

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

APR 17 2015

IN THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
APR 17 2015
CLERK

RECEIVED

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

Petitioners,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

15-1102

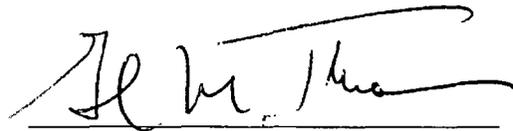
Case No. _____

PETITION FOR REVIEW

Kimberly Stewart, Karen Medley, Elaine Brown, Shirley Jones, Saloomeh Hardy, Janette Fuentes and Tommy Fuentes (Charging Parties before the agency), hereby petition the United States Court of Appeals for the District of Columbia Circuit for review of the Decision and Order of the Respondent, National Labor Relations Board, in *Smith's Food & Drug Centers, Inc. d/b/a Fry's Food Stores and UFCW Local 99*, NLRB Case Nos. 28-CA-22836, 28-CA-22837, 28-CA-22838, 28-CA-22840, 28-CA-22858, 28-CA-22871 and 28-CA-22872; and 28-

CB-7045, 28-CB-7047, 28-CB-7048, 28-CB-7049, 28-CB-7058, 28-CB-7062 and 28-CB-7063, originally reported at 358 NLRB No. 66 (July 10, 2012), and subsequently reaffirmed and reissued by a constitutionally valid Board at 362 NLRB No. 36 (March 20, 2015).

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to FRAP 15(c), I hereby certify that a true and correct copy of the foregoing Petition for Review was deposited in the U.S. Mail, first class postage prepaid, addressed to the following parties or representatives who have participated in the proceedings before the agency:

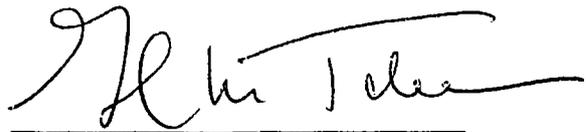
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on April 17, 2015.



Glenn M. Taubman

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Smith's Food & Drug Centers, Inc. d/b/a Fry's Food Stores and Karen Medley and Kimberly Stewart and Elaine Brown and Shirley Jones and Saloomeh Hardy and Janette Fuentes and Tommy Fuentes

United Food and Commercial Workers Union Local 99 and Kimberly Stewart and Elaine Brown and Karen Medley and Shirley Jones and Saloomeh Hardy and Janette Fuentes and Tommy Fuentes.
Cases 28-CA-022836, 28-CA-022837, 28-CA-022838, 28-CA-022840, 28-CA-022858, 28-CA-022871, 28-CA-022872, and 28-CB-007045, 28-CB-007047, 28-CB-007048, 28-CB-007049, 28-CB-007058, 28-CB-007062, and 28-CB-007063

July 10, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On May 3, 2011, Administrative Law Judge William G. Kocol issued the attached decision. The Acting General Counsel and the Charging Parties each filed exceptions and a supporting brief. The Respondent Employer and the Respondent Union each filed an answering brief to the Acting General Counsel's and the Charging Parties' exceptions. The Acting General Counsel filed reply briefs to the Respondent Employer's and the Respondent Union's answering briefs. The Charging Parties filed a reply brief to the Respondent Employer's and the Respondent Union's answering briefs.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

¹ The Charging Parties seek to disqualify Board Members Block, Griffin, and Flynn from ruling in this proceeding, arguing that their recess appointments to the Board by the President were unconstitutional. For the reasons set forth in *Center for Social Change, Inc.*, 358 NLRB No. 24 (2012), we reject this argument. Member Flynn is recused and took no part in the consideration of this case.

² In adopting the judge's dismissal of the complaint, we note that (a) the Acting General Counsel does not contest the facial validity of the Respondent Union's standard dues-checkoff authorization agreement, and (b) there is no evidence that any of the Charging Parties attempted to revoke—or even inquired about revoking—their authorizations during any of the possible window periods. We thus find it unnecessary to

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. July 10, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Johannes Lauterborn, Esq., for the General Counsel.
Frederick C. Miner, Esq. (Littler Mendelson, P.C.), of Phoenix, Arizona, for Respondent Employer.

