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302 NLRB No. 49

International Brotherhood of Electrical Workers, Local No. 2088, AFL–CIO (Lockheed Space Operations Company, Inc.) ***and*** **David D. May.**
Case 12–CB–3064

March 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT, DEVANEY, AND OVIATT

Upon a charge filed by David D. May, an Individual, on February 18, 1988, the General Counsel of the National Labor Relations Board issued a complaint on March 18, 1988, against International Brotherhood of Electrical Workers, Local No. 2088, AFL–CIO, the Respondent, alleging that it has violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act by various acts and conduct. On March 30, 1988, the Respondent filed an answer, admitting in part and denying in part the allegations of the complaint, and requesting that the complaint be dismissed.

The complaint alleges in paragraph 4 that the Respondent and Lockheed Space Operations Company, Inc., the Employer, have been and are now parties to a collective-bargaining agreement. Paragraph 5 alleges that the Charging Party executed a checkoff authorization on September 30, 1985, which permits the Employer to deduct from his wages the Charging Party's "Initiation fee, and on the first pay day of each month, [his] regular membership dues in Local Union 2088, International Brotherhood of Electrical Workers,

AFL–CIO, and remit same to said Union." Paragraph 6 alleges that on January 8, 1988, the Charging Party resigned his membership in the Respondent. Paragraph 7 alleges that since his resignation and continuing to date, the Respondent has received, accepted, and retained membership dues withheld from the Charging Party's pay in reliance on the above-described authorization. Paragraphs 8 and 9 set forth the concluding allegations that the previously described conduct establishes that the Respondent is violating Section 8(b)(1)(A) and (2). Although admitting the allegations in paragraphs 4, 5, and 7, and acknowledging that the Charging Party mailed to it a memorandum requesting that he be dropped from membership, the Respondent denies that the Charging Party effectively resigned his union membership as alleged in paragraph 6, as well as all allegations that it has violated the Act.

On May 20, 1988, the General Counsel filed with the Board a Motion to Transfer Proceedings to the Board and Motion for Summary Judgment, with brief and exhibits attached. On May 24, 1988, the Board issued an order transferring proceeding to the Board and Notice to Show Cause why the motion should not be granted. On June 20, 1988, the Respondent filed a response to the Notice to Show Cause.[1]

[1] The Board granted the Respondent's request that its response to the Notice to Show Cause be accepted out of time.

App. 3

Ruling on Motion for Summary Judgment

I. ADMITTED OR UNDISPUTED FACTS

The undisputed complaint allegations establish that on September 30, 1985, Charging Party May signed a checkoff authorization form directing the Employer to deduct from his wages his "regular membership dues" owed to the Respondent Union. The authorization provided that it would be "irrevocable for a period of one year from the date hereof or until the expiration of the present collective bargaining agreement between the Company and the Union, whichever is the shorter of the two periods."[2]

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[2] The authorization in its entirety reads as follows:

> I hereby authorize Lockheed Space Operations Co. to deduct from my wages as an employee of said Company, my Initiation fee, and on the first pay day of each month, my regular membership dues in Local Union 2088, International Brotherhood of Electrical Workers, AFL–CIO, and remit same to said Union. It is understood that Lockheed Space Operations Co. assumes no responsibility or liability under this authorization except to deliver the aforesaid deductions as indicated. This authorization shall be irrevocable for a period of one year from the date hereof or until the expiration of the present collective bargaining agreement between the Company and the Union, whichever is the shorter of the two periods, provided however that this authorization shall be irrevocable for successive yearly periods and may only be revoked by my giving written notice by mail to the Company and the Local Union, received by both during the 10 day period prior to the end of any such applicable yearly period or during the 10 day period prior to the termination date of any applicable collective bargaining agreement, whichever occurs sooner. In the absence of such notice or revocation sent

The Respondent admits in its response to the Notice to Show Cause that there "is no requirement that an employee be a member of the Respondent," and it cites only the checkoff authorization as its basis for asserting that May has a continuing dues obligation after his attempt to resign.[3]

On January 8, 1988, the Charging Party mailed a note to the Respondent containing the following statement:

> I, David Dwayne May, employee #T07556, am requesting that I be dropped from your union membership. I have sent a notice to Lockheed payroll, stopping my union dues.

The Respondent did not accept that letter as effecting a valid resignation, and it continued receiving and retaining membership dues deducted from May's wages, at least until the date of the complaint, March

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> and received in accordance with the foregoing, this authorization shall be irrevocably renewed for additional periods or until the end of the collective bargaining agreement whichever occurs sooner and for successive periods thereafter in accordance with the foregoing.

[3] The complaint states that the Employer has its office and place of business in Titusville, Florida, and that it is the contractor on the shuttle processing contract at Kennedy Space Center. We take administrative notice of the fact that, as permitted by Sec. 14(b) of the Act, Florida has a right-to-work law that prohibits the inclusion of union-security clauses in collective-bargaining agreements. There is no indication in the record that the Kennedy Space Center is outside the State's jurisdiction. See *Lord v. Electrical Workers IBEW Local 2088*, 481 F.Supp. 419, 424 (M.D.Fla. 1979), affd. in part, revd. in part 646 F.2d 1057 (5th Cir. 1981), cert. denied 458 U.S. 1106 (1982).

22, 1988.[4] At the time May transmitted his letter there was in effect between Lockheed and the Respondent a collective-bargaining agreement that was not due to expire until July 1, 1989.

II. POSITIONS OF THE PARTIES

The General Counsel, relying on *Auto Workers Local 128 (Hobart Corp.)*, 283 NLRB 1175 (1987), argues that May effectively resigned his membership by transmitting to the Respondent a letter making clear his intent to resign. He further asserts that, despite the language in the printed checkoff authorization specifying particular time periods during which the signatory may revoke the authorization, May's resignation from the Respondent Union by itself revoked the authorization without regard to when it was transmitted. In so contending, the General Counsel relies on *Machinists Local 2045 (Eagle Signal)*, 268 NLRB 635, 637 (1984), in which the Board held as follows:

> [A] resignation will, by operation of law, revoke a checkoff authorization, even absent a revocation request, where the authorization itself makes payment of dues a quid pro quo for union membership. This is so whether or

[4] Although the Respondent's answer does not expressly admit receipt of the letter, its answer quotes the letter verbatim as explained below. Moreover, the Respondent's argument in response to the Notice to Show Cause is not that it failed to receive the letter, but that the letter is ineffective to revoke May's dues obligation because it was sent during the period when the authorization was irrevocable.

> not the resignation is made during the period for revocation set forth in the authorization itself.

In finding such a quid pro quo in *Eagle Signal*, the Board relied on the authorization's reference to "regular monthly dues." The General Counsel argues that the same result should obtain in the instant case because the authorization contains similar language, stating that Lockheed is authorized "to deduct . . . my *regular membership dues* in [Respondent Union]" (emphasis added). Under *Eagle Signal*, the General Counsel reasons, continued acceptance of dues payments from May's wages after May's resignation violated Section 8(b)(1)(A) of the Act.

The General Counsel also argues that the Respondent's acceptance and retention of dues deducted pursuant to such a checkoff after the member's effective resignation from membership is an unlawful restriction on an individual's right to resign union membership under the holding of *Machinists Local 1414 (Neufeld Porsche -Audi)*, 270 NLRB 1330 (1984), and that such a restriction "impairs the [Act's] policy of voluntary unionism" that the Supreme Court recognized in Pattern Makers League v. NLRB, 473 U.S. 95, 107 (1985).

