

UNITED STATE OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Fry's Food Stores,
Employer,

UFCW Local 99,
Union,

and

Kimberly Stewart, Karen Medley,
Elaine Brown, Shirley Jones,
Salomeh Hardy, Janette Fuentes and
Tommy Fuentes,
Charging Parties.

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CHARGING PARTIES' STATEMENT OF POSITION

Glenn M. Taubman, Esq.
c/o National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
gmt@nrtw.org

Attorney for Charging Parties

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INTRODUCTION

In *Stewart v. NLRB*, 851 F.3d 21 (D.C. Cir. 2017), the U.S. Court of Appeals for the District of Columbia Circuit vacated the Board's decision in this case, *Smith's Food & Drug Centers, Inc. d/b/a Fry's Food Stores*, 362 NLRB No. 36 (Mar. 20, 2015), adopting 358 NLRB No. 66 (July 9, 2012), and remanded for issuance of a new decision. By Order dated June 30, 2017, the Board accepted the D.C. Circuit's remand and requested statements from the parties. This constitutes Charging Parties' Statement of Position.

FACTS

The seven Charging Parties and hundreds of similarly-situated employees work (or worked) as grocery clerks for Fry's, a large supermarket chain in Arizona. They are subject to UFCW Local 99's exclusive representation, but are not required as a condition of employment to be union members or pay union dues because Arizona is a Right to Work state. Nevertheless, Charging Parties and some of their co-workers became members of Local 99, and signed union-created checkoff forms authorizing the automatic deduction of union dues from their paychecks. The checkoff authorizations stated:

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 between the Employer and Local 99, whichever occurs sooner, and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and Union written notice of revocation bearing my signature thereto.

(G.C. Ex. 8, at 1).¹

These checkoff authorization forms do not mention that federal law provides employees with the right to revoke such authorizations whenever a collective bargaining agreement is not in effect. (LMRA Section 302(c)(4), 29 U.S.C. § 186(c)(4), states that “a written [dues deduction] assignment . . . 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.” (Emphasis added)).

On October 25, 2008, the collective bargaining agreement between Fry’s and Local 99 terminated. (G.C. Ex. 5). Between that date and October 4, 2009, Fry’s and Local 99 signed nine temporary extension agreements, each lasting anywhere from 28 to 62 days, respectively. (G.C. Ex. 6).² The last temporary extension agreement expired on October 31, 2009, and no agreement of any kind was in effect from that date until

¹ “G.C. Ex.” refers to the exhibits admitted at the ALJ hearing in this case. “TR” refers to the transcript of that hearing.

² “All parties agree that the series of interim agreements have no legal significance.” *Stewart*, 851 F.3d at 33. Other circuits agree that such temporary extension agreements are not “applicable collective bargaining agreements” within the meaning of Section 302(c)(4). *Anheuser-Busch, Inc. v. Teamsters Local 822*, 584 F.2d 41, 43 (4th Cir. 1978); *Atlanta Printing Specialties*, 215 NLRB 237 (1974), *enforced*, 523 F.2d 783, 785 (5th Cir. 1975).

November 12, 2009, when Fry's and Local 99 signed a Memorandum of Understanding adopting a successor collective bargaining agreement. In October and November 2009, Local 99 began threatening a strike against Fry's, and many employees became concerned for their jobs. (TR 122-27).

During the year-long contract hiatus between October 25, 2008 and November 12, 2009, and especially as the potential strike drew nearer, Charging Parties and hundreds of their co-workers attempted to resign from Local 99 and stop the deductions of union dues from their paychecks. (G.C. Ex. 7).³ They exercised their rights in two ways.

First, Charging Parties and many other employees sent letters to Local 99 and/or Fry's resigning their membership in the Union. (G.C. Exs. 7-15). Local 99 and Fry's refused to accept those resignation letters as indicating employees' desire to revoke their dues checkoff authorizations at the earliest opportunity, and continued to collect dues from those nonmembers. (G.C. Exs. 7-15).

Second, Charging Parties and many other employees sent letters to Local 99 and/or Fry's during the year-long contract hiatus period explicitly stating that they were revoking their dues checkoff authorizations.⁴ Local 99, by means of a form letter, notified hundreds

³ G.C. Exhibit 7 is a compendium, arranged alphabetically, of the many hundreds of resignation and revocation letters submitted by employees to Local 99 and/or Fry's during the contract hiatus period, as well as some of Local 99's responses to those letters.