Adam Zapala and Steven L. Stemerman, Esqs. (Davis Cowell & Bowe, LLP), of San Francisco, California, for Respondent Union.

Glenn M. Taubman, Esq. (National Right to Work Legal Defense Foundation), of Springfield, Virginia, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Phoenix, Arizona, on June 29, 2010, and January 18, 2011.¹ The first charge in this case was filed December 28, 2009,² and the amended consolidated complaint was issued June 11, 2010. The complaint alleges that Smith's Food & Drug Centers, Inc. d/b/a Fry's Food Stores (Fry's) violated Section 8(a)(2), (3), and (1) of the National Labor Relations Act (the Act) by continuing to remit to the Union the money from the wages of employees who had signed checkoff authorizations and that by continuing to accept that money United Food and Commercial Workers Union Local 99 (the Union) has violated Section 8(b)(1)(A) by both restraining and coercing employees in the exercise of their Section 7 rights and by breaching its duty of fair representation and violated Section 8(b)(2) by attempting to cause Fry's to violate Section 8(a)(3).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Fry's, the Union, and the Charging Parties, I make the following.

_____ pass on the Respondent Union's contention that we should give deference to its interpretation of the language of the authorization agreement.

¹ I closed the hearing by order dated March 22, 2011.

² All dates are 2009, unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

Fry's, a corporation, with an office and place of business in Tolleson, Arizona, and stores at several locations throughout Arizona, is engaged in the retail sale of groceries, meat, and related products and annually derives gross revenues in excess of \$500,000 and purchases and receives at its Arizona facilities goods valued in excess of \$50,000 directly from point outside Arizona. Fry's and the Union admit and I find that Fry's is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

Employees voluntarily signed checkoff authorizations that were clearly *not* linked to union membership. The complaint alleges, and the facts show, that thereafter some employee resigned from membership in the Union. The complaint alleges that by failing to treat the membership resignation as a checkoff revocation, the Union violated the Act. This argument is untenable under *Electrical Workers Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991), and *Steelworkers Local 4671 (National Oil Well)*, 302 NLRB 367 (1991). Second, the complaint alleges, and the facts shows that some employees attempted to revoke their checkoff authorizations during a hiatus between collective-bargaining agreements and during times that were allowed under the terms of the checkoff authorization. That argument too is untenable. *Frito Lay*, 243 NLRB 137, 144 (1979).

I emphasize that there are only two arguments—resignations from membership and untimely revocations of checkoff authorizations—that are covered by the complaint. Faced with this clear precedent, the arguments of the General Counsel have morphed and, as shown below, have become increasingly untethered from the complaint and contradictory in nature. At the trial the Union's counsel stated:

I have one other thing and it's . . . a standing objection to the entire conduct of this case, frankly, Your Honor, and that is, you know, the defense is entitled to some clear notice about what the theory is and, frankly, the Region has just run roughshod over our due process rights. One week the theory is X. The next week the theory is Y. The following week the theory is X, Y, and Z. You know, you can't prepare to defend a case when the Region's changing its theory week in and week out.

I agree completely with this statement.

B. Motions

The Union filed a motion to dismiss the portions of the complaint alleging that after the Charging Parties resigned from membership in the Union, the Union violated Section 8(b)(1)(A) by continuing to accept money deducted from the wages of the Charging Parties pursuant to checkoff authorizations that these employees had signed. I concluded that *Electrical Workers Local 2088 (Lockheed Space Operations)*, supra,

and *Steelworkers Local 4671 (National Oil Well)*, supra, were directly on point. I therefore granted the motion and dismissed those allegations in the complaint. The General Counsel appealed my ruling and the National Labor Relations Board (the Board) granted the appeal and reversed my dismissal. The Board indicated that the General Counsel's "arguments indicate that he seeks to pursue a theory of violation that has not previously been considered by the Board" and that therefore the General Counsel "should be afforded an opportunity to develop a record to support the theory in this case." The Board, however, did not describe the new theory of a violation that might not be governed by existing law. In my view, no such viable legal theory has been ever articulated by the General Counsel in this case. In the absence of guidance from the Board as to what that new viable legal theory might be, for reasons explained below, I again dismiss those allegations of the complaint for reasons previously stated; I look forward to the Board's explanation of why the disposition of this issue is not squarely governed by the cases cited above.

