UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 400, CLC, Respondent,

and

Case No. 06-CB-222829

SHELBY KROCKER, Charging Party.

CHARGING PARTY'S MOTION TO FILE SURREPLY AND SURREPLY TO ACTING GENERAL COUNSEL'S AND LOCAL 400'S REPLIES TO THE JOINT MOTION TO REMAND THE CASE TO THE REGION

Charging Party Shelby Krocker moves for leave to file the additional arguments below, as a surreply to the Acting General Counsel's and the United Food and Commercial Workers Union, Local 400's ("Union") Reply Briefs. A surreply is necessary because those parties raise arguments not addressed in their original briefs on the merits or in their Joint Motion to Remand the Case, and contain material factual inaccuracies. Indeed, taken together, their "replies" are multiple times the number of pages as their original Joint Motion. In fairness, Charging Party should be allowed to respond to these arguments.

In particular, the Union now raises the argument that the remedies sought by Charging Party are beyond the scope of the complaint and the stipulated record. Union Reply at 2. The Union has never argued that position. Indeed, the Union ignored Charging Party's request for unit-wide remedies in its response to her exceptions. Misleadingly, the Union now argues that there is no evidence that any employee other than Charging Party suffered from the application of the illegal "MUST BE SIGNED" checkoff, though it previously conceded that this language was used throughout the bargaining unit. Union Resp. to Exceptions at 5 (see quotation, *infra* p. 3).

While Charging Party believes her response contains sufficient grounds to deny the Joint Motion, Charging Party should be permitted to respond to these new and factually inaccurate arguments. Charging Party requests that the National Labor Relations Board ("Board") grant her Motion to File this Surreply, accept the following arguments, and deny the Joint Motion to Remand the Case.

SURREPLY TO THE UNION'S REPLY

The Union filed its reply on April 5, 2021. Charging Party will respond to four issues raised in the Union's reply.

First, the Union belatedly argues that:

> Ms. Shelby Krocker is the only individual affected by the alleged violations in this case and the only individual entitled to relief. That is, the Complaint in this case was filed on behalf of Ms. Krocker as an individual, and does not name any other employees . . . . Nor does the stipulated record make any mention of any other employee or group of employees. On this record, there is not a shred of evidence that any employee other than the Charging Party herself was affected in any way by the words on the dues checkoff form or even that any other individual signed the same form at issue in this matter.

Union Reply at 2. This is false. The Union had ample notice that its maintenance of its "MUST BE SIGNED" checkoff generally was an allegation in this case. The original and first amended charges and the Complaint allege that its maintenance of the "MUST BE SIGNED" checkoff form against all employees (or similarly situated employees) is unlawful. *See* Stip. Exs. 1(a), 1(e), 1(g).[1]

[1] The Complaint should be treated as applying to the entire unit. In *Ironworkers Local 433*, 298 NLRB 35, 35 (1990), the Board found merit to the General Counsel's argument that the remedy should include "employee-members unnamed but similarly situated to those named in the respective Complaints" over the objection of the Respondent who argued, as the Union does, that there was an "absence of evidence to 'suggest' that there may be 'others; similarly situated.'" In that case, the Board held the existence of this "easily definable class" is the *only* criteria for "class" treatment, and the identity of the individual employees within the class is solely a "compliance" issue. *Id.* at 36. Here, the class of employees who were discriminated against is easily definable (i.e., all bargaining unit employees who were given the "MUST BE SIGNED" checkoff form), therefore the Complaint and any remedy should be applied to the entire unit.

The fact that the charge was brought by Charging Party as an individual has no bearing on the relief available. The Board can, and routinely does, provide relief to similarly situated discriminatees who are not named in the charge or complaint. *See Int'l Bhd. of Boilermakers*, 253 NLRB 747, 747 (1980) (finding no merit in a respondent's contentions that the ALJ "erred in recommending that Respondent be required to make whole all nonmember applicants for referral rather than limiting the makewhole order to those individuals who filed charges" and "inclusion of unnamed discriminatees in the make-whole order will deprive Respondent of a full and fair hearing, raising 'fundamental due process issues'").

