

**BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7**

AT&T SERVICES, INC

Respondent

and

VERONICA ROLADER, an Individual

Charging Party

CASE NO. 07-CA-228413

**RESPONDENT AT&T SERVICES, INC.'S INITIAL BRIEF ON MERITS
OF STIPULATED RECORD**

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ATTORNEYS FOR RESPONDENT
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I. INTRODUCTION

This case implicates important issues regarding an employee's right to revoke a dues deduction authorization upon the expiration of the underlying collective bargaining agreement. The relevant facts are undisputed and the case has been submitted to the National Labor Relations Board on a stipulated record.¹ The Board should overturn the jurisprudence of *Frito-Lay*, 243 NLRB 137 (1979) and its progeny and, consistent with its decision in *Valley Hospital Medical Center*, 368 NLRB No. 139 (2019), adopt a new standard to permit an employee to revoke a dues checkoff authorization agreement during contractual hiatus periods.

General Counsel alleges the Company violated Sections 8(a)(1), (2), and (3) of the Act by failing to honor Charging Party Veronica Rolader's request to revoke her dues authorization post-expiration of the underlying Collective Bargaining Agreement ("CBA") and by placing restrictions on her right to request such a revocation. Although the Company's conduct was lawful under extant Board law and consistent with the CBA, the Company agrees that these important issues are ripe for reform.

After expiration of the applicable CBA, Charging Party voluntarily resigned her membership in Communications Workers of America ("Union" or CWA") and CWA Local 4009 ("Local 4009") and submitted to the Company written requests to revoke a dues checkoff authorization she had signed 18 years earlier. The Company was obligated to deny Charging Party's requested revocation because it was untimely under the expired CBA and under the terms of the checkoff authorization. General Counsel alleges the Company violated the Act by failing to accept her written request to revoke her dues checkoff agreement; continuing to deduct union

¹ In its Order issued July 20, 2020, the Board granted the parties' joint motion and transferred this case to the Board; approved the stipulated record, including the stipulated facts and statements of position filed by the Respondent and the Charging Party; and directed the parties to file initial briefs on the merits with the Board.

dues from her wages; and remitting those dues to the Union. General Counsel also alleges the Company violated the Act by maintaining the CBA provisions requiring an employee seeking to revoke her dues checkoff agreement to send a revocation letter via certified mail, and to send only one such letter per envelope. The General Counsel also asserts the Company was required to inform Charging Party of the next available dates when she could revoke her checkoff agreement.

The Company agrees with the Charging Party's contention that an employee should be permitted to revoke her dues checkoff authorization during contractual hiatus periods, and that the Board's decision in *Frito-Lay*, 243 NLRB 137(1979) was wrongly decided and should be overturned. Further, the Company joins with the General Counsel and current and former Board members in calling for overturning *Frito-Lay* and its progeny and for reform in this area of the law to permit revocation of a dues checkoff authorization during contractual hiatus periods.

Application of the flawed *Frito-Lay* doctrine also is appropriate here because Charging Party worked in Michigan, which in 2013 enacted a Right to Work law prohibiting employers and unions from maintaining agreements requiring union membership or payment of union dues as a condition of employment. After Charging Party voluntarily and lawfully resigned her union membership, she should not be obligated to pay union dues. In contravention of state law, however, Charging Party's dues checkoff authorization agreement (and the expired CBA) only allowed her to revoke that agreement during an annual 14-day period. Because Charging Party requested to revoke her dues authorization a few weeks after the revocation period had closed, the Company was contractually bound to reject her revocation. Charging Party therefore was required to continue to pay union dues, and the Union continued to receive her dues, even though Charging Party was no longer a Union member and made clear she desired to stop paying the Union dues. Nor did she receive any benefit from those monthly payments.

Although the Company's actions were lawful under *Frito-Lay* and its progeny, the undisputed facts show the manifest injustice caused by the Board's moribund *Frito-Lay* doctrine.

II. FACTS

The facts of this case are undisputed. The parties agreed to a stipulated record and the following summarizes the relevant stipulated facts and incorporated documentary evidence.