At the original hearing in this case, I also considered a petition to revoke subpoenas that were served by the General Counsel on the Union and Fry's. I ruled that the Union and Fry's were not required to produce documents concerning "a class of similarly situated but as-yet-unidentified employees." I concluded that the identification of similarly situated employees could occur at the compliance stage of this proceeding if the complaint ultimately proved meritorious. The General Counsel also appealed this ruling and the Board again reversed my ruling. Armed with the additional evidence, the General Counsel offered several thousand additional documents into the record. In my view the documents predictably contributed nothing to the outcome of this case. Rather, the result was unnecessary costs to the Union and Fry's in collecting and copying the documents and avoidable delay in the final resolution of this case.³ Moreover, the case is still in the exact position it was when I first ruled on this issue: If the complaint has merit, the identification of similarly situated employees will occur at the compliance stage of this proceeding.

The subpoenaed documents covered by the special appeal were provided to the General Counsel in early December 2010. On Friday, January 14, 2011, in the late afternoon, the General Counsel served additional subpoenas on the Union and Fry's. The trial was set to resume the next business day, January 18. The new subpoenas requested documents concerning employees who resigned from membership outside the 10(b) period. According to the General Counsel, employees who resigned from membership in the Union, even beyond the 6-month period and who have not heretofore filed charges with the Board were entitled to reimbursement for amounts paid to the Union pursuant to checkoff authorizations during the 10(b) period covered by existing charges. This would necessarily require

³ The General Counsel requested, and I granted, 3 weeks for the General Counsel to assemble the documents in a manner consistent with the Rules of Evidence. I granted another week for the parties examine the thousands of documents to assure that the General Counsel had done so, and then yet another week for me to resolve any disputes over the documents. Thereafter, time was spent resolving issues raised receiving these documents into evidence.

FRY'S FOOD STORES

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the litigation of events—the resignations—that occurred years ago. Indeed, at the trial the General Counsel sought to litigate events that occurred in 1992, explaining that it was necessary under his legal theory. Torn between following the Board's instruction to allow the General Counsel to develop the record to allow the Board an opportunity to consider a theory it has not previously considered yet still being unable to identify that theory, I again opted to apply existing law and granted a motion to revoke those subpoenas. *Allied Production Workers Union 12 (Northern Engraving Corp.)*, 337 NLRB 16 (2001), is directly on point. I recognize, however, if the Board concludes that the General Counsel has articulated a legal theory within the boundaries of the complaint but not covered by existing law, it may be necessary to again reverse my ruling and remand the case to permit litigation of those events.

C. Resignations from Union Membership

I now turn to the facts of this case. By way of background, Arizona is a right-to-work State. The Union is the 9(a) representative of a unit of employees described in the complaint in this case. Fry's and the Union were parties to a collective-bargaining agreement that was in effect by its terms from October 26, 2003, to October 25, 2008. Article 15 of that contract obligated Fry's to remit to the Union amounts equivalent to dues from the pay of unit employees who authorized the deductions in writing.

Fry's and the Union were unable to agree to a successor contract before the October 25, 2008 date set for expiration of the then existing contract, so they entered into a series of extension agreements for varying periods of time beginning October 26, 2008, and ending October 31, 2009. On November 12, 2009, Fry's and the Union finally agreed to a new collective-bargaining agreement that runs from October 12, 2009, to October 27, 2012. A number of unit employees, including Charging Parties Karen Medley, Kimberly Stewart, Elaine Brown, Shirley Jones, Salomeh Hardy, Janette Fuentes, and Tommy Fuentes, had signed checkoff authorizations with the Union. The written authorization provides:

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 be-

tween 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.

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.

At various times, the Charging Parties and others resigned from their membership in the Union. None of the Charging Parties submitted their resignations during the window periods set forth in the checkoff authorizations. Using the specific example described by the General Counsel in his special appeal to the Board:

For example, Charging Party Salomeh Hardy signed a checkoff authorization on October 6, 2004, and resigned her Union membership on September 29, 2009. (See ¶¶ 10(a) of the Complaint and Answer and Motion to Dismiss, Exhibit C at 7.) Because Respondents' collective-bargaining agreement did not expire before October 6, 2005, Hardy's irrevocability period lasted until October 6, 2005, and renewed for one year until October 6, 2006. Her irrevocability period renewed again for one year on October 6, 2006; October 6, 2007; and October 6, 2008.

