UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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 REPLY BRIEF TO RESPONDENT UNION'S ANSWERING BRIEF

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I. Introduction

In its Answering Brief, Respondent Union takes the "kitchen sink" approach and attempts to divert the Board's attention by misrepresenting certain arguments of the Acting General Counsel (General Counsel) and alleging that the General Counsel is seeking to overturn decades of established law. Notwithstanding these distractions, the issue to be answered in this case remains the same: whether the Board will interpret the language of a dues check-off authorization for what it says and apply the law that logically flows from it.

II. Respondent Union's Answering Brief Fails to Support the ALJ's Decision or Rebut the General Counsel's Exceptions Regarding the ALJ's Failure to Recognize that Employees Have Two Distinct Rights to Revoke Their Check-Off Authorizations at the Termination of an Applicable Collective-Bargaining Agreement.

At the heart of this litigation lies the ALJ's refusal to accept the principle that employees have a right to revoke their check-off authorizations both at the one-year anniversary of the signing of an authorization and at the expiration date of an applicable collective-bargaining agreement. *Atlanta Printing Specialties and Paper Products Union Local 527, AFL-CIO (The Mead Corp.)*, 215 NLRB 237, 237 (1974), enfd. 523 F.2d 783 (5th Cir. 1975) (interpreting Section 302(c)(4) of the Act to "guarantee [to] 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") (emphasis added); *NLRB v. Atlanta Printing Specialties Paper Products Union 527, AFL-CIO*, 523 F.2d 783, 788 (5th Cir. 1975) (holding that "Whatever the rationale [for enacting Section 302(c)(4)], Congress provided for revocation at two distinct times: on the anniversary of the authorization, and at the termination of the collective-bargaining agreement. In view of

the clear statutory language and in view of the Supreme Court's decision in *Felter*, we hold that Section 302(c)(4) guarantees employees an opportunity to revoke dues checkoff authorizations at the expiration of each collective-bargaining agreement.") (citation omitted). The Board repeated this principle in *Frito Lay, Inc.*, 243 NLRB 137 (1979), which Respondent Union repeatedly cites in its Answering Brief.

By applying the incorrect legal standard to his analysis of the employees' attempts between June 29, 2009, and November 12, 2009, to revoke their check-off authorizations, the ALJ ignored the employees' right to revoke their check-off authorizations after the October 25, 2008 termination date of the parties' collective-bargaining agreement. Instead, the ALJ erroneously determined that for those employees who had signed a check off during the 2003 CBA before October 25, 2007, each had one opportunity to revoke during the window period before an anniversary date of the authorization's execution, while those employees who had signed a check off during the last year of the 2003 CBA, each had one opportunity to revoke at or upon the termination date of the labor contract.

Not even Respondent Union could muster the courage to embrace the ALJ's mistaken view that the law affords but one opportunity per year to employees to revoke their check-off authorizations. To be sure, Respondent Union cites random check-off authorization language in sundry cases in a vain attempt to prop up this argument. In none of these cited cases, however, did the Board discuss the frequency with which check-off authorization language permitted employees to revoke authorizations during any given period. In at least one case and directly contrary to Respondent Union's representation, employees preserved both the right at least once per year to revoke an authorization and the right to revoke upon the

termination of their labor contract. *See American Smelting & Refining Co.*, 200 NLRB 1004 (1972).

The Respondent Union understandably went to great lengths in its Answering Brief to portray itself as having interpreted its members' check-off authorizations to permit its members to revoke them during both the 15-day window period 30 to 45 days before an anniversary of a member's signing of the authorization and a nonexistent 15-day window period 30 to 45 days before the October 25, 2008 expiration date of its labor contract. If Respondent Union could not—and which it did not—demonstrate that it had interpreted the authorizations to allow members to revoke them on or during a reasonable window period before or after October 25, 2008, then all employees' check-off authorizations could, and did, become revocable at will after this date.

III. Respondent Union's Answering Brief Fails to Support the ALJ's Decision or Rebut the General Counsel's Exceptions Regarding the ALJ's Failure to Find That Respondent Union's Unlawful Application of the Check-Off Language Resulted in Employees' Check Offs Becoming Revocable at Will After October 25, 2008.

