

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**SMITH'S FOOD & DRUG CENTERS, INC.
d/b/a FRY'S FOOD STORES**

and

Case 28-CA-22836

KAREN MEDLEY, an Individual

and

Case 28-CA-22837

KIMBERLY STEWART, an Individual

and

Case 28-CA-22838

ELAINE BROWN, an Individual

and

Case 28-CA-22840

SHIRLEY JONES, an Individual

and

Case 28-CA-22858

SALOOMEH HARDY, an Individual

and

Case 28-CA-22871

JANETTE FUENTES, an Individual

and

Case 28-CA-22872

TOMMY FUENTES, an Individual

**UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 99**

and

Case 28-CB-7045

KIMBERLY STEWART, an Individual

and

Case 28-CB-7047

ELAINE BROWN , an Individual

and

Case 28-CB-7048

KAREN MEDLEY , an Individual

and

Case 28-CB-7049

SHIRLEY JONES, an Individual

and

Case 28-CB-7058

SALOOMEH HARDY, an Individual

and

Case 28-CB-7062

JANETTE FUENTES, an Individual

and

Case 28-CB-7063

TOMMY FUENTES, an Individual

**GENERAL COUNSEL'S STATEMENT OF POSITION
ON ISSUES RAISED BY REMAND**

Kyler Scheid
Counsel for the General Counsel
2600 N. Central Avenue, Suite 1400
Phoenix, Arizona 85004
Telephone: (602) 416-4769
Facsimile: (602) 640-2178
kyler.scheid@nlrb.gov

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I. INTRODUCTION

During a contractual hiatus period from October 25, 2008, through November 12, 2009, employees of Smith's Food & Drug Centers, Inc. d/b/a Fry's Food Stores (Respondent Employer) who had previously executed dues check-off authorizations attempted to revoke them. Some of the same employees, along with additional employees of Respondent Employer, resigned their union memberships during this same contractual hiatus. The dues check-off authorizations executed by these employees on their face did not afford the employees an opportunity to revoke upon termination of Respondent Employer's collective-bargaining agreement with United Food and Commercial Workers Union, Local 99 (Respondent Union), or, at best, were ambiguous as to when they could be revoked. In any event, Respondent Union treated the authorizations as permitting revocation only during a 15-day window tied to the annual anniversary of employees' execution of the authorizations, and not during any window tied to the termination of the collective-bargaining agreement, or at will following termination of the agreement. Although, in litigating this case, Respondent Union argued that the employees' check-off authorizations also allowed for revocation during a 15-day window before the termination of the applicable collective-bargaining agreement, the authorizations, on their face, do not establish such a window, and the record evidence does not establish that employees were advised of this *in pectore* escape period. Accordingly, Respondent Union and Respondent Employer did not afford the employees the opportunity to revoke their dues check-off authorizations upon termination of the collective-bargaining agreement and continued collecting and deducting dues from employees who requested to revoke and those who resigned during the contractual hiatus period.

The National Labor Relations Board (the Board) has interpreted Sections 8(b)(1)(A) and (2) and Sections 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act), 29 U.S.C. §§158(b)(1)(A) & (2) & 158(a)(1), (2), & (3), to make the check-off of dues without an authorization valid under Section 302(c)(4) of the Labor Management Relations Act (the LMRA), 29 U.S.C. §186(c)(4), an unfair labor practice. See *Electrical Workers, Local 2088 (Lockheed Space Operations Co.)*, 302 NLRB 322, 325 n.8 (1991) (*Lockheed*); *WKYC-TV, Inc.*, 359 NLRB 286, 289 n.13 (2012). The Board has interpreted Section 302(c)(4) of the LMRA to “guarantee[] an employee two distinct rights when he executes a check-off authorization under a collective-bargaining agreement”: (1) a “chance at least once a year to revoke his authorization” on the annual anniversary of the employee’s execution of the authorization, and (2) “a chance upon termination of the collective-bargaining agreement to revoke his authorization.” *Atlanta Printing Specialties*, 215 NLRB 237, 237 (1974), *enfd.* 523 F.2d 783 (5th Cir. 1975); *Frito-Lay, Inc.*, 243 NLRB 137, 138 (1979) (*Frito Lay*). Where, as here, authorizations do not specifically address revocability during a period tied to the termination of the applicable collective-bargaining agreement, the Board will construe them as permitting revocation at will following termination. *Chemical Workers Local 143 (Lederle Laboratories)*, 188 NLRB 705, 706 n.1, 707 (1971) (*Lederle Laboratories*).