Analysis

Section 302(c)(4) of the Act permits an employer to deduct union membership dues from employees' wages and remit those moneys to their exclusive collective-bargaining representative, 'Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.'

The General Counsel argues that the Union and Fry's violated the Act in failing to honor the resignations as functional equivalents of timely revocations of checkoff authorizations that became effective upon the expiration of the yearly escape periods set forth in those authorizations. Continuing to use Hardy as an example, the General Counsel argues:

Because Hardy resigned her Union membership on September 29, 2009, Respondent Union was on notice that her obligation to pay dues ended on October 6, 2009, the expiration date of her irrevocability period. By continuing to accept, receive, and retain Hardy's dues deducted from her wages after October 6, 2009, Respondent Union violated the Act.

I now examine the impact that resignations from membership had on the checkoff authorizations signed by the employees. The starting point is to determine whether those checkoff authorizations were contingent upon continued union membership because in *National Oil*, supra, the Board held that an employee is bound by terms of a checkoff authorization notwithstanding his resignation from union membership because the language checkoff authorization clearly indicated an agreement to pay dues irrespective of membership in the union. The language in the checkoff authorizations signed by the Charging Parties in this case similarly clearly show that the authorized payments to the Union were *not* tied to union membership; the General Counsel does not contend otherwise. Therefore, under *National Oil* resignation from union membership did not relieve these employees of their obligations under the checkoff authorizations to continue to make payments to the Union.

The General Counsel, however, argues that resignation becomes the functional equivalent of revocation upon the expiration of the yearly escape periods required by Section 302(c)(4) even though the revocations were not timely. This is so, the argument goes, because when the employees resigned their membership in the Union, the Union should have reasonably understood that employees also desired to revoke their checkoff authorizations. But this argument is foreclosed by *Lockheed*. In *Lockheed* the Board stated:

Our review of statutory policies and contractual principles persuades us that 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 and that he will pay such dues through a partial assignment of his wages, i.e., a checkoff. Neither is there a reasonable basis for precluding enforcement of such a voluntary agreement.

Lockheed, supra at 328. In other words, the Board allows for the possibility that an employee may no longer wish to remain a member of a union but nonetheless desires to contribute to a union for contract administration expenses via a checkoff authorization. The General Counsel does not explain how this holding can be reconciled with his theory that the Union should have understood that resignation also meant the employee was also announcing a desire to revoke the checkoff authorization. See also *American Nurses' Assn.*, 250 NLRB 1324 fn. 1 (1980), where the Board stated:

[W]e agree with the Administrative Law Judge that resignation from the Union does not constitute revocation of dues-checkoff authorizations, and that union security and dues checkoff are distinct and separate matters.

Moreover, the General Counsel's argument would allow employees who resign from membership to escape from the window periods specified in the checkoff authorization form, window periods that are similar to those in the checkoff authorizations that Board found were lawful in *Lockheed*. Stated differently, employees could achieve through resignation what they could not achieve through revocation.

In sum, I again conclude that allegations in the complaint concerning the impact of resignation from membership on the ability to escape from the obligations set forth in checkoff au-

thorizations are governed by *Lockheed* and *National Oil* and those cases mandate the dismissal of those allegations in the complaint.

D. Revocations of Checkoff Authorization

As indicated above, Fry's and the Union were unable to agree to a successor contract before the October 25, 2008, date set for expiration for the then existing contract, so they entered into a series of extension agreements for varying periods of time beginning October 26, 2008, and ending October 31, 2009. On November 12, 2009, Fry's and the Union agreed to a collective-bargaining agreement that runs from October 12, 2009, to October 27, 2012.

