

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

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

and

Case 06-CB-222829

SHELBY KROCKER, an Individual

**BRIEF IN SUPPORT OF COUNSEL FOR THE GENERAL COUNSEL'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

The Counsel for the General Counsel (“General Counsel”) files these exceptions to the April 20, 2020 Decision and Recommended Order (“ALJD” or “Decision”)¹ of the Chief Administrative Law Judge Robert A. Giannasi (“ALJ”), dismissing the Complaint alleging that the United Food and Commercial Workers Union, Local 400, CLC (“Respondent”) violated the National Labor Relations Act (the “Act”), by maintaining a misleading and coercive union membership, dues check-off authorization and payroll deduction authorization form. For the reasons discussed below, the Decision should be reversed and the Board should find that (1) the language of the dues check off authorization is unlawful because it misleads employees into believing that they must sign the form and that they do not have an option not to do so; (2) the revocation language of the dues check-off provision obscures, rather than clearly states, when an employee may revoke his or her check-off authorization; (3) the language of the check-off provision transferring the authorization to a future employer is unlawful because it waives employees’ future rights; and (4) Respondent’s failure to provide Shelby Krockner, an Individual (“the Charging Party”), with the window period dates within which she would be able to revoke her authorization, as she requested, violated its duty of fair representation to her. The language of Respondent’s form, as well as Respondent’s actions with respect to Charging Party, not only violates its duty of fair representation to the employees it represents, but also violates their Section 7 rights under the Act and their statutory rights under the Labor Management Relations Act.

¹ Citations herein to the ALJD appear as (ALJD XX: YY), where XX and YY designate page and line numbers, respectively.

The ALJ erred in finding that the language of the form used by Respondent as its membership application and check-off and payroll deduction authorizations was not misleading, confusing or ambiguous and not restraining or coercive under Section 8(b)(1)(A). (29 U.S.C. §158). The ALJ also erred in holding that, in union communications or documents to employees, ambiguous language alone, even if it concerns Section 7 rights, cannot amount to either a violation of the duty of fair representation or restraint or coercion under Section 8(b)(1)(A). (ALJD, p. 6). In essence, the ALJ held that for a union to violate the Act in its communications to employees, the General Counsel must prove that the union's communication was more than ambiguous or misleading, but intentionally misleading.

These findings and holdings are erroneous and give unions license to freely obfuscate and mislead employees with impunity in communications concerning their statutory rights. These findings and holdings are contrary to Board precedent and protect entities sending misleading messages, rather than the workers being misled.

As demonstrated below, the ALJ ignored important issues raised in the briefs and misapplied existing law. The framework in which he analyzed the lawfulness of this check-off form has the effect of creating a double and different standard for analyzing employer communications to employees and union communications to employees concerning matters affecting their Section 7 rights,

The Board should follow the precedent cited below and should analyze union communications with employees using the principles it applies to employer communications to employees under *The Boeing Co.*, 365 NLRB No. 154 (December 14, 2017). Here, using the *Boeing* analysis (as further discussed below in Section III.D), the Board should find this form

unlawful because of its impact on employees' Section 7 rights, which are not outweighed by any legitimate justification by Respondent.

Further, the Board should also find that Respondent breached its duty of fair representation to the Charging Party in failing to provide her with the dates for revocation of her check-off authorization, as she requested.

II. STATEMENT OF THE CASE

The charge in this matter was filed by the Charging Party on June 27, 2018 and served by regular post-paid mail upon Respondent on June 28, 2018. (Facts, ¶1; Exhs.1(a) and 1(b)). The Regional Director for Region 6 ("RD") of the National Labor Relations Board ("NLRB") dismissed the charge in Case No. 06-CB-222829 on September 28, 2018. (Facts, ¶2; Exhs.1(c)). The Charging Party appealed the RD's dismissal on October 12, 2018, and the NLRB Office of Appeals reversed the RD's Dismissal on June 21, 2019. (Facts, ¶3; Exhs.1(d)).

The first amended charge was filed by the Charging Party on July 22, 2019 and a copy was served by regular post-paid mail upon Respondent on July 24, 2019. (Facts, ¶4; Exhs. 1(e) and 1(f)). A Complaint and Notice of Hearing ("Complaint") issued on September 27, 2019 and was served upon Respondent by post-paid certified mail the same day. (Facts, ¶5; Exhs. 1(g) and 1(h)). Respondent served its Answer to the Complaint on October 25, 2019. (Facts, ¶6; Exh. 1(i)). An Amendment to Complaint issued on December 13, 2019 and was served upon Respondent by post-paid certified mail the same day. (Facts, ¶7; Exhs. 1(j) and 1(k)).

On January 9, 2020, the Counsel for the General Counsel ("General Counsel"), the Charging Party, and Respondent filed a Joint Motion to submit this case to an Administrative

Law Judge based on a stipulated record.² On January 10, 2020, the ALJ issued an Order Granting the Joint Motion to submit this case based on a stipulated record and setting a brief schedule.

On April 20, 2020, the ALJ issued a decision and recommended order in the above-referenced case dismissing all Complaint allegations.