In the alternative, the General Counsel contends that even if May's resignation from union membership did not also automatically revoke his checkoff authorization, resignation nonetheless reduces the amount properly owing as union membership dues to zero. Under

this view, the receipt and acceptance by the Respondent of any moneys exceeding that amount are unlawfully extracted.[5]

The Respondent argues that there are no external requirements that May or any other unit employee be a member of the Respondent. It asserts that one who becomes a member may cease membership at any time simply by ceasing to pay dues, an act that will ultimately result in automatic loss of membership. The Respondent contends, however, that by signing the checkoff authorization, May "elected to forego his right to be able to stop payment of dues at any time" and thereby "[e]ffectively agreed" to waive any right to resign "except in the manner and at the time" specified in the authorization. Therefore, the Respondent argues, May's January 8 resignation letter, which did not comply with the terms of the authorization, did not constitute an effective resignation of membership.

The Respondent further contends that the Board's *Eagle Signal* rationale fails properly to take account of the tension existing between an employee's Section 7 right to sever membership ties with a labor organization and the provisions of Section 302(c)(4), which permits the use of checkoff authorizations so long as they "shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable

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[5] In making this argument, the General Counsel relies on the view of former Member Johansen, expressed in *Postal Service*, 279 NLRB 40, 42 fn. 5 (1986), remanded 827 F.2d 548, 555 (9th Cir. 1987).

collective agreement, whichever occurs sooner." The Respondent also notes criticism of the Board's *Eagle Signal* analysis in the opinions of two United States courts of appeals.[6]

III. ANALYSIS

A. *Board Precedent*

This case presents the question whether a union, without reliance on any valid union-security clause, may seek to require the continued checkoff of union "membership dues" from the wages of an employee who signed a dues-checkoff authorization that is irrevocable for 1 year or the expiration of the current collective-bargaining agreement, whichever is sooner, but who resigned from membership before the end of that period of irrevocability.

In *Shen-Mar Food Products*, 221 NLRB 1329 (1976), enfd. as modified 557 F.2d 396 (4th Cir. 1977), the Board faced a similar issue in the context of an employer's defense to an allegation that it had violated Section 8(a)(5) and (1) of the Act by breaching the dues-checkoff provision of the collective-bargaining agreement through its refusal to check off dues and remit them to the union for nine employees who had resigned their union memberships and attempted to revoke their checkoff authorizations within the authorization's irrevocability period. In particular, the employer

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[6] *NLRB v. Postal Service*, 833 F.2d 1195 (6th Cir. 1987); *NLRB v. Postal Service*, 827 F.2d 548 (9th Cir. 1987).

had argued that compelling it to check off dues for employees who had resigned union membership amounted to approving a union-security device compelling union membership. Pointing out that the events took place in Virginia, a right-to-work state in which union-security clauses were prohibited, the employer argued that forcing the employer to be party to such a compulsion conflicted with Section 14(b) of the Act, which allows States to maintain their policies of prohibiting union-security clauses. The Board, agreeing with the administrative law judge, held that dues-checkoff authorizations were exclusively a matter of Federal law and thus not within the purview of Section 14(b) and that such authorizations could not properly be viewed as union-security devices because they did not "impose union membership or support as a condition required for continued employment. . . ." Id. at 1330.[7]

Several years after it issued *Shen-Mar*, the Board decided *Carpenters (Campbell Industries)*, 243 NLRB

[7] The administrative law judge had distinguished earlier cases, notably *Penn Cork & Closures, Inc.*, 156 NLRB 411 (1965), in which the Board found it a violation of the Act to continue to check off dues from employees after a majority of the unit had voted, pursuant to Sec. 9(e)(1) of the Act, to deauthorize the union, i.e., invalidate the union-security clause that had been in effect when the employees originally signed the checkoff authorizations. *Shen-Mar*, supra, 221 NLRB at 1332 and fn. 5. The Board in *Penn Cork* found it unreasonable to assume that the employees had been unmindful of the union-security clause when they executed the authorizations, and the Board also held that the "right of the majority of the employees to withdraw union-shop authority would indeed be an empty one if individually they could not thereafter cease paying union dues upon resigning from membership." 156 NLRB at 414–415.

147 (1979), which presented the issue of the effect of employee revocations within the irrevocability period in a slightly different context. As in the present case, the issue was raised not as an employer defense to a charge that it unlawfully refused to submit union dues to the union, but as the basis for an allegation that the union violated the Act by insisting on receiving checked off dues. In *Campbell Industries*, the Board found a violation of Section 8(b)(1)(A) on the basis of language in the checkoff authorization which the Board construed as making union membership the consideration for the employee's agreement to have his dues withheld from his wages, i.e., the Board determined that the employees had agreed to pay dues to the union only so long as they were union members and that their consent to such payments ended with their resignations from membership. Id. at 149. The Board contrasted this with the circumstances in *Frito-Lay, Inc.*, 243 NLRB 137 (1979), in which it dismissed the 8(b)(1)(A) allegations because of the absence of language indicating such a quid pro quo understanding. *Campbell Industries*, supra, 243 NLRB at 149 fn. 9. This was the genesis of the so-called *Eagle Signal* analysis on which the General Counsel relies in this case.

In neither *Campbell* nor *Eagle Signal* did the Board mention *Shen-Mar*, supra, and it seems clear that those two cases did not completely overrule *Shen-Mar*, even sub silentio. Because it is critical to the result in both *Campbell* and *Eagle Signal* that the authorization contain the phrase "membership dues" or some equivalent phrase linking the dues directly to

membership, those opinions implicitly reject the proposition that the policies of the Act demand that employees always be free to escape restrictions on checkoff revocation by resigning membership regardless of the language in the authorizations they signed. At least to the extent that *Shen-Mar* rejected the broad argument that requiring nonmember employees to continue honoring a dues-checkoff authorization constitutes per se an unlawful imposition of union membership (221 NLRB at 1330), it has not been overruled.

On the basis of the language of the checkoff authorization in this case, however, the General Counsel is correct in arguing that, under the Board's analysis in *Eagle Signal*, the Respondent violated Section 8(b)(1)(A) in continuing to accept dues deducted from Charging Party May's wages after May had clearly communicated his intent to resign his membership in the Respondent. Nevertheless, in light of the refusal of two courts of appeals to accept the *Eagle Signal* analysis as an acceptable application of either principles of contract law (on which *Eagle Signal* relied) or provisions of the Act, we have decided to reexamine the question of the effect of an employee's resignation from union membership on his authorization for the deduction of union dues from his wages. As explained below, although we reach the same result in this case, and although both the "membership dues" language of the authorization and principles of contract law are part of our analysis, we no longer adhere to the "quid pro quo" doctrine of *Eagle Signal*.

B. *Statutory Provisions and Policies*

We begin our reexamination of the question of the effect of an employee's resignation from union membership on his authorization for the deduction of union dues from his wages by reviewing the statutory policy. The part of the statute which deals with checkoff authorizations is Section 302(c)(4). It permits an employer to deduct union membership dues from employees' wages and remit those moneys to their exclusive collective-bargaining representative, "*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." As set forth in section I, above, the terms of the authorization signed by Charging Party May include a provision making the authorization irrevocable for 1 year from its date or until expiration of the collective-bargaining agreement, whichever period is shorter. The authorization in question here plainly meets the requirements of Section 304(c)(4).[8]

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[8] We do not suggest that if the authorization did not so comply, Sec. 302(c)(4) would by itself provide the basis for the finding of an unfair labor practice. *Salant & Salant, Inc.*, 88 NLRB 816, 818 (1950). With respect to the question whether we should take account of policies underlying that section in deciding issues relating to checkoff under Sec. 8 of the Act, however, we think the better view is stated in *Atlanta Printing Specialties (Mead Corp.)*, 215 NLRB 237 (1974), enfd. 523 F.2d 783 (5th Cir. 1975), and by the dissent in *Frito-Lay, Inc.*, supra, 243 NLRB at 139–141, both finding that such consideration is appropriate. Compare 243

Neither the language of Section 302(c)(4) nor its legislative history definitively resolves the issue in this case. If anything, the record of congressional intent is ambiguous. From the main portion of Section 302(c)(4) which reads "money deducted from the wages of employees in payment of *membership* (emphasis added), 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.