A. Background of the Parties

The Company provides telephone, internet, and television services to business and residential customers. (Stip. ¶ 2). For many years, CWA has been the collective bargaining representative for bargaining unit employees who work in the Company's operations throughout the traditional five-state "Midwest" region of Indiana, Michigan, Ohio, Wisconsin and a small portion of Illinois. (Stip ¶ 6(b); Ex. 2). The Collective Bargaining Agreement ("CBA") between the parties was effective from April 12, 2015, through April 14, 2018 and covered a bargaining unit of employees who work in various job titles and business units throughout that geographic area. (Stip. ¶ 6(a); Ex. 2). CWA is the union signatory to the CBA and its predecessor agreements. (Stip. ¶ 6(b)). The CBA expired April 14, 2018, without an extension agreement or successor collective bargaining agreement in place. (Stip. ¶ 9). Local 4009, Communications Workers of America ("Local 4009"), is the designated servicing representative for bargaining unit members working in the Southfield, Michigan area. (Stip. ¶ 4(d)).

At all relevant times, Charging Party Veronica Rolader worked for the Company in its Southfield, Michigan facility, and was a member of the bargaining unit. (Stip. ¶ 2).

Under CBA Article 6, all Bargaining Unit employees are required to pay Union dues as a condition of employment, during the life of the agreement, unless such a requirement is prohibited by law. (Ex. 2, p. 7). This provision of the CBA is prohibited by Michigan law and thus not applicable to employees in Michigan. In March 2013, Michigan's legislature enacted a "Right to

Work" law, prohibiting agreements between employers and unions that would require employees to be union members or to pay union dues as a condition of employment. MCL § 423.14.

CBA Article 7 governs deductions from wages for Union dues. Article 7.04 lays out the process for an employee to revoke her dues checkoff agreement and states the following:

Any authorization of dues deduction shall not be subject to revocation except that an employee may revoke the authorization during the period beginning fourteen (14) days prior to each anniversary date, or during the period beginning fourteen (14) days prior to the termination date of this Collective Bargaining Agreement. Revocation of dues must be accomplished as follows:

(A) Each employee who desires to revoke his or her dues deduction authorization must advise his or her Payroll Office by an individually signed letter. There shall be only one (1) letter per envelope.

(B) The letter to the Payroll Office must be sent by Registered or Certified Mail.

(C) Each such letter not postmarked within the specified time limits and in accordance with the above procedure will be considered void and the employee will be so advised by the Company.

(D) The Company will send copies of the letters and associated envelopes to the District Headquarters of the Union on a daily basis.

An employee's authorization shall be deemed automatically cancelled if the employee leaves the employ of the Company, is transferred or is promoted out of the Bargaining Unit.

This Section will not affect any dues authorization form previously signed by the employee and submitted to the Company whose terms vary with the above. In such a case the terms of any employee's original dues authorization form will supersede those terms listed herein.

(Ex. 2, p. 8-12).

Under Article 7.03, the Union agrees to indemnify and hold the Company harmless from all claims and damages which may arise from the Company honoring its agreement to deduct dues from wages and remit them to the Union. *Id.*

B. Charging Party's Dues Checkoff Authorization

On January 4, 2000, Charging Party signed an agreement authorizing the Company to deduct Union dues from her wages and for the Company to remit her dues to the Union. (Stip. ¶ 8; Ex. 3). The terms of the authorization agreement reflect the terms of Article 7 and provides:

This authorization shall remain in effect when I am employed by AT&T unless cancelled by me. Such cancellation must be individually sent to my AT&T Payroll Office and to the Union Local by Certified Mail postmarked within the fourteen (14) day period prior to the contract anniversary date (defined as each 365 day period from the date of execution of this Agreement) or termination date of the current or subsequent Collective Bargaining Agreement, and shall be effective in the first payroll period in the following month.

Id.

The CBA expired on April 14, 2018, without an extension agreement or successor collective bargaining agreement in place. (Stip. ¶ 9). On June 14, 2018, Charging Party sent a letter via certified mail to Local 4009, stating that she is resigning from her membership in the Union, revoking her dues deduction authorization form, and no longer authorizes any payments to the Union. (Stip. ¶ 10(a); Ex. 4). The same day, Charging Party sent a parallel letter to the Company stating she is revoking her dues deduction authorization and had resigned from the Union. (Stip. ¶ 10(b); Ex. 5). On June 25, the Company informed Charging Party it could not accept her requested revocation of her dues checkoff agreement because it was untimely, to wit “Your opt-out period for **2018** is 03/31/2018 - 04/13/2018. **Your letter was postmarked June 14.**” (Stip. ¶ 11(b); Ex. 7)(emphasis in original).

