JD–50–13
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED WORKERS OF AMERICA, LOCAL 621

Union

and Case 29–CB–097003

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 32BJ

Charging Party

Erin Schaefer and *Tara O'Rourke*, for the General Counsel.
Bryan McCarthy, Esq., of Valley Stream, NY,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL ROSAS, Administrative Law Judge. This case was tried in Brooklyn, New York, on June 19, 2013. The Service Employees International Union Local 32BJ (Local 32BJ) filed the charge on January 24, 2013,[1] and the General Counsel issued the complaint on January 25, 2013. The complaint alleges that the United Workers of America, Local 621 (Local 621 or Union) violated Section 8(a)(1) and (2) of the National Labor Relations Act (the Act)[2] by accepting dues deducted from employees' paychecks and remitted to Local 621 by the joint employer AKAM Associates (AKAM) and The Gretsch Condominium (Gretsch) (the Employer) after employees revoked their checkoff authorizations.[3] Local 621 denies the allegations, asserts

[1] All dates are 2012 unless otherwise indicated.
[2] 29 U.S.C. Sec. 151.
[3] Shortly before trial, Local 32BJ and the Employer settled the complaint against the latter. As a result, that portion of the consolidated complaint, Case 29–CA–097001, was severed and withdrawn. GC Exh. 1(h.)

that the revocations were untimely and ineffective, and therefore, it lawfully received the dues from the Employer.[4]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Local 621, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a domestic corporation, engaged in providing residential property management at its facilities in New York and Brooklyn, New York, where it annually derives gross annual revenues in excess of $500,000, and received at its Manhattan and Brooklyn facilities goods and supplies in excess of $5000 directly from enterprises outside of New York. Local 621 admits, and I find, that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Locals 621 and 32BJ are labor organizations within the meaning of Section 2(5) of the Act.[5]

II. ALLEGED UNFAIR LABOR PRACTICES

The facility at issue is a residential condominium operated by the Employer in Brooklyn, New York (Brooklyn facility). The following employees of the Employer at the Brooklyn facility constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act (the unit):

> [A]ll full time and regular part-time janitors, porters, doormen, superintendents, cleaners and maintenance employees employed by Gretsch located at the Brooklyn facility, excluding all other employees, including clerical employees, guards and supervisors as defined in Section 2(11) of the National Labor Relations Act.

Local 621 was the exclusive collective-bargaining representative of the unit. Local 621 and Gretsch were parties to a collective-bargaining agreement (CBA), with an effective term of March 31, 2011, to March 31, 2014. The CBA covered the terms and conditions of employment of the unit, including the following union-security provision:

> It shall be a condition of employment that all employees covered by this Agreement who are members of the Union on the execution date of this Agreement shall remain members. All employees who are not members of the execution date hereof shall, as a condition of employment, either become and remain members of the Union on the

[4] Local 621 also asserted at par. 19 of its answer, in pertinent part, that it had a charge pending alleging that it was unlawful for the Employer to unilaterally cease the contractual deduction/remittances as of February 1, 2013, pursuant to the untimely October 1, 2012 revocation. Case 29–CA–104002." GC Exh. 1(g). That charge, however, was also withdrawn shortly before trial. GC Exhs. 1(g), 2(a)–(b). Nevertheless, Local 621 presented testimony by Carlos Garcia, a Local 621 member, in an attempt to establish unlawful conduct by the Employer. His admissible testimony, which I credit, failed to do that. (Tr. 16–23.)

[5] Jt. Exh. 1(a).

