

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 400, CLC (KROGER STORE
NO. 755),**

and

Case No. 06-CB-222829

SHELBY KROCKER.

**CHARGING PARTY SHELBY KROCKER'S BRIEF IN SUPPORT OF HER
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

Alyssa K. Hazelwood
Aaron B. Solem
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
Telephone: (703) 321-8510
E-mail: akh@nrtw.org
abs@nrtw.org

Counsel for Charging Party

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
FACTS	1
ARGUMENT	3
I. The Union violated the Act by including the phrase “MUST BE SIGNED” on the checkoff and by failing to accept Krockner’s valid checkoff revocation	3
A. The Union’s mandatory language in its checkoff violates the Act (Exceptions 3–5, 8).	3
B. The checkoff was validly revoked by Krockner’s letter (Exceptions 6, 13, 15)	7
II. The Union’s three-part form violated the Act (Exceptions 7, 9–10)	9
III. The checkoff violates the Act by not giving employees an opportunity to revoke during a contract hiatus (Exception 11)	12
IV. The checkoff’s portability clause violates the Act, as does the Union’s efforts to mandate that all employees who pay dues by checkoff must make it “portable” (Exception 12)	15
V. The Union violated the Act by failing to provide Krockner with the specific dates it contended she could revoke her checkoff (Exception 14)	18
VI. The Union’s checkoff and its conduct violated its duty of fair representation (Exceptions 1–2).	19
VII. The Union’s subsequent actions do not cure its illegal acts under Passavant (Exceptions 16–18)	21
A. The Union has not cured or remedied its violations	21
B. The Union’s attempt to “cure” the violation fails to comply with Passavant	23
CONCLUSION	25
CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

CASES	PAGE
<i>Affiliated Food Stores, Inc.</i> , 303 NLRB 40 (1991)	23
<i>Am. Screw Co.</i> , 122 NLRB 485 (1958)	3
<i>Anheuser-Busch, Inc. v. Teamsters, Local 822</i> , 584 F.2d 41 (4th Cir. 1978)	13
<i>Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund</i> , 700 F.2d 1269 (9th Cir. 1983)	17
<i>Auto Workers Local 909 (Gen. Motors Corp.-Powertrain)</i> , 325 NLRB 859 (1998)	18
<i>Baltimore Sun Co.</i> , 302 NLRB 436 (1991)	8
<i>Bay Cities Metal Trades Council</i> , 306 NLRB 983 (1992)	4,10
<i>Branch 529, Nat’l Ass’n of Letter Carriers</i> , 319 NLRB 879 (1995)	18
<i>Brown Transp. Corp.</i> , 239 NLRB 711 (1978)	3
<i>Chem. Workers, Local 143 (Lederle Labs.)</i> , 188 NLRB 705 (1971)	12
<i>Double D Constr. Grp., Inc.</i> , 339 NLRB 303 (2003)	4
<i>Elec. Workers IUE Local 444 (Paramax Sys.)</i> , 311 NLRB 1031 (1993)	20
<i>Ellis v. Ry. Clerks</i> , 466 U.S. 435 (1984)	21
<i>Felter v. S. Pac. Co.</i> , 359 U.S. 326 (1959)	23

TABLE OF AUTHORITIES (Cont.)

CASES	PAGE
<i>Frito-Lay, Inc.</i> , 243 NLRB 137 (1979)	13, 14
<i>Gloria’s Manor Home for Adults</i> , 225 NLRB 1133 (1976)	3
<i>Graphic Commc’ns Int’l Union Local 735-S</i> , 330 NLRB 32 (1999)	8
<i>IAM Dist. Ten v. Allen</i> , 904 F.3d 490 (7th Cir. 2018)	5, 6
<i>IBEC Housing Corp.</i> , 245 NLRB 1282 (1979)	3
<i>IBEW, Local No. 2088 (Lockheed Space Ops. Co.)</i> , 302 NLRB 322 (1991)	7, 8, 9, 10
<i>Indep. Stave Co.</i> , 248 NLRB 219 (1980)	10
<i>Indus. Towel & Uniform Serv.</i> , 195 NLRB 1121 (1972)	12, 15
<i>Int’l Ass’n of Machinists (Hughes Aircraft Co.)</i> , 164 NLRB 76 (1967)	18
<i>Int’l Bhd. of Operative Potters v. Tell City Chair Co.</i> , 295 F. Supp. 961 (S.D. Ind. 1968)	5
<i>Int’l Union of Dist. 50, UMW (Ruberoïd Co.)</i> , 173 NLRB 87 (1968)	3
<i>Int’l Union of Elec. Workers, Local 601 (Westinghouse Elec. Corp.)</i> , 180 NLRB 1062 (1970)	3, 4, 5, 7
<i>Int’l Woodworkers of Am.</i> , 304 NLRB 100 (1991)	8
<i>In re Allied Prod. Workers Union Local 12</i> , 337 NLRB 16 (2001)	8

TABLE OF AUTHORITIES (Cont.)

CASES	PAGE
<i>JBM, Inc.</i> , 349 NLRB 866 (2007)	3
<i>Knox v. SEIU, Local 1000</i> , 567 U.S. 298 (2012)	21
<i>Kroger Co.</i> , 334 NLRB 847 (2001)	15
<i>Law Enf't & Sec. Officers, Local 40B (S. Jersey Detective Agency)</i> , 260 NLRB 419 (1982)	18
<i>Local 32B-32J, SEIU</i> , 266 NLRB 137 (1983)	9
<i>Local 58, IBEW</i> , 365 NLRB No. 30 (Feb. 10, 2017)	18
<i>Local 307, Nat'l Postal Mail Handlers Union (U.S. Postal Serv.)</i> , 339 NLRB 93 (2003)	19
<i>Lowell Corrugated Container Corp.</i> , 177 NLRB 169 (1969)	12
<i>Luke Constr. Co.</i> , 211 NLRB 602 (1974)	9
<i>Mastrobuono v. Shearson Lehman Hutton, Inc.</i> , 514 U.S. 52 (1995)	10
<i>Miranda Fuel Co.</i> , 140 NLRB 181 (1962), <i>enforcement denied</i> , 326 F.2d 172 (2d Cir. 1963)	20
<i>Mode O'Day Co.</i> , 280 NLRB 253 (1986), <i>supplemented</i> , 290 NLRB 1234 (1988)	3
<i>Newspaper & Mail Deliverers' Union (NYP Holdings, Inc.)</i> , 361 NLRB 245 (2014)	22
<i>NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527</i> , 523 F.2d 783 (5th Cir. 1975)	12

TABLE OF AUTHORITIES (Cont.)