Notwithstanding Respondent Union's ersatz assertions in its Answering Brief that it interpreted the check-off language to permit revocation during a window period prior to October 25, 2008, the record evidence is clear that Respondent Union did not contemplate, during any relevant time frame, that employees could revoke their check-off authorizations during a window period prior to October 25, 2008, during any other window period, or at any time other than during the window period preceding a member's anniversary of his or her signing of the authorization. First, and again directly contrary to Respondent Union's representations in its Answering Brief, there is no record evidence that any member had

sought to revoke a check off during this window period or had sought to resign his or her Union membership during this window period.

Second, every letter that Respondent Union sent to its members between late June 2009 and the middle of November 2009, in response to a member's request to revoke one's check off or to resign one's Union membership, either provided the member with the dates of the specific anniversary-signing window period or offered to provide them to the member upon request. None of these letters contained any information about or included any mention of the expiration or termination of any collective-bargaining agreement or the revocation of one's check off at the termination date of a collective-bargaining agreement. Rather, these letters categorically specified that the "only" time during which the member could revoke a check off was during the window period preceding the anniversary of a member's signing of the check off.[1]

Counsel for Respondent Union reinforced Respondent Union's uncompromising position on acceptance of check-off revocations by authoring a letter dated December 23, 2009, to former member Shirley Jones and attaching a copy of her check-off

[1] For example, the Union sent a letter to former member Kimberly Stewart dated September 29, 2009, which stated in relevant part:

> However, the dues check-off authorization, which is separate and apart from the membership application, states that request[s] 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. We need to receive another written request after June 13, but before June 29. I have also enclosed a copy of the dues authorization you signed. (GCX 8)

Similarly, the Union sent Ms. Stewart another letter dated November 12, 2009, which stated in relevant and similar part:

> However, the dues check-off authorization, which is separate and apart from the membership application, states that request[s] 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. (GCX 8)

authorization thereto. In this letter, counsel quoted the principal text of Ms. Jones's check off and authoritatively wrote that, "This section means you had to revoke your dues authorization somewhere between September 30, 2009 and October 16, 2009." (GCX 9) Although counsel also briefly discussed the underlying collective-bargaining agreement in the letter, he failed to mention anything about accepting a check-off revocation at any time other than during the 15-day window period preceding the anniversary of the check-off's execution.

This letter stands in stark contrast to the topical testimonial evidence proffered by Respondent Union at trial, which consisted of the former president of Respondent Union, Warren Barclay, testifying that in about 1990, he had informed a body of unidentified Union staff that the check-off's language should be administered in such a way so as to permit members to revoke their check offs during the 15-day window period that precedes both the anniversary of a member's execution of the check off and the expiration of the collective-bargaining agreement. (Tr. 170) Of course, whatever scintilla of relevance Mr. Barclay's actions of 21 years ago may have on the parties' current dispute as it relates to the intersection of check offs and window periods is dwarfed by the abundance of contemporary letters from Respondent Union to its members. These letters, including the letter from counsel to Respondent Union, as well as the absence of evidence to show that Respondent Union honored check-off revocations during the window period prior to 2008 or during any period other than the window period preceding the anniversary of the check off's execution, demonstrate that Respondent Union has not interpreted the check-off language as affording its members an opportunity to revoke the check-off authorization at the end the collective-bargaining agreement.

In its Answering Brief, Respondent Union mistakenly ascribes certain motivations and purposes to the General Counsel. For example, Respondent Union contends that the General Counsel desires to overrule *Frito Lay, Inc.*, 243 NLRB 137 (1979), in furtherance of its purported theory that employees have the right to revoke their check-off authorizations at will during a contract hiatus, or that the contract hiatus provides an additional window period for employees to revoke their check-off authorizations. (RU Brief at 1, 5, and 12) Contrary to these contentions, the General Counsel is neither attempting to overrule *Frito-Lay* nor desirous of doing so, nor does the General Counsel find it necessary to do so to prevail in this matter. The General Counsel, moreover, does not allege that a contract hiatus gives employees carte blanche to revoke their check offs during the hiatus.

