

**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

**COUNSEL FOR THE GENERAL COUNSEL’S BRIEF IN REPLY TO
RESPONDENT’S ANSWER TO GENERAL COUNSEL’S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

In accordance with Rule 102.46 of the Board’s Rules and Regulations, Series 8, as amended, Counsel for the General Counsel (“General Counsel”) respectfully requests that the Board consider the following brief in response to Respondent’s Answering Brief to the Exceptions of the General Counsel and the Charging Party dated September 1, 2020 (“Respondent’s Answering Brief”). In support of this Reply, the General Counsel states the following.¹

Many of the matters raised in Respondent’s Answering Brief have already been addressed in the General Counsel’s Exceptions and its brief in support thereof and will not be repeated here. Certain issues, however, merit a response.

¹ On January 9, 2020, the 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, which was granted on January 10, 2020. 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. Reference to the April 20, 2020 Decision and Recommended Order (“ALJD”) of the Chief Administrative Law Judge Robert A. Giannasi (“ALJ”) appear as (ALJD XX: YY), where XX and YY designate page and line numbers, respectively.

In its Answering Brief, Respondent attempts to give the appearance that it was generous by accepting the Charging Party's withdrawal of her dues check-off even though it was "untimely," and that the Charging Party was reimbursed for the dues she was owed, thereby making any exceptions made by the General Counsel moot.² In making this assertion, Respondent conveniently fails to address why its actions were insufficient to remedy the matter. Additionally, Respondent makes the related argument that it provided the Charging Party with enough information for her to determine when her next opportunity was to revoke her checkoff authorization and that there is no evidence that the Charging Party was ever "confused" about the right to revoke window period, thereby precluding any of General Counsel's exceptions to the contrary.³ All of these arguments must fail.

On March 5, 2018, the Charging Party requested Respondent to resign her membership and to revoke her dues check-off authorization during a period of irrevocability. (Facts, ¶17(a); Exh. 4). On March 29, 2018, Respondent responded that her request was untimely and directed her to the language in its check-off card. It did not, however, apprise the Charging Party of exactly when the window period occurs, and the language in the dues check-off card provides no additional specificity. (Facts, ¶17(b); Exh. 5)

Respondent's long, circuitous sentence in its dues check-off authorization fails to clearly inform employees of when they have the right to revoke this authorization. Respondent left this lay employee to decipher confusing statute language in attempting to ascertain what her rights are. Even though Respondent insinuates that it could not have done anything else to fully remedy the matter, it would have been very easy for Respondent to simply tell the Charging Party the exact dates when her dues check-off authorization request would be timely. This would be

² Respondent's Answering Brief, p. 7.

³ Respondent's Answering Brief, p. 8 and 14.

expected of any business collecting money from an individual, and a union should not be held to a different standard.

Although Respondent ultimately reimbursed the Charging Party for her dues, Respondent never informed the Charging Party when the open period for revocation would occur, which could have ultimately led to Respondent's improper collection of dues. By failing to inform the Charging Party of the specific next period where revocation could be effectuated or inform her that the request would be honored at the next available revocation period, Respondent has violated its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

Moreover, in order to sufficiently remedy this matter, Respondent needs to be held accountable and be required to communicate with employees in a manner that they can easily understand in order for them to freely exercise their rights regarding union membership in the workplace. Plain, unambiguous, and easily understood language will benefit employees by clarifying their choices under Section 7. It is unclear why Respondent continues to argue that a lay employee of a grocery store should be able to easily understand the language used here in its voluntary checkoff authorization. It is also mystifying why Respondent refuses to speak to the working-class employees it represents in a voice that they can easily understand. Employees would not know the dates Respondent is referencing here – “the termination date of the agreement between the Employer and Local 400,” “whichever occurs sooner,” “year to year thereafter,” “subsequent yearly period” – and it is for this simple reason that Respondent should plainly state what these actual dates are.⁴

Likewise, Respondent contends that the allegations before it are moot because it removed the words, “Must Be Signed” from its voluntary checkoff authorization, while maintaining that

⁴ Exhs. 3 and 6.

such language is not unlawful.⁵ As an initial matter, although Respondent claims there is no relevant case law rendering this language unlawful, the analysis set forth in *Pomona Valley Hospital*⁶ is applicable here. In that case, the Board has 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.⁷ As such, maintaining such strong language indicating that a voluntary form "MUST" be signed is contradictory, coercive and confusing to the reasonable employee and is therefore unlawful.