CASES	PAGE
<i>NLRB v. Falk Corp.</i> , 308 U.S. 453 (1940).....	22
<i>NLRB v. Hiney Printing Co.</i> , 733 F.2d 1170 (6th Cir. 1984)	22
<i>NLRB v. Metalab-Labcraft</i> , 367 F.2d 471 (4th Cir. 1966)	22
<i>NLRB v. Methodist Hosp. of Gary, Inc.</i> , 733 F.2d 43 (7th Cir. 1984)	22
<i>Passavant Mem’l Area Hosp.</i> , 237 NLRB 138 (1978)	23, 24
<i>Peninsula Shipbuilders’ Ass’n v. NLRB</i> , 663 F.2d 488 (4th Cir. 1981)	23
<i>Rochester Mfg. Co.</i> , 323 NLRB 260 (1997)	22
<i>Ry. Clerks (Yellow Cab Co.)</i> , 205 NLRB 890 (1973)	15
<i>Sea Pak v. Indus., Tech. & Prof’l Emps.</i> , 400 U.S. 985 (1971).....	5
<i>SEIU, Local 121RN (Pomona Valley Hosp.)</i> , 355 NLRB 234 (2010)	4, 6, 9
<i>State ex rel. Dunlap v. Berger</i> , 567 S.E.2d 265 (W.Va. 2002).....	10
<i>Stewart v. NLRB</i> , 851 F.3d 21 (D.C. Cir. 2017)	13, 14
<i>Tamosiunas v. NLRB</i> , 892 F.3d 422 (D.C. Cir. 2018)	4, 6, 9, 10
<i>Teamsters Local 200</i> , 367 NLRB No. 93 (Feb. 26, 2019)	16

TABLE OF AUTHORITIES (Cont.)

CASES	PAGE
<i>Teamsters Local 385</i> , 366 NLRB No. 96 (June 20, 2018).....	21, 23
<i>UAW, Local 600 v. NLRB</i> , 956 F.3d 345 (6th Cir. 2020)	20, 21
<i>UFCW, Local 540</i> , 305 NLRB 927 (1991)	8
<i>Union of Sec. Pers. of Hosps. (Church Charity Found. of Long Island, Inc.)</i> , 267 NLRB 974 (1983)	18
<i>United Steelworkers of Am., Local 4671</i> , 302 NLRB 367 (1991)	8
<i>U.S. Postal Serv.</i> , 362 NLRB 865 (2015)	19
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967).....	20
<i>Valley Hosp. Med. Ctr., Inc.</i> , 368 NLRB No. 139 (Dec. 16, 2019).....	13
<i>WKYC-TV, Inc.</i> , 359 NLRB 286 (2012)	12
<i>Yellow Freight System of Ind.</i> , 327 NLRB 996 (1999)	3
 STATUTES	
National Labor Relations Act, 29 U.S.C. § 157	<i>passim</i>
29 U.S.C. § 158.....	3
29 U.S.C. § 158(b)(1)(A).....	<i>passim</i>
29 U.S.C. § 159(e)	17
Labor Management Relations Act, 29 U.S.C. § 186.....	5
29 U.S.C. § 186(c)(4).....	<i>passim</i>

TABLE OF AUTHORITIES (Cont.)

RULES	PAGE
National Labor Relations Board Rules & Regulations, § 102.46(a)(2).....	1
MISCELLANEOUS	
<i>Merriam-Webster Online Dictionary</i> , https://www.merriam-webster.com/dictionary/beyond (last visited Feb. 27, 2020).....	13
General Counsel Mem. 19-04, Union’s Duty to Properly Notify Employees of Their <i>General Motors/Beck</i> Rights and to Accept Dues Checkoff Revocations after Contract Expiration (2019).....	10, 11, 19

Pursuant to Section 102.46(a)(2) of the National Labor Relations Board’s (“Board”) Rules and Regulations, Charging Party Shelby Krockner submits this Brief in Support of Her Exceptions to the Administrative Law Judge’s Decision and Order.

FACTS

Shelby Krockner (“Krockner”) is an employee at a Kroger Mid-Atlantic store in Morgantown, West Virginia, and is a member of the bargaining unit represented by United Food and Commercial Workers Union, Local 400 (“Union” or “Local 400”). Shortly after she was hired, she was presented with the Union’s one-page, three-part form containing: (1) a membership application; (2) a dues deduction authorization (“checkoff”); and (3) a “UFCW Local 400—ABC Payroll Deduction Authorization Form.” Ex. 3.¹ On September 2, 2017, Krockner signed two parts of the three-part form: the Membership Application and the checkoff authorization. Stipulation at ¶ 16(b); Ex. 3. Both parts she signed contained the phrase “MUST BE SIGNED.” Ex. 3.

While the checkoff portion of the form is stylized as a “Voluntary Check-Off Authorization,” each side of the title includes (in large, capital, and underlined letters) the phrase “MUST BE SIGNED.” See Ex. 3. Below the title and the dual commands that it “MUST BE SIGNED,” the checkoff states in small, difficult to read print:

You are hereby authorized to deduct dues from my wages, commencing with the next payroll period, an amount equal to all Union dues and other fees as shall be certified by the Secretary-Treasurer of Local 400 of the United Food and Commercial Workers International Union, and to remit the same amounts to the said Secretary-Treasurer. This authorization is voluntarily made in consideration of the cost of representation and other activities undertaken by UFCW Local 400 and is irrespective of my membership in the Union.

¹ For purposes of this brief, references to the Joint Motion to Submit Stipulated Facts and Exhibits to the Administrative Law Judge will be cited as “Stipulation,” and all references to exhibits (“Ex.”) will refer to the exhibits attached to the Stipulation.

This authorization and assignment is without condition and shall be irrevocable for a period of one year from the date of execution or until the termination date of the agreement between the Employer and Local 400, whichever occurs sooner, and from year to year thereafter, regardless of union membership, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period or the termination of the collective bargaining agreement between the Union and my employer, I give the Employer and the Union written notice of revocation bearing my signature thereto.

The Secretary-Treasurer of Local 400 is authorized to deposit this authorization with any Employer under contract with Local 400, and is further authorized to transfer this authorization to any other Employer under contract with Local 400 in the event I should change employment or to the same employer if I return to work after hiatus.

Ex. 3.

On March 5, 2018, Krocker sent a letter to the Union resigning her membership and revoking her checkoff (“March 5 Letter”). Stipulation at ¶ 17(a); Ex. 4 at 1. On March 29, 2018, the Union sent Krocker a letter accepting her membership resignation, but denying her checkoff revocation. Stipulation at ¶ 17(b); Ex. 5. The Union claimed such a revocation was untimely because of the terms of her checkoff. *Id.* The Union continued to accept and retain dues from Krocker’s wages. *See* Stipulation at ¶ 17(c).

On June 27, 2018, Krocker filed the underlying unfair labor practice charge to challenge the Union’s conduct and its misleading forms. Stipulation at ¶ 1; Ex. 1(a). In September 2018, approximately six months after Krocker sent her March 5 Letter, and over two months after she filed her charge, the Union refunded her \$174.23, which is the amount of dues collected from her paycheck since she sent in her March 5 Letter. Stipulation at ¶ 17(c). The Union’s payment did not include interest. *Id.*

The Region issued a complaint, Ex. 1(g), and on January 9, 2020, the parties submitted a Joint Motion to Submit Stipulated Facts and Exhibits to the Administrative Law Judge, which was granted by Order dated January 10, 2020. The Parties submitted briefs and reply briefs. On April

20, 2020, Administrative Law Judge Robert A. Giannasi (“ALJ”) issued his Decision and Order, which found the Union did not violate the National Labor Relations Act (“Act”) and dismissed the General Counsel’s Complaint. *See* Admin. Law J. Decision & Order (“ALJD”).