In the ALJD, the ALJ ignored the substantial weight of the evidence, failed to apply Board precedent properly, and made findings of fact unsupported by the record. Thus, the General Counsel seeks reversal of the ALJD and requests the issuance of a decision finding that Respondent violated the Act, as charged, and an appropriate remedial Order providing for: (1) Removal of the phrase “MUST BE SIGNED” from Respondent’s multi-part document, confirmation from Respondent that it has removed this phrase in the current multi-part document and the presentation of evidence that the current amended multi-part document has been disseminated to all bargaining unit employees; (2) Creation and dissemination of a revised Membership Application, Voluntary Check-Off Authorization and ABC Payroll Deduction in three separate documents, which clearly provide information, in plain language, to employees that allows them to make an informed decision on union membership and dues check-off; (3) Removal of the transfer of authorization to “any Employer under contract” language from the dues check-off authorization form, confirmation from Respondent that it has removed this language in the current multi-part document and the presentation of evidence that the current amended multi-part document has been disseminated to all bargaining unit employees; and (4)

² That joint submission contains an agreed-upon list of documentary exhibits, numbered Exhibits 1 through 7, and a Stipulation of Facts numbered 1 through 22. Citations herein are generally either to the Stipulations of Facts (Facts, ¶ __) or Exhibits (Exhs. __) contained in the Joint Motion.

provision to employees, upon request, of the dates they are entitled to revoke their dues check-off authorization.

III. STATEMENT OF FACTS

Kroger Mid-Atlantic Division (“the Employer”) is an Employer under the Act, engaged in the operation of retail grocery stores. (Facts, ¶10). Respondent, a labor organization under the Act, is the exclusive bargaining representative of a unit of employees employed in the stores of the Employer operated in the Charleston, West Virginia area. (Facts, ¶15; Exh. 2). As such, the Employer and Respondent are parties to a collective bargaining agreement (“CBA”), which is effective by its terms from October 8, 2017 to August 29, 2020 and contains a union security provision. (Facts, ¶13; Exh. 2).

Respondent maintains a Three-Part Form containing a “Membership Application,” a “Voluntary Check-Off Authorization,” and a “UFCW Local 400-ABC Payroll Deduction Form,” all in one document, (collectively, “the Respondent’s Three-Part Form”). (Facts, ¶16(a); Exh. 3). On both sides of the heading “Voluntary Check-Off Authorization,” Respondent maintains the phrase “MUST BE SIGNED” in a larger font than the heading, bracketed, underlined and in all capital letters. (Exh. 3). Additionally, the “Voluntary Check-Off Authorization” form states: “The Secretary-Treasurer of Local 400 is authorized to deposit this authorization with any 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.” (Exh. 3). Further, the “Voluntary Check-Off Authorization” provides that it is,

...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

subsequently yearly period or the termination of the collective bargaining agreement between the Union and my employer.

(Exh. 3). The confusing three-part form, the “Must Be Signed” direction in the form, the language making the authorization to another employer, and the incomprehensible language in the check off authorization quoted above individually and collectively form the basis for the instant charge.

On September 2, 2017, the Charging Party executed the Membership Application and the Check-Off Authorization portions of Respondent’s Three-Part Form but did not execute the Payroll Deduction Form. (Facts, ¶16(b); Exh. 3). Thereafter in September 2017, West Virginia enacted its Workplace Freedom Act and became a right-to-work state. W. Va. Code, §§ 21-1A-3, 21-1A-4 and 21-5G-1 to 7.

On about March 5, 2018, the Charging Party sent two identical letters to the Employer and one to Respondent asking to resign her membership and stop her dues deduction. (Facts, ¶17(a); Exh. 4). On March 29, Respondent responded to her, stating that while she was no longer a member, she was bound to pay dues until she properly revoked her dues authorization during one of the specified window periods on the check-off card. (Facts, ¶17(b); Exh. 5). Respondent did not provide the Charging Party with the revocation window period dates. (Exh. 5). Union dues continued to be deducted from Charging Party’s paycheck and Respondent continued to accept these dues payments (Facts, ¶16; Exhs. 4 and 5).

On June 27, 2018, the Charging Party filed a charge alleging that dues continued to be wrongfully deducted from her paycheck and unlawfully accepted by Respondent, in violation of Section 8(b)(1)(A) of the Act. (Facts, ¶1; Exh. 1(a)). In September 2018, six months after she resigned her membership in the union and withdrew her check-off authorization, Respondent

refunded the Charging Party the dues collected from her paycheck since her March 5, 2018 revocation letter. (Facts, ¶17(c)).

Additionally, since late 2018, Respondent made some revisions to its Three-Part Form. (Facts, ¶18; Exh. 6). While this revised version has removed the “MUST BE SIGNED” language from the “Voluntary Check-Off Authorization,” it still contains language stating that:

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.

(Exh. 6). The revised form also maintains the following language which is very similar to its original version of its “Voluntary Check-Off Authorization.” This revised form states:

...irrevocable for the period of one year from the date I sign this authorization, or until the termination of the applicable collective agreement between Local 400 and my employer, whichever occurs sooner; and I agree and direct that this authorization shall be automatically renewed, and shall be irrevocable for successive one-year periods or for the period of each succeeding applicable collective agreement, whichever shall be shorter. To revoke this authorization, I agree that I will give written, signed notice to Local 400 and my employer not more than 45 days and not less than 30 days prior to (i) the end of the initial or any successive one-year period, or (ii) the termination of my initial or any successive collective agreement, whichever occurs sooner.

(Exh. 6).

IV. ARGUMENT

RESPONDENT VIOLATED SECTION 8(b)(1)(A) OF THE ACT AND ITS DUTY OF FAIR REPRESENTATION

Respondent Maintained an Unlawful Check-Off Form

Employee rights to be members of a union or to refrain from being members of a union are core rights protected by the Act. Unions have a legal obligation not to mislead employees when communicating with them about their choice regarding union membership. Respondent’s union membership and dues check-off form is confusing, misleading and coercive and thus

interferes with employees' free choice so that they are unable to freely exercise their Section 7 rights. *Office & Professional Employees Int'l Union Local 29 (Dameron Hospital Association)*, 331 NLRB 48, 64 (2000). Violation of this obligation not to mislead employees they represent concerning their Section 7 rights is itself a violation of the Act as well as a violation of the duty of fair representation. Respondent acted in bad faith by maintaining a misleading form, without legitimate justification for doing so, and thus both breached its duty of fair representation and violated the Act.