Thus, Respondent Union’s treatment of employees’ dues check-off authorizations as not permitting revocation during any period other than the 15-day window tied to the annual anniversary of the employees’ execution of the dues check-off authorizations and Respondent Employer’s continued deduction of dues amounted to unfair labor practices. Further, with respect to employees who resigned from membership in Respondent Union during the contractual hiatus, but did not specifically request to revoke, the Board has held that an

employee's resignation from union membership terminates the employees' obligation to pay dues, unless the employee's dues check-off authorization clearly and unmistakably states that the employee will continue to pay dues even after resignation, in which case dues may be deducted notwithstanding resignation, but only "during the entire agreed-upon period of irrevocability." *Lockheed*, 302 NLRB at 329. Since the employees' dues check-off authorizations were revocable at will during the contractual hiatus period for the reasons explained above, the employees' resignations terminated their obligation to pay dues, and Respondent Employer's deduction and Respondent Union's acceptance of their dues also amounted to unfair labor practices.

Accordingly, Counsel for the General Counsel respectfully urges the Board to find that Respondent Union's failure to honor requests to revoke dues check-off authorizations during the contractual hiatus period and its acceptance of dues from employees who requested to revoke and those who resigned during that period, and Respondent Employer's continued deduction of dues, to be unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) and Sections 8(a)(1), (2), and (3) of the Act, 29 U.S.C. §§158(b)(1)(A) & (2) & 158(a)(1), (2), & (3), and to order all appropriate relief, including the reimbursement of all unlawfully deducted dues.

II. PROCEDURAL HISTORY

On June 11, 2010, the General Counsel issued an Amended Consolidated Complaint and Notice of Hearing (Complaint) against Respondent Union and Respondent Employer, alleging that Respondent Employer violated Section 8(a)(1), (2) and (3) of the Act, 29 U.S.C. § 158(a)(1), (2), and (3), by continuing to deduct amounts equal to union dues from employees' wages after those employees resigned from Respondent Union and/or revoked their dues check-off authorizations, and that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. § 158(b)(1)(A), by continuing to accept that money.

A hearing was held on June 29, 2010, and January 18, 2011, before an Administrative Law Judge for the Board (the ALJ). On May 3, 2011, the ALJ issued a decision and recommended Order, recommending dismissal of the allegations of the Complaint in their entirety. The General Counsel and Charging Parties filed exceptions.

On July 9, 2012, the Board (Chairman Pearce and Members Griffin and Block) issued its Decision and Order adopting the ALJ's dismissal of the Complaint in *Fry's Food Stores*, 358 NLRB 704 (2012). Thereafter, the Charging Parties petitioned the United States Court of Appeals for the District of Columbia (the D.C. Circuit) for review of the Board's 2012 Decision and Order.

On January 25, 2013, the D.C. Circuit placed the case in abeyance pending the Supreme Court's review of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which raised questions concerning the validity of certain recess appointments to the Board.

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including the appointments of Members Griffin and Block. Subsequently, on the Board's motion, the Court vacated the Board's 2012 Decision and Order, and remanded the case to the Board for further proceedings.

On March 20, 2015 the Board (Chairman Pearce and Members Hirozawa and McFerran) issued the Decision and Order in order in *Fry's Food Stores*, 2015 WL 1291907 (2015), again adopting the recommended Order of the ALJ and dismissing the Complaint in its entirety. The Charging Parties petitioned the D.C. Circuit for review of the Board's Decision and Order a second time.

On March 21, 2017, the D.C. Circuit (Circuit Judges Srinivasan and Wilkins with Senior Circuit Judge Silberman dissenting) vacated the Board's decision and remanded the case for further proceedings. *Stewart v. NLRB*, 851 F.3d 21 (D.C. Cir. 2017), *as amended* (Mar. 23, 2017). In particular, the D.C. Circuit found that the Board incorrectly applied the holding of *Frito Lay*, *supra*, because, the ALJ, in factual findings not disturbed by the Board, found that the employees' dues check-off authorizations did not give them an opportunity to revoke during any window period tied to expiration of the collective-bargaining agreement (unless they signed the authorizations during the last year of the collective-bargaining agreement), but, in *Frito Lay*, the Board held that a union can lawfully confine employees' ability to revoke dues check-off authorizations to two reasonable window periods: one preceding the annual anniversary of the dues check-off authorization, and the second preceding the expiration of the collective-bargaining agreement. *Id.* at 29-30. Since, based on the ALJ's factual findings, employees were not afforded the second window period required under *Frito Lay*, the D.C. Circuit vacated the Board's decision and remanded for further proceedings. *Id.* The D.C. Circuit held that the Charging Parties' additional argument—that Respondent Employer and Respondent Union were required to cease deducting and accepting dues for those employees who resigned, but did not specifically request to revoke, in the next available revocation period—was contingent on the question of whether the employees' dues check-off authorizations were revocable during the contractual hiatus, such that the Charging Parties' additional argument could be addressed, if appropriate, once that question has been settled. *Id.* at 31.