⁴ On October 6 and November 9, 2009, Karen Medley notified Local 99 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, Kimberly
(continued...)

of employees that it would not honor those revocation letters because they were not sent within the short “anniversary date” window period specified in the checkoff authorization, even though they *were* sent “beyond the termination date of the applicable agreement,” the period specified in Section 302(c)(4).⁵ Fry’s continued to deduct the dues, never questioning Local 99’s instructions. (TR 97-104, 110, 118-19). Thus, Local 99 and Fry’s paid no heed to the fact that Section 302(c)(4) grants employees a statutory right to revoke checkoff authorizations during a contract hiatus period, and they continued to deduct money from Charging Parties and other employees’ wages,

⁴(...continued)

Stewart notified Local 99 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, Elaine Brown notified Local 99 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, Shirley Jones notified Local 99 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, Salomeh Hardy notified Local 99 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, Janette and Tommy Fuentes notified Local 99 in writing that they were revoking their checkoff authorizations, and on October 2 and November 11, 2009, both notified Fry’s of the same. (G.C. Exs. 8-15).

⁵ For example, the denial letter Local 99 sent to Kimberly Stewart stated that her written revocation request would not be honored because “request for withdrawal must be made in writing not less than thirty (30) and not more than forty-five (45) days prior to the anniversary date of the execution of the agreement.” (G.C. Ex. 8, p. 3; *see also* G.C. Ex. 9, p. 2). Similar denial letters were sent to many other employees. (G.C. Ex. 7). The denial letters linked the employees’ ability to revoke to the 30-45 day period *prior* to the anniversary date of the signing of their specific dues checkoff authorizations, and failed to acknowledge any opportunity employees had to revoke the checkoff authorizations “beyond the termination” of the collective bargaining agreement, i.e., during a hiatus period. Local 99 included in some of these form letters specific future dates when revocations would be “timely,” but not in others. (G.C. Ex. 7).

notwithstanding the revocation letters. (G.C. Exs. 7-15).

After ULP charges were filed, the General Counsel issued a complaint, alleging that Local 99 had violated NLRA Sections 8(b)(1)(A) and (2), 29 U.S.C. §§ 158(b)(1)(A) and (2), and that Fry's had violated NLRA Sections 8(a)(1), (2) and (3), 29 U.S.C. §§ 158(a)(1), (2) and (3), by continuing to deduct dues from Charging Parties and hundreds of similarly-situated employees who had resigned and/or revoked their dues checkoff authorizations "beyond the termination" of the 2003-2008 contract.

ARGUMENT

I. The Board Should Overrule *Frito Lay* and Adopt the Dissent of Member Murphy in That Case. The Board Should Also Adopt the Concurring/Dissenting Opinion of Judge Silberman in *Stewart v. NLRB*.

The key to properly deciding this case can be easily stated. The Board should: overrule *Frito-Lay, Inc.*, 243 NLRB 137 (1979) and adopt the dissent of Member Murphy in that case; adopt the concurring/dissenting opinion of Judge Silberman in *Stewart v. NLRB*; and adopt the decision in *Anheuser-Busch, Inc. v. Teamsters Local 822*, 584 F.2d 41 (4th Cir. 1978). Doing this will fully protect employees' right to refrain under NLRA Sections 7 and 8(b)(1)(A), and their concomitant right to revoke a dues checkoff during the times mandated by Section 302(c)(4). Doing this will at long last comply with Congress' mandate in Section 302(c)(4) that dues checkoffs must be revocable "beyond" the termination of the contract. Finally, doing this will clean up this confusing area of the law, which serves only to enrich unions at the expense of employees who no longer wish

to support them financially. *See, e.g., NLRB v. Okla. Fixture Co.*, 332 F.3d 1284 (10th Cir. 2003) (en banc); *Atlanta Printing Specialties*, 215 NLRB 237 (1974), *enforced*, 523 F.2d 783 (5th Cir. 1975); *Monroe Lodge No. 770, IAM v. Litton Bus. Sys., Inc.*, 334 F. Supp. 310 (W.D. Va. 1971), *aff'd*, No. 71-2063, 1972 WL 3025 (4th Cir. May 15, 1972); *NLRB v. Penn Cork & Closures, Inc.*, 376 F.2d 52 (2d Cir. 1967).