Here, the ALJ erred by failing to find that Respondent repeatedly interfered with employees' right to refrain from joining a labor organization and revoking dues check-off authorization in violation of the Act. First, Respondent unlawfully obscured the voluntary nature of its dues check-off form by maintaining language indicating that the employee *must* sign it. Second, Respondent's check-off authorization unlawfully stated that the check-off is transferrable to "any other Employer under contract" with Respondent. Third, the format and language in Respondent's use of a document which combines a membership application, a dues check-off, and a payroll deduction, unlawfully obscured an employee's choice when completing the document. Fourth, Respondent breached its fiduciary duty to unit members by maintaining ambiguous and confusing language regarding an employee's right to terminate the check-off authorization. Finally, Respondent unlawfully failed to advise the Charging Party of her specific dues check-off revocation dates when it rejected her revocation request as untimely.

Respondent's coercive and ambiguous language and communications have allowed it to unjustly profit by depriving employees of their right to refrain from joining the Union. Principles of fairness mandate that a reasonableness standard must be used when determining whether a

union's communications with its members are unlawful; anything less frustrates the purposes of the Act. The ALJD should be overruled in its entirety based on the reasons set forth below.

F. EXCEPTIONS 1-5: The ALJ erred by not finding that Respondent's maintenance of a Voluntary Check-Off Authorization form with the instruction "MUST BE SIGNED"³ printed on either side of the heading was coercive and/or breached Respondent's duty of fair representation and fiduciary duty to employees.

Respondent's Three-Part Form contained a section entitled "Voluntary Check-Off Authorization to Any Employer Under Contract with United Food & Commercial Workers Union, Local 400." However, on either side of the title in larger block capital letters was the instruction "MUST BE SIGNED." (Exh.3). For the reasons discussed below, this instruction on this form is unlawful under the Act.

1. By including the "MUST BE SIGNED" instructions, Respondent misled and thereby coerced employees.

The "MUST BE SIGNED" instruction bookending the title of the form, underlined in capitals and in larger font than the form title was clearly designed to communicate that the form had to be signed and that not signing was not an option. This language is deliberately misleading and coercive in causing employees to believe that their only choice is to sign the form.

In finding no violation of the Act, the ALJ asserted that the General Counsel's argument was that the language in Respondent's Three-Part Form is violative of the Act because it was ambiguous. However, this form, as the General Counsel argued, is more than ambiguous – it is

³ In late 2018, Respondent removed the "MUST BE SIGNED" language from its check-off authorization form. (Facts, ¶ 18; Exh. 6).

misleading. By printing the directive “MUST BE SIGNED” in all capital letters, in a font larger than the heading, plus underlined, Respondent *deliberately* caused employees to believe that they had to sign the Check-Off Authorization. (ALJD 6: 17-22). Respondent’s deliberate efforts to mislead employees is further evidenced by how, in contrast, Respondent’s language regarding the voluntary nature of the form was written in difficult to read, small print. (Exh. 3). An employee could not be expected to understand that signing the form was voluntary when confronted with “MUST BE SIGNED” in bold capital lettering on both sides of the form’s heading. By misleading employees into believing that they had no choice but to sign the check-off form, Respondent acted in bad faith.

Moreover, contrary to the ALJ’s finding, *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234 (2010), enfd 440 Fed. Appx. 524 (9th Cir. 2011) is applicable here. (ALJD 6-7: 24-10). In *Pomona*, the Board held that the overall context should be considered when determining whether the union’s words can be construed as coercive, even if this is not the only reasonable construction. *Id.* at 235. As in *Pomona*, Respondent’s Three-Part Form could reasonably mislead employees into believing that they were required to sign it, or it would lead to an adverse consequence.

The ALJ was incorrect in asserting that the “Must Sign”⁴ language did not contradict the Dues Check-Off form’s “voluntary” language. The “MUST BE SIGNED” instruction was a prominent order to employees, overshadowing and contrary to any language buried in the form regarding the voluntariness of the employees’ signatures. By giving the appearance that employees must sign the Check-Off Authorization, Respondent unlawfully impeded employees’ right to refrain from doing so.

⁴ The ALJ used the phrase “Must Sign” rather than “Must Be Signed”.

2. By acting in bad faith, Respondent breached its duty of fair representation.

Contrary to the ALJ's conclusion, Respondent acted in bad faith in the drafting of the Three-Part Form and thus breached its duty of fair representation. The duty of fair representation is a "judicially created doctrine founded on the principle of fair dealing." *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031, 1037 (1993), enf. denied 41 F. 3d 1532 (D.C. Cir. 1994). Unions have a duty to the employees they represent, and a breach of this duty interferes with Section 7 rights and violates Section 8(b)(1)(A). A breach occurs "when a union's conduct toward a member of the collective-bargaining unit is arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). To demonstrate bad faith, a plaintiff must show that the union engaged in "intentionally misleading conduct." *Ohlendorf v. United Food and Commer. Workers Int'l Union, Local 876*, 883 F. 3d 636, 644 (6th Cir. 2018).

By misleading employees through the use of a confusing format and unclear language concerning the employees' obligations to Respondent, Respondent acted in bad faith and thereby breached its duty of fair representation to the employees. The misleading nature of the language in Respondent's Three-Part Form is evidence of bad faith. There is ample support from not only the Board, but the courts, that a union that misleads its members acts in bad faith. As noted by multiple circuits: "A union acts in bad faith when it acts with an improper intent, purpose, or motive," and "[b]ad faith encompasses fraud, dishonesty, and other intentionally misleading conduct." *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F. 3d 120, 126 (2d Cir. 1998).