III. STATEMENT OF FACTS

Respondents were parties to a collective bargaining agreement in effect from October 26, 2003, through October 25, 2008 (the 2003-2008 CBA). (GCX 5) Between October 25, 2008

and October 4, 2009, Respondents entered into nine separate written temporary agreements that extended the 2003-2008 CBA for durations of between 28 and 62 days. (GCX 6) The last contract extension expired at midnight on October 31, 2009. (GCX 6) No contract was in effect from October 31, 2009 until November 12, 2009, when the Respondents signed a Memorandum of Understanding in which they agreed to the terms of a successor CBA. (GCX 6)

Article 15 of the 2003-2008 CBA contains the following language regarding dues check-off:

The Employer will deduct an amount equivalent to dues, assessments (provided such assessments are not used to fund any economic activity or anti-company publicity against the Employer) and initiation fees each week from the wages of the employees who voluntarily authorize such deductions in writing, and will forward same to the union monthly during the term of this Agreement unless the authorization is canceled in writing by the employee to the Union and the Union notifies the Employer. No deduction will be made on any employee until receipt by the Employer of a signed copy of a voluntary deduction authorization.

The Union agrees to submit to the Employer a list of employees' names and deduction amounts for the current month no later than the first day of each month.

The Union shall indemnify and hold harmless the Employer against any and all claims, damages or suits or other forms of liability which may arise out of or by reason of any action taken by the Employer for the purposes of complying with this Article.

In addition, since at least the early 1990s, Respondent Union used a form for dues check-off authorization containing the following language:

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 [the Union]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.

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.

(Tr. 165)

Between June 29, 2009 and November 12, 2009, a number of employees, including, but not limited to, the Charging Parties, sent letters to the Union asking to resign their union memberships and/or asking to revoke their dues check-off authorizations. Approximately 561 employees resigned their Union memberships and approximately 198 employees sought to revoke the check-off authorizations that they had previously executed. (GCX 7, Bates 2315-2338)

In response to employees' requests to revoke their check-off authorizations and/or resign from membership, Respondent Union sent letters to the Charging Parties as well as most, if not all, other employees who attempted to revoke their dues check-off authorizations and/or resign, accepting their resignations, but denying their requests to revoke their dues check-off authorizations. (GCX 7) Respondent Union's letters informed employees that their dues check-

off authorizations were separate and apart from their membership applications, and that requests for withdrawal had to be made in writing not less than thirty (30) days not more than forty-five (45) days prior to the anniversary date of the execution of the agreement. (GCX 7) In some of these letters, Respondent Union provided employees with the specific dates for the next available window period during which they could request to revoke their check-off authorizations. (GCX 7) The dates provided by Respondent Union corresponded with the window period tied to the anniversary of the employees' execution of their check-off authorizations and did not mention any other applicable window period. (GCX 7) In other letters sent to employees, Respondent Union directed employees to contact Respondent Union again if they would like obtain the applicable dates. (GCX 7) None of Respondent Union's letters mentioned a window period tied to the termination date of any applicable collective-bargaining agreement. (GCX 7)

Respondent Union thus refused to honor employees' requests to revoke check-off authorizations and refused to cease collecting dues from those who resigned. Moreover, Respondent Employer continued to deduct dues from employees' wages, and Respondent Union continued to accept those dues. (GCX 7, Bates 2339-2741)

IV. APPLICABLE LEGAL PRINCIPLES

Section 302 of the Labor Management Relations Act generally makes it a crime for an employer to willfully "pay, lend, or deliver" money to a labor organization or for a labor organization to "request, demand, receive or accept" such payments, except for in limited circumstances. 29 U.S.C. § 186. These restrictions were meant to deal with several forms of labor racketeering including, but not limited to, bribery and extortion. See *Monroe Lodge No. 770, International Association of Machinists and Aerospace Workers, AFL-CIO v. Litton Business Systems, Inc.*, 334 F.Supp. 310 (W.D.Va., 1971). Section 302(c)(4) contains exceptions, including, but not limited to, an express exception for the payment of union dues.

