own voluntary consent in their authorization agreements. In short, the deal they entered with Local 99 has been preserved. There has been no violation of the Act. The ALJ's Decision should be adopted in its entirety.

V. CONCLUSION

The Complaint has no merit. The Board should adopt the ALJ's Decision in its entirety.

DATED this 14th day of June, 2011.



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dba Fry's Food Store

CERTIFICATE OF SERVICE

I certify that I have this 14th day of June, 2011, caused copies of the foregoing **BRIEF OF FRY'S FOOD STORES IN OPPOSITION TO EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** to be served on the following:

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