

**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 EMPLOYER'S ANSWERING BRIEF**

Johannes Lauterborn
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 N. Central Avenue, Suite 1800
Phoenix, Arizona 85004
Telephone: 602-640-2150
Fax: 602-640-2178
E-mail: Johannes.Lauterborn@nlrb.gov

I. Introduction

In its Answering Brief, Respondent Employer follows the ALJ and Respondent Union and argues that the General Counsel is attempting to overturn established law. This is not the case, and 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 Employer’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).

By applying the incorrect legal standard to his analysis of employees’ attempts between June 29, 2009, and November 12, 2009, to revoke their check-off authorizations, the ALJ ignored employees’ right to revoke them after the October 25, 2008, termination date of the 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 CBA.

According to Respondent Employer, nothing precludes the ALJ’s interpretation of the check-off authorization language that a window period opens at recurring periods which are measured by reference either to an anniversary date or expiration of the parties’ agreement. While this interpretation may be plausible, there is no record evidence that shows that Respondent Union engaged in this practice. To the contrary, the record evidence shows that Respondent Union interpreted the check-off language in only one way: by refusing to permit employees to revoke at any time other than during the window period preceding a member’s anniversary of his or her signing of the authorization.

III. Respondent Employer'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.

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. 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

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

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 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 collected-bargaining agreement that was scheduled to expire by

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)

its terms on October 25, 2008, did not in fact expire until its last extension expired on October 31, 2009.

IV. Respondent Employer'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, the Board is respectfully requested to find that the ALJ erred in failing to find the violations alleged in the complaint, as set forth above, and to provide an appropriate remedy for said violations.

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

/s/ Johannes Lauterborn
Johannes Lauterborn
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28

2600 N. Central Avenue - Suite 1800
Phoenix, Arizona 85004
Telephone: 602-640-2150
Facsimile: 602-640-2178
Johannes.Lauterborn@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT EMPLOYER'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:

Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Via E-Mail:

Frederick C. Miner, Attorney at Law
Littler Mendelson, PC
2425 East Camelback Road, Suite 900
Phoenix, AZ 85016
E-Mail: fminer@littler.com

Via Overnight Delivery:

Lynne Gellenbeck, Attorney at Law
The Kroger Co. Law Department
1014 Vine Street
Cincinnati, OH 45202-1141

Fry's Food and Drug Stores, Inc.
500 South 99th Avenue
Tolleson, AZ 85353

Fry's Food Stores of Arizona, Inc.
155 West Combs Road
Queen Creek, AZ 85142

Fry's Food Stores of Arizona, Inc.
542 East Hunt Road
Queen Creek, AZ 85243

Fry's Food Stores of Arizona, Inc.
185 West Apache Trail
Apache Junction, AZ 85120

Fry's Food Stores of Arizona, Inc.
5941 East McKellips Road
Mesa, AZ 85215

Adam Zapala, Attorney at Law
Davis, Cowell & Bowe, LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
E-Mail: az@dcbsf.com

United Food and Commercial Workers Local 99
2401 North Central Avenue, 2nd Floor
Phoenix, AZ 85004

Glen M. Taubman, Attorney at Law
National Right to Work Legal Defense
Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
E-Mail: gmt@nrtw.org

Ms. Karen Medley
5453 East Reavis Street
Apache Junction, AZ 85119

Ms. Kimberly Stewart
30503 North Royal Oak Way
Queen Creek, AZ 85143

Ms. Elaine A. Brown
698 East Navajo Avenue
Apache Junction, AZ 85119

Ms. Shirley A. Jones
7616 East Mawson Road
Mesa, AZ 85207

Ms. Saloomah Hardy
29288 North Gold Lane
Queen Creek, AZ 85143

Ms. Janette Fuentes
2242 North Monticello Drive
Florence, AZ 85132

Mr. Tommy Fuentes
2242 North Monticello Drive
Florence, AZ 85132

/s/ Johannes Lauterborn
Johannes Lauterborn
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004
Telephone 602-640-2150