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'S BRIEF ANSWERING CWA'S INITIAL BRIEF ON A STIPULATED RECORD

The "Initial Brief" on the merits filed by Communications Workers of America, AFL-CIO ("CWA" or "Union") fails to demonstrate any legitimate reason the Board should continue to ignore the plain language of Section 302(c)(4) of the Labor Management Relations Act by continuing to enforce restrictions on an employee's right to revoke her dues checkoff authorization after the expiration of the applicable collective bargaining agreement.[1] The CWA's merits argument relies on the Board's flawed decision in *Frito-Lay*, 243 NLRB 137 (1979) and its erroneous interpretation of Section 302(c)(4). Respondent AT&T Services, Inc. ("Company"), General Counsel, and Charging Party Veronica Rolader agree that the Board must reform this area of law and overturn *Frito-Lay*.

Section 302 makes it unlawful for an employer to deliver money to a labor organization unless the payment falls within a specific exception to the statue. 29 U.S.C. §186. One such

[1] Because the CWA has now fully participated in this case by submitting its Initial Brief on the merits – and plainly did so *after* first reading the merits briefs filed earlier on September 8, 2020 by Respondent and Charging Party – Respondent consents to the CWA's intervention in this case. Respondent continues to object to the CWA's Motions to Remand and Reopen the record, however, for all of the reasons stated in Respondent's Opposition to CWA's Motions to Intervene and Remand and Reopen the Record, filed on August 5, 2020. The CWA's Initial Brief also confirms that there are no material factual disputes in the case, providing additional grounds to deny the CWA's Motions to Remand and Reopen the Record (See pp. 5-7 of CWA's Initial Brief on Stipulated Record).

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). Simply put, the governing law must be reformed to accord with the statutory language, that employees must be permitted to revoke a dues checkoff authorization "beyond the termination date of the applicable collective agreement," i.e., after the expiration of the applicable CBA.

In its Initial Brief, CWA erroneously relies on *Smith's Food & Drug Centers*, 366 NLRB No. 138 (July 24, 2018) in support of upholding *Frito-Lay*. (CWA Brief p. 7-12). CWA contends that *Smith's Food & Drug* "holds the most precedential value on this issue." *Id*. at p. 7, fn 2. In that case, however, the Board did not consider whether *Frito-Lay* was wrongly decided. In fact, the Board made clear it was merely addressing the narrow issue as to whether the ALJ's interpretation of the checkoff authorization was correct. 366 NLRB No. 138, slip. op. at 3. The Board expressly did not decide the validity of *Frito-Lay*. To the contrary, Member Kaplan openly questioned the continued viability 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).

Id. at fn. 6. Contrary to the CWA assertions, nothing in the *Smith's Food & Drug* decision addresses the validity of *Frito-Lay* and its progeny. To the contrary, Member Kaplan's comments directly conflict with CWA's position, correctly noting that the *Frito-Lay* doctrine warrants reform.

In addition, CWA contends the Board should not consider overturning *Lockheed Space Operations*, 302 NLRB 322 (1991) and *National Oil Well*, 302 NLRB 367 (1991), as the Company argued in its Initial Brief. Under *Lockheed* and *National Oil Well*, a dues checkoff authorization may remain valid and enforceable even after an employee resigns her membership in the union. CWA does not attempt to defend these decisions on their merits. Nor should it. Both are fundamentally unjust decisions as each one requires an employee to continue to pay union dues after resigning union membership, and, as in this case, after an employee unsuccessfully seeks to revoke her dues checkoff authorization.

Oddly, rather than defend these cases on their merits, CWA contends "[t]hese arguments were not raised prior hereto; do not appear to have been part of the GC's theory in this case and are not appropriate for the Board's review." (CWA Brief at p. 8, fn. 3). The Initial Briefs were the Parties' first opportunity to raise *any* legal arguments in this proceeding. These were initial briefs on the merits, being filed in compliance with the Board's July 28, 2020 Order Approving Stipulation, Granting Motion, and Transferring Proceeding to the Board. The CWA's disingenuous contention this argument is somehow untimely or waived must be rejected.

Charging Party resigned her Union membership via Certified Mail when she first attempted to revoke her dues checkoff authorization on June 14, 2018. (Stip. ¶ 10(b), Ex. 5). The CWA's central argument depends on the validity of *Lockheed* and *National Oil Well*. CWA's Brief expressly states "*Frito-Lay, Lockheed, National Oil Well* and their progeny directly address the issue at bar and are dispositive of this matter." CWA Brief, p. 12, fn 5. Therefore, this case presents

the ideal opportunity for the Board to consider whether these decisions were wrongly decided and to reform this area of law.

For these reasons, and the reasons set forth in the Company's Initial Brief, 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2020, a copy of the foregoing was served upon:

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