On October 6 and November 9, 2009, Medley notified the Union in writing that she was revoking her checkoff authorization and on October 12 and November 16, 2009, Medley notified Fry's of the same. On September 30, November 9 and 13, 2009, Stewart notified the Union in writing that she was revoking her checkoff authorization and on November 16, 2009, Stewart notified Fry's of the same. On September 30, November 9 and 10, 2009, Brown notified the Union in writing that she was revoking her checkoff authorization and on November 16, 2009, Brown notified Fry's of the same. On November 12, 2009, Jones notified the Union in writing that she was revoking her checkoff authorization and on November 12, 2009, Jones notified Fry's of the same. On September 29 and November 10, 2009, Hardy notified the Union in writing that she was revoking her checkoff authorization and on December 4, 2009, Hardy notified Fry's of the same. On October 2 and November 11, 2009, J. Fuentes and T. Fuentes notified the Union in writing that they were revoking checkoff authorization and on October 2 and November 11, 2009, J. Fuentes and T. Fuentes notified Fry's of the same. In addition, during the 10(b) period in this case, June 28 to November 12, 2009, other employees notified the Union in writing that they were their revoking checkoff authorizations and notified Fry's of the same. None of the revocations occurred during their 1-year anniversary date specified in the checkoff authorizations and, thus, they were untimely. Rather, the revocations occurred during the hiatus period before a new contract was reached. The Union and Fry's refused to honor the revocations of the checkoff authorizations and continued to deduct money from the wages of the employees and send the money to the Union. The Union sent letters to those employees; the letters explained that the revocations were not timely under the terms of the checkoff authorization and described the next opportunity the employee would have to revoke the checkoff authorization.

Analysis

The complaint alleges by continuing to remit to the Union the money from the wages of the employees, Fry's has violated Section 8(a)(2) and (3) and that by continuing to accept that money the Union has violated Section 8(b)(1)(A) by both restraining and coercing employees in the exercise of their Section 7 rights and by breaching its duty of fair representation and violated Section 8(b)(2) by attempting to cause Fry's to violate Section 8(a)(3). These allegations rise or fall on whether or not the employees had the right revoke their checkoff authorizations during time periods that are *not* specified in the authoriza-

tions that they had signed. In *Frito Lay*, 243 NLRB 137, 144 (1979), the Board rejected the notion that employees are free to revoke their checkoff authorizations at will during the hiatus period between contracts. Here, like in *Frito Lay*, employees were not entitled to withdraw at will during the hiatus period between the contracts.

Next, the General Counsel points to language in the letters the Union sent to the employees who resigned from membership or attempted to revoke their checkoff authorizations. Some letters provided the employees with the dates of the next escape period occurring on the anniversary of their signing the authorization (all admittedly accurate dates.) The General Counsel complains that:

None of those letters contained any information about the termination dates of any collective-bargaining agreement, an extension of any collective-bargaining agreement, or the possibility of revoking one's check-off authorization at any time other than during the 15-day window period preceding the anniversary of one's execution of the check-off authorization.

I first take time to individually address the impact each of the three items of missing information in the letters. Then I stop after giving two reasons why the whole matter of the letters is a mere distraction from the allegations in the complaint. The letters in fact did not provide information of the dates on which the employees could next revoke their authorizations upon the expiration of the contract. But remember no new contract had been reached so there were no dates to provide. And unless the new collective-bargaining agreement was to be for a term of less than a year, then the anniversary dates described in the letters were indeed the next chance the employees could revoke their authorizations. Next, the letters in fact did not provide dates when employees could revoke their checkoffs during any extension agreement, but as described above, this is wholly irrelevant. Finally, the letters did not contain any information concerning the possibility of revoking the checkoff at any time other than the employee's anniversary date. But this seems to me to simply be restating the first two items, albeit in a different way. In any event, whatever was said in these letters is entirely irrelevant to the allegations in the complaint in this case. First, the complaint does not allege that the letters themselves contained any unlawful statements or breached the union fiduciary duty. Second, whatever letters said, they were sent *after* and in reply to the resignations and attempted revocations and therefore could not have caused any confusion among employees concerning their *earlier* attempts to revoke the authorizations.

Next, the General Counsel argues that during the hiatus between the old and new contracts:

Respondents during this period entered into at least eight extensions of the 2003 CBA, each for a different duration so that it was impossible, in some cases, to determine the applicable window period during which to revoke the checkoff authorizations.