See also, Mock v. T.G. & Y. Stores Co., 971 F. 2d 522, 531 (10th Cir. 1992) and *Baxter v. United Paperworkers Int'l Union, Local 7370*, 140 F. 3d 745, 747 (8th Cir. 1998).

Respondent's actions here show the same bad faith as evidenced by the union in *Paramax. Supra*, 311 NLRB at 1037-1041. By failing to "inform the unit employees of their obligations, [the unions] breached their fiduciary duty of fair dealing in violation of Section 8(b)(1)(A)." *Id.* at 1041. In *Paramax*, the Board reasoned that it was "inconsistent with elemental notions of good faith and honesty" for the union to maintain a union security clause phrased in a way to lead a reasonable employee to believe that the employee had a greater obligation than he did. *Id.*, at 1040. As in *Paramax*, Respondent presented employees with misleading language that failed "to apprise employees of the lawful limits of their obligation" to Respondent. *Id.* If a communication with a union to its unit members is misleading or ambiguous, "this ambiguity must be held against [the union], 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), *enfd* 15 F. 3d 1088 (9th Cir. 1993) (citations omitted). Based on this precedent, by intentionally misleading employees regarding their right to refrain from union membership, Respondent has violated Section 8(b)(1)(A). Further, even if the language was considered merely ambiguous, rather than misleading, under *Paramax*, this language also violates the Act. 311 NLRB at 1037. The ALJ thus erred in concluding that no violation of the Act occurred, even if the language of the form was only ambiguous.

3. By failing to meet its fiduciary obligation to the employees, Respondent breached its duty of fair representation to the employees.

The duty of fair representation has been compared to that of a fiduciary to its beneficiaries. The Board has stated that the “requirement of fair dealing between a union and its members is in a sense fiduciary in nature. . . .” *Miranda Fuel*, 140 NLRB 181 (1962), enf. denied 326 F. 2d 172 (2d Cir. 1963). Here, the Respondent drafted a form which has monetary implications both for the union and for the employees because employees had to decide if they would pay dues to Respondent. A form that is ambiguous or misleading about the voluntariness of union membership and check-off is clearly beneficial to Respondent at the expense of employees. This is a feature in the instant case that the ALJ completely ignored.

Further, the Board has consistently held that a union’s position as exclusive bargaining representative carries with it the concomitant fiduciary duty to “deal fairly” with unit employees. *Security Officers Local 40B (South Jersey Detective Agency)*, 260 NLRB 419, 420 (1982). In *Air Line Pilots v. O’Neill*, 499 U.S. 65, 74-75 (1991), the Supreme Court stated:

The duty of fair representation is thus akin to the duty owed by other fiduciaries to their beneficiaries. . . . the duty a union owes to the employees it represents [is like] the duty a trustee owes to trust beneficiaries. . . . Others have likened the relationship between union and employee to that between attorney and client. . . a union owes employees a duty to represent them adequately as well as honestly and in good faith.

This is not the standard used by the ALJ in his analysis. He applied a very narrow view of bad faith and did not consider Respondent’s clear conflict of interest in the matter.

Under the correct fiduciary standard, Respondent, as the unit employees’ fiduciary, was obligated at a minimum to provide them with a dues check-off authorization form that was not misleading, contradictory or ambiguous. By failing to do this, Respondent failed to act in good faith and breached its duty of fair representation. Respondent additionally caused employees to potentially pay dues to Respondent that they otherwise would have chosen not to pay.

Respondent's maintenance of a check-off authorization form with the instruction "MUST BE SIGNED" printed on either side of the heading was misleading, or at the very least, contradictory or ambiguous, and was thus coercive and breached Respondent's duty of fair representation and fiduciary obligation to employees. By this conduct, Respondent violated Section 8(b)(1)(A). There was no reason for Respondent to include the instruction "MUST BE SIGNED" on the form. The message here was not subtle -- the "MUST BE SIGNED" instruction was located on both the left side and the right sides of the form, underlined and in a large font. This was a loud and clear message to the employee to sign the form, which included a union membership application, a check-off authorization, and a payroll deduction authorization. There was no lawful reason to place this language on the form. This instruction in all capitals and underlined in large font belies the voluntary nature of the authorization form.

To remedy this violation of the Act, Respondent should be required to remove the phrase "MUST BE SIGNED" from the multi-part document, acknowledge that it has done so in the current multi-part document and provide evidence that the current amended multi-part document has been disseminated to all bargaining unit employees.

G. EXCEPTIONS 6-7: The ALJ erred in not finding that Respondent coerced employees by maintaining a Three-Part Form with a misleading format.

Since the Respondent elected to utilize a Three-Part Form, it was obligated to provide the employees with a form utilizing a clear format that allowed the employees to understand that they were being presented with three different independent forms with their own processes associated with them. Specifically, it is Respondent's obligation to clearly inform employees that they were being presented with three contracts, each contract covering a different subject

and establishing different obligations on the part of the employee. Respondent clearly failed to meet this obligation

Respondent's Three-Part Form combined a "Membership Application," a "Voluntary Check-Off Authorization," and a "UFCW Local 400 ABC Payroll Deduction Authorization Form." The ALJ erred in concluding that this format was not confusing, misleading, and did not amount to restraint or coercion of employees in violation of Section 8(b)(1)(A). (ALJD 7:12-14).