On December 22, 2018, Charging Party again sent the Company certified mail letter to revoke her dues checkoff authorization, and noted she had resigned from her Union membership on June 14, 2018. (Stip. ¶ 10(c); Ex. 6). Once again, on January 2, 2019, the Company informed Charging Party that it could not accept her requested revocation of her dues checkoff agreement

because it was untimely: “Your opt-out period for **2019** is 03/31/2019 - 04/13/2019. **Your letter was postmarked December 22.**” (Stip. ¶ 11(d); Ex. 8)(emphasis in original).

From June 18, 2018, through February 1, 2019, the Company deducted Union dues from Charging Party’s pay and remitted those dues to the Union. (Stip. ¶ 13). Charging Party was laid off from her position with the Company on February 2, 2019. (Stip. ¶ 14).

On August 5, 2019, the Union ratified a new collective bargaining agreement, retroactively effective April 15, 2018, through April 9, 2022 (“2018-2022 CBA”). The terms of Article 7.04 of the 2018-2022 CBA are identical to the predecessor CBA. (Stip. ¶ 15; Ex. 9, p. 8-9).

III. LAW AND ARGUMENT

This case underscores the compelling reasons the Board must overturn its flawed decision in *Frito-Lay*, 243 NLRB 137 (1979) and its progeny and chart a new path to permit an employee to revoke a dues deduction authorization agreement upon expiration of the underlying collective bargaining agreement. In *Frito-Lay*, the Board erred in finding the employer and the union did not violate the Act by refusing to accept an employee’s revocation of a dues checkoff authorization post-expiration of the CBA, and where the employee did not request revocation within a prescribed window period. The *Frito-Lay* doctrine contravenes Section 302 of the LMRA because it enables an employer and union to make a checkoff authorization irrevocable beyond the termination date of the CBA. That doctrine also is incongruous with the Board’s recent decision in *Valley Hospital Medical Center*, 368 NLRB No. 139 (December 16, 2019), in which the Board held that an employer’s obligation to withhold and remit union dues ceases upon expiration of the subject CBA. The same principles and logic also mandate that *Frito-Lay* be overturned.

Section 302 of the Labor Management Relations Act makes it unlawful for an employer to deliver money or thing of value to a labor organization unless the payment falls within a specific exception to the statute. One such exception exempts

"money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, **or beyond the termination date of the applicable collective bargaining agreement**, whichever occurs sooner."

The Board must overturn *Frito-Lay* and its progeny and find Charging Party's dues checkoff authorization, and the dues checkoff provisions of the CBA, are facially invalid because they restrict employees from revoking dues checkoff authorizations after expiration of the CBA.

The current *Frito-Lay* standard also is overly restrictive because it is rooted in the discredited principles of compulsory union membership. An employee must be permitted to revoke her dues checkoff authorization when she resigns her Union membership. The present case demonstrates the manifest injustice under current Board law, which illogically separates union membership from dues checkoff authorization. Charging Party signed her dues checkoff authorization agreement when she was subject to a CBA union security clause that made union membership a condition of employment. When Michigan enacted its 'right to work' law in 2013, Charging Party could no longer be required to maintain union membership – and no longer required to pay union dues – to keep her job. When she voluntarily resigned her Union membership, she concomitantly should have been able to cease payment of union dues. Notwithstanding clearly demonstrating she did not want to be a Union member and did not want to pay dues, Charging Party was advised that she could not revoke her authorization agreement for nearly a year.

General Counsel's separate allegation the Company is obligated to provide employees with the next available revocation periods when they submit an untimely revocation request is not supported under Board law and should be dismissed. The Union – and not the Company – has a

duty of fair representation to bargaining unit employees, and it should bear the burden of informing unit employees when they can and cannot revoke a dues checkoff authorization.