The problem is that the express language of the proviso of paragraph (4) does not hinge the irrevocability of authorization on an employee's continued status as a union member, but rather keys it exclusively to time-sensitive criteria—a period of up to 1 year or the expiration of the collective-bargaining agreement, whichever occurred first. One thus could read the proviso as granting authority to unions and employers to enter into checkoff agreements that provide, once employee consent to checkoff has been given, for limited periods of irrevocability without regard to an

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NLRB at 138–139 and fn. 2, and cases there cited. Certainly it makes sense to look at the history of Sec. 302(c)(4) in deciding how to construe a checkoff authorization so as to best effectuate Federal labor policies.

employee's maintaining membership status.[9] The congressional deliberations offer meager assistance in determining which portion of paragraph (4)—the main clause or the proviso—should prevail.

Enacted as part of the Taft-Hartley amendments, the provision was added by Senator Ball as a floor amendment to the Senate bill, S. 1126. The principal thrust of the Ball amendment was to restrict the ability of unions to exact from employers large contributions for so-called welfare funds, which union leaders were found to have used, without sufficient accountability, for their own institutional ends rather than for the direct economic benefit of employees. The amendment was structured to bar generally any direct payments to unions with certain exceptions, one of which concerned the welfare fund problem but another of which addressed the separate issue of employee-authorized dues-checkoff payments.[10] Although the floor

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[9] It is arguable, of course, that membership status might be an *implicit* limitation on the proviso. But it seems probable that Congress would have explicitly placed such a limitation in the proviso if it had clearly wanted to make checkoff ultimately depend on union membership.

[10] The amendment was not unexpected. In the committee report which accompanied S. 1126, Senator Ball and Senator Taft, among others, filed Supplemental Views, in which they indicated an intent to offer such an amendment on the Senate floor. The only relevant explanation offered in the Supplemental Views was that the amendment "prevents the check-off of union dues unless authorized in writing by the individual employee. Such authorization may be irrevocable for the period of the contract, which is the usual form of the check-off today." S. Rep. No. 105, 80th Cong., 1st Sess. at 52 (1947) (Supplemental Views), reprinted in *I Legislative History of the Labor-Management Relations Act, 1947* 548

statements of Senator Ball did little more than paraphrase the text of his amendment, Senator Taft, who spoke in support of it, elaborated on the checkoff provision. He explained that checkoff "is a device by which the employer pays into the union treasury, without the consent of the particular employees who have earned the money, a certain percentage agreed to in the collective-bargaining agreement contract[; thus] the amendment provides that it is proper to make such an agreement with respect to money deducted from the wages of employees in payment of membership dues in

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(1948) (hereafter Leg. Hist.). As actually introduced, however, the amendment also provided for the opportunity to revoke the checkoff annually.

A corresponding provision dealing with checkoff authorizations was included in the House bill, H.R. 3020, which would have added a new subpar. (C)(i) to existing Sec. 8(a)(2). This amendment would have prohibited employer assistance to labor organizations through deducting union fees, dues, and assessments, but made an exception from this prohibition when those deductions had been "voluntarily authorized in writing by such employee and such authorization is revocable by the employee at any time upon thirty days' written notice to the employer. . . ." H.R. 3020, 80th Cong., 1st Sess. 20–21, reprinted in I Leg. Hist. 50–51.

The House Report on this provision described it as a restriction on "the check-off of union dues, fees, fines, assessments, and other levies upon members" and referred to it as "a form of union security" that saved "time and trouble" for "employers, employees, and unions." H.Rep. No. 245, 80th Cong., 1st Sess. 29 (1947), I Leg. Hist. 320.

Although Congress finally enacted as the Taft-Hartley amendments the Conference Report to H.R. 3020, it was the Ball amendment to S. 1126 that was adopted in the Conference Report in lieu of the House provision. H. Conf. R. No. 510, on H.R. 3020, 1st Sess. 66–67, 80th Cong. 67–68 (1947), reprinted in I Leg. Hist. 570–571.

a labor organization," subject to the proviso requiring written assignment and delimiting irrevocability (emphasis added).

Senator Taft then alluded to the hearings before the Labor Committee, which he chaired:

> So far as the testimony shows that is the usual form of check-off. Under it the employee himself signs a slip or assignment authorizing the checkoff. If he once signs such an assignment under the collective-bargaining agreement, it may continue indefinitely until revoked, and it may be irrevocable during the life of the particular contract, or for a period of 12 months. That, I think, is substantially in accord with nine-tenths of all checkoff agreements, and simply prohibits a check-off made without any consent whatever by the employees. [Id. at 1311.]

If one turns to the hearing record that Senator Taft mentioned in his floor speech—-at least that record presented before the Labor Committee which he chaired during its consideration of a number of bills during the first session of the 80th Congress before reporting out S. 1126 as an original bill—-several salient points come to light concerning the then-prevailing industry practices on dues checkoff.[11]

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[11] Cf. *John Deklewa & Sons*, 282 NLRB 1375, 1380 (1987); id. at 1392 (concurring) (in determining congressional intent, it is relevant to examine what problems in actual labor-management experience were presented to Congress for resolution).

First, dues checkoff was usually ancillary to union-security agreements, which required some form of union membership as a condition of employment. Under the Wagner Act, unions could negotiate closed-shop or union-shop agreements, as well as agency-fee and maintenance-of-membership arrangements. For a variety of reasons, unions and employers alike found it mutually advantageous to adjoin dues-checkoff provisions with such agreements.[12] Second, checkoff agreements covered an array of employee obligations to unions, including not only membership dues but also initiation fees, fines, and assessments. Third, most

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[12] According to the testimony presented at the committee hearings, unions found that without checkoff, they diverted valuable time and resources away from "constructive" contract administration in order to collect dues on an individual basis. Moreover, there was the potential that such efforts might impinge on the employer's plant production and efficiency to the extent that the union attempted to collect dues in and around the facility. Finally, to the extent that members remained delinquent in their dues payments, unions and employers faced the burdens associated with discharging such employees under the union-security agreement. Statement of Lee Pressman, General Counsel of CIO, Hearings on S. 55 & S.J. Res. 22 before the Sen. Comm. on Labor & Public Welfare, 80th Cong., 1st Sess. at 1151–1152 Senate (1947) (hereafter Hearings). See also Statement of Textile Workers Union of America, Senate Hearings at 1530 ("Granted the desirability of union security, it follows that check-off is the least expensive and most effective method of maintaining it during the term of the particular collective-bargaining agreement.")

