

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

AT&T SERVICES, INC.

Respondent

and

Case 07-CA-228413

VERONICA ROLADER, an Individual

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF
TO COMMUNICATION WORKERS OF AMERICA, AFL-CIO/CLC (CWA) INITIAL
BRIEF ON STIPULATED RECORD**

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I. INTRODUCTION

On November 7, 2019,¹ an Amended Complaint and Notice of Hearing issued, alleging that Respondent refused to revoke the dues check-off authorization of the Charging Party, continued to deduct money from the Charging Party's wages which were remitted to the Communication Workers of America, (CWA), AFL-CIO (International Union), maintained provisions in the collective-bargaining agreement and in the Charging Party's dues check-off authorization card, and failed to provide the Charging Party with the effective window dates for dues check-off revocation, and thereby violated the National Labor Relations Act (the Act) by interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act, rendering unlawful assistance and support to CWA, and discriminating against Respondent's employees and thereby encouraging membership in a labor organization. On January 22, the Charging Party, Respondent, and Counsel for the General Counsel executed a Joint Motion to Submit Stipulated Record to the Board and Joint Stipulation of Facts (Motion).

On September 8, Counsel for the General Counsel, Charging Party and Respondent filed briefs regarding the Motion. On the same date, CWA filed its Initial Brief on Stipulated Record (Brief). On November 20, the National Labor Relations Board (the Board) issued an Order Granting Motion to Intervene and Denying Motion to Remand and Reopen the Record (Order). In relevant part, the Order provided that to the extent they have not already done so, any party desiring to respond to the Brief could do so by close of business December 4. On December 3, the Associate Executive Secretary extended to December 18 the date to file a responsive brief to the Brief based on an unopposed request for an extension of time to file briefs.

¹ All dates are 2020 unless otherwise noted.

II. CWA’S BRIEF

In relevant part, CWA contests any assertion that employees may revoke dues checkoff authorizations at will during a contract hiatus irrespective of the terms of the checkoff authorization. In support of this claim, CWA asserts that the Board has rejected this assertion many times, citing *Fry’s Food Stores*, 366 NLRB No. 138 (2018). (Brief at 7-10) CWA further argued that the Division of Advice has examined and rejected employees’ attempted revocations during contract hiatus in *Southwestern Bell Telephone Company*, 17-CA-12624 (September 27, 1985). (Brief at 10-12)

CWA briefly addressed the impact of the passage of a right to work law, relying upon an Advice memorandum in *Teamsters Local No. 406*, 07-CB-137758 (February 19, 2015), to assert that the Charge should be dismissed, assertedly because the Charging Party had “numerous opportunities since the 2012 passage of Right to Work (for less) in Michigan to revoke her dues checkoff authorization.” (Brief at 12-13) Other than the Advice memorandum, CWA cites no other cases in support of its position.

CWA argues that the certified mail requirement is a legitimate and reasonable means of ensuring that employee intentions are honored. In support of this assertion, CWA cites *Ohlendorf v. United Food and Commercial Workers International Union, Local 876*, 883 F.3d 636, 639 (6th Cir. 2018), and an uncited Associate General Counsel Advice decision. (Brief at 13-14)

III. CWA’S CITED CASES AND REASONS ARE NOT DISPOSITIVE

Contrary to CWA’s assertion, the Board’s holding in *Fry’s Food Stores* is much narrower than that asserted by CWA and does not support its arguments that dues revocations submitted during a contract hiatus are invalid as untimely. In the opening paragraph of *Fry’s Food Stores*, the Board stated that the issue of the case was that the United States Court of Appeals for the

District of Columbia Circuit had remanded the case for further consideration consistent with the court's opinion, which was "that the manner in which the judge interpreted one aspect of the checkoff authorization agreement was incompatible with the Board's decision in *Frito-Lay*, 243 NLRB 137 (1979)." *Fry's Food Stores*, 366 NLRB No. 138, slip op. at 1. Specifically, the judge had found that employees who signed authorization cards during the last year of the contract could revoke their authorizations upon the expiration of that contract; the court was troubled by the judge's statement that *only* those employees could revoke their authorizations at the expiration of the contract. *Id.*, slip op. at 3. The court found that the authorization agreement, as interpreted by the judge, was distinguishable from *Frito-Lay* and *Atlanta Printing Specialties*, 215 NLRB 237 (1974), which allowed *all* employees to revoke their authorizations during both their anniversary of signing and pre-expiration window periods, and that the judge's reliance upon *Frito-Lay* was misplaced. *Id.*, slip op. at 3. The Board reiterated that the issue of the case was limited:

To begin, we emphasize the narrow scope of the court's remand. In accordance with its instructions, our task is to address the apparent discrepancy between the judge's reliance on *Frito-Lay* (in rejecting the contention that the authorizations were revocable at will during the hiatus period) and his suggestion that the language of the authorization agreement allowed only some employees to revoke during a window period prior to contract expiration, as would be contrary to the dictates of *Frito-Lay*. *Id.*, slip op. at 4.