A. The Board Should Overturn *Frito Lay* Because Employees Have a Statutory Right to Revoke a Dues Checkoff Authorization at Any Time “beyond the termination date” of a CBA

The *Frito-Lay* doctrine cannot be reconciled with Section 302(c)(4), which accords an employee the statutory right to revoke a dues check-off authorization at any time “beyond the termination date” of a CBA. The unambiguous statutory language mandates that an employee must be permitted to revoke her checkoff authorization upon expiration of the underlying CBA.

Section 302 of the Labor Management Relations Act makes it unlawful for an employer to deliver money or a thing of value to a labor organization unless the payment falls within a specific exception to the statute. 29 U.S.C. §186. One such exception exempts

"money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, **or beyond the termination date of the applicable collective agreement**, whichever occurs sooner."

Id. at §186(c)(4)(emphasis added).

The Board’s decision in *Frito-Lay*, 243 NLRB 137(1979) cannot be reconciled with this unambiguous statutory language. In that case, the Board erroneously held the employer and union did not violate the Act when they refused to accept revocations of dues checkoff authorizations from employees during a contract hiatus period, because the dues checkoff authorizations limited the revocation period to “not more than twenty (20) days and not less than ten (10) days prior to the expiration of” the applicable CBA. In finding the parties did not violate the Act, the Board determined they were not required to accept dues checkoff revocations after the expiration of the CBA, or when employees resign from the Union.

The time is ripe for the Board to overturn *Frito-Lay* and its progeny, and find that Charging Party's dues checkoff authorization, and the dues checkoff provisions of the CBA, are facially invalid because they restrict employees from revoking their dues checkoff authorizations after the expiration of the CBA. *See NLRB v. Atlanta Printing Specialties*, 523 F. 2d 783, 788 (5th Cir. 1975)("when there is no collective bargaining agreement in effect, dues checkoff authorizations are revocable at will."); *Anheuser-Busch v. International Broth. of Teamsters*, 584 F. 2d 41, 43 (4th Cir. 1978)("We conclude, however, that § 302(c)(4) of the Taft-Hartley Act [29 U.S.C. § 186(c)(4)] guaranteed the employees the right to revoke their checkoff authorizations at will during the hiatus between collective bargaining agreements.")

Section 302 was devised as an anti-corruption measure to prohibit the direct payment of moneys from an employer to a union except in limited circumstances. *See Lockheed Space Operations Co.*, 302 NLRB 322, 325-27 (1991). Section 302(c)(4) was added to ensure that dues-checkoff arrangements are made with valid employee consent, and that employees be given the right, at least annually and at the expiration of the CBA, to revoke that consent. *Id.* The statutory language demonstrates two distinct periods in which the checkoff authorization "shall not be irrevocable," which are "a period of more than one year, or beyond the termination date of the applicable collective bargaining agreement." Section 302(c)(4) concludes with the phrase "whichever occurs sooner," which demonstrates that there are two independent events that permit a checkoff agreements to become revocable, at the expiration of the CBA and at least annually. Even if, as here, the checkoff agreement contains annual revocation periods, employees must also be permitted to revoke the authorization at any time "beyond" the expiration of the CBA because there will inevitably be times when the expiration of the CBA "occurs sooner" than the next applicable annual revocation period.

Current and former Board members and the current General Counsel have voiced skepticism of the extant Board law in this area, to the extent it is applied to preclude revocation during contractual hiatus periods. Most recently, in *Smith's Food & Drug Centers*, 366 NLRB No. 138 (July 24, 2018), Member Kaplan has called for reform. In that decision, the Board addressed a case alleging the employer and the union violated the Act by refusing to honor employees' attempted revocations of dues-checkoff authorizations following expiration of the collective-bargaining agreement. Unlike the present case, the Board limited its decision to the narrow issue as to whether the ALJ's interpretation of the checkoff authorization was correct, and expressly declined to decide the continued validity of *Frito-Lay*. Member Kaplan nonetheless questioned the continued efficacy of *Frito-Lay* and its progeny, in footnote 6:

Because the General Counsel, who is in control of the complaint, has not argued that *Frito-Lay* should be overruled and has shifted theories over the course of the litigation, Member Kaplan finds it unnecessary to pass on whether that decision was correctly decided. Similarly, the General Counsel has not argued that *Lockheed* and *National Oil Well* should be overruled, and today's resolution of issues potentially implicating those decisions also makes it unnecessary for Member Kaplan to pass on their correctness. See fn. 17, below. **Member Kaplan believes, however, that these areas of Board law warrant reform and in a future appropriate case he would examine the correctness of each of the foregoing decisions.** (emphasis added).