These arguments echoed the reasoning of the National War Labor Board, which in a series of cases ordered the inclusion of checkoff provisions as a supplement to union-security clauses. See 1 *Termination Report of the National War Labor Board (1942–1945)* at 101–102, citing *Bethlehem Steel Corp.*, sub nom. *Little Steel*, 10 LRRM 969, 979 (July 16, 1942).

often, checkoff agreements were automatic in that they did not require any employee consent. However, there was not complete uniformity of practice among covered employers and unions. For example, where a maintenance-of-membership agreement was negotiated, which gave employees the option of joining the union, it was not unusual for the employees to be afforded the option of authorizing checkoff; in addition, the employees would be given an opportunity to resign during certain escape periods, which would then effectively obviate the checkoff obligation.[13] Furthermore, the congressional hearing record suggests the emergence, following World War II, of bargaining contracts that had dues-checkoff provisions *without* any underlying union-security clause requiring union membership. As Secretary of Labor Schwellenbach put it, citing material from the Bureau of Labor Statistics, checkoff "may be combined with a standard union security provision or it may stand alone in lieu of any other union

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[13] Secretary of Labor Schwellenbach testified that 39 percent of the employees covered under union-security agreements that contained checkoff provisions, over half of which (i.e., 23 percent) were automatic, without employee consent. The remaining 16 percent of employees were covered by voluntary checkoff provisions. Senate Hearings at 47, 51, 66–67. This information was evidently drawn from U.S. Labor Dept., Bur. Lab. Statistics, Bull. No. 865, "Extent of Collective Bargainging and Union Recognition, 1945" (1946).

See also Senate Hearings at 979 (testimony of William Green, president of AFL) (acknowledging that employee authorization of checkoff was usually associated with maintenance-of-membership form of union security).

security provision."[14] He added that "[i]n voluntary check-offs, employees who desire to have their union dues checked off are required to sign a formal authorization, which may be binding for the duration of the agreement or revocable at any time upon written notice."

Several conclusions may be drawn from this evidence and Congress' consideration of it. First, it seems

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[14] Id. at 66.

Secretary Schwellenbach provided similar evidence to the House Education and Labor Committee. Vol. 5, Hearings on Bills to Amend and Repeal the National Labor Relations Act, 80th Cong., 1st Sess. at 3022 (1947) (hereafter House Hearings).

For a contemporary summary of the various forms of union-security agreements, together with checkoff provisions, see U.S. Labor Dept., Bur. Lab. Statistics, Bull. No. 909, "Extent of Collective Bargaining and Union Recognition, 1946" (1947); U.S. Labor Dept., Bur. Lab. Statistics, Bull. 908, "Union Security Provisions in Collective Bargaining" (1947).

Speaking on the mutual advantages of checkoff for employers and unions, CIO General Counsel Pressman testified before the Senate Labor Committee that "most employers . . . prefer the check-off with or without union security to union security without the check-off [as] indicated by the issue which has been posed with some frequency in recent months in collective-bargaining negotiations in which the employer has offered a universal check-off in preference to union security, contending that he [the employer] prefers the relatively easy, automatic, mechanical process of the check-off to being forced to deal with problems relating to discharge of recalcitrant individual employees." Id. at 1151.

There is evidence apart from the congressional hearings that during World War II, the National War Labor Board ordered the inclusion of checkoff in some bargaining agreements in lieu of any form of enforced union membership. See *Termination Report*, supra, citing *Bower Rolling Bearing Co.*, 10 LRRM 981 (Mar. 11, 1942).

clear that Congress had an overriding intent to eliminate the practice of automatic checkoff agreements, under which employees had no say in an employer's deducting dues from wages and paying such moneys directly to the union. Moreover, once individual authorization was given, an employee was to be afforded periodic opportunities to reconsider his or her initial decision. Second, Congress, in agreement with the Administration,[15] felt that checkoff should be limited to membership dues only, not fines, initiation fees, or other levies.

Beyond that, however, the record is not clear whether Congress intended to regulate the manner in which checkoff authorizations would interact with an employee's status as a union member. As noted, Congress confronted a variety of practices. In one category, there was a direct link between checkoff and membership, as a result of an accompanying union-security agreement; in another, union membership did not seem to be a prerequisite, practically speaking, to checkoff authorization. At best, Congress seems to have simply stayed its hand from deciding whether in all instances checkoff authorization must ultimately be a function of union membership. Because Section 302(c)(4), even as amplified by its legislative history, does not address the particular situation here, in which checkoff authorization coincides with union membership, but there is no union-security provision, we think it appropriate to examine that section in the

[15] Senate Hearings at 49–50.

light of more general policies of the Act in fashioning the applicable rule.[16]

In particular, we find it reasonable to take account of the policy of "voluntary unionism" that, as the Supreme Court explained in Pattern Makers, was incorporated into the Act by the 1947 Taft-Hartley

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[16] We note that, in *SeaPak v. National Maritime Union*, 300 F.Supp. 1197 (S.D.Ga. 1969), affd. 423 F.2d 1229 (5th Cir. 1970), affd. mem. 400 U.S. 985 (1971), a district court briefly reviewing the history of Sec. 302(c)(4), decided a case involving the continued checkoff of dues after employees had revoked authorizations, and its judgment in favor of the union's right to continued receipt of dues was ultimately affirmed by the Supreme Court. But we do not find in that summary affirmance a clear resolution of the issue before us in this case. In *SeaPak*, the court denied the summary judgment motion filed by an employer who sought to cease checking off dues of certain employees by relying on a Georgia law that required that all dues-checkoff authorizations be revocable at will, and it granted the motion of the union for enforcement of the dues-checkoff clause of the collective-bargaining agreement. The employer argued that the Georgia law was permissible as a right-to-work law regulating forms of union-security agreement under Sec. 14(b) and that therefore any restrictions on revocation in the authorizations they had signed could not apply. The court held that there was a clear conflict between the state law prohibiting *all* restrictions on revocation and the Federal law allowing, but limiting, such restrictions, and in such a conflict the state law must yield under principles of preemption. Because the court of appeals adopted the opinion of the district court and the Supreme Court affirmed summarily, we cannot be sure exactly how broad this decision should be read. At least, there is no indication that any party presented an *Eagle Signal* argument, i.e., contended that the language of the authorization itself indicated a contractual understanding that resignation from the union would revoke the checkoff. Therefore, we do not view *SeaPak* as foreclosing the mode of analysis we use below to decide this case.

amendments,[17] and of the principle that waivers of statutory rights must be clear and unmistakable.[18]

In its 1947 modification of Section 7 of the Act, Congress gave employees the right to refrain from engaging in the activities specified in that section. Because those activities include "join[ing], or assist[ing] labor organizations," it can hardly be disputed that

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[17] 473 U.S. at 114.

[18] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). We acknowledge that the Sixth Circuit was critical of any reliance on *Pattern Makers* to support a Board finding, under the *Eagle Signal* analysis, that a checkoff authorization had been validly revoked by an employee's attempt to resign. *NLRB v. Postal Service*, 833 F.2d at 1201. The court noted that the issue in *Pattern Makers* was whether a union could burden the statutory right to resign union membership by imposing fines on employees for returning to work during a strike after the employees had resigned. The court saw no restrictions on the resignation rights of the employees whose checkoff authorizations were at issue before it and hence held that the General Counsel, arguing on behalf of the Board, was "asking this Court to extend the holding of *Pattern Makers* far beyond its rationale. . . ." Id. As explained below, however, we are not relying on *Pattern Makers* for the proposition that employees cannot agree for a limited period to forgo exercising their statutory right to refrain from supporting a union. We are simply invoking the "voluntary unionism" principle—which the Sixth Circuit acknowledges forms "the underlying rationale" of *Pattern Makers* (833 F.2d at 1201)—as a reason for requiring explicit language before we will find that an employee has waived any of the rights guaranteed by Sec. 7 of the Act. See also *NLRB v. Sheet Metal Workers Local 16*, 873 F.2d 236 (9th Cir. 1989); *Auto Workers Local 449 v. NLRB*, 865 F.2d 791 (6th Cir. 1989) cert. denied 110 S.Ct. 71 (1989); *NLRB v. Sheet Metal Workers Local 73*, 840 F.2d 501 (7th Cir. 1988) (all declining to limit *Pattern Makers* to its facts and applying it to union constitutional restrictions on the right to resign whether or not they are enforced through union discipline).