To the extent any party argues that *Frito Lay* and related issues were not properly raised below and cannot be considered by the Board, they are wrong. The facts and the violations pled in the General Counsel's complaint are clear, and the Board is free to find a violation on any applicable theory, even if it differs from the one relied upon by the General Counsel. *See IBEW Local 58 (Paramount Indus., Inc.)*, 360 NLRB No. 30 (Feb. 10, 2017).⁶ Here, the Complaint contains a single, simple allegation, that the dues collections occurring after the employees' resignations and revocations were unlawful.

⁶ As the Board stated in *IBEW Local 58*, 360 NLRB No. 30, at *4 n.17: Although the General Counsel has not clearly pursued a violation on this theory, it is well within established Board practice to find a violation under the circumstances of this case, where all of the underlying facts are undisputed. The Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, even in the absence of exceptions, where the unlawful *conduct* was alleged in the complaint. *See, e.g., Hawaiian Dredging Construction Co.*, 362 NLRB No. 10, slip op. at 2 fn. 6 (2015); *Pepsi America, Inc.*, 339 NLRB 986 (2003); *Jefferson Electric Co.*, 274 NLRB 750, 750–751 (1985), *enfd.* 783 F.2d 679 (6th Cir. 1986). *See also, e.g., NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (5th Cir. 1959) (enforcing Board decision that found a violation on a theory different from the one relied upon by the judge, despite the General Counsel and the charging party's failure to except to the judge's decision). Here, the violation is alleged in the complaint, the factual basis for the violation is clear from the record, the law is well established, and no due process concerns are implicated.

Moreover, Local 99's Answer to the Complaint specifically raised *Frito-Lay* as a defense.

Thus, the Board is free to sustain the Complaint on virtually any legal ground it chooses.

II. Fry's and Local 99 Could Not Lawfully Deduct Dues After Employees Revoked Their Checkoff Authorizations During a Contract Hiatus, Because Section 302 Makes Such Authorizations Revocable at Will "Beyond the Termination" of the Applicable CBA.

Section 302(c)(4) gives employees an unambiguous statutory right to revoke their dues checkoffs at will "*beyond*" the expiration of the collective bargaining agreement. *Stewart*, 851 F.3d at 35 (Silberman, J., concurring & dissenting).⁷ Despite this statutory clarity, the Board summarily affirmed the ALJ's holding that Charging Parties and similarly-situated Fry's employees could *not* revoke their checkoff authorizations "beyond" the termination date of the contract, during the hiatus period. 362 NLRB No. 36 (Mar. 20, 2015), *reaffirming & adopting* 358 NLRB No. 66 (July 9, 2012). The Board's prior decision in this case is in direct contravention of Section 302(c)(4), and employees' right to refrain from supporting a union under NLRA Sections 7 and 8(b)(1)(A).

As the Fifth Circuit recognized in *NLRB v. Atlanta Printing Specialties*, 523 F.2d 783 (5th Cir. 1975), the legislative history of Section 302(c)(4) shows Congress' concern

⁷ Section 302(c)(4) states:

The provisions of this section shall not be applicable . . . with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *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*

29 U.S.C. § 186(c)(4) (emphasis added).

with money being taken from an employee “without any consent.” *Id.* at 787. Citing *Felter v. Southern Pacific Co.*, 359 U.S. 326, 336 (1959), the Fifth Circuit held that Section 302(c)(4) creates two distinct escape periods for employees to withdraw their consent: (1) at the annual anniversary date of signing and (2) when the CBA expires.

Congress intended to preserve the employees’ freedom of choice to refrain from union membership. The reason for the annual escape period was to allow the employee to reconsider at least once a year. Arguably, the reason for the contract expiration escape period was that the employee should have an opportunity to reconsider at the point when the collective bargaining agreement under which he paid dues would end. At that time either a new collective bargaining agreement would be negotiated, with terms as yet unknown, or there would be no contract in existence. The union concedes that when there is no collective bargaining agreement in effect, dues checkoff authorizations are revocable at will. *See Murtha v. Pet Dairy Products Co.*, 44 Tenn.App. 460, 314 S.W.2d 185 (1957).

Whatever the rationale, Congress provided for revocation at two distinct times: on the anniversary of the authorization, and at the termination of the collective bargaining agreement.