Frito-Lay, 243 NLRB at fn. 6.

Similarly, in his dissent the Board's 2012 decision in *WKYC*, 359 NLRB No. 30 (2012), former Member Hayes opined on the unreasonableness of limiting revocations to obscure, annual revocation windows. In *WKYC*, the Board overturned over 50 years of precedent to find that contractual dues deduction provisions survive the expiration of a CBA.² In dissent, former

² *WKYC* was ultimately abrogated by the Supreme Court's decision in *Noel Canning*. The holding of *WKYC* was later reinstated by *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015), which was then overturned by *Valley Medical Center*, 368 NLRB No. 139 (2019).

Member Hayes looked to the unreasonableness of the revocation language within dues checkoff authorizations and explained why such revocation procedures violate Section 7 rights to refrain from union participation:

Exempting dues-checkoff clauses from automatic post-expiration continuation under the *Katz* rule is consistent with these cases and with the principle of "voluntary unionism" established by the Act. The majority's decision today is not.

It is no answer to say, as my colleagues do, that employees' Section 7 right to refrain from union activity is adequately protected because they may revoke their checkoff authorizations if they no longer wish to support the Union. It is unlikely that employees will recall the revocation language in their authorizations, and less likely still that they will understand that their obligation to pay dues as a condition of employment terminated as a matter of law once the contract expired. Even if they do remember and understand, checkoff authorizations typically permit revocation only during brief annual window periods, and the wording of the revocation language may be difficult to understand.

Member Hayes went on to recite checkoff authorization language that is nearly identical to Charging Party's checkoff authorization, explaining that such is the very type of language that violates employees' Section 7 rights to refrain from joining a labor organization. Slip. Op 47.

The *Frito-Lay* jurisprudence also is incongruous with the Board's recent decision in *Valley Hospital Medical Center*, 368 NLRB No. 139 (December 16, 2019), in which the Board held that an employer's obligation to withhold and remit union dues ceases upon expiration of the underlying CBA. In *Valley Hospital*, the Board reasoned that an employer's obligation to withhold and remit union dues is purely contractual in nature and therefore does not exist prior to the commencement of a CBA. Therefore, the employer maintains the status quo by ceasing to withhold dues upon CBA expiration because that was the status quo prior to the creation of the CBA. In support of that conclusion, the Board reasoned that checkoff authorizations differ from other wage deductions, such as for employee savings accounts and charitable contributions, because checkoff arrangements involve direct payments to a union, which are subject to the limits of Section 302(c)(4) and which cannot exist at the beginning of a collective-bargaining relationship

before contractual terms are agreed upon. It therefore logically follows that checkoff authorizations must be fully revocable upon the expiration of the foundational CBA. The limits of Section 302(c)(4) unambiguously require that employees must be permitted to revoke dues checkoff authorization upon the expiration of the CBA. *Frito Lay* and its progeny cannot be squared with the rationale in *Valley Hospital Medical Center* nor the statutory language of Section 302(c)(4), and therefore must be overturned.

B. The Board Also Should Overturn *National Oil Well* and *Lockheed* Because Employees Who Lawfully Resign their Union Membership Must Be Permitted to Revoke their Dues Checkoff Authorization

The Board also should overturn its decisions in *National Oil Well*, 302 NLRB 367 (1991) and *Lockheed Space Operations Co.*, 302 NLRB 322 (1991). An employee who lawfully resigns her union membership must be permitted to revoke her dues checkoff authorization at the same time, and irrespective of the revocation periods within her checkoff authorization. When Charging Party resigned her Union membership, she was no longer obligated to pay Union dues and therefore, she should be permitted to revoke her dues checkoff authorization.

Section 7 of the Act provides that employees not only have a right to "form, join, or assist labor organizations," but an equal right "to refrain from any or all of such activities." The Act's plain language requires that unionism remain voluntary, a concept long enforced by the U.S. Supreme Court. See e.g. *Pattern Makers v. NLRB*, 473 US 95, 104-05 (1985) ("union restrictions on the right to resign to be inconsistent with the policy of voluntary unionism implicit in §8(a)(3)").