Respondent's maintenance of the Three-Part Form with its confusing format and ambiguous language was misleading and "inconsistent with elemental notions of good faith and honesty." *Paramax Systems*, 311 NLRB at 1040. The format of this combined document is confusing and misleading to employees because three different forms were displayed on the same page with minimal physical demarcation between them. This format could reasonably be expected to lead employees to believe that the three forms were in fact just one form, and that they had to sign all the forms and could not choose to sign one or two of the forms. In addition, the check-off language is buried in the middle of a single page containing three separate authorizations: a union membership application, the check-off, and a second union deduction form. Respondent's Three-Part Form bears the title "Membership Application." The second and third parts come under this title and a reasonable employee could be misled and coerced into believing the check-off form was required as a condition of joining the union. In *Tamosiunas v. NLRB*, 892 F.3d 422, 430 (D.C. Cir. 2018), the court stated that under Board precedent, "if any reasonable employee could view the communication as coercive or restraining," the union has violated the law. Such is the case here.

Nor is there any place for the employee to print his or her name on the second or third parts of the Three-Part Form. A reasonable employee could believe that the printed name and information on the first “part” of the form applied to all three parts of the form and 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.” *Independent Stave Co.*, 248 NLRB 219, 227 (1980).

Respondent breached its duty of fair representation through its failure to follow the reasonable requirement that it communicate clearly with employees, particularly in matters of such great importance as membership, dues and fee payment. The ALJ erred by ignoring the Board admonition that: “[i]t is hard to imagine what is ‘unreasonable’ in requiring a union clearly to set forth those obligations its members owe, and to provide clear and sufficient notice of the consequences for failure to meet those obligations; the obligation does not, and should not, rest on the members.” *Distillery, Rectifying, Wine and Allied Workers, Local 38 (Schenley Distillers)*, 242 NLRB 370, 371 (1979), *enfd* 642 F.2d 185 (6th Cir. 1981). Having three forms on one page, as Respondent does here, serves no purpose other than to obscure an employee’s choice regarding union membership. While a union may prefer to use a one-page form, this Three-Part Form is misleading, difficult to understand and not properly demarcated.

H. EXCEPTION 8: The ALJ erred by not finding that Respondent’s maintenance of a Check-Off Authorization form which includes the phrases “year to year thereafter,” “subsequent yearly period,” and “whichever occurs sooner” was coercive and/or breached Respondent’s duty of fair representation and fiduciary obligation to employees.

The second paragraph of Respondent’s Check-Off Authorization form contained the bewildering phrases “year to year thereafter,” “subsequent yearly period” and “whichever

occurs sooner.” This confusing language could only be intended to mislead employees regarding their right to terminate the check-off authorization after contract expiration. The text that contains these phrases and on which Respondent relied to reject the Charging Party’s revocation request consists of a single, difficult-to-follow 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.(sic) I give the Employer and the Union written notice of revocation bearing my signature thereto.

(Exh. 3). This language is difficult for lawyers to parse; for those unfamiliar with legalese, it is virtually impossible. Neither the Charging Party, nor any other employee, could be expected to understand when they could revoke their authorization. This language thus places significant limitations on an employees’ ability to revoke authorization for dues deductions.

Because reasonable employees would likely be misled by Respondent’s phrases about when they could revoke their dues check-off authorization, the ALJ erred in his conclusion on this language. Respondent’s text – along with other parts of the check-off form – effectively deprives employees of their Section 7 right to refrain from financially supporting Respondent. An employee could reasonably believe that the window period applied to both the anniversary date (on which the initial check-off authorization form was signed) and the date of contract termination.⁵ In addition, employees could also interpret this language as precluding employees from revoking their authorizations upon expiration of the contract. Nevertheless, the ALJ,

⁵ Indeed, the ALJ apparently was misled by this language into this same conclusion when he rejected the idea of requiring unions to provide window period dates, upon request, and gave an example of a union providing an annual as well as contract termination window period dates.

incredibly and incorrectly, concluded that the objectionable language is “plain, reasonable and in no way impermissible.” (ALJD 8: 29-31). This language is a confusing and misleading run-on sentence that is far from being plain and reasonable. It is meant to confuse and did. There is simply no legitimate reason this language must be so perplexing. There are much simpler and clearer ways to convey a deadline for revoking dues authorization.

Contrary to the ALJ’s determination, Board law is clear that misleading or ambiguous language effectively restricts the right of employees to revoke their dues check-off authorizations under Section 302(c)(4) of the Labor Management Relations Act. The maintenance of this misleading language was coercive and breached the Union’s duty of fair representation and fiduciary obligation to employees in violation of Section 8(b)(1)(A). By sanctioning this language, the ALJ is permitting Respondent to take advantage of and unjustly profit from the employees to whom it owes a fiduciary duty to represent in good faith. The employees are deprived of their right to refrain from being a member of the union and deprived of their right to cease paying full dues. As noted above, in order to protect employees’ Section 7 rights, a union must not use misleading language, but instead use plain and clear language in these critical forms.

When interpreting check-offs, the Board applies contractual principles through the lens of the rights and policies of the Act. *See IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 328 (1991). General contract principles require that contractual provisions 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.”). Further, when reviewing such contract language, the ALJ did not

consider that the Act “jealously” guards employee rights, including employees’ Section 7 right to refrain from assisting a union. *Tamosiunas v. NLRB*, 892 F.3d, at 430. In this context, where Respondent is the drafter and the beneficiary of the language of the contract, it owes a fiduciary duty to the signer of the contract. Where the contract also involves the waiving of statutory rights, Respondent has an even stronger obligation to be clear and straight forward with the employees it represents. A failure to use clear language in this context is a plain violation of the Act and the duty of fair representation.