Although the Board noted the legal standard, including *Frito-Lay*, it was in the context of addressing the court's remand which specifically referenced the judge's application of *Frito-Lay*. The Board, noting that the General Counsel unequivocally did not challenge the facial validity of the authorization agreement, found that the judge lacked any basis to interpret the agreement. *Id.*, slip op. at 4. "Because the judge's interpretation was not relevant or necessary to any viable argument in this case, we explicitly disavow it." *Id.* Further, the Board expressly stated that it would not, based on the facts of the case, reexamine the principles of *Frito-Lay*, *Electrical*

Workers IBEW Local 2088 (Lockheed Space Operations), 302 NLRB 322 (1991), and *Steelworkers Local 4671 (National Oil Well)*, 302 NLRB 367 (1991) even though Board Member Kaplan believed it would be appropriate to do so in a future case. *Id.* slip op. at 4 fn. 17. Accordingly, and contrary to CWA’s contention, in *Fry’s Food Stores*, the Board did not reject any assertion that employees may revoke a dues authorization at will during a contract hiatus and did not reaffirm its commitment to *Frito-Lay*.

CWA’s reliance upon *Southwestern Bell Telephone Company*, 17-CA-12624 (September 27, 1985) is similarly misplaced. The General Counsel’s position in a case, whether by a Division of Advice memorandum or General Counsel memorandum, is not Board law. See, e.g., *Valley Hospital Medical Center*, 368 NLRB No. 139, slip op. at 8 fn.30 (2019) (“the Board is not bound by the General Counsel’s statement of position on an issue of law” created by General Counsel’s 18-02 memo); *Kysor Industrial Corp.*, 307 NLRB 598, 602 fn. 4 (1992) (affirming without comment the administrative law judge’s finding rejecting the reliance on a General Counsel Advice memorandum). Further, the cited Advice memorandum is also not on point; in *Southwestern Bell Telephone Company*, the Division of Advice recommended that the charges should be dismissed in deferral to an arbitrator’s determination on the issue and where the arbitration award met the criteria for deferral (i.e. not clearly repugnant to the Act). Similarly, CWA’s reliance upon *General Teamsters Union Local No. 406*, 07-CB-137758 (February 19, 2015), and the uncited Associate General Counsel Advice decision is misplaced, as an Advice memorandum is not Board law and holds no precedential value. CWA’s reliance on *Ohlendorf v. Food and Commercial Workers Local 876*, 883 F.3d 636, 639 (6th Cir. 2018), is also unavailing. CWA cites this sixth circuit decision and an uncited Assistant General Counsel decision to assert that certified mail requirements are valid. CWA cites no Board decision or

Supreme Court decision in support of its assertion that a certified mail requirement in a dues authorization is lawful. Although in *Ohlendorf*, the sixth circuit found no violation for a certified mail requirement, the circuit cited no Board law dispositive to the certified mail ballot issue. Further, the *Ohlendorf* decision, standing alone, does not establish Board law. As aptly summarized by Administrative Law Judge Ira Sandron when addressing the application of Board law versus holdings of courts other than the Supreme Court:

[T]he Board generally applies a “nonacquiescence policy” to appellate court decisions that conflict with Board law, *D. L. Baker, Inc.*, 351 NLRB 515, 529 at fn. 42 (2007); *Arvin Industries*, 285 NLRB 753, 757 (1987), and instructs its administrative law judges to follow Board precedent, not court of appeals precedent. *Gas Spring Co.*, 296 NLRB 84, 97 (1989) (citing, inter alia, *Insurance Agents (Prudential Insurance)*, 119 NLRB 768 (1957), revd. 260 F.2d 736 (D.C. Cir. 1958), affd. 361 U.S. 477 (1960), enf’d. 908 F.2d 966 (4th Cir. 1990), cert. denied 498 U.S. 1084 (1991).

The Board has explained that it is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision but will instead respectfully regard such ruling solely as the law of that particular case. See *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993), revd. 60 F.3d 1195 (6th Cir. 1995).

Sf Markets, LLC, 363 NLRB No. 146, slip op. at 11 (Mar. 24, 2016)

IV. CONCLUSION

Nothing in the CWA’s Brief negates or in any way undermines the arguments made in the Counsel for the General Counsel’s Brief to the Board dated September 8. Based on the foregoing reasons, the record evidence considered as whole, and the reasons stated in the Counsel for the General Counsel’s Brief to the Board, Counsel for the General Counsel respectfully submits that the Board should find the violations as alleged and should order such other relief as may be necessary and appropriate to effectuate the policies and purpose of the Act.

Dated at Detroit, Michigan, this 18th day of December 2020.

Respectfully submitted,

/s/ Larry A. Smith

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CERTIFICATE OF SERVICE

I hereby certify that **COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO COMMUNICATION WORKERS OF AMERICA, AFL-CIO/CLC (CWA) INITIAL BRIEF ON STIPULATED RECORD** in Case 07-CA-228413 was served via E-Gov, E-Filing, and Electronic Mail, on this 18th day of December 2020, on the following:

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December 18, 2020

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Signature