Section 7 protects both the right to refrain from belonging to a union and the right to refrain from contributing money to it, except to the extent that the proviso to Section 8(a)(3) of the Act permits an employee to be required to pay dues under a contractual provision as there defined. These expressly stated policies of the Act, together with the contractual principles reviewed in section C below, must inform our decision concerning what the Respondent could lawfully require of May after he resigned membership and revoked his authorization for deductions made from his wages for the support of the Respondent.

C. *Relevant Contract Law Principles*

The Board has held that a checkoff authorization under Section 302(c)(4) is a contract between an employee and his employer.[19] Although we adhere to the characterization of a dues-checkoff authorization as a contract, reconsideration of this issue persuades us that the *Eagle Signal* analysis did not adequately take into account pertinent principles of contract law. A checkoff authorization is that special form of contract defined in the Restatement 2d, *Contracts* Section 317 (1981), as an "assignment of a right." More specifically, a checkoff authorization is a partial assignment of a future right, that is, an employee (the assignor) assigns to his union (the assignee) a designated part of the wages he will have a right to receive from his employer

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[19] *Cameron Iron Works*, 235 NLRB 286, 289 (1978); *Eagle Signal*, supra at 637.

(the obligor) in the future, so long as he continues his employment. The employer is thereby authorized to pay the specified amounts to the union when the employee's right to wage payments accrues.[20] Further, an assignment may be conditional and/or revocable, and when an assignment is made upon a condition, the absence or disappearance of that condition may destroy the assignee's right.[21] Put in the terms of the issue in this case, the contractual questions are (1) whether an employee who has agreed to assign part of his wages to a union pursuant to the terms of an authorization like the one signed by May has agreed to make the assignment only on the condition that he is a union member, and (2) whether, when that condition disappears—either through the action of the employee in resigning or through the action of the union in expelling him—the union-assignee's right to the wage payments is terminated.

Of course, principles of contract law need not always be strictly applied in the collective-bargaining context.[22] In applying the foregoing contract law principles to determine whether the checkoff authorization signed by Charging Party May should be read as imposing an obligation to have union dues deducted from his wages after he has communicated an intent to resign his union membership, we do so in light of the

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[20] Restatement 2d, *Contracts* §§ 321 and 326 (1981).

[21] Id. at §§ 320, 331.

[22] *NLRB v. Postal Service*, supra, 827 F.2d at 554.

statutory provisions and policies of the Act.[23] Most significantly, we read the contract at issue here in the light of the policy of not lightly implying, from less than explicit language, a waiver of Section 7 rights, such as the right to refrain from assisting a union.

D. *Application of the Clear and Unmistakable Waiver* Doctrine to Agreements to Assist a Union

Our review of statutory policies and contractual principles persuades us that 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. But the policies discussed above also make it reasonable for us to conclude that an employee who has promised only to pay union "membership" dues by checkoff for 1 year has not necessarily thereby obliged himself

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[23] *Penn Cork & Closures, Inc.*, 156 NLRB 411 (1965) (construing checkoff authorization as permitting revocation after the union loses a Board-conducted deauthorization election; policies of Sec. 9(e)(1) of the Act invoked). See also *Speedrack, Inc.*, 293 NLRB 1054 (1989), and *Hydrologics, Inc*., 293 NLRB 1060 (1989) (construing the scope of a contract reopener in light of the policies of the Act). Construing the terms of employee wage assignments in the light of statutory policies is especially appropriate, because such assignments are commonly subject to regulation in the public interest. Restatement 2d *Contracts*, supra, Statutory Note to Ch. 15 at 7–9.

to continue paying such dues throughout that period—i.e., to continuing assisting the union—even when he is no longer a union member. We will require clear and unmistakable language waiving the right to refrain from assisting a union, just as we require such evidence of waiver with regard to other statutory rights.[24] The authorization signed by May, which refers only to an obligation with respect to payments of "my Initiation fee" and "my regular membership dues" plainly does not meet this standard.

The Respondent seeks to surmount this difficulty by arguing that May in fact continued to be a "member" even after he attempted to resign, because his authorization was not merely an agreement to pay dues through a checkoff mechanism but also constituted an agreement to refrain from resigning his membership. Hence, the Respondent in essence argues May waived two rights through the authorization—his right to refrain from assisting the Respondent and his right to refrain from belonging to it. Under this theory, May continued to owe dues as a member and to be obligated, during the stated irrevocability period of the authorization, to have those dues deducted from his wages. Because, however, we find the authorization's references to payment of dues insufficiently clear to require continued payment of membership dues after resignation,

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[24] See, e.g., *Metropolitan Edison v. NLRB*, supra, 460 U.S. at 708; *Southern California Edison Co.*, 284 NLRB 1205 fn. 1 (1987), enfd. mem. 852 F.2d 572 (9th Cir. 1988); *Missouri Portland Cement Co.*, 284 NLRB 432, 433 (1987).

a fortiori we find the language insufficiently clear to prohibit May from resigning.[25]

In reaching this conclusion we are not identifying forced union membership with forced payment of dues. As noted above, we agree that the Board's decision in Shen-Mar rejecting that equation is still good law. We recognize that paying dues and remaining a union member can be two distinct actions. We merely hold that the policy of "voluntary unionism" that informs the Supreme Court's decision in Pattern Makers with regard to remaining, or declining to remain, a union member also logically relates to other forms of union activity. The policy warrants the application of a test that will assure that the extraction of moneys from an employee's wages to assist a union, if not authorized by a lawful union-security clause, is in accord with the

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[25] Because the authorization is not sufficiently clear to waive either the Sec. 7 right to resign union membership or the right to refrain from assisting a union, we need not, and do not, decide whether or not an employee may, by authorization or other form of contract that he signs as an individual, agree to an enforceable waiver of the right to resign for a limited period. Cf. *Pattern Makers*, supra, in which the majority rejected the argument of the dissent that, in imposing fines on employees who resigned and crossed a picket line, the union was simply acting on a valid "promise" made by the employees not to engage in such conduct. 473 U.S. at 113 fn. 26. But there the "promise" consisted simply of the act of joining the union and thereby implicitly agreeing to be bound by any restrictive rules thereafter enacted through the union's democratic processes. Id. at 126–127, 129. The Court observed that a "promise" made in this manner was "unlike any other in traditional contract law." Id. at 113 fn. 26. Thus, the Court in *Pattern Makers* did not pass on the efficacy of individual agreements.

employee's voluntary agreement. If the employee did not agree, when he signed the authorization, to have "regular membership dues" deducted even when he is no longer a union member, then the employee's continued financial support of the union is not clearly "voluntary" after he has resigned.

Accordingly, we will construe language relating to a checkoff authorization's irrevocability—i.e., language specifying an irrevocable duration for either 1 year from the date of the authorization's execution or on the expiration of the existing collective-bargaining agreement—as pertaining only to the *method* by which dues payments will be made *so long as dues payments are properly owing.* We shall not read it as, by itself, a promise to pay dues beyond the term in which an employee is liable for dues on some other basis.[26] Explicit

[26] A different situation exists when an employee is subject to a lawful union-security clause under which members and nonmembers alike have an obligation to provide dues to their collective-bargaining representative either by checkoff or some other means. Such clauses often literally require "membership," thereby reflecting the language used in the proviso to Sec. 8(a)(3) of the Act, but as the Supreme Court has held, the requirement that an employee remain a "member" refers to membership "whittled down to its financial core," i.e., the payment of dues and fees. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). When a union can establish the dues obligation through a valid union-security clause, the checkoff authorization merely affects the manner of payment of dues which the employee will continue to owe, in at least some amount, regardless of any attempt to resign. *Distillery Workers Local 80 (Capitol-Husting Co).*, 235 NLRB 1264, 1265 (1978). Here the sole basis cited by the Respondent for continuing to extract membership dues after an attempt to resign is the checkoff authorization itself, so we need not decide how we would construe a similar checkoff authorization for an employee

language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership will be required to establish that the employee has bound himself or herself to pay the dues even after resignation of membership. If an authorization contains such language, dues may properly continue to be deducted from the employee's earnings and turned over to the union during the entire agreed-upon period of irrevocability, even if the employee states he or she has had a change of heart and wants to revoke the authorization.[27]

It is true that our test is not a bright line rule and that thus there is a less than absolute predictability as to whether we will find that any given authorization

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whose dues obligation continues on other grounds after resignation.