To remedy this violation, the phrases “year to year thereafter” and “subsequent yearly period” and “whichever occurs sooner” should be removed from the Check-off Authorization form, including the revised Check-Off Authorization form. (Exh. 6) New language should be substituted in the form to plainly and clearly indicate that the revocation of a dues check-off is available upon the expiration of the collective bargaining agreement and on the anniversary date on which the employee initially signed the check-off authorization form.

I. EXCEPTIONS 9-10: The ALJ erred by finding that the “Transferability” language in the “Voluntary Check-Off Authorization” form that requires employees to give Respondent the authority to transfer the employees’ check-off obligations to a new employer under contract with Respondent (not limited to a successor employer) was not coercive.

The ALJ erred in concluding that Respondent’s Check-Off Authorization form contained legitimate waiver language. The form states:

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, 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.

(Exh. 3) As an initial matter, the language was not a legitimate waiver because it did not clearly and explicitly inform signers of their rights not to sign the Check-Off Authorization form, as explained above. Further, in determining whether a check-off remains valid after an employee's separation from employment, the Board examines "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 (2019). For example, in *Teamsters Local 200*, the Board found that a union violated the Act when it caused the employer to deduct dues from an employee's pay after he returned to work for the employer without a valid dues deduction authorization in place. *Id.* The employee had signed a dues deduction authorization form, left his employment, but returned after a six-week hiatus. Because "there was no language in his checkoff that addressed reemployment" it was unlawful for the union to continue to take dues from the employee, despite his prior agreement to have dues deducted. *Id.*

It is unreasonable to expect, and burdensome to require, an employee to know all the employers under contract with Respondent at the time a check-off authorization is signed. More significantly, an employee cannot "clearly and unmistakably" agree to be bound to a contract with a party that is not contemplated at the time a check-off is signed.

Contrary to the ALJ's determination, this transferability language was unlawful on its face because Respondent should have separate check-off authorizations on file for each employer that employs a union member. Section 302(c)(4) of the Labor Management Relations Act (LMRA) provides that dues check-off is a legal relationship between the employee and the employee's employer. Thus, such a contract cannot be established prospectively by binding the employee to a legal relationship with an unidentified employer (except a successor employer).

By maintaining the “Transferability” provision in the “Voluntary Check-Off Authorization” form, Respondent coerced employees in violation of the Act.

The ALJ’s reliance on *Associated Builders and Contractors v. Carpenters Vacation and Holiday Trust Fund*, 700 F. 2d 1269, 1276 (9th Cir. 1983) is misplaced. (ALJD 9: 14-23). The ALJ relied on *Associated Builders* to support the proposition that transferability language from one employer to another does not violate the Act. However, opining that Section 302(c)(4) “does not require” a particular outcome is not an affirmative pronouncement on the meaning of the statute. Moreover, *Associated Builders* was written against the background of a construction industry “Master Agreement,” which the court focused on in permitting authorizations to transfer in that specific context, and only to those employers which were parties to the “Master Agreement.” *Id.* Notably, the court *relied* on the transitory nature of employment in the construction industry and stated:

In this case, the provision in the 1981 Master Agreement permitting an employer to designate a bank as its agent to receive authorizations and revocations is a reasonable adaptation of the requirements of section 302(c)(4) to the transitory nature of employment in the construction industry. A contractual requirement that each employee must send authorizations and revocations directly to each of the employee's employers would be impractical because an employee ordinarily works for several different employers during the course of a year. *Id.*

Furthermore, the court was concerned that no dues be deducted without a valid employee authorization, and that it not extend beyond one year, in keeping with the explicit language of Section 302(c)(4). *Id.* As the court noted: “[S]ection 302(c)(4) requires only that, for any dues deducted from an employee's wages pursuant to that provision, the employer paying those wages must have received an authorization from the employee that is not irrevocable for longer than a year. . . .” *Id.*, at 1276-1277. The court’s emphasis was on prohibiting deduction of dues

without employee consent. In this regard, the U.S. Supreme Court noted that any dues-related procedures should not “impinge” on employee’s freedom to remove check-off. *Felter v. Southern Pacific Co* , 359 U.S. 326, 333 (1959). Permitting unqualified, in perpetuity transferability, removes such freedom.

In *Felter v. Southern Pacific Co.*, the Supreme Court stated that employers and unions have considerable latitude to set up procedures for processing individual authorizations and revocations of check-offs, as long as the procedures do not infringe upon the employee's freedom to revoke the check-off. *Id.*, at 333-35. The Court noted that employers may make reasonable designations of agents to whom revocations may be sent. *Id.*, at 335. In the instant case, the Employer is not in the construction industry so there would be no bookkeeping impediment to requiring that a new authorization form be signed when the Charging Party or any other employee changes employers.

The duty of fair representation applies in all contexts of union activity, including contract negotiation, administration, and grievance processing. *Merritt v. Int’l Ass’n of Machinists & Aerospace Workers*, 613 F.3d 609, 619 (6th Cir. 2010). Thus, by not making clear to the employees that by signing the check-off authorization form they will be bound in perpetuity to a check-off authorization with every future employer that is signatory with Respondent, Respondent failed to consider the employees’ rights. By not informing or alerting the signers that they could be bound for the rest of their working lives by this one sentence, Respondent breached its duty of fair representation and fiduciary duty to the employees and violated Section 8(b)(1)(A). The reference to a transfer of authorization to “any other Employer under contract” with Respondent should be removed from the dues Check-Off Authorization form.

The ALJ asserted that *Kroger Co.*, 334 NLRB 847 (2001) supports the argument that once an employee signs the form at issue, that employee is bound in perpetuity to pay dues to any subsequent employer. It does not. This specific issue was not before the Board in *Kroger*. Rather, the Board expressed its concerns regarding assumptions that employees were waiving rights where there is no “clear and unmistakable waiver.” *Id.* at 849. The instant case puts this specific issue before the Board.