Additionally, and contrary to the Union's inaccurate claims, the stipulated record explicitly states that the Union maintained the unlawful checkoff as a general matter—not limited to Charging Party specifically. Stip. ¶ 16(a). The Union explicitly agreed that an issue to be determined in this case was "whether the Respondent's *maintenance* of its Three-Part Form . . . restrained and coerced *employees* in the exercise of *their* rights guaranteed in Section 7 of the Act . . . ." Stip. ¶ 19 (emphases added). Moreover, the Union stipulated that it changed its dues deduction form, removing the phrase "MUST BE SIGNED," in late 2018. *See* Stip. ¶ 18. ("Since late 2018, Respondent has been using a revised version of its Three-Part Form, which is attached hereto as Ex. 6"). There would have been no need to change the form unless it used the checkoff generally. Finally, the Union concedes this point in its Brief in Support of Exceptions, when it explains that all Kroger employees were given the checkoff to sign:

> [E]mployees of Kroger who wish to sign up for membership in the Union are given the option of signing three separate authorizations: a "Membership Application," a "Voluntary Check-off Authorization," and a "UFCW Local 400-ABC Payroll Deduction Authorization Form." ([Stip. at] Exhibits 3 and 6). Each authorization requires an employee to affix their signature and the date to that part if the employee wants that part to apply to them ([Stip. at] Exhibit 3).

Union Br. in Support of Exceptions at 5.

It is reasonable (and not controversial) to make the entire bargaining unit whole in this instance, especially when that class of obvious discriminatees is easily identifiable.

Second, the Union characterizes Charging Party's arguments for a unit-wide remedy as a "last-minute attempt . . . to expand the universe of allegedly affected individuals." This is incorrect. Charging Party has argued at each stage in the proceedings that the entire unit is entitled to a remedy. *See, e.g.*, Charging Party Reply to ALJ at 3–4; Charging Party Br. in Support of Exceptions at 22. This argument was wholly ignored by the Union in its response to her exceptions. *See* Union Resp. to Exceptions. The Union failed to address this argument at the proper time, and given that briefing has been complete for over six months, should not be allowed to belatedly argue it now. The Union has waived this argument under NLRA Section 10(f) by failing to object in its brief on the merits.

Third, the Union argues the remedies Charging Party seeks are "extraordinary, unnecessary, and punitive." Union Reply at 4. This is inaccurate. Charging Party seeks to put the bargaining unit in the position it would have been but for the blatant violations. Such a remedy is standard in Board practice and is not punitive. What would be punitive would be to allow the Union to get away with maintaining an unlawful checkoff against those employees who signed the "MUST BE SIGNED" checkoff and not to allow the affected employees an opportunity to revoke and be refunded dues obtained through the unlawfully coerced checkoff during the Section 10(b) period. *Ironworkers Local 433*, 298 NLRB 35, 36 (1990); *see also California Saw & Knife Works*, 320 NLRB 224, 254 (1995) ("It is well-established Board policy that when the General Counsel has proven unlawful conduct against a defined and easily identifiable class of employees—here, dues objectors—the Board, with court approval, has found it appropriate to extend remedial relief to all members of that class, including individuals not named in the complaint.").

Fourth, the Union and the Acting General Counsel continue to wrongly contend Charging Party has been given complete relief. *See* Union Reply at 3; AGC Reply at 5. Not so. While the Union has paid back the dues that were deducted from her paycheck, Charging Party is owed more, namely interest on the amounts unlawfully deducted from her wages. *See, e.g.*, *Teamsters Local 385*, 366 NLRB No. 96, slip op. at 3 (June 20, 2018) (requiring interest payments despite the union already refunding the amounts deducted). Charging Party has raised this issue several times throughout the briefing of this case (*see e.g.* Charging Party Br. in Support of Exceptions, 21–22) and neither the Union nor the General Counsel have ever attempted to respond as to why Charging Party is not entitled to this additional monetary remedy. The Union cannot continue to claim Charging Party has received "complete" relief while ignoring this remedy.

SURREPLY TO THE ACTING GENERAL COUNSEL'S REPLY

The Acting General Counsel filed his reply brief on March 31, 2021. Charging Party will briefly address four points relating to the Acting General Counsel's reply.

First, the Acting General Counsel chides Charging Party for not providing any case law to support her straightforward application of the Board's Rules and Regulations. AGC Reply at 3 n.1. In support of this argument, Acting General Counsel concludes that such an interpretation "contradicts dozens if not hundreds of instances in which the Board has approved just such a settlement." AGC Reply at 1. Notably, the Acting General Counsel fails to provide even a single example of these "hundreds" of supposed Board-approved informal settlements. The case the Acting General Counsel cites, *McDonald's, USA, LLC*, 368 NLRB No. 134, 2019 WL 6838007 (Dec. 12, 2019), is inapposite. In *McDonalds*, the informal settlement was properly presented to the ALJ before he reached his decision (consistent with NLRB Rules and Regulations Section § 101.9(d)). *Id.* at *2. The ALJ declined to approve the settlement and that decision was appealed

to the Board. In that case, the Board did not issue an order approving the settlement, rather it remanded to the ALJ for settlement approval (again, consistent with Section § 101.9). *Id.* at *1. This situation is entirely different. The Union and the Acting General Counsel are presenting an informal settlement to the Board in the first instance, *after* the ALJ reached his decision and the case has been fully briefed on exceptions. Unlike the settlement in *McDonalds*—which was properly before the ALJ—an informal settlement at this stage of the proceedings is not contemplated by the Board's rules and should be rejected. The Acting General Counsel has neither case law nor regulatory authority to support his contrary conclusion.[2] Charging Party's arguments are based on a straightforward reading of the Board's rules and should be adopted.