Charging Party indisputably had no obligation to remain a Union member, and she lawfully resigned her membership on June 15, 2018. Under the Board's *National Oil Well* decision, a resignation of union membership does not equate to a revocation of a dues checkoff authorization, a fundamentally flawed concept that defies the basic principles of contract law. In *National Oil Well*, the Board reasoned that a resignation of union membership was insufficient to revoke a

checkoff authorization unless the terms of the checkoff agreement indicated that union membership was consideration for wage deductions. Such holding rests on the suspect premise that one would voluntarily agree to have her wages reduced for the benefit of union membership even after affirmatively resigning that membership. Of course, the only reasons one would voluntarily pay union dues are because it is a required condition of employment, or in consideration for union membership.

Here, when Charging Party signed her checkoff authorization 18 years hence, membership and dues payment were required conditions of employment. That changed in 2013, when Michigan passed its Right to Work law, and again in June 2018 when Charging Party resigned her membership. Notwithstanding that Charging Party resigned from the Union and could no longer be compelled to pay dues as a condition of employment, she was nonetheless compelled under *National Oil Well* to pay Union dues. Charging Party was subject to wage reductions for more than six months, simply because she mailed her revocation letter a few weeks too late. These facts perfectly illustrate the manifest injustice of *National Oil Well*.

Dues checkoff agreements are permissible under a narrow exception to Section 302. In *Lockheed Space Operations Co.*, 302 NLRB 322 (1991), the Board analyzed this text and opined on the relationship between union membership and the payment of union dues. The Board noted:

From the main portion of Section 302(c)(4) which reads "money deducted from the wages of employees in payment of membership dues", one could suppose that, as a matter of existing industrial practice, the deduction of dues from wages was merely a payment mechanism for satisfying a preexisting dues obligation that was itself created by virtue of membership in the union. It would logically follow from this interpretation that an employee's cessation of union membership would eliminate the underlying dues obligation that was being satisfied by the checkoff, effectively nullifying the checkoff as well.

In this regard, the Board in *Lockheed* understood the principle that an employee would only voluntarily agree to pay union dues in exchange for union membership. Despite this recognition

of the interplay between membership and dues payments, the Board then finds the revocability requirements of Section 302(c)(4) do not hinge on continued union membership, but rather time sensitive criteria – annually and upon the expiration of the CBA. As in *National Oil*, the Board failed to see (or simply ignored) the obvious connection between union dues and union membership. Despite its flawed analysis, the Board in *Lockheed* ultimately held that by resigning from the union, the employee also revoked his dues checkoff agreement, even though revocation was outside of the stated period. This finding was based on the fact that the language of the dues checkoff agreement suggested that the dues were paid in exchange for union membership.

The legacy of the *Lockheed* decision has been its erroneous proclamation "there is no reasonable basis for precluding an employee from individually agreeing that he will pay dues to a union whether or not he is a member of it and that he will pay such dues through a partial assignment of his wages, i.e., a checkoff. Neither is there a reasonable basis for precluding enforcement of such a voluntary agreement." *Id.* at 328; see *National Oil Well, Inc.*, 302 NLRB 367 (1991)(applying *Lockheed* to find language in checkoff agreement authorized dues deductions even in absence of union membership). The present case provides strong evidence to the contrary, because there is a reasonable basis for such a finding here: Charging Party signed the dues checkoff authorization in 2000 when doing so was a condition of employment. More than 13 years later, Charging Party was no longer obligated to remain a Union member or to pay Union dues. She resigned from the Union and attempted to revoke her dues authorization, demonstrating that she did not voluntarily choose to pay Union dues regardless of membership status.

Further, according to the terms of Charging Party's checkoff authorization, the agreement "renews" each year, regardless whether she is a Union member or not. These "renewals" are not supported by consideration; Charging Party receives nothing in exchange for "renewing" her dues

checkoff, yet her wages are reduced and she is subject to another full year in which she is unable to revoke the authorization. Charging Party receives no benefit of the bargain because each renewal merely infringes upon her Section 7 rights to choose not to participate in the union.

Therefore, when an employee resigns her membership in the Union, her dues checkoff authorization must be revocable or void.