Specifically, Section 302(c)(4) permits an employer to deduct moneys 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.” *Id.* § 186(c)(4).¹

The Board has interpreted Section 302(c)(4) of the Act to “guarantee [to] an employee two distinct rights when he executes a check-off 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.” *Atlanta Printing Specialties*, 215 NLRB at 237.

In *Atlanta Printing Specialties*, the check-off authorizations executed by employees provided for two separate 15-day escape periods: one immediately before the anniversary date of the employee’s dues authorization execution; and a second immediately before the termination date of the “applicable collective-bargaining agreement.” *Id.* Prior to the 15-day escape period preceding the termination of the existing collective-bargaining agreement, the parties executed a successor collective bargaining agreement. When employees nonetheless attempted to revoke

¹ Section 302(c)(4) was enacted as part of the Taft Hartley amendments, and was added by Senator Ball as a floor amendment to the Senate Bill, S. 1126. See *Electrical Workers IBEW Local 2088 (Lockheed)*, 302 NLRB 322, 325 (1991). In the committee report which accompanied the Bill, Senators Ball and Taft, among others, filed Supplemental Views in which they indicated that the amendment “prevents the check-off of union dues unless authorized in writing by the individual employee. Such authorization may be irrevocable for the period of the contract, which is the usual form of the check-off today.” S. Rep. No. 105, 80th Cong., 1st Sess. at 52 (1947) (Supplemental Views), reprinted in I Legislative History of the Labor-Management Relations Act, 1947 548 (1948) (hereafter Leg. Hist.). *Lockheed* at 325, fn. 10. A corresponding provision, which was introduced in House bill, H.R. 3020, would have amended Section 8(a)(2) of the Act to prohibit employer assistance to labor organizations through deducting union fees, dues, and assessments, unless those deductions had been “voluntarily authorized in writing by such employee and such authorization is revocable by the employee at any time upon thirty days’ written notice to the employer....” H.R. 3020, 80th Cong., 1st Sess. 20-21, reprinted in I Leg. Hist. 50-51. *Lockheed*, at 325, fn. 10. *Id.*

their dues authorizations during the 15-day window preceding the expiration of the old agreement, the union refused to honor those revocation notices on the grounds that the “applicable” collective bargaining agreement was the new agreement, and not the old agreement that had not yet expired when the new agreement was executed and prematurely put into effect. *Id.* The Board noted that the union’s interpretation of the phrase “applicable collective-bargaining agreement” would enable it to negate the employees’ second chance to revoke their dues check-off authorizations under Section 302(c)(4), the chance to revoke upon termination of the collective-bargaining agreement. *Id.* Because the employer and the union had denied employees the statutory rights conferred by Section 302(c)(4), the Board concluded they committed unfair labor practices in violation of the Act. *Id.* at 238.

In a later decision, the Board found that there is no violation of Section 302(c)(4) where dues check-off authorizations are irrevocable for stated periods and automatically renewed for like periods, so long as employees are still provided an opportunity to revoke their authorizations at least once per year and at expiration of applicable collective agreements. *Frito-Lay*, 243 NLRB at 144. In *Frito-Lay*, six employees who had executed check-off authorizations resigned their union membership and notified the union and employer that they no longer authorized the deduction of dues from their paychecks during a hiatus period between the expiration of the old collective-bargaining agreement and the execution of a new agreement. The language of the applicable check-off authorizations, however, expressly limited revocability to two escape periods, one of which was “not more than twenty (20) days and not less than ten (10) days prior to the expiration . . . of the applicable collective bargaining agreement.”² *Id.* at 137-38. The

² The checkoff authorization form utilized by the union in *Frito-Lay* provided, in relevant part:

This authorization shall take effect as of the date hereof and shall remain in effect until revoked by me as hereinafter set forth. This authorization shall be irrevocable for a period of one year from the date hereof, or until the termination of the collective bargaining agreement now in effect

employer and the union denied the revocation requests as untimely under the terms of the employees' check-off authorizations. *Id.* In analyzing the validity of the check-off authorization, the Board explained that Congress, by enacting Section 302(c)(4), evidently “sought to insure that such authorizations could be revoked at least once a year and at the termination of any applicable collective agreement.” *Id.* at 138 (internal quotations omitted). According to the Board, limiting the opportunity to revoke to a reasonable escape period prior to the expiration of either of those time periods was consistent with this aim. *Id.* Because the employees in *Frito-Lay* had voluntarily executed dues check-off authorizations that “*expressly* contemplated the possibility of periods where no contract would be in effect,” and since the employees did not revoke their authorizations during either of those express escape periods, the Board found the refusal to honor their revocations were not unfair labor practices. *Id.* at 138 (emphasis in original).