But this argument too is meritless because it is premised on the notion that employees are entitled to revoke their checkoff authorizations during the window periods preceding the termina-

tion of the extension agreements. In *Atlanta Printing Specialties*, 215 NLRB 237 (1974), enfd. 523 F.2d 783 (6th Cir. 1975), the Board held that the "applicable collective-bargaining agreement" Section 302(c)(4) is the one in effect at the time the employees signed their check-off authorizations and *not* subsequent collective-bargaining agreements. Moreover, as the Union explains in its brief, the rationale underlying *Atlanta Printing* is to provide a date-certain for revocations of checkoff authorizations; allowing revocations as a matter of law prior to the expiration of extension agreements would create confusion. Board law and common sense require the rejection of the General Counsel's theory concerning the impact of the extension agreements on checkoff revocations.

The General Counsel then cites *Food & Commercial Workers Local 1 (Big V Supermarkets)*, 304 NLRB 952 (1991), enfd. 975 F.2d 40 (2d Cir. 1992). But that case is clearly inapplicable here because it involved checkoff authorizations with no revocations periods and thus were revocable at will.

Next, the General Counsel claims that the checkoff-authorization forms were ambiguous and therefore employees were allowed to revoke the authorization at will. But I have already concluded 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. Moreover, the General Counsel has failed to show that any ambiguity that employees might perceive resulted from the misleading acts of the Union rather ambiguity inherent in the statutory language and the judicial gloss placed on that language.

E. General Counsel's Brief

In his closing brief, the General Counsel refers to "the unlawful language contained within the checkoff authorizations signed by the employees. He now challenges the facial validity of the checkoff authorizations. I decline to resolve that matter because the General Counsel has not accorded Fry's and the Union due process. Although the General Counsel sets forth the checkoff authorization language in paragraph 5 of the complaint, the same paragraph that contains the unit description, the collective-bargaining agreement, including the relevant the language from that contract concerning checkoffs, the dates of the extension agreements, and the date a new collective-bargaining agreement was reached, the complaint does NOT allege that any of these items violated the Act. To the contrary, the complaint only alleges that conduct described in subsequent paragraphs violated the Act. Indeed, when I earlier dismissed allegations in the complaint, I did not dismiss any of the allegations of paragraph 5 in the complaint because they did not involve any unlawful conduct. And in his brief to the Board in support of his special appeal the General Counsel stated:

Rather, the AGC alleges that Respondent Union continued to accept, receive, and retain dues deducted from employees' wages after the irrevocability periods specified in the checkoff

authorizations expired, and by doing so violated the Act. The AGC also alleges that because the checkoff authorizations became revocable at will after October 25, 2008, and remained revocable at will until November 12, 2009, an employee's resignation of Union membership during that period extinguished the employee's obligation to pay dues.

Again, there is not the slightest indication that the General Counsel is challenging the facial validity of the checkoff authorization. To the contrary, by this statement the General Counsel indicates that during the time periods before the expiration of the old contract and after the beginning of the new contract the Union and Fry's properly continued to deduct dues pursuant to the checkoff authorization forms; that is to say the authorization forms themselves were lawful. Moreover, after the trial resumed the General Counsel stated:

Well, Your Honor, let me be clear that we are not and we have, although it's very easy to do so, we have not alleged in the Complaint that [the checkoff authorization form] is facially invalid.

And later, I specifically invited the General Counsel to move to amend the complaint to challenge the facial validity of the checkoff authorization and the General Counsel declined, stating, "Your Honor, we are not alleging that it is a facially invalid [checkoff]." I also point out that the General Counsel's earlier position concerning the checkoff authorization was that it was "ambiguous." And at the trial while discussing with me the window period prior to the expiration of the contract, the

General Counsel conceded:

Well, I think both parties agree that during the 15 day period before October of 2008 that the parties could revoke. I'm not arguing that.'

The General Counsel then proceeded to explain that his argument was that the extension agreements confused matters for employees seeking to revoke their authorizations. This is directly contrary to the interpretation the General Counsel now takes in his brief. And of course the events preceding the expiration of the 2003–2008 contract are well beyond the 10(b) period covered by any charge in this case.

Because the complaint does not challenge the facial validity of the checkoff authorizations and because the General Counsel has repeatedly stated that he is not doing so, I conclude any effort to resolve the matter now would result in a denial of basic due process for the Fry's and the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 3, 2011

⁴ 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.