Atlanta Printing Specialties, 523 F.2d at 787-88. The Fourth Circuit concurs, holding in a case directly on point that Section 302(c)(4) “guaranteed the employees the right to revoke their checkoff authorizations at will during the hiatus,” and that “revocations tendered during the period between the expiration of one bargaining contract and the execution of the next one were effective.” *Anheuser-Busch, Inc.* 584 F.2d at 43-44.

The Board’s contrary interpretation of Section 302(c)(4) in this case was based on *Frito-Lay*. There, a divided Board refused to allow employees to revoke dues checkoff authorizations during a contract hiatus, believing that Section 302(c)(4)’s one-year irrevocability period and clever union draftsmanship overrode the statute’s escape period

for dues checkoff revocations “beyond” the termination of the contract. In essence, *Frito-Lay* allowed unions to use “a gimmick—to deprive an employee of a right to revoke after termination” of the contract. *Stewart*, 851 F.3d at 33 (Silberman, J., concurring and dissenting). The “gimmick” occurs when unions establish revocability periods that are *not* “beyond” the termination date of the agreement, but months *before* that date.

In her dissent in *Frito-Lay*, Member Murphy correctly recognized that “as a matter of law, under the clear mandate of the proviso to Section 302(c)(4) of the Act, a dues checkoff authorization is revocable when a collective-bargaining contract is not in effect.” 243 NLRB at 139.

No legal exegesis looking for vague implications of the language used or for some veiled legislative intent is necessary here, for the language [of Section 302(c)(4)] is clear on its face that once the contract terminates the authorization is revocable. And this rather obvious conclusion is in accord with past Board decisions on the matter.

Id. at 140 (citations omitted) (Member Murphy, dissenting).

Besides violating the precedents of two Circuits, the Board’s misinterpretation of Section 302(c)(4) in *Frito Lay* and this case suffers from two fatal flaws. First, the Board ignored the word “or” in the statute: “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.” 29 U.S.C. § 186(c)(4) (emphasis added). In effect, *Frito Lay* seems to contend that federal law provides only one guaranteed

“window period” to escape union payments.⁸ As *Atlanta Printing Specialties* and *Anheuser-Busch* both recognized, however, Congress guaranteed employees two distinct periods to revoke their checkoffs, including during the hiatus between contracts.

Second, *Frito-Lay*'s misinterpretation of Section 302(c)(4) fails because it ignores the word “beyond” in the phrase “beyond the termination date of the applicable collective agreement.” 29 U.S.C. § 186(c)(4). “Beyond” means “on or to the farther side of,” “at a greater distance than” and “in a degree or amount surpassing.” *Merriam-Webster Online Dictionary*.⁹ Thus, when Congress wrote that “a written assignment . . . shall not be irrevocable . . . *beyond* the termination date of the applicable collective agreement,” 29 U.S.C. § 186(c)(4) (emphasis added), it clearly meant checkoffs shall be revocable *after* that termination date, not at some restrictive, union-designated window (a.k.a. “a gimmick,” 851 F.3d at 33) that occurs well *before* the contract's termination.

The Board majority in *Frito-Lay* attempted to replace the word “beyond” in the statute with the word “at.” For example, *Frito-Lay* twice states that Section 302(c)(4)

⁸ Section 302(c)(4) does not contain any reference to “window periods.” It only refers to the authorization card being irrevocable for successive one-year periods, or until a collective bargaining agreement has expired. While the validity *per se* of 15 day window periods is not directly at issue in this case, the contention that Section 302(c)(4) limits revocations to one minuscule yearly period is false. There is no textual support that revocations should be limited to such a small window period. *See Felter*, 359 U.S. at 336; *Litton Bus. Sys., Inc.*, 334 F. Supp. at 316-17. The better reading is that once an authorization has been revoked, it is incumbent upon the union and employer to give the revocation effect when the employee's next available “open period” occurs, even if it is technically untimely when first received. *Id.*

⁹ <http://www.merriam-webster.com/dictionary/beyond>.

permits revocation only “at the termination of any ‘applicable collective agreement[s],’” 243 NLRB at 138 (repeated twice).¹⁰ Of course, “at” and “beyond” have entirely different meanings. “At” refers to a fixed point,¹¹ while “beyond” refers to things after a fixed point. *Frito-Lay*’s attempt, through sleight-of-hand, to replace “beyond” with “at” in Section 302(c)(4) must now be rejected by this Board. *Stewart*, 851 F.3d at 33 (Silberman, J., concurring and dissenting). It is high time for the Board to fix these errors.