Notwithstanding the above, in cases where check-off authorization language does not specifically provide for a window period in which employees can revoke at expiration of the applicable collective-bargaining agreement, the Board has found the check-off authorization is terminable at will after expiration of the collective-bargaining agreement. *Lederle Laboratories*, 188 NLRB at 706 n.1; *United Food & Commercial Workers Local One (Big V Supermarkets)*, 304 NLRB 952, 953 (1991) (*Big V Supermarkets*), *enfd.* 975 F.2d 40 (2d Cir. 1992) (union

between my Employer and the Union, or, if no such agreement is now in effect, until the termination of any collective bargaining agreement which may hereafter become effective between my Employer and the Union, whichever occurs first. This authorization shall be irrevocable after the expiration of the shorter of the periods above specified for further successive periods of one year from the date of expiration of such period or until the termination of any collective bargaining agreement which may be effective during such successive periods, whichever occurs first. Revocation of this authorization shall be effective only if I give written notice of such revocation to my Employer with a copy to the Local Union, not more than twenty (20) days and not less than ten (10) days prior to the expiration of each period of one year or of the applicable collective bargaining agreement between my Employer and the Union, whichever occurs first.

violated Section 8(b)(1)(A) by failing to honor partial revocation limited to new organizing when authorizations facially included no limit on revocability); *Trico Products Corp.*, 238 NLRB 1306, 1309 (1978) (authorizations not facially including any limitation on revocability treated as revocable at will). These rulings are consistent with well-settled Board and Court law that dues check-off authorizations are voluntary and where possible should be interpreted in a manner consistent with Section 302(c)(4). See *Luke Construction Company, Inc.*, 211 NLRB 602 (1974); *Pattern Makers v. NLRB*, 473 U.S. 95 (1985) (policy of federal labor law is “voluntary unionism”).

Finally, in *Lockheed*, 302 NLRB 322 (1991), the Board analyzed the question of “whether a union, without reliance on any valid union-security clause, may seek to require the continued check-off of union ‘membership dues’ from the wages of an employee who signed a dues-check-off authorization that was irrevocable for 1 year or the expiration of the current collective-bargaining agreement, whichever is sooner, but who resigned from membership *before* the end of the period of irrevocability.” *Id.* at 323 (emphasis supplied). The Board held that in a Right to Work state, to which category Arizona belongs, and where an employee had executed a check-off authorization, an employee’s communication to a union of an intent to resign from union membership immediately extinguishes the employee’s obligation to pay dues, notwithstanding dues check-off authorization language specifying that the authorization would be irrevocable during particular periods of time:

But the policies discussed above also make it reasonable for us to conclude that an employee who has promised only to pay union “membership” dues by checkoff for 1 year has not necessarily thereby obliged himself to continue paying such dues throughout that period -- i.e., to continuing assisting the union -- even when he is no longer a union member.

* * *

Accordingly, we will construe language relating to a checkoff authorization's irrevocability -- i.e., language specifying an irrevocable duration for either 1 year from the date of the authorization's execution or on the expiration of the existing collective-bargaining agreement -- as pertaining only to the method by which dues payments will be made so long as dues payments are properly owing. We shall not read it as, by itself, a promise to pay dues beyond the term in which an employee is liable for dues on some other basis.

Id. at 328-29. The Board in *Lockheed* then created a narrow and limited exception to the general rule that resignation extinguishes the obligation to pay rules. *Id.* Specifically, the Board held that only if an employee's check-off authorization clearly and unmistakably waived the employee's right to refrain from assisting the union in the absence of membership would the union's continued acceptance, receipt, and retention of dues after the employee's resignation and "during the entire agreed-upon period of revocability" be lawful:

We will require clear and unmistakable language waiving the right to refrain from assisting a union, just as we require such evidence of waiver with regard to other statutory rights.