Further, contrary to Respondent's arguments, it has failed to fully remedy this violation by merely removing the words "MUST BE SIGNED." To remedy this violation, Respondent should be required to remove the phrase "MUST BE SIGNED" from its 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. In addition, Respondent should be provided to post a Notice to remedy its unlawful conduct. As Respondent has fallen short of such action, this allegation is not moot and a finding that Respondent has violated 8(b)(1)(A) of the Act by maintaining the language "MUST BE SIGNED" in its voluntary dues check-off authorization is appropriate.

Respondent argues that the exceptions regarding the transferability of its check-off authorization should also be rejected, and again asserts that it has never even attempted to enforce the transfer language against the Charging Party or any other employee.⁸ Regardless of whether Respondent has made any attempt to enforce this language, the language remains

⁵ Exh. 6.

⁶ 355 NLRB 234, 235 (2010).

⁷ *Id.*

⁸ Respondent's Answering Brief, p. 12.

unlawful on its face and should be removed.⁹ Section 302(c)(4) of the Labor Management Relations Act indicates that the dues check-off is a legal relationship between the employee and his employer.¹⁰ Therefore, it violates principles of contract law to bind an employee to a legal relationship with a nonexistent employer.¹¹

Ironically, even though Respondent maintains that it has never attempted to enforce the language, Respondent also continues to assert that such transferability language is necessary in the retail food industry because of the high turnover rates of employees.¹² Unlike construction workers, the work of employees of a grocery store, like the Charging Party in this case, is not project-based. Grocery employees are not changing employers routinely when their trade-based work at a project is done. Indeed, there may be high turnover of workers in the retail food industry, but this is also true in many other service industries. If the application is changed, many industries that similarly have high turnover would have to be added, which is not what was designed or contemplated by the construction industry exception. Finally, there is no precedent supporting that transferability of these dues check-offs would benefit or protect the rights of employees employed in the retail food industry.

In its Answering Brief, Respondent incorrectly states that the General Counsel did not allege a breach of the duty of fair representation in the Complaint, in response to Respondent's Motion for a Bill of Particulars or in its Opening Brief to the ALJ.¹³ First, the General Counsel is not required to plead his theory of the case in the complaint.¹⁴ Nevertheless, the Complaint here

⁹ Exh. 3 and 6.

¹⁰ Labor Management Relations Act, 1947 ("LMRA"), 29 U.S.C.A. §186(c)(4).

¹¹ With the exception of a potential successor employer. *William J. Burns International Detective Agency, Inc.*, 182 NLRB 348, 350 (1970).

¹² Respondent's Answering Brief, p. 11.

¹³ Respondent's Answering Brief, p. 15.

¹⁴ *McDonald's USA, LLC*, 362 NLRB 1347, 1347 (2015); *Boilermakers Local 363 (Fluor Corp.)*, 123 NLRB 1877, 1913 (1959).

has advised Respondent of the charges constituting unfair labor practices as defined in the Act, affording Respondent due notice and a full opportunity for hearing thereon. The Complaint noted the language Respondent used in its Membership Forms and communications with the Charging Party amounted to a violation of the Act. Further, paragraph 11 specifically provides that, “Respondent has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(b)(1)(A) of the Act”, which encompasses the duty of fair representation.¹⁵

Second, in its Response to Respondent’s Motion for Bill of Particulars, the General Counsel stated point blank that the case simply “involves the ambiguous and confusing language and format of Respondent’s membership cards and communications between the Union and a member regarding the revocation of the member’s dues deduction authorization.”¹⁶ This remains true. The General Counsel also afforded Respondent more detail on the phrases in Respondent’s forms and communications with the Charging Party that are alleged to be unlawful, all under the umbrella of an 8(b)(1)(A) allegation.¹⁷

Finally, in the General Counsel’s Brief to the ALJ dated February 28, 2020, the General Counsel discussed the Union’s fiduciary duty to unit members and the principles of fairness. General Counsel wrote that “principles of fairness” demanded a reasonableness standard when determining whether a union’s communications with its members are unlawful.¹⁸ General Counsel also explicitly stated that Respondent violated the duty of fair representation by not

¹⁵ Exh. 1(g).