III. The Board Must Reconcile Conflicting Precedent.

Not only did the Board misconstrue Section 302’s plain language in *Frito Lay* and this case, but its case law on this issue is often conflicting and irreconcilable. In *Atlanta Printing Specialties*, the Board itself recognized that: “Section 302(c)(4) guarantees 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.” 215 NLRB at 237. But then in *Frito-Lay*, and again in this case, the Board reached a very different conclusion.

Adding to the inconsistency is the Board’s decision in *WKYC-TV*, 359 NLRB 286

¹⁰ Local 99 also ignores the word “beyond,” appearing in Section 302(c)(4), in its checkoff authorization card, which states that “[t]his authorization and assignment shall be irrevocable for a period of one (1) year from the date of execution or *until the termination date of the agreement between the Employer and Local 99.*” (emphasis added). (App. 133).

¹¹ “At” is “used as a function word to indicate presence or occurrence in, on, or near, <staying *at* a hotel> <*at* a party> <sick *at* heart>.” *Merriam-Webster Online Dictionary*, <http://www.merriam-webster.com/dictionary/at>.

(2012), which held that employees “are free to revoke their checkoff authorizations when the collective-bargaining agreement expires.” *Id.* at 292.¹² There, the Board held that *employers* could not unilaterally suspend the collection of dues during a contract hiatus, reasoning that only *employees* should decide when to end the deduction of dues from their salaries.

Initially, the dissent suggests that dues checkoff is not really voluntary, and that most employees would not willingly agree to checkoff in the absence of a contractual union-security provision. This view simply cannot be reconciled with the reality that dues-checkoff provisions exist even in the absence of union-security provisions, including in the states with “right-to-work” laws. Nor is it consistent with the fact that *employees are free to revoke their checkoff authorizations when the collective-bargaining agreement expires*; that rule—not allowing employers unilaterally to cease deducting union dues regardless of their employees’ wishes—is consistent with “voluntary unionism.”

Id. (emphasis added).

Thus, *WKYC-TV* held that only *employees* possess the unfettered prerogative to revoke at will at the expiration of the collective bargaining agreement. Yet, in this case, when the Charging Parties and hundreds of similarly-situated grocery clerks actually attempted to exercise that prerogative, the Board applied *Frito-Lay* to hold that they were barred from revoking their dues checkoffs at will during the contract hiatus, all because of Local 99’s “gimmick” of tying the revocation language in the checkoff to a period *before* the contract’s expiration. *Stewart*, 851 F.3d at 33 (Silberman, J., concurring &

¹² Although *WKYC-TV* was decided by an unlawfully constituted Board under *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), its reasoning was adopted by a constitutionally-valid Board in *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (Aug. 27, 2015).

dissenting). The Board cannot have it both ways.

Thus, the Board erred in validating Fry's and Local 99's refusal to honor employees' revocations of their checkoff authorizations sent during the contract hiatus of October 25, 2008 to November 12, 2009, and its must now reverse *Frito Lay* and its prior decision in this case. The Board must fix the law and make it consistent and workable so employees can protect their rights under Section 7 and Section 302(c)(4).

IV. Assuming Local 99's Dues Checkoff Does Not Contain a Second Period to Allow All Employees to Revoke at Will at the Expiration of Any Applicable Collective Bargaining Agreement, It Must Be Struck Down as Violating *Frito-Lay*, NLRA Section 7, and LMRA Section 302.

The court of appeals majority in *Stewart* found an ambiguity in Local 99's dues checkoff form, and instructed the Board to reassess its decision in light of that ambiguity. "On remand, insofar as the Board might seek to reinstate the same result in favor of the company and union, the Board would need to explain how it could do so consistently with *Frito-Lay* and *Atlanta Printing* or justify any departure from those decisions." 851 F.3d at 30–31. On its face, Local 99's dues checkoff form does not permit all employees to revoke at will "beyond the termination date of [any] applicable collective agreement," as required by § 302(c)(4). Under that circumstance, the D.C. Circuit majority believed the ALJ had read Local 99's dues checkoff language as limiting the "applicable agreement" to the one in effect when the employee initially signed his or her checkoff, and not any later agreements.