* * *

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

Id. at 328-29. The Board the interpreted the language of the authorization, which stated: "I hereby authorize Lockheed Space Operations Co. to deduct from my wages as an employee of said Company, my Initiation fee, and on the first pay day of each month, my regular membership dues in Local Union 2088, International Brotherhood of Electrical Workers, AFL-CIO, and remit same to said Union." *Id.* at 329. Focusing on that language, the Board found that the at-issue employee had not "clearly and unmistakably waived his right to refrain from assisting the

Respondent Union for periods when he was not a member. *Id.* All that he clearly agreed to do was allow certain sums to be deducted from his wages and remitted to the Respondent for payment of his ‘Initiation fee’ and his ‘regular membership dues.’” *Id.* The Board noted “although the *time specifications* of the authorization may be clear and unmistakable, the question of whether ‘regular membership’ dues must continue to be paid by someone who is not a member is not.” *Id.* at 330. (emphasis in original)³ As such, the Board construed the dues check-off in *Lockheed* as permitting the union to continue collecting dues from the at-issue employee only so long as he remained a member of the Union.

V. ARGUMENT

A. The Language of the Dues Check-Off Authorizations Was, at Best, Ambiguous, and the Union’s Application of That Language Was, in Any Event, Unlawful

The dues check-off authorizations in the instant matter do not afford the two distinct window periods for revocation required under *Atlanta Printing Specialties* and *Frito Lay, supra*.

The ALJ found that the employees’ dues check-off authorizations permitted employees to revoke during a window period tied to the anniversary of the execution of the authorizations,

³ The authorization in *Lockheed* read as follows:

I hereby authorize Lockheed Space Operations Co. to deduct from my wages as an employee of said Company, my Initiation fee, and on the first pay day of each month, my regular membership dues in Local Union 2088, International Brotherhood of Electrical Workers, AFL-CIO, and remit same to said Union. It is understood that Lockheed Space Operations Co. assumes no responsibility or liability under this authorization except to deliver the aforesaid deductions as indicated. This authorization shall be irrevocable for a period of one year from the date hereof or until the expiration of the present collective bargaining agreement between the Company and the Union, whichever is the shorter of the two periods, provided however that this authorization shall be irrevocable for successive yearly periods and may only be revoked by my giving written notice by mail to the Company and the Local Union, received by both during the 10 day period prior to the end of any such applicable yearly period or during the 10 day period prior to the termination date of any applicable collective bargaining agreement, whichever occurs sooner. In the absence of such notice or revocation sent and received in accordance with the foregoing, this authorization shall be irrevocably renewed for additional periods or until the end of the collective bargaining agreement whichever occurs sooner and for successive periods thereafter in accordance with the foregoing.

and, *only for employees who signed authorizations during the last year of the collective-bargaining agreement*, upon the expiration of the collective bargaining agreement. *Fry's Food Stores*, 358 NLRB at 706. Thus, based on the ALJ's interpretation of the authorizations, employees signed authorizations before the last year of the collective-bargaining agreement, were not afforded an opportunity to revoke upon termination of the collective-bargaining agreement, or any window period tied to the termination of the collective-bargaining agreement, as required under *Atlanta Printing Specialties* and *Frito Lay, supra*. There is no language in the authorizations that could be read to afford employees who signed authorizations before the last year of the collective-bargaining agreement to revoke upon termination of the collective-bargaining agreement. Because the employees' dues check-off authorizations did not specifically provide for a window period in which certain employees could revoke upon termination of the collective-bargaining agreement, the authorizations became terminable at will after expiration of the collective-bargaining agreement. *Lederle Laboratories*, 188 NLRB at 706 n.1; *Big V Supermarkets*, 304 NLRB at 953; *Trico Products Corp.*, 238 NLRB at 1309. Construing the ambiguity in the check-off language in this fashion is consistent with both the principles of contractual interpretation,⁴ the federal policy of favoring voluntary unionism, and the principle that waivers of statutory rights must be clear and unmistakable. *Pattern Makers v. NLRB*, 473 U.S. 95 (1985); *Lockheed*, 302 NLRB at 327-30, 327 n. 18 and 329 n. 29; *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Pursuant to *Atlanta Printing, supra*, and Section 302(c)(4) of the LMRA, employees had the right to revoke their check-offs

⁴ Although the circumstances herein are not identical, the Board has long applied the doctrine of *contra proferentem*, whereby an ambiguous promise, agreement or term is construed against the party who drafted it, to other written documents relating to terms and conditions of employment such as work rules. See *Layfayette Park Hotel*, 326 NLRB 824, 828 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Second Circuit has also endorsed the Board's policy of resolving ambiguity against the drafter of work rules by observing that "the employees of respondent are not grammarians." *NLRB v. Miller*, 341 F.2d 870, 874 (1965).

after the termination date of the applicable collective-bargaining agreement, regardless of the date on which an employee executed his or her dues check-off authorization. Following the termination date of the collective-bargaining agreement on October 25, 2008, the employees' dues check-off authorizations became revocable at will, and the Respondent Union's failure to honor these employees' requests to revoke, its repeated requests for Respondent Employer to deduct and remit dues for their employees following their requests to revoke, and Respondent Employer's continued deduction of dues violated the Act. *Big V Supermarkets*, supra.