ARGUMENT

I. The Union violated the Act by including the phrase “MUST BE SIGNED” on the checkoff and by failing to accept Krockner’s valid checkoff revocation.

A. The Union’s mandatory language in its checkoff violates the Act (Exceptions 3–5, 8).

The ALJ erred in his conclusion that the bold “MUST BE SIGNED” language on the Union’s checkoff does not violate Section 8(b)(1)(A). 29 U.S.C. § 158(b)(1)(A). Section 7, 29 U.S.C. § 157, gives employees the right to refrain from financially assisting a union. A union that restrains or coerces employees in the exercise of their right to refrain violates Section 8(b)(1)(A). Thus, any forced restriction on the right to refrain violates Section 8.

It is axiomatic that checkoffs are invalid unless voluntarily authorized by an employee. *JBM, Inc.*, 349 NLRB 866, 867 (2007) (citing *Yellow Freight Sys.*, 327 NLRB 996, 997 (1999) (“The Board has consistently held . . . that employees cannot be required to authorize dues checkoff as a condition of employment.”); *Int’l Union of Elec. Workers, Local 601 (Westinghouse Elec. Corp.)*, 180 NLRB 1062 (1970); *see also Mode O’Day Co.*, 280 NLRB 253 (1986), *supplemented*, 290 NLRB 1234 (1988); *IBEC Housing Corp.*, 245 NLRB 1282, 1283 (1979)); *see also Brown Transp. Corp.*, 239 NLRB 711, 715-16 (1978); *Gloria’s Manor Home for Adults*, 225 NLRB 1133, 1143 (1976); *Int’l Union of Dist. 50, UMW (Ruberoide Co.)*, 173 NLRB 87, 87 (1968) (“[T]he Respondents violated Section 8(b)(1)(A) of the Act by threatening employees with discharge or with loss of retroactive contract benefits if they refused to sign an authorization for checkoff of dues[.]”); *Am. Screw Co.*, 122 NLRB 485, 489 (1958). Employees have a Section 7 right to refuse to sign a checkoff. *JBM, Inc.*, 349 NLRB at 867. “Any conduct, express or implied, which coerces

an employee in his attempt to exercise this right clearly violates Section 8(b)(1)(A).” *Westinghouse Elec. Corp.*, 180 NLRB at 1062. In other words, a union violates Section 8(b)(1)(A) when it coerces employees into signing a checkoff authorization.

To determine whether a union’s communication is coercive, the Board uses a reasonable person standard. The test is “whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.” *Double D Constr. Grp., Inc.*, 339 NLRB 303, 303–04 (2003) (footnote omitted). Even if a document is open to multiple reasonable constructions, “if any reasonable employee could view the communication as coercive or restraining, the union . . . has violated the law.” *Tamosiunas v. NLRB*, 892 F.3d 422, 430 (D.C. Cir. 2018) (footnote omitted); *see also SEIU, Local 121RN (Pomona Valley Hosp.)*, 355 NLRB 234, 235 (2010) (the Board must evaluate a message in its overall context to determine if the words could be construed as coercive, whether or not that is the only reasonable construction). If there is ambiguity, “this ambiguity must be held against the Respondent, the publisher of the letter, rather than against the employees who are not labor lawyers or union officials or otherwise knowledgeable about the intricacies of Section 7 and 8(b)(1)(A) of the Act.” *Bay Cities Metal Trades Council*, 306 NLRB 983, 985 (1992) (citation omitted).²

Here, the checkoff demands on either side of its title that it “MUST BE SIGNED.” These demands are in all capital letters, bold, underlined, and in the largest size font on the checkoff portion of the form. Ex. 3. Because a reasonable employee could interpret the phrase “MUST BE

² The ALJ concluded that ambiguity alone cannot constitute a coercion or restraint under Section 8(b)(1)(A). ALJD at 6:4–6; Exception 3. Charging Party does not believe there is any ambiguity in the phrase “MUST BE SIGNED.” making the ALJ’s statement regarding ambiguity irrelevant. However, even if the “MUST BE SIGNED.” language could be read as ambiguous, the case law stated above supports the contention that ambiguity *can* constitute a violation of Section 8(b)(1)(A).

SIGNED” as a mandatory command, any union intentions or interpretations to the contrary are irrelevant.³ See *Tamosiunas*, 892 F.3d at 429 (even “implied threats may run afoul of Sections 7 and 8.”). Therefore, the Union’s checkoff unlawfully coerces employees in the exercise of their right to refrain from signing a checkoff by stating that it “MUST BE SIGNED.” *Westinghouse Elec. Corp.*, 180 NLRB at 1062.

Inexplicably, the ALJ concluded that, despite the Union’s two “MUST BE SIGNED” demands on either side of the checkoff, “[t]here was no coercion either in the language on the form or extraneously in a separate communication.” ALJD at 7:5–6. The ALJ also concluded that the “MUST BE SIGNED” command “did not contradict the heading of the dues checkoff form that clearly stated it was voluntary.” ALJD at 7:1–3.⁴

The ALJ accepts the Union’s pretextual justification for its misrepresentation, namely, that West Virginia’s wage assignment statute requires all assignments to be signed. ALJD at 7:6–8. But, pursuant to Supreme Court precedent, state wage assignment laws are preempted by federal labor laws and, therefore, cannot control the Union’s checkoff. See *Sea Pak v. Indus., Tech. & Prof’l Emps.*, 400 U.S. 985 (1971) (mem.) (summary affirmance of a district court decision finding Section 302, 29 U.S.C. § 186, preempts state dues deduction laws); see also *Int’l Bhd. of Operative Potters v. Tell City Chair Co.*, 295 F. Supp. 961, 965 (S.D. Ind. 1968) (Section 302 “is sufficiently pervasive and encompassing” to preempt state wage assignment laws); *IAM Dist. Ten v. Allen*, 904

³ It is of note that the first portion of the form, the “Membership Application,” also contains the phrase “MUST BE SIGNED.” See Ex. 3. The third part of the form, “UFCW Local 400-ABC Payroll Deduction Authorization Form,” does not contain such mandatory language. *Id.* In keeping with the Union’s threat, Krockner only signed the two parts of the form that contained the mandatory language.

⁴ The ALJ incorrectly quoted the “MUST BE SIGNED” language as “Must Sign” throughout his opinion. See, e.g., ALJD at 6:15, 17; 7:1, 9, 23; Exception 4. This error, though pervasive, does not change the legal result. Including the phrase “must sign” would still violate the Act because an employee could still reasonably believe that the checkoff was mandatory.