Second, the Acting General Counsel fails to address the other elephant in the room—the Joint Motion is contrary to Board rules and precedent. The Joint Motion does not ask the Board to approve the settlement, rather, it merely informs the Board the Acting General Counsel believes the settlement complies with *Independent Stave Co., Inc.*, 287 NLRB 740 (1987), and requests that the Board remand the case to the Region for further processing. Such a request ignores the fact that once a hearing begins, the parties must seek approval of the settlement from the adjudicator.[3] Even in *McDonalds*, the case upon which the Acting General Counsel primarily relies, the settlement required the approval of the ALJ (with an appeal to the Board of the ALJ's decision). *McDonalds*, 368 NLRB No. 134, 2019 WL 6838007, at *3; *see also* NLRB Rules & Regul. § 101.9(d). Here, the Acting General Counsel and the Union seek to ignore these procedures and

[2] The Acting General Counsel also flaunts the Board's Rules and Regulations, as shown by the fact that he failed to provide a Table of Contents and Table of Authorities for his response brief, which is required for filings over twenty pages in length. NLRB Rules & Regul. § 102.5(a).

[3] The rules provide for the approval of the ALJ, however, assuming *arguendo*, that the Board considers an informal settlement appropriate in this instance (which it should not), the adjudicator would be the Board.

ask the Board to remand the case without seeking approval of the settlement agreement.[4] The Acting General Counsel is trying to make it impossible for Charging Party to seek review in a federal circuit court under NLRA Section 10, by styling this as a simple remand order instead of a decision on the merits yielding a "final order."

Third, the Acting General Counsel argues that the violations have been fully remedied by the Union agreeing to change its checkoff language going forward. AGC Reply at 5. However, Employees who were coerced and restrained in the exercise of their Section 7 rights into signing the unlawful checkoff prior to the Union's edits will still be bound by an unlawful card and may be chilled from revoking it pursuant to its terms. The only way to fully remedy the violations is to cease giving effect to the unlawful checkoffs, or to allow employees to revoke their unlawful checkoff retroactively if they wish. *Rochester Mfg. Co.*, 323 NLRB 260, 263 (1997).

Fourth, the Acting General Counsel states: "[t]he remedies requested by the Charging Party reach beyond the facts adduced in the investigation or produced at hearing" and "the Complaint did not contain a remedial provision requiring the Respondent to reimburse the dues of the entire bargaining unit." AGC Reply at 6.[5] The fact the Complaint did not allege a specific remedy, or that the Acting General Counsel does not believe the facts support Charging Party's remedy is irrelevant. The Board has the power to fashion its own remedies for violations fairly alleged in the Complaint. *Local 58, Int'l Bhd. of Elec. Workers (Paramount Indus., Inc.)*, 365 NLRB No.

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[4] In doing so, the Acting General Counsel seeks to avoid the inherent contradiction involved in the Board approving an informal settlement agreement in the first instance. Such an approval would require a Board order (rather than a remand to the ALJ, whose opinion already issued) and would contradict the definition of an informal Board settlement, which does not require a Board order. *See* NLRB Rules & Regul. § 101.9(b)(2) (stating an informal settlement "is not subject to approval by the Board and does not provide for a Board order.").

[5] Contrary to the Acting General Counsel's brief, there was no hearing in this case. This matter went before the ALJ on a stipulated record.

30, n.17 (Feb. 10, 2017); *Kaumagraph Corp.*, 313 NLRB 624, 625 (1994). Here, the Complaint alleges that the Union violated the Act by maintaining certain unlawful provisions in its checkoff—a checkoff that it agreed was generally maintained and only changed in response to this litigation in "late 2018." Stip. ¶ 18. The proper way to remedy this violation is to put the employees in the same position they would have been but for the unlawful checkoff. The best way to do that is to apply a unit-wide, *nunc pro tunc* remedy, allowing those individuals who were coerced into signing the checkoff to revoke and get a refund within the Section 10(b) period.

CONCLUSION

Based on the foregoing, the Board should grant Charging Party's Motion to File Surreply, and based on the arguments herein and in her Response to the Joint Motion to Remand, the Board should deny the Joint Motion to Remand.

Respectfully Submitted,

Date: April 8, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2021, a true and correct copy of Charging Party's Motion to File Surreply and Surreply was filed electronically with the Executive Secretary using the NLRB e-filing system, and copies were sent to the following parties via e-mail:

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