[27] Although our rule may often produce the same result with respect to authorizations referring to "membership dues" as would be the case under the *Eagle Signal* doctrine, we are not simply applying that test under another label. As we read the court precedent, the courts were critical of the *Eagle Signal* analysis mainly because it rested on the unsupported assertion that the "language" and the "legal import" of authorizations referring to payment of union membership dues "could not be clearer," i.e., that such authorizations clearly constituted agreements in which the benefits of union membership were the "quid pro quo" for the payment of dues and were revoked by operation of law upon revocation. *NLRB v. Postal Service*, supra, 833 F.2d at 1200; *NLRB v. Postal Service*, supra, 827 F.2d at 553–554, citing *Campbell Industries*, supra, 243 NLRB at 149, and *Eagle Signal*, supra, 268 NLRB at 637. We now acknowledge that the language is not clear as a matter of contract law. Indeed, as explained above, that is the problem. Acknowledging the ambiguity, we now construe the authorization in the light of the statutory policies that we have identified as relevant.

incorporates a clear and unmistakable waiver. This argument could be made, however, against many of the Board's legal standards, e.g., the standards for determining whether questions directed at employees about a union are coercive, whether parties have reached an impasse in negotiations, or whether union agents are entitled to gain access to private property for the purpose of exercising various Section 7 rights. The ease with which a legal test may be applied is certainly a factor to be taken into account in deciding between competing standards. But it is only *one* factor, and it may be outweighed by policy considerations that militate against adopting a simpler standard that would allow only one or a few considerations—e.g., the time period specified in a checkoff authorization—to be dispositive. The rule of construction that we adopt in this case will help assure that employees signing checkoff authorizations are fully aware of what they are agreeing to do and that they will not be required to assist a labor organization beyond the period when they have clearly agreed to do so. As explained above, this comports with important policies of the Act—the Section 7 right to refrain from assisting a union and the policy that waiver of Section 7 rights must be clear and unmistakable.

Finally, we are satisfied that our holding here will not have a widespread disruptive effect on existing dues-checkoff arrangements or place undue burdens on unions and employers. In the first place, as noted above (fn. 27, supra), the result of applying our rule will often be the same as in the application of the *Eagle*

Signal analysis, an analysis that has been Board law for more than a decade. Further, nothing we say in this case is intended to suggest that, in order to avoid unfair labor practice liability, an employer must continually monitor the membership status of employees who have signed checkoff authorizations. Thus, our analysis does not require that we find an employer guilty of an unfair labor practice for continuing to check off union dues during a period before the employee has notified the employer of his resignation. And both unions and employers are free to ask employees when they communicate their resignations whether they wish to have a continued checkoff of dues notwithstanding their resignations. If an employee wishes to continue to pay dues to the union, then the employee can amend his or her authorization to so indicate. If not, then the dues checkoff should cease because continued payment of dues is not voluntary. If all the parties to a checkoff authorization—the assignor, the assignee, and the obligor—wish to assure a stable arrangement that will not change during the stipulated period, regardless of changes in the employee's membership status, then they can use language that makes clear the intended result.[28]

Applying our analysis to the admitted or undisputed facts in this case, we find that in signing the

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[28] See *Steelworkers Local 4671 (National Oil Well)*, 302 NLRB 367, in which we have deemed an employee bound by a checkoff authorization notwithstanding his resignation because the language clearly indicated an agreement to pay dues "irrespective of my membership in the Union."

authorization at issue here, May did not clearly and unmistakably waive his right to refrain from assisting the Respondent Union for periods when he was not a member. All that he clearly agreed to do was allow certain sums to be deducted from his wages and remitted to the Respondent for payment of his "Initiation fee" and his "regular membership dues." He did not clearly agree to have deductions made even after he has submitted his resignation from "membership." Indeed, as noted above, the Respondent does not contend that the authorization plainly contains such a promise, since it argues only that May "effectively" agreed to "forego any right to effect a resignation by ceasing to pay dues except in the manner and at the time [specified in] his agreement." Thus, although the *time specifications* of the authorization may be clear and unmistakable, the question of whether "regular membership" dues must continue to be paid by someone who is not a member is not.

In sum, we construe May's authorization as permitting the Respondent to continue collecting dues from him only so long as he remained a member. By continuing to collect sums equivalent to regular dues from May's wages after he communicated his intent to resign membership and to revoke his authorization, the Respondent is treating him as if he is still a member of the Respondent Union or has agreed to pay dues even when not a member. We find that this constitutes an unlawful restraint on the Section 7 right to refrain from engaging in concerted activity except for union support obligations imposed by a lawful

union-security clause. The Respondent thereby violated Section 8(b)(1)(A) of the Act.

There is insufficient evidence, however, on which to base a finding of violation of Section 8(b)(2). Because this case is before us on a Motion for Summary Judgment, the complaint allegations and the Respondent's answer provide the entire factual basis for our analysis. The complaint alleges that the Respondent "received, accepted, and retained" May's postresignation membership dues and the Respondent admits these actions. The complaint does not further allege that the Respondent took any affirmative steps to cause the Employer to continue to deduct May's dues, postresignation. In the absence of a specific allegation establishing a causal connection between the Employer's continued transmission of dues to the Respondent and some action by the Respondent that prompted this, it is inappropriate to make a finding of violation of Section 8(b)(2). Cf. *Machinists Local 2045 (Eagle Signal)*, 268 NLRB 635, 636 (1984) (union advised employer of opposition to employees' revocations of checkoff).

Accordingly, we grant the General Counsel's Motion for Summary Judgment in part, and deny it in part.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer has an office and place of business located at Titusville, Florida, where it annually purchases and receives goods, products, and materials valued in excess of $50,000 directly from points located outside the State of Florida. We find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On September 30, 1985, the Charging Party employee signed a checkoff authorization providing that his initiation fee in the Respondent as well as his regular monthly membership dues could be deducted from wages owed him by the Employer and paid over to the Respondent. The authorization further provided that the checkoff agreement was irrevocable for 1 year from the date of execution or until the expiration of the parties' collective-bargaining agreement, whichever occurred sooner.

On January 8, 1988, the Charging Party submitted to the Respondent Union a written resignation of membership in the Respondent Union. At this time the Respondent and the Employer were parties to a collective-bargaining agreement that was not due to expire until July 1, 1989. The Charging Party was not subject to any restriction purporting to prohibit him from

resigning. Despite his communication of an intent to resign, the Respondent Union has continued to receive, accept, and retain dues withheld from the Charging Party's pay, in reliance on the checkoff authorization. Based on these findings, and for the reasons discussed in the analysis above, we find that the Respondent has violated Section 8(b)(1)(A) of the Act by restraining or coercing an employee in the exercise of his rights under Section 7 of the Act.