F.3d 490, 495 (7th Cir. 2018). The ALJ cannot justify the Union’s unlawful coercion of employees on the basis of a state law that has no application to Krockner’s checkoff. It is also not clear how West Virginia’s written wage assignment requirement differs in any material respect from Section 302(c)(4), which also requires a dues checkoff to be a written assignment.

Even assuming, *arguendo*, that the West Virginia wage assignment law could apply in this situation, the ALJ erred in accepting the Union’s justification rather than applying the reasonable employee standard. *See Tamosiunas*, 892 F.3d at 430; *Pomona Valley Hosp.*, 355 NLRB at 235. Applying the proper standard, the “MUST BE SIGNED” language remains misleading and coercive to any reasonable employee. Common sense dictates that, if a document has a signature line—indeed, the checkoff *only* had a signature and date line—that it would need to be signed to be effective. *See Ex. 3*. It would defy even the most basic of social norms to believe otherwise. Therefore, any additional language demanding that it “MUST BE SIGNED” to be effective would be superfluous and intended to mislead employees. Even assuming such language could be necessary, the card does not say something benign like “you must sign this document for it to be *effective*,” it says “MUST BE SIGNED.” Twice. The location of the mandatory language is further evidence of its coercive effect. If it was located next to the signature line (as it is on the membership portion of the card), the ALJ would have a stronger basis for his (if still ultimately unsuccessful) interpretation of the Union’s checkoff that “must be signed” means “must be signed to be effective.” However, in this case, the “MUST BE SIGNED” language was printed on the top of the checkoff portion of the card, on either side of the title, underlined and in all capital letters. Further discrediting the ALJ’s rationale is the fact that there are no other fillable fields on the checkoff. Without a signature and accompanying date, the form would be blank and the Union

would have no authorization to keep dues deducted from the employees' wages. Implied in the single signature field is the premise that the card must be signed to be effective.

An example further disproves the ALJ's ultimate conclusion. If a union steward verbally told Krocker that the checkoff must be signed, there would be no question that such a communication would violate the Act. *See, e.g., Westinghouse Elec. Corp.*, 180 NLRB at 1062. The Board has often held that similar written communications also violate the Act. *Id.* (finding a letter telling employees they must pay dues by checkoff is a violation of the Act). The ALJ never explains why such verbal or written communications violate the Act, but when the same command is written on a checkoff, it does not. Nor does the ALJ give the slightest nod to the fact that Krocker and her fellow employees are not labor lawyers and may not know that these documents are not mandatory.

Therefore, the ALJ erred in his conclusion that the mandatory nature of the Union's checkoff form was lawful and did not violate the Act.

B. The checkoff was validly revoked by Krocker's letter (Exceptions 6, 13, 15).

A checkoff stating that it "MUST BE SIGNED" cannot contain a "clear and unmistakable" waiver of the right to cease paying dues upon resignation. The Board requires such a waiver for the Union to lawfully continue to deduct dues after resignation and checkoff revocation. *IBEW, Local No. 2088 (Lockheed Space Ops. Co.)*, 302 NLRB 322, 328 (1991) (hereafter "*Lockheed*"). Thus, the ALJ erred in his conclusion that Krocker's checkoff remained valid after her March 5 revocation, and that the Union did not violate the Act by failing to honor her valid checkoff revocation and by continuing to accept and retain dues deducted from her wages. *See* ALJD at 9:34-41, 10:10.

In *Lockheed*, the Board held that a checkoff may be enforced as an agreement to pay dues after resignation, as long as it contains “*clear and unmistakable language* waiving the right to refrain from assisting a union.” 302 NLRB at 328 (emphasis added). The Board explained, this test:

will help assure that employees signing checkoff authorizations are fully aware of what they are agreeing to do and that they will not be required to assist a labor organization beyond the period when they have clearly agreed to do so. . . . [T]his comports with important policies of the Act—the Section 7 right to refrain from assisting a union and the policy that waiver of Section 7 rights must be clear and unmistakable.

Id. at 329.

In the absence of such clear and explicit waiver language, the Act allows an employee to revoke her checkoff upon resignation, regardless of any window period stated in the terms of the checkoff. *See, e.g., In re Allied Prod. Workers Union Local 12*, 337 NLRB 16, 19 (2001); *Graphic Commc’ns Int’l Union Local 735-S*, 330 NLRB 32, 34 (1999); *United Steelworkers of Am., Local 4671*, 302 NLRB 367, 367-68 (1991); *UFCW, Local 540*, 305 NLRB 927, 929 (1991); *Baltimore Sun Co.*, 302 NLRB 436, 437 (1991); *Int’l Woodworkers of Am.*, 304 NLRB 100, 101 (1991).

As discussed, *supra* Section I.A., the mandatory terms of Krocker’s checkoff violate the Act. However, even assuming, *arguendo*, the “MUST BE SIGNED” commands are not per se illegal, the checkoff’s terms surely do not constitute a “clear and unmistakable” waiver of Krocker’s Section 7 right to cease payment of dues after resignation. *Lockheed*, 302 NLRB at 328. The two large “MUST BE SIGNED” directives on either side of the title negate any “voluntary” language in the fine print of the checkoff purporting to waive the Section 7 right to refrain from assisting a union. Krocker, or any other reasonable employee, could not make a knowing and voluntary waiver by signing something that twice says it “MUST BE SIGNED” in the largest typeface on the checkoff, underlined, and in all capital letters. A checkoff card with contradictory terms—that it is “voluntary” *and* that it “MUST BE SIGNED”—cannot be described as being clear and

unmistakable. The checkoff, therefore, did not contain the type of “clear and unmistakable” waiver that the Board contemplated in *Lockheed*, such that an employee would be fully aware that the checkoff purported to waive her Section 7 right to refrain. *See id.* at 329.

Thus, Krocker did not waive her Section 7 right to refrain from assisting the Union by signing her checkoff, and she validly revoked her checkoff through her March 5 Letter. The Union violated the Section 8(b)(1)(A) by rejecting Krocker’s valid checkoff revocation and continuing to accept dues deducted from her wages. The ALJ erred by failing to explicitly consider this issue and by finding the Union did not violate the Act through its post-revocation conduct.