¹⁶ Exh. 1(n), p. 2.

¹⁷ Exh. 1(n).

¹⁸ General Counsel’s Brief to the Chief Administrative Law Judge, p. 10-11.

informing the Charging Party of the specific time period when her revocation could be effectuated or that her request would be honored at the next available revocation period.¹⁹

Additionally, contrary to the contentions of Respondent, the ALJ was clearly aware that the General Counsel was arguing that Respondent had breached its duty of fair representation in its actions. The ALJD provides:

In condemning the Respondent's conduct in this case, the General Counsel invokes both the alleged restraint or coercive nature of the Respondent's conduct and the alleged violation of its duty of fair representation. The overview section of the General Counsel's opening brief (Br. 9-11) seems to suggest that ambiguous language such as that used by Respondent in this case is, in and of itself, tantamount to a violation of its duty of fair representation and also amounts to restraint or coercion under Section 8(b)(1)(A).²⁰

I cannot accept the General Counsel's assertion that language ambiguity alone in union communications or documents amounts to either a violation of the duty of fair representation or restraint or coercion under Section 8(b)(1)(A). But, in any event, the union's language in this case is not ambiguous—at least not so ambiguous as to amount to unlawful restraint or coercion or bad faith.²¹

Therefore, Respondent's assertion that the General Counsel did not allege a breach of the duty of fair representation in any of its briefs or filings prior to the issuance of the ALJD is simply false.

Respondent similarly argues in its Answering Brief that the Charging Party did not allege that the Union breached its duty of fair representation.²² Yet, in the original charge dated June 27, 2018 in this case, the Charging Party did allege that the Union breached its duty of fair representation.²³ Specifically, the Charging Party stated that, "These, and other related acts and

¹⁹ General Counsel's Brief to the Chief Administrative Law Judge, p. 19.

²⁰ ALJD 5: 4-10.

²¹ ALJD 6: 4-8.

²² Respondent's Answering Brief, p. 15.

²³ Exh. 1(a).

omissions, violate the National Labor Relations Act, and threaten, restrain, and discriminate against Charging Party and similarly situated employees in the exercise of their Section 7 right to refrain from collective activity and violate the duty of fair representation that the Union owes to all members and non-members alike.”²⁴ As such, Respondent again is making completely inaccurate claims.

Respondent attempts to paint a picture that it was not sufficiently apprised of the duty of fair representation allegations made against it and therefore, the General Counsel should be precluded from making such assertions now. However, based on the foregoing, it is apparent that throughout the entirety of these proceedings, Respondent was aware that the Charging Party and the General Counsel were asserting that Respondent breached its duty of fair representation. The General Counsel did not wait until after the close of the hearing to raise the duty of fair representation allegation. The duty of fair representation issue was raised in a timely and proper manner and was correctly addressed by the ALJ.

Under these circumstances, the General Counsel again urges the Board to reject the ALJ’s findings, grant the General Counsel’s Exceptions and order Respondent to fully remedy its unlawful acts as set forth in the Brief in Support of Counsel for the General Counsel’s Exceptions to the Administrative Law Judge’s Decision.

Dated at Pittsburgh, Pennsylvania, this 10th day of September 2020.

Respectfully submitted,

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²⁴ Exh. 1(a).

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**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL’S BRIEF
IN REPLY TO RESPONDENT’S ANSWER TO GENERAL COUNSEL’S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on September 10, 2020 I served the above-entitled document(s) by **electronic mail or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

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