> thirty-first (31st) day following the beginning of their employment, or the effective date or execution date of this Agreement, whichever is later, or if a non-member, pay service fees, which in the case of a regular service fee payer shall be equal to the Union's initiation fees and periodic dues, or in the case of an objecting service fee payer, shall be the proportion of the initiation fees and dues uniformly required, corresponding to the proportion of the Union's total expenditures that supports representational activities and costs.[6]

In a manner set forth in the collective-bargaining agreement, unit employees signed dues deduction authorizations to give the Employer permission to deduct union dues from their paychecks on a monthly basis and remit such dues to the Union. The language contained in the dues-deduction authorizations states, in relevant part:

> This authorization is voluntarily made in order to pay my fair share of the Union's cost of representing me for the purposes of collective bargaining, and this authorization is not conditioned on my present or future membership in the Union. This authorization shall be irrevocable for a period of one year from the date hereof or until the termination date of said agreement, whichever occurs sooner, without regard to whether I am a member of the Union during that period, and I agree that this authorization shall be automatically renewed and irrevocable for successive periods of one year unless revoked by written notice to you and the Union ten (10) days prior to the anniversary of this authorization.[7]

On September 26, 2012, unit employees voted in an election conducted pursuant to a petition filed in Case 29–UD–087588 to rescind the Local 621's authority to require union membership as a condition of employment. The results of the decertification election were certified on October 11, 2012.[8]

On October 1, 2012, unit employees submitted and Local 621 received letters which stated:

> I am writing to notify United Workers of America Local 621 ("the Union") that I hereby terminate my membership in the Union effective immediately. I am currently employed by The Gretsch Condominium at 60 Broadway, Brooklyn NY. 11211. As you may know, the employees represented by the Union at this job site recently requested that the National Labor Relations Board supervise a de-authorization election, which was conducted on September 25, 2012 (NLRB Case No. 29–UD–087588). Based on the certified results of that election, the bargaining unit employees are no longer subject to the union security clause contained in the collective bargaining agreement currently in effect between the Company and the Union ("CBA"). Therefore, maintaining membership in good standing with the Union, including the payment of periodic membership dues, initiations fees, agency fees or any other required amounts, is no longer a condition of my employment and I have elected to terminate any and all such membership obligations with the Union at this time.

[6] Jt. Exh. 1(b).
[7] Jt. Exh. 1(c).
[8] Jt. Exh. 1(d).

> I am simultaneously providing written notice to the Company of my decision and have rescinded my authorization for the Company to continue to withhold membership dues or fees of any kind from my wages for the purpose of transmitting those amounts to the Union under the dues check-off provision of the CBA. A copy of my letter to the Company is attached for your reference.[9]

On or about October 1, 2012, unit employees submitted, and the Gretsch and AKAM received letters which stated:

> I am writing to notify The Gretsch Condominium and AKAM Associates, as my employers, that I hereby rescind, effective immediately, any and all previous authorization(s) I have provided to you to withhold membership dues, initiation fees, agency fees or any other amounts withheld from my wages for the purpose of transmitting such funds to United Workers Of America Local 621 ("the Union") on my behalf under the dues check-off provision of the collective bargaining agreement currently in effect between the Company and the Union ("CBA").
>
> As you may know, the employees represented by the Union at this job site requested that the National Labor Relations Board supervise a de-authorization election, which was conducted on September 25, 2012 (NLRB Case No. 29–UD–087588). Based on the certified results of that election, I am no longer subject to the union security clause of the CBA. Therefore, maintaining membership in good standing with the Union, including the payment of periodic membership dues, initiations fees, agency fees or any other required amounts to the Union is no longer a condition of my employment and I have elected to terminate any and all such membership obligations with the Union at this time. I am simultaneously providing written notice to the Union of my decision to voluntarily terminate all membership obligations with the Union effective immediately. A copy of my letter to the Union is attached for your reference.[10]

Notwithstanding the aforementioned revocations, during the period of October 2012, to March 2013, the Employer continued to deduct dues from employees' paychecks and remitted them to Local 621. Local 621, in turn, accepted said dues.

LEGAL ANALYSIS

The General Counsel asserts that Local 621 violated Section 8(b)(1)(A) of the Act by accepting dues deducted from the employees' paychecks and remitted by the Employer to the Union after employees revoked their checkoff authorizations on October 1. Local 621 argues that the revocations of the checkoff authorizations were untimely because they were submitted prior to the Regional Director's certification of the September 26 deauthorization election results. The nine employees submitted the revocation letters on October 1, but the Regional

[9] Jt. Exh. 1(e).
[10] Jt. Exh. 1(f).