II. The Union’s three-part form violated the Act (Exceptions 7, 9–10).

In order for a checkoff to be voluntary, the employee must understand the terms of what she is signing. The ALJ erred in his conclusion that the three-part form is not coercive both in presentation and through confusing language. *See ALJD at 7:12–19, 8:20–31.* With respect to the latter, the ALJ erred by failing to consider the checkoff’s terms as a whole and instead focused on isolated phrases. *See ALJD at 7:31–34.*

First, the checkoff is buried in the middle of a single page containing three separate authorizations: a membership application, the checkoff, and a second Union deduction form. Based on the layout of this form, a reasonable employee could be coerced into believing the checkoff form was required as a condition of joining the Union. *See Tamosiunas*, 892 F.3d at 429; *Pomona Valley Hosp.*, 355 NLRB at 235; *see also Local 32B-32J, SEIU*, 266 NLRB 137, 138–39 (1983) (holding employees must have the choice to pay dues by automatic authorization and holding dual-purpose membership and checkoff cards unlawful); *Luke Constr. Co.*, 211 NLRB 602 (1974) (holding dual purpose membership and dues authorization forms unlawful). Specifically, the Union’s form is titled at the top “Membership Application.” The second and third

parts could appear to come naturally under this title. While each part of the form has its own title, there is no demarcation between the start or end of each “part.” Nor is there any place for the employee to print his or her name on the second or third parts of the form. It would be reasonable for an employee to believe that the printed name and information on the first “part” of the form applied to all three parts of the form. If the checkoff were truly its own, separate document, surely the Union would require the employee to print his or her name on it so it would know who was signing the card, as signatures are notoriously illegible. Thus, a reasonable employee could believe that the form, in its entirety, was the membership application form. “[F]ree choice is abrogated by improperly connecting the dues-checkoff authorization to the membership obligation under a union-shop clause.” *Indep. Stave Co.*, 248 NLRB 219, 227 (1980).

Second, the checkoff’s terms are confusing such that a reasonable employee would not understand what rights the checkoff purported to waive and what her obligations and/or limitations on her rights would be. When interpreting checkoffs, the Board applies contractual principles through the lens of the rights and policies of the Act. *See Lockheed*, 302 NLRB at 328. General contract principles require the contractual provisions to be interpreted against the drafter, particularly in cases as here, where the contract is one of adhesion. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (citations omitted) (“[A] court should construe ambiguous language against the interest of the party that drafted it.”); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 274–75 (W.Va. 2002) (closely scrutinizing a clause beneficial to the drafter of an adhesion contract and impairing rights afforded by statute); *see also Bay Cities Metal Trades Council*, 306 NLRB at 985. These principles are only strengthened by the Act’s policies and purpose of “jealously” guarding employee rights, including employees’ Section 7 right to refrain from assisting a union. *Tamosiunas*, 892 F.3d at 430; *see also* General Counsel Memo 19-

04, Unions' Duty to Properly Notify Employees of Their *General Motors/Beck* Rights and to Accept Dues Checkoff Revocations after Contract Expiration (2019), available at <https://www.nlr.gov/guidance/memos-research/general-counsel-memos> (search for GC 19-04).

Here, the Union's checkoff contains convoluted language, which could only be intended to confuse employees. For example, the "paragraph" upon which the Union relied to reject Krockner's revocation as untimely is actually a single, confusing run-on sentence:

This authorization and assignment is without condition and shall be irrevocable for a period of one year from the date of execution or until the termination date of the agreement between the Employer and Local 400, whichever occurs sooner, and from year to year thereafter, regardless of union membership, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period or the termination of the collective bargaining agreement between the Union and my employer, I give the Employer and the Union written notice of revocation bearing my signature thereto.

Ex. 3. Krockner, or any reasonable employee, may not understand the significant limitations the Union purports to place on her ability to revoke her authorization for dues deductions, which effectively (in conjunction with other parts of the checkoff) purports to waive her Section 7 right to refrain from financially supporting the Union. Gen. Counsel Mem. 19-04. The signing of such a confusing checkoff cannot "clearly and unmistakably" waive Krockner's right to refrain, and any such confusing language should be interpreted against the drafter, in this case, the Union. The ALJ failed to look at the checkoff language as a whole and instead considered only the phrases "whichever occurs sooner," "year to year thereafter" and "subsequent yearly period." ALJD at 7:31-34. The ALJ concluded that those phrases did not "distort" the requirements of Section 302(c)(4) to restrain or coerce employees. The ALJ should have considered the entirety of the checkoff language from an employee's point of view, instead of isolating these phrases.

III. The checkoff violates the Act by not giving employees an opportunity to revoke during a contract hiatus (Exception 11).

The ALJ erroneously failed to consider the General Counsel’s allegation that the Union’s checkoff unlawfully limits employees’ ability to revoke at the expiration of a collective bargaining agreement to a short window period prior to contract expiration. *See* Gen. Counsel Br. to ALJ at 16–17.

Under Section 7 and Labor Management Relations Act Section 302(c)(4), employees are guaranteed the right to revoke their checkoffs “beyond the termination date of the applicable collective agreement.” 29 U.S.C. § 186(c)(4).⁵ Pursuant to the plain text of Section 302(c)(4), in order for a checkoff to be valid, it *must* allow for revocation *after* the expiration of a collective bargaining agreement. A union which enforces an invalid or revoked checkoff against an employee violates the Act. *See NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527*, 523 F.2d 783, 784–85 (5th Cir. 1975) (citing *Indus. Towel & Uniform Serv.*, 195 NLRB 1121 (1972), *enforcement denied* 473 F.2d 1258).

Section 302(c)(4) guarantees that an employee may revoke her checkoff authorization when a collective bargaining agreement expires and a new one has not yet been entered into. *See WKYC-TV, Inc.*, 359 NLRB 286, 292 (2012) (stating that employees “are free to revoke their checkoff authorizations when the collective-bargaining agreement expires”); *Chem. Workers, Local 143 (Lederle Labs.)*, 188 NLRB 705, 707 (1971) (finding employees’ checkoffs “became terminable at will after the contract expired”); *Lowell Corrugated Container Corp.*, 177 NLRB 169, 173 (1969) (adopting ALJ finding that an “employee is free to repudiate or revoke his [checkoff]

⁵ “Section 302(c)(4) guarantees an employee ‘two distinct rights’ when he executes a dues checkoff authorization: (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.” *NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527*, 523 F.2d 783, 787 (5th Cir. 1975).

authorization at any time after the contract expire[s]”); *see also Stewart v. NLRB*, 851 F.3d 21, 32–35 (D.C. Cir. 2017) (Silberman, J., concurring in the judgment and dissenting); *Anheuser-Busch, Inc. v. Teamsters, Local 822*, 584 F.2d 41, 43 (4th Cir. 1978); *Valley Hosp. Med. Ctr., Inc.*, 368 NLRB No. 139 (Dec. 16, 2019) (“union security” clause in a collective bargaining agreement does not survive contract expiration).

Current Board law contravenes the plain text of Section 302(c)(4), and this interpretation must be corrected. In *Frito-Lay, Inc.*, 243 NLRB 137 (1979), the Board held that a union did not violate the Act when it limited employees’ ability to revoke their checkoffs to a short window period before the end of the collective bargaining agreement. *Id.* at 137. The two-Member Board majority held that Section 302(c)(4) only requires that employees be given the opportunity to revoke a checkoff “at least once a year and at the termination of any applicable collective-bargaining agreements.” *Id.* at 138. The Board majority then concluded that the union complied with this requirement because its checkoff provided a yearly window period and a ten-day window period of days *before* a contract’s expiration. *Id.* at 138–39. In dissent, Member Murphy correctly rejected this conclusion, pointing out that Section 302(c)(4)’s use of the phrase “*beyond the termination date* of the applicable collective agreement” describes a time that an employee can revoke *after* a collective bargaining agreement expires, not before. *Id.* at 140 (emphasis added) (Member Murphy, dissenting).