Although Respondent Union asserts that the employees' dues check-off authorizations permitted all employees to revoke both during a window period preceding their anniversary date and during a window period preceding the termination of the collective-bargaining agreement, the authorizations, on their face, do not allow employees who signed authorizations more than one year before termination of the collective-bargaining agreement during any period tied to the termination of the agreement, as explained above. Further, when responding to employees' resignations and requests to revoke, Respondent Union advised the employees of the window period tied to the anniversary of their execution of their dues check-off authorizations, but not of any window period tied to the termination of the collective-bargaining agreement. Even if Respondent Union had, *in pectore*, interpreted the authorizations to allow all employees to revoke during a window period preceding the termination of the collective-bargaining agreement, employees were effectively deprived of their right to revoke upon expiration of the collective-bargaining agreement by Respondent Union's failure to include language in its dues check-off authorizations allowing for revocation during such period or otherwise advise employees of their right to revoke during such period, including in response to employees' requests to revoke. Moreover, there is no evidence in the record that the Union ever honored an

employee's request to revoke his or her authorization during a 15-day window period before termination of an applicable collective bargaining agreement, including, but not limited to, the 2003-2008 CBA. Respondent Union never believed employees had such a right to revoke at expiration of the collective bargaining agreement, and its application of the language of the employees' dues check-off authorizations in this case was unlawful.⁵

B. Respondent Union Violated the Act by Continuing to Accept, Receive and Retain the Dues of Employees Who Resigned Their Union Memberships When Employees' Check Offs Were Revocable at Will

In *Lockheed*, supra, the Board not only took into account the Act's policy of "voluntary unionism," but also the principle that waivers of statutory rights must be clear and unmistakable. The Board utilized both to interpret whether the language of the at-issue check-off authorization permitted the union to continue collecting dues from an employee only so long as he remained a member of the union. Notably, and as explained above, the Board also addressed the check-off authorization's language relating to the time periods for revocability, writing "although the *time specifications* of the authorization may be clear and unmistakable, the question of whether 'regular membership' dues must continue to be paid by someone who is not a member is not." *Id.* at 330.

⁵ Although the complaint does not allege the letters sent by Respondent Union breached its fiduciary duty to employees, it should be assumed here that Respondent Union did not believe employees had such a right. To hold otherwise would implicitly acknowledge that Respondent Union interpreted the language of the dues check-off authorizations to include that right yet nonetheless failed to mention so in its letters to employees. It is well settled that a union owes a fiduciary duty to employees it represents as the exclusive collective-bargaining representative to deal fairly and honestly with them, and it should be assumed here, that Respondent Union owed a similar fiduciary duty to deal with its employee-members fairly and honestly. *Electrical Workers Local 3 (Fischbach & Moore)*, 309 NLRB 856, 857-58 (1992) (noting that, in a union-security setting, a union that fails its fiduciary duty forfeits the rights pursuant to an otherwise lawful union-security provision to demand the discharge of an employee who becomes delinquent in paying dues); *Big Rivers Electric Corp.*, 260 NLRB 329, 329 (1982) (Union's duties prior to seeking a discharge for failure to pay dues or fees include informing the employee of the amount owed, the method used to compute that amount, when such payments are to be made, and the fact that discharge will result from failure to pay). It should be assumed here, that Respondent Union owed a similar fiduciary duty to deal with its employee-members fairly and honestly.

In the instant matter, the evidence shows that about 561 employees resigned their Union memberships between June 28, 2009, and December 12, 2009. The signed check-off authorizations executed by these employees state that the “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.” Although the foregoing language may well have been sufficiently clear to permit Respondent Union to continue collecting dues from the employees in the absence of membership in the Union under *Lockheed*, the analysis does not stop there.