Assuming the ALJ properly construed Local 99's dues checkoff form (which must

be construed most strongly against the draftsman), the Board must find that form facially illegal: a) under NLRA Sections 7 and 8(b)(1)(A), because it unlawfully restrains and coerces employees into supporting a union against their will; and b) under Section 302(c)(4), because it deprives employees of one of the two recognized revocation periods under cases like *Atlanta Printing Specialties*.

V. Resignation From Union Membership Strongly Correlates to a Desire to Cease Paying Union Dues at the Earliest Possible Opportunity.

This case also presents the issue of whether Fry's and Local 99 were required to treat employees' *resignations* from the Union as evidence of their simultaneous desire to *revoke* all financial support of the Union at the earliest possible opportunity. The Board's prior decision answered that question in the negative, but that decision must now be reversed as well.

In this case, many employees sent Local 99 resignation letters, but did not explicitly say they wanted their checkoffs revoked. (G.C. Ex. 7). Common sense dictates that individuals who resign from an organization also wish to cease paying dues to it at the earliest possible opportunity. For example, when an individual sends a letter to a civic organization or health club stating "I hereby resign my membership," is it reasonable to assume that person *wants* to continue paying dues to the organization? Of course not. The only reasonable assumption is that the person wants to discontinue paying dues as quickly as possible. *See Knox v. SEIU, Local 1000*, 567 U.S. 298, 312 (2012) ("Shouldn't the default rule comport with the probable preferences of most nonmembers? And isn't it

likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the . . . union dues?”).

Here, hundreds of Fry’s employees resigned their union membership after the contract expired. (G.C. Exs. 7-15). Yet the prior Board irrationally presumed that those resignees did *not* wish to stop the deduction of union dues from their paychecks at the first available opportunity. This presumption must be rejected as both irrational and a clear violation of the NLRA’s principles of voluntary unionism, *Pattern Makers’ League v. NLRB*, 473 U.S. 95 (1985), and the Section 7 “right to refrain,” 29 U.S.C. § 157.

Local 99 has argued that it is possible employees may resign to avoid union membership restrictions, such as being fined for crossing a picket line, while still wanting to financially support the Union’s bargaining activities. This argument, however, defies common sense. If anything, that an employee resigns in order to defy a union’s strike dictate suggests that he does not want to support the union’s bargaining tactics, either. Any other interpretation is unreasonable. *Knox*, 567 U.S. at 312. Indeed, it is equally likely that grocery clerks, unschooled in labor law, did not know the precise words to use, or did not imagine that resigning could be insufficient to cut off further dues collections.

Local 99 refuses to honor resignations as an expression of employees’ desire to revoke their dues checkoffs at the earliest possible time, so it hides behind “gimmicks” that serve its financial self-interests. *Stewart*, 851 F.3d at 33 (Silberman, J., concurring & dissenting). This is shown by the many resignation letters Local 99 received from Fry’s

grocery clerks, none of whom is schooled in the intricacies of NLRB law or Section 302(c)(4)'s jargon. It is also shown by the convoluted and confusing checkoff language Local 99 drafted and uses, and by the brusque manner in which it treated employees who sought to resign their memberships or revoke their dues checkoffs, even refusing to inform many of them of the specific dates of their own "window periods." (G.C. Ex. 7). But padding union coffers from the pockets of unwilling employees is not a legitimate reason for burdening employees' statutory right to refrain. *Cf. Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 515 (5th Cir. 1998) (holding that a union's "unduly cumbersome" objection procedure "serves only to further the illegitimate interest of the [union] in collecting" more dues than it was entitled to); *Felter*, 359 U.S. at 336 (holding that "[t]he complete freedom of individual choice in this area, . . . may seem unfortunate to labor organizations, but it is a problem with which we think Congress intended them to live."). Strapping employees who resign their union memberships to the mast of continued financial obligations is the antithesis of free choice.

Electrical Workers, Local 2088 (Lockheed Space Operations Co.), 302 NLRB 322 (1991), makes this clear. In *Lockheed*, the Board held that where an employee executes a dues checkoff authorization in a Right to Work state, his or her resignation from union membership automatically extinguishes any further obligation to pay dues, notwithstanding any irrevocability language in the checkoff authorization itself. *Id.* at 328-29. This policy promotes an employee's free choice to join or refrain.

Lockheed recognized one narrow exception to that general rule: where the checkoff authorization explicitly obligates the employee to pay dues even when he or she is not a union member, the checkoff authorization remains in force, notwithstanding an employee's resignation, *but only until the period of irrevocability ends*.