The Board’s interpretation of Section 302(c)(4) in *Frito Lay* fails as a textual matter 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.” Definition of “beyond,” *Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/beyond> (last visited Feb. 27,

2020). 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.

The *Frito-Lay* majority, however, attempted to replace the word “beyond” in the statute with the word “at.” For example, it stated twice that Section 302(c)(4) permits revocation only “at the termination of any ‘applicable collective agreement[s].’” 243 NLRB at 138 (repeated twice). Of course, “at” and “beyond” have entirely different meanings. “At” refers to a fixed point while “beyond” refers to things after a fixed point. This is why Judge Silberman of the D.C. Circuit noted that *Frito-Lay* adopted an “anti-textual interpretation” of the word “beyond.” *Stewart*, 851 F.3d at 35. He properly noted that the Board’s decision in *Frito-Lay* “claims that ‘beyond’ can mean ‘before.’” *Id.* And thus the “Board has engaged in a blatant attempt to rewrite a statute in which Congress spoke plainly.” *Id.*

Here, the Union’s checkoff and its enforcement violated the plain text of Section 302(c)(4). The checkoff states, in pertinent part, that it is “irrevocable . . . until the termination date of the agreement between the Employer and Local 400 . . . and from year to year thereafter, regardless of union membership, unless not less than thirty (30) days and not more than forty-five (45) days prior to . . . the termination of the collective bargaining agreement between the Union and my employer, I give the Employer and Union written notice of revocation” Ex.3.⁶ This language purports to limit an employee from revoking her checkoff to a fifteen-day window period *before* the expiration of the collective bargaining agreement. As discussed above, such a limitation is contrary to the plain text of Section 304(c)(4) and, therefore, maintenance of such language

⁶ The Union includes a similar restriction in the checkoff it currently maintains. Ex. 6.

violates Section 8(b)(1)(A). To the extent Board law holds otherwise in *Frito-Lay*, it should be overruled.

IV. The checkoff's portability clause violates the Act, as does the Union's efforts to mandate that all employees who pay dues by checkoff must make it "portable" (Exception 12).

The ALJ concluded that the Union's maintenance of checkoff language requiring an employee to agree to authorize the Union "to transfer this authorization to any other Employer under contract with Local 400" if she changes employment did not violate the Act. ALJD at 9:25–29; Ex. 3.⁷ This conclusion is in error.

A checkoff authorization is a contract between an employee and an employer for the employer to periodically deduct an amount from the employee's wages and remit it to a third party. The employee cannot knowingly or willingly contract with unknown future employer(s) through a clause that continues in perpetuity.

The Board has long recognized that dues deduction authorizations expire upon the termination of the employment relationship. *See Indus. Towel & Uniform Serv.*, 195 NLRB at 1121 (holding "the checkoff authorization has been extinguished by the employee's cessation of employment"); *but see Kroger Co.*, 334 NLRB 847 (2001). For example, in *Industrial Towel*, the Board held that "when an individual severs his employment relationship, he also severs any obligation under a signed checkoff authorization, and . . . such obligation cannot be revived until the individual has signed a new authorization." *Ry. Clerks (Yellow Cab Co.)*, 205 NLRB 890, 891 (1973) (describing the holding in *Indus. Towel*). If the checkoff authorization is terminated, it cannot be reestablished by fiat with an unknown future party. Put another way, an employee cannot be bound to an

⁷ The Union includes this same language in the checkoff it currently maintains. Ex. 6.

agreement to contract with an unknown number of potential *future* unidentified employers—they are unknown, speculative parties.

Even in a case where the Board analyzed whether a checkoff remains valid after an employee's separation from employment, the Board examined "whether the checkoff authorization contains a 'clear and unmistakable' waiver of the individual employee's statutory right to refrain from supporting the union." *Teamsters Local 200*, 367 NLRB No. 93, slip op at *1 n.1 (Feb. 26, 2019). No such clear and unmistakable waiver exists here.

Specifically, Krockner's checkoff is unclear as to whether the "Employer under contract with Local 400" is under contract at the time the employee signed the checkoff or under contract at any time the Union attempts to enforce the contract. If the former, it is unreasonable to expect, and burdensome to require, an employee to know (for a lifetime) all of the employers under contract with the Union at the time she signed her checkoff. If the latter, an employee cannot "clearly and unmistakably" agree to be bound to a contract with a party that is not contemplated (or may not even exist) at the time she signed the checkoff.

This checkoff's language is particularly egregious because it has no time limitation. Pursuant to the plain language of the checkoff, an employee could change her employment to an employer not under contract with the Union (thereby ceasing dues deductions). Then, decades later, she could change jobs again, this time to an employer under contract with the Union. The Union—a third party—could then present her checkoff, which had not been enforced or enforceable for decades, to the new employer and purport to bind the new employer and the employee—the actual parties to the contract—to the checkoff's terms, including its strict limitations on its ability to be rescinded.

The ALJ cites *Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund*, 700 F.2d 1269, 1276 (9th Cir. 1983), for the proposition that Section 302(c)(4) “does not require that an employee be free to revoke the check-off whenever he changes employers.” ALJD at 9:14–17. The facts and holding of this case are readily distinguishable.

Associated Builders concerns the construction industry, a unique industry subject to different rules, such as Section 9(e) agreements. See 29 U.S.C. § 159(e). Moreover, in that case, the portability clause in the checkoffs authorized the transfer of an employee’s checkoff to “all individual employers who were parties to the 1981 Master agreement.” *Associated Builders*, 700 F.2d at 1277 (internal quotations omitted). Employees signing the checkoffs at issue would have been employed by signees of the 1981 Master agreement. *Id.* at 1276–77. An employee who worked pursuant to that agreement would have had access to copies of the contract—and would know at the time of signing and in perpetuity which employers he had potentially agreed to check off dues for.

Here, the situation is much different. Krockner’s checkoff does not bind her to dues deductions to a finite and known list of employers. Instead, it purports to bind her to dues deductions to “any Employer under contract with Local 400.” Ex. 3 (emphasis added). At the time they were obligated to sign a checkoff, employees, including Krockner, would have no way of knowing all the employers Local 400 had contracted with, is currently contracted with, or will contract with in the future. In other words, unlike the employees in *Associated Builders*, who had a finite list of employers to which they were agreeing to be bound in their collective bargaining agreement, Krockner and her fellow employees could not possibly know who they were agreeing to contract

with in perpetuity.⁸ Employees simply cannot bind themselves to contract with an unknown or nonexistent party.⁹ Since the checkoff purports to do just that, its portability clause is unlawful, as is the Union's effort to mandate such a clause as a condition of using the dues checkoff system.

Thus, the Union violated the Section 8(b)(1)(A) by maintaining a provision in its checkoff requiring employees to agree to transfer the authorization to any employer under contract with it, and the ALJ erred by dismissing this allegation.

V. The Union violated the Act by failing to provide Krockner with the specific dates it contended she could revoke her checkoff (Exception 14).