As discussed above, employees’ check offs were revocable at will after the termination of the collective-bargaining agreement on October 25, 2008. Under *Lockheed*, once an employee resigned his or her Union membership after October 25, 2008, that employee no longer had a duty to abide by the terms of the dues check-off authorization that mandated paying dues unless the authorization clearly set forth the employee’s obligation to pay dues even in the absence of Union membership. Assuming *arguendo* that the check-off authorizations at issue in this case clearly set forth an employee’s obligation to pay dues even in the absence of Union membership, *Lockheed* only requires that where an authorization contains such language, the employee continue paying dues “to the union during the entire agreed-upon period of irrevocability...” *Id.* at 329.

In the instant matter, the employees who resigned were not required to continue paying dues after submitting their resignations because at that point in time, there was no longer any “agreed-upon period of irrevocability.” This is so because the irrevocability period set forth in the check-off authorization expired along with the termination of the collective-bargaining agreement. As such, once the dues check-off authorizations became revocable at will, an

employee's resignation of Union membership had the same effect as an employee's revocation of his or her dues check-off authorization: both resignation and revocation extinguished an employee's duty to continue to pay dues. To hold otherwise, that where check-off authorizations are revocable at will, employees who resign union membership are nonetheless required to continue paying union dues *ad infinitum*, or at least until they separately revoke their check-off authorizations, would be contrary to *Atlanta Printing*, the language of Section 302(c)(4) and the policy of voluntary unionism set forth in *Pattern Makers*, supra.

By continuing to accept, receive, and retain the dues of employees who resigned their Union memberships when employees' check offs were revocable at will, Respondent Union violated the Act. In addition, because Respondent Employer continued to give effect to revoked check-off authorizations by continuing to deduct money from employees' wages and remitting this money to the Union, Respondent Employer also violated Section 8(a)(1), (2) and (3) of the Act.

C. The ALJ Incorrectly Applied *Frito-Lay* to This Case

The General Counsel believes the ALJ erred in applying *Frito Lay* to the facts of this case. In this case, unlike in *Frito-Lay*, the check-off authorizations at issue did not clearly or unambiguously set a specific window period in which employees could revoke their authorizations at the termination of the applicable collective-bargaining agreement. The authorizations in *Frito-Lay* stated:

Revocation of this authorization shall be effective only if I give written notice of such revocation to my Employer with a copy to the Local Union, not more than twenty (20) days and not less than ten (10) days prior to the expiration of each period of one year or of the applicable collective bargaining agreement between my Employer and the Union, whichever occurs first.

Id. at (insert citation). Thus, the applicable language in *Frito-Lay* clearly provided employees the dual opportunity for revocation set forth in *Atlanta Printing* and Section 302(c)(4). As the

D.C. Circuit noted, “this is not a *Frito-Lay* case.” The General Counsel agrees, and requests the Board overrule the ALJ insofar as he erred in treating it as one.

VI. CONCLUSION

Based on the foregoing, the Board is respectfully requested to find the violations alleged in the complaint as set forth above, and to provide an appropriate remedy for said violations.

Dated at Phoenix, Arizona, this 28th day of August, 2017.

/s/ Kyler Scheid _____
Kyler Scheid
Counsel for the General Counsel
2600 N. Central Avenue, Suite 1400
Phoenix, Arizona 85004
Telephone: (602) 416-4769
Facsimile: (602) 640-2178
kylerscheid@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that General Counsel's Statement of Position on Issues Raised on Remand in Cases 28-CA-22836, *et al.*, was served via E-Gov, E-Filing, and Electronic Mail, on this 28th day of August, 2017, on the following:

Via E-Gov, E-Filing:

Gary W. Shinnars, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1015 Half Street SE – Room 5011
Washington, DC 20570

Via Electronic Mail:

Frederick C. Miner, Attorney at Law
Littler Mendelson, PC
2425 East Camelback Road, Suite 900
Phoenix, AZ 85016-4242
fminer@littler.com

Jennifer L. Mora, Attorney at Law
Littler Mendelson, PC
2049 Century Park E, Floor 5
Los Angeles, CA 90067
jmora@littler.com

Steven L. Stemerman, Attorney at Law
Yuval M. Miller, Attorney at Law
McCracken, Stemerman & Holsberry, LLP
595 Market Street, Suite 800
San Francisco, CA 94105
stem@msh.law
ymiller@msh.law

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



Dawn M. Moore
Acting Secretary to the Regional Attorney
National Labor Relations Board
Region 28 - Las Vegas Resident Office
Foley Federal Building
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, Nevada 89101
Telephone: (702) 820-7466
Facsimile: (702) 388-6248
Email: dawn.moore@nlrb.gov