C. The CBA Provisions Requiring Employees to Send Revocations Via Certified Mail and One Per Envelope Unduly Restrict an Employee from Freely Invoking Her Statutory Right to Revoke Her Dues Checkoff Authorization

General Counsel separately alleges the Company violated the Act by maintaining provisions in the CBA that require an employee seeking to revoke her dues checkoff authorization to send the Company a letter via certified mail, with only one revocation per envelope. Although such requirements are lawful under current law, they also are ripe for reform as they create unnecessary barriers for bargaining unit members to exercise their Section 7 right to choose not to financially support the Union.. See *Local Joint Exec. Bd. of Las Vegas*, 363 NLRB No. 33 (Oct. 30, 2015) (finding union violated the Act when it refused to accept a member’s revocation that was timely and sent via certified mail); *Ohlendorf v. United Food & Commercial Workers*, 883 F. 3d 636 (6th Cir. 2018)(enforcing dues checkoff revocation language that required revocation to be sent by certified mail); *National Oil Well, Inc.*, 302 NLRB 367 (1991)(enforcing revocation language in checkoff agreement that required revocations to be presented individually).

Although the Board has not previously found “certified mail” and “one per envelope” revocation requirements unlawful, it has long held a union may not create similar barriers to revoke checkoff authorizations. See *Local 58, IBEW (Paramount Indus., Inc.)*, 365 NLRB No. 30 (2017), *enforced*, 888 F.3d 1313 (D.C. Cir. 2018) (union may not place restrictions on employees’ right to resign memberships or revoke checkoffs); *see also IAM (L-3 Communications)*, 355 NLRB 1062 (2010) (union may not complicate resignation or objection procedures).

In *Local 58, Electrical Workers, IBEW (Paramount Industries, Inc.)*, 365 NLRB No. 30 (2017), the Board rejected the union's cancellation policy which had recently been changed to require members to (1) "appear[] in person" at the union hall, and (2) "show picture identification," or (3) if the "member feels that appearing in person" would be an "undue hardship," to contact the union to make unspecified "other arrangements" to verify their identity. The Board found the policy unlawful because "[o]n its face, the challenged policy communicates the union's intention to make resignation more difficult for members than it had been, and it imposes a significant burden on union members who wish to exercise that right." Similarly, here, the CBA provisions requiring an employee to send her revocations via certified mail and one per envelope creates unnecessary burdens on an employee who wishes to revoke her authorization. In order to send a revocation via certified mail, the employees must physically go to a post office, fill out forms, and pay fees to mail the revocation. Language barriers or lack of reasonable access to a post office may impose additional burdens on some employees. The certified mail and one letter per envelope requirements are entirely unnecessary and serve no practical purpose other than to dissuade employees from revoking their dues checkoff authorization.

These requirements have been found invalid in similar contexts. In *California Saw & Knife Works*, 320 NLRB 224, 235-37 (1995), the Board analyzed a union's requirements for nonmember employees who pay union dues to assert objections to certain union expenditures, known as *Beck* objections. The Board specifically struck down requirements that *Beck* objections must be sent via certified mail and one letter per envelope, finding that the union violated its duty of fair representation by maintaining such requirements. The Board rejected the union's claim that the certified mail requirement was necessary to determine whether the objection was timely filed finding that the burden of filing via certified mail outweighed the benefit because the employee

could choose to utilize certified mail if she was concerned that timeliness would be in dispute, *Id.* at 236. Similarly, the Board found that the purpose of the one letter per envelope rule was intended to prevent employees from objecting en masse, which the Board described as an effort to burden the objection process. The same is true here. The only reasonable justification for these restrictions in the CBA is to burden an employee who seeks to revoke her dues checkoff authorization. The Board therefore should find these restrictions unlawful.

D. The Company Did Not Violate the Act by Failing to Notify Charging Party of the Next Available Revocation Period

1. The Union, Not the Company, is responsible to inform employees of the revocation window period

The Company cannot be required to meddle in the affairs between the Union and its bargaining unit members. General Counsel's allegation that the *Company* has an affirmative duty to notify unit members of the next available revocation period is entirely novel, unsupported by Board law or historical labor policy. The Union – and not the Company – owes bargaining unit employees a statutory duty of fair representation. The Company has no corresponding obligation. It follows that the Union is duty-bound to apprise unit employees who have authorized dues deductions of the next available revocation period, not the Company.