The ALJ erred in his conclusion that the Union was not required to tell Krockner the dates during which it contended she could timely revoke her checkoff. The Board requires a union to provide employees with information affecting their employment. *See, e.g., Int'l Ass'n of Machinists (Hughes Aircraft Co.)*, 164 NLRB 76 (1967) (checkoff information); *Auto Workers Local 909 (Gen. Motors Corp.-Powertrain)*, 325 NLRB 859, 859 (1998) (an accounting of disparity in grievance settlement money distribution); *Union of Sec. Pers. of Hosps. (Church Charity Found. of Long Island, Inc.)*, 267 NLRB 974, 980 (1983) (status of grievance); *Law Enf't & Sec. Officers, Local 40B (S. Jersey Detective Agency)*, 260 NLRB 419, 419 (1982) (copies of collective bargaining agreement and health and welfare plan); *Branch 529, Nat'l Ass'n of Letter Carriers*, 319 NLRB 879, 880-81 (1995) (copies of grievances). In fact, "where a requesting employee has a legitimate interest in the information, whether expressed or obvious, and where the union has 'raised no substantial countervailing interest' in refusing to provide the information, it must be

⁸ The applicable collective bargaining agreement was between Kroger and the Union only. Ex. 2, at 1.

⁹ This is especially true because a checkoff is a contract between an employee and an employer. *See Local 58, IBEW*, 365 NLRB No. 30, slip op. at 4 (Feb. 10, 2017) ("The Board has held that a checkoff authorization . . . is a contract between an employee and his employer.") (footnote and citation omitted).

provided.” *U.S. Postal Serv.*, 362 NLRB 865, 869 (2015) (quoting *Local 307, Nat’l Postal Mail Handlers Union (U.S. Postal Serv.)*, 339 NLRB 93 (2003)).¹⁰

Applying these principles to the facts at issue requires a finding that the Union was required to provide Krockner with the information requested. In her resignation and checkoff revocation letter, Krockner specifically asked “if you contend that I must meet a ‘window period’ in order to revoke my dues check-off authorization, I ask that you . . . tell me *specifically* what ‘window period’ dates I must meet in order to revoke the dues check-off authorization.” Ex. 4, at 1 (emphasis added). In response, the Union stated:

With regard to your Union dues deductions, when you signed a dues check-off authorization form, you agreed to have your dues deducted from your paycheck, regardless of Union membership, from year to year unless notice was given no less than 30 days and not more than 45 days prior to the date you signed your membership application, which is September 2, 2017 (copy enclosed) or the termination of the collective bargaining agreement. Because your dues revocation is not timely, we are unable to process your request.

Ex. 5. This response fails to *specifically* state the time period during which Krockner could timely revoke her checkoff. *See* Gen. Counsel Mem. 19-04, at 9. Instead, it requires Krockner to calculate the dates on which she can send in her revocation. The Union violated Section 8(b)(1)(A) by failing to provide Krockner with her revocation period dates as she had requested, and the ALJ erred by dismissing this allegation.

VI. The Union’s checkoff and its conduct violated its duty of fair representation (Exceptions 1–2).

The ALJ erred in dismissing the General Counsel’s allegation that the Union’s ambiguous checkoff and subsequent actions violated its duty of fair representation. A union owes a duty of fair representation toward every member of the bargaining unit by virtue of its position as exclusive

¹⁰ The ALJ claimed: “No case law [was] cited in support of this affirmative duty.” ALJD at 9:47–10:1. Charging Party cited all of these cases to the ALJ.

representative. A union breaches its duty when its conduct toward a bargaining unit member is “arbitrary, discriminatory, or in bad faith.” *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). A union’s breach of its duty of fair representation violates Section 8(b)(1)(A). *Miranda Fuel Co.*, 140 NLRB 181, 184–85 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). The Union’s use of a confusing three-part form and its command that the checkoff portion “MUST BE SIGNED,” which as discussed *supra* Section I, is in violation of established Board law, is in bad faith.

Contrary to the ALJ’s interpretation, ALJD at 5:16–30, the Board in *Electrical Workers, IUE Local 444 (Paramax Systems)*, 311 NLRB 1031 (1993), supports the General Counsel’s argument that the Union’s checkoff violates its duty of fair representation. In *Paramax*, the Board held that “the union must apprise all unit employees, not just those who are faced with imminent discharge, as to the precise extent of their obligations and rights.” *Id.* at 1040. Here, the checkoff form says it “MUST BE SIGNED.” This is an inaccurate statement of an employee’s obligations and rights because, as explained *supra*, it is black letter Board law that employees are *not* required to sign a checkoff. Thus, the Union violated its duty of fair representation by misinforming employees of their obligations and rights.

The ALJ stated that the principles in *UAW Local 600 v. NLRB*, 956 F.3d 345 (6th Cir. 2020) did not apply because the facts here are distinguishable. ALJD at 6 n.5. This statement is not accurate, as the facts are similar. In *Local 600*, the charging party was entitled to revoke his checkoff upon resignation. Here, Krockner was entitled to do the same, pursuant to well-established Board law. Her checkoff was either coerced or did not contain a “clear and unmistakable” waiver of the kind necessary to bind her to pay dues after resignation. In *Local 600*, the union intentionally ignored the charging party’s revocation request and responded with a partial refund only after charges were filed. Here, the Union intentionally and explicitly rejected Krockner’s revocation, and

only refunded her dues (without interest) several months after she filed her charge. In *Local 600*, the Sixth Circuit found that the union violated its duty of fair representation by engaging in this intentional conduct. The Board should find a similar violation here.

VII. The Union’s subsequent actions do not cure its illegal acts under *Passavant* (Exceptions 16–18).

The ALJ erred in his statements that the Union “more than cured” its violations and that the matter has been “substantially remedied or effectively contradicted by subsequent conduct.” ALJD at 10 n.8. These statements are contrary to the facts of this case as well as to applicable law.

A. The Union has not cured or remedied its violations.

The Union has not sufficiently remedied or cured its violations for several reasons.

First, Krocker has not been made whole by the Union. As stipulated, the amount refunded to Krocker by the Union was the “total amount of dues collected from her paycheck since her March 5, 2018 letter.” Stipulation at ¶ 17(c). As the Union’s refund did not include interest, Krocker has not been made whole. *See, e.g., Teamsters Local 385*, 366 NLRB No. 96, slip op. at 3 (June 20, 2018) (requiring interest payments despite the union already refunding the amounts deducted). “A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (citation and quotation marks omitted). “[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Id.* at 307–08 (citing *Ellis v. Ry. Clerks*, 466 U.S. 435, 442 (1984)). However small any interest payment may be, Krocker is entitled to a full monetary remedy for the Union’s conduct.