CONCLUSION OF LAW

By receiving, accepting, and retaining membership dues withheld from the pay of David D. May after his resignation from membership in the Respondent and by doing so solely on the authority of a checkoff authorization that did not clearly and explicitly provide for postresignation dues obligations, the Respondent Union has restrained and coerced employees in their exercise of Section 7 rights and violated Section 8(b)(1)(A) of the Act.

REMEDY

Having found that the Respondent has engaged in the unfair labor practices described above, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent must give full force and effect to the Charging Party's resignation and make him whole

for all moneys deducted from his wages following the date of his resignation, January 8, 1988, with interest.

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Electrical Workers, Local No. 2088, AFL–CIO, Cocoa Beach, Florida, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Receiving, accepting, and retaining moneys withheld from wages as membership dues after employees have resigned membership in the Union, where such action is not taken in reliance on a union-security clause in effect in the collective-bargaining agreement governing the employee's terms and conditions of employment, and where the terms of the voluntarily executed checkoff authorization do not clearly and explicitly impose any postresignation dues obligation on the employee.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, with interest, employee David D. May for all moneys deducted from his wages as union dues after the date of his resignation from union membership.

(b) Post at its Cocoa Beach, Florida offices and, with permission, at the Employer's Titusville, Florida facility, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps it has taken to comply.

[Notice Omitted]

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[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

STATE OF CALIFORNIA
DECISION OF THE PUBLIC EMPLOYMENT RELATIONS BOARD [SEAL]

VIC TREVISANUT, et al., Charging Parties, v. CALIFORNIA UNION OF SAFETY EMPLOYEES, Respondent.	Case No. S-CO-132-S PERB Decision No. 1029-S December 13,1993

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Vic Trevisanut, et al.; Sam A. McCall, Jr., Attorney, for California Union of Safety Employees.

Before Blair, Chair; Hesse and Caffrey, Members.

DECISION

BLAIR, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Union of Safety Employees (CAUSE) to a PERB administrative law judge's (ALJ) proposed decision. The ALJ found that CAUSE unlawfully interfered with State Bargaining Unit 7 (Unit 7) employees' rights in violation of sections 3513(i) and 3515 of the Ralph C. Dills Act (Dills Act)[1] by refusing to honor

[1] The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3513(i) states:

signed withdrawal forms and letters that the union admittedly received. The Board has reviewed the entire record in this case and finds that CAUSE violated sections 3531(i) and 3515 of the Dills Act.

"Maintenance of membership" means that all employees who voluntarily are, or who voluntarily become, members of a recognized employee organization shall remain members of such employee organization in good standing for a period as agreed to by the parties pursuant to a memorandum of understanding, commencing with the effective date of the memorandum of understanding. A maintenance of membership provision shall not apply to any employee who within 30 days prior to the expiration of the memorandum of understanding withdraws from the employee organization by sending a signed withdrawal letter to the employee organization and a copy to the State Controller's office.

Section 3515 states:

Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (i) of Section 3513, or a fair share fee provision, as defined in subdivision (k) of Section 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state.

FACTUAL BACKGROUND

In June 1991, Vic Trevisanut (Trevisanut) launched a campaign against CAUSE by soliciting Unit 7 members to withdraw from CAUSE. The parties' agreement permitted employees to withdraw 30 calendar days prior to the expiration of the contract.[2] Additionally, Dills Act section 3513(i) requires the employee to send a signed withdrawal letter to the employee organization and a copy to the State Controller's office. The CAUSE/state contract was to expire on June 30, 1991, which would have made the window period for withdrawals from June 1 to June 30. However, the parties agreed to extend the contract one month to July 30. Thereafter, the contract expired before the parties reached agreement on a successor contract.

Trevisanut solicited members to withdraw their membership by sending them a form entitled "Request to Terminate CAUSE Membership." He then forwarded the withdrawal forms to CAUSE. Other Unit 7 employees mailed their requests directly to CAUSE.

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[2] Article 3.1 of the 1988-91 contract between CAUSE and the state provided:

> A written authorization for CAUSE dues deductions in effect on the effective date of this Contract or thereafter submitted shall continue in full force and effect during the life of this Contract; provided, however, that any employee may withdraw from CAUSE by sending a signed withdrawal letter to CAUSE within thirty (30) calendar days prior to the expiration of this Contract. Employees who withdraw from CAUSE under this provision shall be subject to paying a CAUSE Fair Share fee as provided above.

Some withdrawals were received by CAUSE during the month of June, some were received in July, and some were received in August.

Upon receipt of the withdrawal forms CAUSE sent an acknowledgment form to the members. In addition to this form, CAUSE included a flyer advising that services and benefits available to nonmembers would be reduced effective July 1. Employees who submitted written withdrawals to CAUSE, but did not return the acknowledgment forms to CAUSE were not removed from the membership rolls and dues continued to be deducted from their pay checks.

On August 20, Trevisanut filed a charge with PERB alleging that CAUSE violated the Dills Act by refusing to honor withdrawal letters that it received during the window period. In addition, Trevisanut sent another form to Unit 7 employees who had returned their withdrawals to him. This form asked the members to authorize legal action requiring CAUSE to refund the difference between membership dues and fair share fees. Ninety-seven (97) employees returned the authorization form. Those individuals were named as charging parties in this unfair practice charge.

Position of the Parties

The charging parties contended that employees who submitted withdrawal forms in June had complied with the contract window period and the Dills Act requirements. They further contended that CAUSE improperly added the requirement that employees return

the acknowledgment form to confirm their withdrawal and that the refusal to honor withdrawal requests that did not include the additional form violated the employees' statutory right to refuse to participate in CAUSE activities. They stated that July withdrawals were valid because California State Employees' Association (Fry) (1986) PERB Decision No. 604-S (CSEA (Fry)) prohibits the parties from extending the contract without also extending the window period. They claim that August withdrawals were valid because there is no requirement of maintenance of membership in the absence of a contract. (Ibid.)

At the beginning of the hearing the charging parties moved to amend the complaint and certify it as a class action. The ALJ denied class action status.

CAUSE contended that the requirement that members return the acknowledgment form, which confirmed that they were aware of the impact of withdrawing, was reasonable. CAUSE stated that it reasonably presumed that individuals who did not return the acknowledgment had changed their minds in light of the new information contained in the flyer, and that its intention was to insure that no member was unwittingly harmed by withdrawing.

CAUSE further contended that, although the window period would have been during the month of June, once the parties agreed to extend the contract for another month, the window period shifted forward to the month of July. Thus, withdrawals that were submitted in June were premature and untimely.

ALJ'S DECISION

The ALJ framed the issue as whether CAUSE violated the Dills Act by interfering with charging parties' rights to withdraw from union membership.

She states that an alleged interference with the exercise of protected rights by either an employer or an employee organization is analyzed under Carlsbad Unified School District (1979) PERB Decision No. 89.[3] She notes that Carlsbad does not require that the respondent act with unlawful motive.

As to the window period, the ALJ notes that PERB has held that under CSEA (Fry) an exclusive representative and employer are prohibited from extending the agreement without also extending the time within which a union member could resign. Therefore, any signed withdrawals that were received by CAUSE during both June and July 1991 were timely filed.

The ALJ determined that withdrawal requests received after the expiration of the contract were also valid. She states that maintenance of membership provisions are creatures of contract. Therefore, absent a valid contract, members cannot be forced to maintain their membership. Thus, withdrawal requests received by CAUSE in June, July or August were valid.

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[3] The Board has held that the standard applied to cases involving employer misconduct is appropriate in cases involving employee organization misconduct.(State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S.

As to the acknowledgment form, the ALJ states that although CAUSE was entitled to send out the notices advising members that their services would be cut if they withdrew, CAUSE was not entitled to require employees to submit an additional form in order to make their withdrawals effective.