Notwithstanding Respondent Union's misguided characterizations of the General Counsel's case, the General Counsel has shown that the plain language of the check-off authorization does not envision the existence of any window period for revocations prior to or after the termination date of a collective-bargaining agreement. Furthermore, at no time has Respondent Union interpreted the check-off language in such a way so as to permit its members to revoke the check offs at any time—including, as is evident from the record in this matter, during a window period before the October 25, 2008 expiration date of the collective-bargaining agreement—other than during the 15-day window period 30 to 45 days prior to the anniversary of the member's execution of the check-off authorization. Therefore, the plain language of the check off, Respondent Union's unlawfully restrictive application of the rule, as well as the principle that all employees have the right to revoke their check-off authorizations at the expiration—or during a window period before or after the expiration—of the applicable collective-bargaining agreement, require the conclusion that an employee who

executed a check-off authorization before October 25, 2008, has the right to revoke it at will on or after this date. General Counsel's theory does not in any way implicate *Frito-Lay's* main holding that check-off authorizations do not automatically become revocable at will during a contract hiatus. In addition, General Counsel notes that the contract hiatus in the instant case occurred between November 1 and 12, 2009, the period of time during which no collective-bargaining agreement was in place. The collective-bargaining agreement that was scheduled to expire by its terms on October 25, 2008, did not in fact expire until its last extension expired on October 31, 2009.

IV. Respondent Union's Answering Brief Fails to Support the ALJ's Decision or Rebut the General Counsel's Exceptions Regarding the ALJ's Failure to Find That Respondent Union Violated the Act By Continuing to Accept, Receive, and Retain the Dues of Employees Who Resigned Their Union Memberships When Employees' Check Offs Were Revocable at Will.

In *Electrical Workers IBEW Local 2088 (Lockheed Space Operations Co., Inc.),* 302 NLRB 322 (1991), the Board created a narrow and limited exception to its new rule that language in an employee's check-off authorization that limits its periods of revocability does not bind the employee to pay dues after the employee has resigned his or her union membership. The Board clarified that only if the check-off authorization clearly and unmistakably waived the employee's right to refrain from assisting the union would the union's continued acceptance, receipt, and retention of the deducted dues after the employee resigned his or her union membership be lawful.

> 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 328-29. Applying *Lockheed*, supra, to the instant case in this context, once an employee resigned his or her Union membership after October 25, 2008, the employee no longer had a duty to abide by the check off's terms that mandated paying dues unless the check off clearly set forth the employee's obligation to pay dues even in the absence of Union membership. If the check off contained this language, *Lockheed* required the employee to continue paying dues "to the union during the entire agreed-upon period of irrevocability . . . ."

However, even assuming that the check offs at issue clearly set forth an employee's obligation to pay dues even in the absence of Union membership, 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" because the period of agreed check off expired with the termination of the collective-bargaining agreement. This distinguishes the instant case from the situation in *United Steelworkers of America, Local 4671 (National Oil Well, Inc.)*, 302 NLRB 367 (1991). Therefore, contrary to the ALJ's assertion that "employees could achieve through resignation what they could not achieve through revocation," once the check offs became revocable at will, an employee's resignation of Union membership had the same effect as an employee's revocation of his or her check off: both resignation and revocation extinguished an employee's duty to continue to pay dues pursuant to the terms of the check off that the employee previously had executed. In sum, by continuing to accept, receive, and retain the dues of employees who resigned their Union memberships when employees' check offs were revocable at will, Respondent Union violated the Act.

V. Conclusion

Based on the foregoing, it is respectfully requested that the Board find that the ALJ erred in failing to find the violations alleged in the consolidated complaint, as discussed above, and to provide an appropriate remedy for said violations.

Dated at Phoenix, Arizona, this 28th day of June 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT UNION'S ANSWERING BRIEF in SMITH'S FOOD & DRUG CENTERS, INC. d/b/a FRY'S FOOD STORES and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 99, Cases 28-CA-22836 et al., was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 28th day of June 2011, on the following:

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