The Board Should Apply the *Boeing* Principles to Dues Checkoff Communications

Unions should not be allowed to mislead employees concerning their statutory rights with impunity. There is no legitimate reason for a union to provide ambiguous or misleading union membership and dues check-off forms to the employees it represents. As the Board has written in *Schenley Distillers*, “[i]t is hard to imagine what is ‘unreasonable’ in requiring a union clearly to set forth those obligations its members owe, and to provide clear and sufficient notice of the consequences for failure to meet those obligations; the obligation does not, and should not, rest on the members.” 242 NLRB at 371. Indeed, it is very easy and a very small burden for a union to change the language of its check-off form. Accordingly, there is no impediment for requiring a union to provide clear information to employees.

Similarly, there is no reason to apply different standards for communications with employees to employers and to unions. Unions should be held to the same standards in their communications to employees where Section 7 rights are implicated as are employers. When a union issues a rule or agreement to bargaining unit employees, especially given its fiduciary relationship to such employees, the union should be held to at least the same standard with respect to the impact on Section 7 rights as an employer’s communication to employees. The

Board should therefore apply its analysis of employee handbook rules and agreements to these union communications and agreements.

Since December 2017, the Board has analyzed employer handbook rules and agreements under the standards articulated in *Boeing. The Boeing Co.*, 365 NLRB No. 154 (December 14, 2017). Under *Boeing*, the Board requires that employee handbook rules and agreements issued by employers to employees should not interfere with or restrain employees' Section 7 rights and, if they are misleading with respect to such rights so that they interfere with them, or if because of their ambiguity they would be reasonably construed by employees interfere with Section 7 rights, such rules and agreements are deemed violative of the Act. 365 NLRB No 154, slip op at 13-17. There is no reason not to hold unions to the same standard of clarity and restraint on interference with Section 7 rights in the agreements that they draft and provide to employees as are applied to employer policies and agreements.

The Board should analyze union communications and agreements with employees using the principles it applies to employer communications to employees under *Boeing*. Thus, under *Boeing*, if an employer policy or rule does not clearly interfere with or prohibit NLRA-protected activities, "the rule is lawful . . . , and the Board's inquiry into maintenance of the rule comes to an end." *Id.*, slip op at 16. If a communication or agreement is ambiguous concerning its impact on NLRA-protected rights, the Board should use the *Boeing* analytical framework of Category 2 rules to determine whether the communication or agreement would reasonably be read to prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

Under this analysis, this check-off form and agreement would fall under Category 2 because these communications by Respondent with the Charging Party would reasonably be read

to prohibit or interfere with her exercise of her Section 7 rights, in its misleading or, at the very least, ambiguous language concerning her statutory rights. The impact on and interference with Section 7 rights are then balanced against Respondent's legitimate justification for the interfering or coercive language. There is no legitimate justification for Respondent not to have used a clear form using unambiguous and non-misleading language concerning employees' union membership and check-off authorization rights. *See also, Schenley Distillers*, 242 NLRB at 371. Since there is no legitimate justification for the language contained in this form, this check-off form should be deemed unlawful. Thus, applying the *Boeing* analysis, the Board should find Respondent's form unlawful because of its actual impact on employees' Section 7 rights, which are not outweighed by any legitimate justification by Respondent.

The Plain Writing Act of 2010, Public Law 111-274, requires that all federal agencies use plain language whenever they communicate with the public. 5 U.S.C. § 301. This philosophy necessitates that the check-off authorization form should be written in plain language. The Board should take this opportunity to require that union check-off authorization forms be written in simple and clear language. This change will benefit all parties involved in these types of disputes and will reduce confusion and unnecessary litigation. Unions should clarify the obligations that employees shoulder when they seek union membership. A union has a fiduciary relationship to employees that it represents. It serves no legitimate purpose for a union's authorization form to be misleading rather than transparent. This is particularly true for check-off authorization forms which implement an automatic monthly payment, which cannot be revoked at will, and, most importantly, which employees have a statutory right to revoke. An authorization form that is clear and transparent, rather than misleading, not only serves the interests of both the union and the employees they represent but is required by the Act.

J. EXCEPTIONS 11 and 12: The ALJ erred when he did not find that Respondent's failure to provide the Charging Party with the actual dates within which to timely request a revocation of her dues check-off authorization was coercive and/or breached its duty of fair representation and fiduciary duty to the employee.

On March 5, 2018, the Charging Party requested that Respondent resign her membership and revoke her dues check-off authorization during a period when revocation was not available. (Facts, ¶17(a); Exh. 4). In response, on March 29, 2018, Respondent informed her that her request was untimely. Even though Respondent lawfully asserted that the Charging Party's request to revoke was untimely, it did not inform her of when the open period for revocation would occur. Moreover, the language in the dues check-off form provides no additional specificity. (Facts, ¶17(b); Exh. 5). This could have resulted in the Charging Party making further untimely revocation requests and to Respondent's improper collection of dues from her.⁶

The ALJ relied upon the majority view in *Frito-Lay, Inc.*, 243 NLRB 137, 139 (1979) in rejecting the proposition that Respondent should be required to provide an employee with her specific dates for revocation after the unit member makes a request. (ALJD 9: 39-42). The General Counsel does not agree with the majority view in *Frito-Lay*.⁷ The language of Section

⁶ Six months after the date of her revocation request and after she filed the instant charge, Respondent refunded her dues to the Charging Party.