Director did not certify the election until October 11, 10 days after they submitted revocation letters. Therefore, Local 621 contends that these revocations were invalid.[11]

An affirmative deauthorization election, held pursuant to Section 9(e) of the Act, invalidates a union-security clause and also provides employees with an opportunity to revoke their checkoff authorizations subsequent to the vote. *Penn Cork & Closure,s Inc*., 156 NLRB 411, 414 (1965), affd. 376 F.2d 52 (2d Cir. 1967). However, only after the certification of the election results do employees gain the right to revoke their prior checkoff authorizations. *Albert Van Luit & Co.*, 229 NLRB 811, 813 (1977). Although it is well established that employees may resign from union membership once an affirmative deauthorization vote is certified, the Board has yet to decide whether prematurely submitted revocations automatically become valid following the certification of the deauthorization election. *NLRB v. Alvert Van Luit Co.*, 597 F.2d 681, 686, above.

On September 26, nine unit employees voted unanimously to deauthorize the union-security clause contained in the CBA, after which they resign their Local 621 union membership. On October 1, pursuant to the deauthorization election the nine unit employees submitted letters to the Union and Employer notifying them that they were revoking the checkoff authorizations. However, their revocation letters were prematurely submitted on October 1, since the Board did not certify the election until October 11. See *West Coast Cintas Corp.*, 291 NLRB 152, 155–156 (1988) (checkoff authorizations remained in effect between the date of the deauthorization vote and the certification of the results and until timely revoked by the employees); *Albert Van Luit & Co.*, 229 NLRB at 813 (employer violated the Act by soliciting checkoff authorization revocations from unit employees prior to certification of the election results).

Notwithstanding the premature submission of unit employees' revocation requests, the question remains whether they ripened into valid requests on October 11 when the Board certified the results of the deauthorization election. The Board initially touched on this issue in *Auto Workers Local 1752 (Schweizer Aircraft)*, 320 NLRB 528, 532 fn. 14 (1995). In *Schweizer*, the Board found that employee revocations were untimely submitted approximately 1 month before they were eligible to become effective. In a concurring opinion, however, Chairman Truesdale construed the employee's premature notice of revocation as an ongoing request to be held in abeyance until the nearest window period for revocability.

[11] At trial, Local 621 called Carlos Garcia in an attempt to undermine the validity of the revocation letters based on the Employer's involvement in distributing them. However, such a defense was neither affirmatively pled in Local 621's answer nor discussed in its brief. (GC Exh. 1(g).) Moreover, although I found Garcia credible as to what he observed, I did not credit his uncorroborated testimony as to what the Employer's building manager allegedly told Local 621's shop steward as he handed him the revocation cards. (Tr. 16–23.) See *Rome Electrical Systems*, 356 NLRB No. 38, slip op. at 2 fn. 4 (2010) (Board "may consider probative hearsay testimony that is corroborated by other evidence or otherwise inherently reliable"); Cf. *Dauman Pallet, Inc.,* 314 NLRB 185, 186 (1994) (Board permitted probative hearsay which was corroborated by nonhearsay testimony). Lastly, the proffered involvement of the Employer's manager in this case is distinguishable from the demonstrated and significant involvement of the manager in *Albert Van Luit & Co.*, 234 NLRB 1087 (1978), enf. 597 F.2d 681 (9th Cir. 1979). In that case, the employer's manager delivered revocation forms to employees during the 3-month hiatus between the decertification election and certification. Here, the Employer's manager handed the forms to Local 621's shop steward at an undetermined point in time.

Chairman Truesdale reinforced that view in *Polymark Corp*., 329 NLRB 9, 11 fn. 7 (1999), while also noting that the employer's failure to honor the employee's premature revocation at the nearest period for revocability was neither alleged nor litigated as a separate violation of the Act. In dissenting opinions, however, Members Liebman and Fox asserted that contract provisions specifying certain time periods that employees could resign their union membership serve legitimate union administrative purposes. Moreover, they disagreed with the notion that forcing employees to wait 11 months until the next window period for filing a resignation was so onerous as to restrict their Section 7 rights. As such, they would find no violation of the Act by a labor organization failing to honor a resignation filed outside such a window period. See *Polymark*, 329 NLRB at 13. It should be noted, however, that such a view would overturn the Board's ruling in *California Saw & Knife Works*, 320 NLRB 224 (1995), which held that forcing an employee to wait until the next window period to file a "*Beck* objection," when the window period had just ended, would restrict the employee's right to resign from the union.