Second, Krocker’s injuries have not been “cured,” because she is still entitled to a notice posting remedy. “The statute clearly calls for the posting of notices as part of the enforcement

procedure of the NLRB,” which serves the purpose of “advising the employees that the NLRB has protected their rights, and preventing or deterring future violations.” *NLRB v. Hiney Printing Co.*, 733 F.2d 1170, 1171 (6th Cir. 1984) (per curium); accord *NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940) (free exercise of employee rights under the Act enhanced by requiring notice postings). Even assuming that some portions of the underlying dispute have been resolved, the Board can always require a notice posting remedy and it should do so in this case. *NLRB v. Methodist Hosp. of Gary, Inc.*, 733 F.2d 43, 48 (7th Cir. 1984); cf. *NLRB v. Metalab-Labcraft*, 367 F.2d 471, 473 (4th Cir. 1966).

Third, in addition to providing additional relief to Krockner, the Board should order the Union to afford relief to “similarly situated” employees covered by the Union’s illegal checkoffs. See, e.g., *Rochester Mfg. Co.*, 323 NLRB 260, 263 (1997) (ordering class-wide retroactive remedies in a case where the union failed to provide new hires with proper *Beck* notice); *Newspaper & Mail Deliverers’ Union (NYP Holdings, Inc.)*, 361 NLRB 245, 256 (2014) (same). Charging parties possess third party standing under the Act to seek a remedy for all others who were illegally coerced into signing an unlawful checkoff agreement. Even assuming the Board finds the Union’s new checkoff lawful, it could order the Union to stop giving effect to its old checkoff because there is no evidence in the record to suggest that the Union voided all of its old checkoffs or offered employees the option of signing its new checkoff. Therefore, the Union’s new prospective revisions alone do not sufficiently address its unlawful conduct.

Lastly, the Union’s belated refund to Krockner does not “cure” its violations, but is a further violation of Section 8(b)(1)(A). The Board has held that delay in effectuating an employee’s Section 7 rights violates Section 8(b)(1)(A). *Teamsters Local 385*, 366 NLRB No. 96, slip op. at 2 (a union violates the Act by ignoring or delaying responses to employees’ checkoff revocations);

Affiliated Food Stores, Inc., 303 NLRB 40, 40 n.2, 45-46 (1991) (finding a union’s ten-week delay in honoring a checkoff revocation a violation of the Act); *see also Felter v. S. Pac. Co.*, 359 U.S. 326 (1959); *Peninsula Shipbuilders’ Ass’n v. NLRB*, 663 F.2d 488 (4th Cir. 1981).

For example, in *Teamsters Local 385*, 366 NLRB No. 96, charging party Santana-Quintana sent a revocation letter that the union ignored for four months. In that case, upon receiving the charge, the Union sent Santana-Quintana a letter stating his revocation had been misfiled, accepted his revocation, and refunded him the dues deducted from his wages. *Id.* Regardless of this immediate response to the filing of the unfair labor practice charge, the Board held that the union’s failure to timely accept Santana-Quintana’s revocation and to immediately refund dues deducted from his wages violated the Act. *Id.*, slip op. at 2 n.4.

Here, the Union’s conduct was more egregious than that in *Teamsters Local 385*. As discussed, *supra* Section I.B., Krockner was entitled to revoke her checkoff because it was not a voluntary waiver of her Section 7 rights. The Union delayed in refunding Krockner’s dues for six months (longer than the delay in *Teamsters Local 385*); the Union’s delay was willful rather than inadvertent; and the Union did not immediately act after the instant charge was filed—it waited over two months after Krockner filed her charge. Stipulation at ¶¶ 1, 17(c).

Therefore, the Union has not remedied or cured its violations and the ALJ erred in his statements to the contrary.

B. The Union’s attempt to “cure” the violation fails to comply with *Passavant*.

The Union’s belated attempt to correct its unlawful actions is an insufficient repudiation of its violations under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). In order to avoid an unfair labor practice proceeding, a respondent must effectively repudiate its acts. Pursuant to the *Passavant* standard, an effective repudiation must be: (1) timely; (2) unambiguous; (3) “specific

in nature to the coercive conduct;” (4) “free from other proscribed illegal conduct;” (5) there must be adequate publication of the repudiation to the employees; (6) “there must be no proscribed conduct on the [Respondent’s] part after the publication;” and (7) such repudiation or disavowal of coercive conduct must give assurances that there will no longer be interference with an employee’s Section 7 rights. *Id.* at 138-39.

Here, the Union’s refund and belated acceptance of Krockner’s checkoff revocation fails each and every *Passavant* requirement. As an initial matter, its actions are not a proper “repudiation,” because did the Union did not admit that it violated the Act, and it merely refunded her \$174.23, representing the total amount of dues collected from her paycheck, without interest. Stipulation at ¶ 17(c). Furthermore, the Union’s action of refunding the dues deducted from Krockner’s wages after her March 5 Letter was: (1) untimely, as it was sent approximately six months after Krockner sent her March 5 Letter and over two months after she filed her unfair labor practice charge, *see Passavant*, 237 NLRB at 139 (finding the repudiation untimely where it was made seven weeks after the commission of the unfair labor practice and three days after the filing of the charge); (2) ambiguous and not specific regarding the coercive conduct because the Union did not admit that it violated the Act, *see id.* (finding the statement “was neither sufficiently clear nor sufficiently specific” as “Respondent did not admit any wrongdoing but merely informed employees that information given them was ‘not correct.’”); (3) not published in a way to inform employees of the repudiation; and (4) gave no assurances that employees’ Section 7 rights would not be violated in the future. Indeed, the Union denies to this day that it violated the Act in any way.

Thus, the Union’s long-delayed refund of Krockner’s dues does not change the fact that the Union violated the Act by maintaining unlawful checkoff provisions and rejecting Krockner’s checkoff revocation. Krockner is entitled to a full remedy, including an interest calculation and

payment and a notice posting, to vindicate her rights, and the ALJ erred in his statements to the contrary.

CONCLUSION

For the foregoing reasons, the ALJ's conclusion that the Union did not violate the Act is in error (Exception 19) and the ALJ's Decision should be reversed in its entirety.

Date: July 2, 2020

Respectfully submitted,

/s/ Alyssa K. Hazelwood

Alyssa K. Hazelwood

Aaron B. Solem

c/o National Right to Work Legal

Defense Foundation, Inc.

8001 Braddock Road, Suite 600

Springfield, VA 22160

703-321-8510

akh@nrtw.org

abs@nrtw.org

Counsel for Charging Party

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2020, a true and correct copy of Charging Party's Exceptions to the Administrative Law Judge's Decision and Order and Brief in Support of Charging Party's Exceptions to the Administrative Law Judge's Decision and Order were filed electronically with the Executive Secretary using NLRB e-filing system, and copies were sent to the following parties via e-mail:

Julie Polakoski-Rennie
National Labor Relations Board Region 6
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222-4111
Julie.Polakoski-Rennie@nrlb.gov

Counsel for the General Counsel

Carey R. Butsavage
John A. Durkalski
1920 L Street, N.W., Suite 301
Washington, D.C. 20036
cbutsavage@butsavage.com
jdurkalski@butsavage.com

Counsel for Respondent UFCW Local 400

Dated: July 2, 2020

/s/ Alyssa K. Hazelwood
Alyssa K. Hazelwood