⁷ (Member Murphy, dissenting) (arguing that contractual window periods for cancelling dues checkoff authorizations do not negate Section 302(c)(4)'s statutory guarantee that an employee may cancel his or her checkoff authorization upon the expiration of the relevant collective-bargaining agreement); *Stewart*

302(c)(4) of the LMRA creates an unconditional statutory right for employees to revoke their dues check-off authorizations upon cessation of the governing collective-bargaining agreement, whether by expiration or termination. The legislative history of Section 302(c)(4) suggests a Congressional intent fully consistent with this interpretation. *Lockheed Space Operations*, 302 NLRB at 325-27.

In addition, Section 302(c)(4) of the LMRA makes clear that the Congressional policy protecting an employee's right to refrain from financially assisting a union includes the right of an employee, at least annually, to revoke a dues check-off authorization. 29 U.S.C. Section 186(c)(4).⁸ The ALJ erred in not recognizing that in order to exercise that right, it is critical that employees clearly understand the exact date or dates when revocation requests can be submitted. Charging Party requested those specific dates, but Respondent only gave her the misleading revocation language described above. In her resignation and check-off revocation letter, Charging Party 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." (emphasis added). (Exh. 4). In response, Respondent stated:

v. NLRB, 851 F.3d 21, 32-35 (D.C. Cir. 2017) (J. Silberman, concurring/dissenting) (noting that "[t]he difference between a right to revoke during a limited pre-termination window and a right to revoke at will upon termination of an agreement is not an insignificant difference. Employees might well decide to revoke their authorizations . . . only *after* termination of an applicable agreement, because of the then-existing unsatisfactory status of relations between the union and employer." Id at 34).

⁸ Revocation restrictions that violate Section 302(c)(4) of the LMRA also violate Section 8(b)(1)(A) of the Act. See *Atlanta Printing Specialties*, 215 NLRB 237, 237 (1974), *enfd* 523 F.2d 783 (5th Cir. 1975); *WKYC-TV, Inc.*, 359 NLRB 286, 289 n.13 (2012).

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.

(Exh. 5). Charging Party's request was a simple one, yet Respondent's response was evasive and only served to confuse the Charging Party. Respondent could have simply told the Charging Party that on September 2, 2019, she had the right to revoke her check-off in order to be consistent with the applicable window period. Instead, Respondent only provided the Charging Party with the date that she signed her membership application.

The duty of fair representation requires that Respondent use plain language to designate when revocation requests can be made. This ensures that employees understand the requirements for an effective revocation and prevents employees from having to file multiple untimely revocation requests which Respondent will summarily deny. Respondent should have informed Charging Party of the specific dates of her next revocation window or informed her that her pending request would be honored at the next available revocation period. Respondent did neither. This failure violated Respondent's duty of fair representation and violated Section 8(b)(1)(A) of the Act. The ALJ erred in not ruling that in order to exercise their revocation right, employees need to know the exact date(s) when revocation requests may be submitted. Employees should not bear the burden of deciphering these dates from the Respondent's obscure check-off authorization text.

Respondent failed to clearly and unambiguously inform Charging Party of her specific dues check-off revocation date range, despite her request. The Board requires unions to

provide employees with relevant information affecting their employment. *See, e.g., Int'l Ass'n of Machinists (Hughes Aircraft Co.)*, 164 NLRB 76 (1967) (check-off information); *Auto Workers Local 909 (Gen. Motors Corp.-Powertrain)*, 325 NLRB 859, 859 (1998) (an accounting of disparity in grievance settlement money distribution).

Respondent Unlawfully Failed to Respond to Charging Party's Request for Information

In this regard, “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 provided.” *U.S. Postal Serv.*, 362 NLRB 865, 869 (2015). An employee who attempts to revoke a check-off authorization has an interest in knowing the specific time period revocation is permitted. To that end, a union must inform employees of the specific dates when their revocation can be effectuated. In the alternative, a union can inform the requester that the request will be honored at their next revocation period. This practice will avoid disputes over employees’ revocation dates and avoid unnecessary litigation. Respondent should not be excused from responding directly to Charging Party’s request for revocation dates and for her window period. By failing to provide this information to Charging Party, Respondent acted in bad faith, violating its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

Employees subject to compulsory dues payment under the Act have the right to receive the information necessary to choose whether to revoke their dues check-off authorization. Here, the Charging Party by letter clearly and specifically requested the Union provide her with the specific dates of her window period. (Exh. 5). This was a clear request for information by an employee to her union. Rather than answering this simple straight forward question,

Respondent responded by letter only providing that the Charging Party must give notice no less than 30 days and not more than 45 days prior to September 2, 2017, the date she signed her membership application.

The Board has found that a union's duty of fair representation includes the duty to neither willfully misinform employees about their grievances nor to willfully keep them uninformed. *American Postal Workers Union*, 328 NLRB 281, 282 (1999). A union's failure to communicate decisions related to a grievance or to respond to requests for information, constitutes more than mere negligence and, instead, rises to the level of arbitrary conduct. Here the only motivation for the Respondent's evasive response was to deceive. No other business would be allowed to operate this way. There is no reasonable excuse or meaningful explanation for the Respondent's lack of transparency in failing to specify the window period. Respondent's failure to clearly answer the information request posed by the Charging Party was arbitrary and violated the Respondent's duty of far representation. *Service Employees Local 3036 (Linden Maintenance Corp.)*, 280 NLRB 995 (1986).

V. CONCLUSION

In conclusion, Counsel for the General Counsel respectfully requests that the Board reject the Administrative Law Judge's findings, grant Counsel for the General Counsel's Exceptions and order Respondent to fully remedy its unlawful acts as set forth above.

Respectfully submitted,

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