The NLRB's General Counsel recently articulated the rationale behind a union's obligation to notify members of a subsequent revocation period, one rooted in its duty of fair representation:

Even where a union lawfully asserts that a request to revoke is untimely, the employee often is not told when the open period for revocation occurs. This has led to employees filing multiple untimely revocation requests that are summarily denied. To remedy this situation, **the General Counsel believes that the union must either inform the employee of the specific next period where revocation can be effectuated or inform the employee that the request will be honored at the next available revocation period** and that failure to do so violates a union's duty of fair representation. Thus, Regions should find that **a failure to do so should be considered a breach of the union's duty of fair representation**, in violation of Section 8(b)(1)(A) of the Act.

GC Memo 19-04, at p. 9 (Feb. 22, 2019) (emphasis added).

The obligation falls entirely on the Union. The General Counsel's theory in this case that the Company bore the duty to provide notice is legally, historically, and logically unsupported. Therefore, the Board should dismiss this allegation in its entirety.

2. The Company informed Charging Party of the revocation window period in response to her revocation request

General Counsel's allegation the Company failed to provide Charging Party with the applicable revocation periods is factually incorrect. Under the terms of her checkoff authorization, the applicable revocation was the two-weeks prior to the expiration of the CBA. Since the CBA expired on April 14, 2018, the applicable revocation period was March 31, 2018, through April 13, 2018, and on those same dates each subsequent year until the Company and the Union ratified a successor CBA. The Company informed Charging Party of these dates even though it had no duty to do so.

Charging Party first attempted to revoke her dues authorization on June 14, 2018. In response, on June 25, 2018, the Company informed Charging Party that her revocation request could not be accepted because it was untimely. (Stip. ¶ 11(b); Ex. 7). The letter it provided stated: "Your opt-out period for **2018** is 03/31/2018 - 04/13/2018. **Your letter was postmarked June 14.**" (Ex. 7)(emphasis in original).

Charging Party again attempted to revoke her dues checkoff authorization on December 22, 2018. Once again, on January 2, 2019, the Company informed Charging Party it could not accept her request to revoke her dues checkoff agreement because it was untimely: "Your opt-out period for **2019** is 03/31/2019 - 04/13/2019. **Your letter was postmarked December 22.**" (Stip. ¶ 11(d); Ex. 8)(emphasis in original).

General Counsel presumably will assert that the Company erred by failing to provide Charging Party with the *next* available revocation dates, instead providing only the *previously* available revocation dates. Such a distinction is meaningless, however, because Charging Party had the right to opt out annually, and thus the next available opt out dates would be the same in 2019 as they were in 2018. Moreover, the Company cured any perceived deficiency in its response to Charging Party's second requested revocation, to which the Company unambiguously informed Charging Party of the available opt-out dates for 2019.

Although the Company has no legal duty to provide Charging Party the next available revocation periods, it did so, and therefore this allegation should be dismissed.

IV. CONCLUSION

For all of these reasons, the Board should overturn *Frito-Lay*, *National Oil Well*, and *Lockheed* and prohibit employers and unions from rejecting dues checkoff revocations during CBA hiatus periods and from employees who have resigned union membership. The Board should also prohibit employers and unions from requiring employees to send dues checkoff revocations via certified mail and one per envelope because such requirements serve no practical purpose but to make it more difficult for employees to exercise their Section 7 rights to choose not to financially support the Union. Finally, the Board should dismiss the allegation that the Company violated the Act by failing to inform Charging Party of the next available revocation periods because the Company has never been obligated to do so, and the Union should have that responsibility as part of its duty of fair representation to dues paying members of the Bargaining Unit.³

³ If the Board finds the Company violated the Act, it should not issue a remedial Order against the Company, because it acted in good faith under current law, and therefore the Board's decision should apply prospectively only. See *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (overturned on other grounds) (No remedial order issued where Board overturned preexisting law to find conduct violated the Act, decision to be applied prospectively only.); *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (Aug. 26, 2016)(overturned on other grounds)(same).

Respectfully submitted,

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