The ALJ determined that the appropriate remedy was to compensate all employees who made timely withdrawal requests in the amount of the dues wrongly withheld from their paychecks. This remedy was granted to all employees who had properly submitted requests to withdraw, whether or not they had joined as parties in this unfair practice charge. Thus, in addition to the 97 named charging parties, the remedy was granted to an unknown number of other employees.

EXCEPTIONS

In its appeal, CAUSE excepts to the ALJ's finding of a 60-day window period for withdrawal, arguing that once the contract was extended the window period merely shifted forward so that it was still the final 30 days of the contract. CAUSE bases this argument on the contention that the contract does not anticipate or authorize a window period longer than 30 days.

Further, CAUSE contends that employees who subsequently retired or were separated from state employment lack standing to file an unfair practice charge (because they are not employees) and thus are not entitled to a remedy.

CAUSE contends that the class of employees to whom the remedy was granted is too broad. CAUSE states that harm could result if employees who had decided not to withdraw once they learned they would lose benefits – and for that reason chose not to join as charging parties – were involuntarily withdrawn from membership.

The charging parties agree with the ALJ's decision, adding that no harm will result from nonparties being granted the remedy as there is nothing to prevent them from refusing to accept the refunded dues.

DISCUSSION

Validity of Requests to Withdraw

We agree with the ALJ's finding that CAUSE violated the charging parties' right to withdraw from membership.

We disagree with CAUSE'S argument that withdrawals submitted in June were premature. When the contract (including section 3.1) was written, there was a date certain upon which the contract would expire. That date established the last day of the window period. Based on the circumstances of this case, the 30-day window period established by the terms of that contract cannot be changed. When the parties agreed to a contract extension, they created a new contract expiration date which results in a different window period by operation of Dills Act section 3513(i). If the extension is for 30 days or less, the window period is

open during the entire extension. If the extension is longer than 30 days, the window period is open during the final 30 days of the extension. We cannot permit the contracting parties to use contract extensions to deprive members of their right to withdraw from union membership. It is unreasonable to require an employee who withdrew during the original window period to comply with a new window period. In this case, the window period would be akin to a moving target. Contrary to CAUSE'S assertion, there is nothing in the contract which suggests that the window period is strictly limited to 30 days if the parties agree to extend the contract. Therefore, withdrawals received in Juneare valid as they complied with the original contract window period. Withdrawals received in July are valid because they complied with the additional window period required when the contract was extended. Withdrawals filed in August were valid because, as the ALJ explained, no contract was in force and thus no maintenance of membership agreement was in force.

Standing of Retired and Separated Employees

In regard to employees who retired or were separated from state service after the unlawful denial of their withdrawal requests, we believe that they have standing. CAUSE contends that former employees have no standing to bring a charge because they were not employees at the time of filing. Dills Act section 3514.5(a) states, in pertinent part:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge. . . .

We interpret this section to mean that, in order for a person to have standing to file an unfair practice charge, that person must have been an employee at the time the unfair practice occurred. To require a charging party to have the status of an employee at any time after that could have undesirable results. For example, such a rule would prevent an unlawfully terminated employee from filing a charge because that person would not be an employee at the time he/she came to PERB to file. Thus, there is only one reasonable interpretation of when a person's status as an employee is to be examined – at the time that the alleged unlawful conduct occurred.

Finding that a violation has occurred, we must now determine who is entitled to a remedy.

Remedy

We believe that only named parties should be granted a remedy. To grant a remedy to employees not named as parties amounts to amending the complaint.

Here, the complaint lists the names of 97 charging parties. At the beginning of the hearing the charging parties made a request that the case be certified as a class action and the ALJ denied the request. The case was litigated with all parties understanding that the case involved only the 97 named charging parties. No subsequent determination was made as to whether

this case met the requirements of a class action. However, in her proposed decision the ALJ essentially treated the case as. a class action by granting the remedy not only to the 97 named charging parties, but also to nonparties who made timely requests to withdraw which were not honored. After denial of the motion for a class action the parties proceeded on the basis that the case was limited to the 97 named charging parties. It would be inappropriate to change this fact at this stage of the proceedings.

For the foregoing reasons, we grant the remedy only to the named charging parties.

CONCLUSION

We affirm the ALJ's findings that withdrawals submitted in June, July or August were valid and that CAUSE'S additional requirement that employees return the acknowledgment form was unlawful. We grant the remedy only to the named charging parties.

REMEDY

We find that the charging parties who submitted valid withdrawal requests are entitled to be reimbursed in the amount of the money wrongfully withdrawn from their paychecks, with interest.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the

Board finds that the California Union of Safety Employees (CAUSE) violated the Ralph C. Dills Act (Dills Act), Government Code section 3513(i) and 3514.5(c) by unlawfully interfering with State Bargaining Unit 7 employees' rights.

Pursuant to section 3514.5(c) of the Dills Act, it is hereby ORDERED that CAUSE and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unlawfully interfering with State Bargaining Unit 7 employees' rights to withdraw from union membership.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Make whole all charging parties who filed timely written withdrawals from membership in CAUSE. CAUSE will refund to each qualifying charging party the amount of dues unlawfully deducted from his/her paychecks beginning with the date on which the withdrawal request should have been given effect. The amount due each charging party shall include interest at the rate of ten (10) percent per annum pursuant to Code of Civil Procedure section 685.010.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached

as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with his instructions.

Member Caffrey joined in this Decision.

Member Hesse's concurrence begins on page 13.

Hesse, Member, concurring: I concur only in the result of the majority decision. I write separately because I wish to affirmatively distance myself from the majority discussion of "Standing of Retired and Separated Employees," particularly the reference to undesirable results.

Relying upon San Leandro Unified School District (1984) PERB Decision No. 450 (San Leandro); Hacienda La Puente Unified School District (1988) PERB Decision No. 685 (Hacienda LaPuente) and its progeny, Los Angeles Unified School District (1988) PERB Decision No. 686, the California Union of Safety Employees argues that since some of the charging parties separated or retired from state service prior to the Public Employment Relations Board (Board) complaint being

issued and some parties departed after the complaint was issued, those individuals who are no longer actively employed with the state have no standing to bring an unfair practice charge and consequently, have no standing to obtain relief.

In San Leandro, the Board held that the charging party, the retired employees association was not an employee association within the meaning of the Educational Employment Relations Act (EERA or Act) and none of the retired employees association members were employees within the meaning of the Act. Furthermore, the charging party lacked standing to challenge the collective bargaining agreement as the association did not represent any employees who had retired or would retire under the new collective bargaining agreement which was the issue in the unfair practice charge before the Board.

In Hacienda La Puente,[1] the Board held first that a former employee's denial of a leave of absence and resignation occurred outside the Board's jurisdictional six-month statute of limitations and secondly, that the charging party now an applicant lacked standing to file a charge to subsequent alleged discriminatory conduct

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[1] **EERA** is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code. A 1989 amendment to EERA section 3543.5 extends EERA protection to applicants against the actions of an employer. No parallel protection exists for applicants against the actions of an employee organization.

because he was not an employee within the meaning of the Act at the time the alleged misconduct took place.

In both San Leandro and Hacienda La Puente, the charging parties were not an employee organization or employees at the time the alleged unlawful conduct occurred. Under California civil procedure, the cause of action accrues when the wrongful act is done. (See 3 Witkin, Cal. Procedure (3d ed. 1985) Actions, sec. 351, p. 380.) Regardless of the employment status of the charging parties subsequent to the filing of the charges, the charging parties in this case were employees at the time the unlawful conduct occurred. Therefore, I conclude that the charging parties had standing to file charges and were entitled to relief.

[Notice Omitted]