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

Id. at 329 (emphasis added). Under *Lockheed*, an employee's resignation in a Right to Work state puts the union on notice that he or she no longer supports the union, and that it must cease collecting that employee's dues upon the expiration of the checkoff's irrevocability period. *See Litton Bus. Sys., Inc.*, 334 F. Supp. at 316-17 (untimely dues checkoff revocation must be given effect during the next period of revocability, without the need for further employee action).¹³

¹³ Federal courts have relied on the Supreme Court's decision in *Felter* to require that even untimely checkoff revocations be given effect as soon as the next revocation period arrives: This court is of the opinion and so holds that while the revocations were ineffective to authorize the cessation of deductions during the second yearly period, they were effective to authorize the Company to cease the deductions at the end of that period. In other words, revocations which were submitted during the year gave the Company and the Union notice of the employees' desire to discontinue the deductions, and it was unnecessary for the employees to resubmit revocations during the fifteen day period at the end of the second year. *See Felter v. Southern Pacific Co.*, 359 U.S. 326, 335 (1959). *Litton Bus. Sys. Inc.*, 334 F. Supp. at 316-17.

As explained above, Local 99's checkoff authorizations were revocable as a matter of law under Section 302(c)(4) during the hiatus between October 25, 2008 and November 12, 2009, due to the expiration of the collective bargaining agreement. Under *Lockheed*, Local 99 and Fry's should have immediately ceased deducting dues from those employees who had resigned during the hiatus, because they no longer had an irrevocability period during that time. Local 99 and Fry's failure to do so violated employees' right to refrain from union membership under NLRA Section 7, 29 U.S.C. § 157. Indeed, this is the only proper reading of the NLRA's statutory policy favoring voluntary unionism. *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985).

The ALJ confused distinct issues when he held that language in Local 99's checkoff authorization stating that it "is not contingent upon [any] present or future membership in the Union" meant that the authorization could never be revoked by means of a resignation letter. This language may mean that the authorization's irrevocability period cannot be vitiated by resignation from membership, but a resignation letter nevertheless can operate as a request that the checkoff authorization be revoked as soon as the irrevocability period ends. *Lockheed*, 302 NLRB at 328-29; *Litton Bus. Sys., Inc.*, 334 F. Supp. at 316-17; *Felter*, 359 U.S. at 336. Contrary to the ALJ, *Lockheed* recognizes that a resignation from membership *does* operate to revoke a checkoff authorization, and that language stating that the authorization is "not contingent on membership" only controls *when* that dues revocation will become effective, not whether

it should ever be given effect. 302 NLRB at 328-29.

In short, Charging Parties and other similarly-situated employees' *resignations* should have been deemed to effectuate the immediate *revocation* of their dues checkoffs, given that they work in a Right to Work state and their "agreed upon period of irrevocability" ended as a matter of law, under Section 302(c)(4), during the October 25, 2008 to November 12, 2009 contract hiatus. The Board's prior decision must be reversed.

CONCLUSION

The Board should overrule *Frito Lay* and adopt the dissenting opinion of Member Murphy in that case. It should also adopt the Fourth Circuit's decision in *Anheuser-Busch* and the concurring/dissenting opinion of Judge Silberman in *Stewart*. Doing these things will properly protect employees' right to refrain under NLRA Section 7, and their concomitant right to revoke a dues checkoff under Section 302(c)(4), which commands that checkoffs must be revocable "*beyond* the termination date of the applicable collective agreement." (Emphasis added).

Respectfully submitted,

s/ Glenn M. Taubman

Glenn M. Taubman
c/o National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
gmt@nrtw.org
Attorney for Charging Parties

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Statement of Position was E-filed with the Board's Executive Secretary and was sent via e-mail to the other parties as follows:

Cornele Overstreet, Director of NLRB Region 28
Kyler Scheid, Attorney (Counsel for the General Counsel)
Cornele.Overstreet@nlrb.gov
Kyler.Scheid@nlrb.gov

Kristin Martin
Eric Myers (Counsel for the Union)
Steve Stemmerman
klm@msh.law
ebm@msh.law
stem@msh.law

Frederick C. Miner (Counsel for the Employer)
Fminer@littler.com

this 28th day of August, 2017.

s/ Glenn M. Taubman

Glenn M. Taubman