In contrast to the facts in *Polimark Corp.,* where Members Leibman and Fox would have required members to wait 11 months to exercise their options under the contract, the unit member resignations were premised on regulatory action. Here, the Board certified the *unanimous* vote of unit members to deauthorize Local 621 and the Employer from deducting any more dues. Therefore, the applicable window for revoking employee/member's dues authorizations was anytime on or after October 11. To adopt Local 621's rationale, however, it was entitled to ignore the premature requests as invalid and continue deducting union dues indefinitely when there no longer appeared to be a legitimate union administrative purpose that would be served.

As there does not appear to be any legitimate union administrative purpose that would be served by requiring unit members to resubmit their revocation requests on or after October 11, the better approach would be to treat them as having been held in abeyance until the Board certified their unanimous decision on October 11. On that day, the Board's certification constituted the validation of an otherwise invalid action by unit members, since Local 621 received, but never responded, to their requests. Treating unit members' premature revocation requests as valid under the circumstances is consistent with Board policy that a union *promptly give effect* to an employee's resignation. *United Parcel Service,* 346 NLRB 360, 363 (2006) (emphasis added).

Accordingly, Local 621's continued collection of union dues from unit members after they revoked their checkoff authorizations and the Board certified their vote to withdraw their membership on October 11 violated Section 8(b)(1)(A) and (2) of the Act.

CONCLUSIONS OF LAW

1. Locals 621 and 32BJ are labor organizations within the meaning of Section 2(5) of the Act.

2. Akam and Gretsch are an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. By refusing or failing to stop collecting union dues from unit members after they voted to deauthorized Local 621 as their labor representative, then notified Local 621 that they resigned from that organization and the Board certified the results of the deauthorization election, Local 621 has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) of the Act.

REMEDY

Having found that Local 621 has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The letter requests of unit employees to the Employer and Local 621 revoking their authorization for the collection and remittance of union dues, dated October 1, 2012, shall be given effect as of the date of Board certification, October 11, 2012. Accordingly Local 621 shall make whole unit members for any union dues collected and remitted to Local 621 between October 11, 2012, and March 2013.[12] Back dues shall be reimbursed with interest thereon as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, United Workers of America, Local 621, Brooklyn, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Collecting dues from members we represent who have resigned from Local 621 as the result of a union decertification election.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole unit employees by returning all dues collected, and not yet reimbursed, from October 11, 2012, to March 2013.

[12] The General Counsel requests a specific amount for each unit member allegedly representing the sum of union dues withheld by the Employer and remitted to Local 621 from October 11, 2012, to March 2013. The amount owed, however, is the extent of dues not already reimbursed to unit employees pursuant to the Local 32BJ's settlement with the Employer.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days after service by the Region, post at the Employer's facility in Brooklyn, New York, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Local 621's authorized representative, shall be posted by Local 621 and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be mailed distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Local 621 customarily communicates with its employees by such means. Reasonable steps shall be taken by Local 621 to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Local 621 no longer represents members employed at the Brooklyn facility, it shall duplicate and mail, at its own expense, a copy of the notice to all former members employed at the Brooklyn facility at any time since October 11, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 31, 2013

_____

Michael A. Rosas
Administrative Law Judge

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT collect dues from members we represent who have resigned from Local 621 as the result of a union decertification election.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, make whole unit employees by returning all dues collected, and not yet reimbursed, from October 11, 2012 to March 2013.

UNITED WORKERS OF AMERICA, LOCAL 621
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor, Brooklyn, NY 11201-4201

(718) 330-7713, Hours: 9 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (718) 330-2862.