AT&T Services, Inc. *and* Veronica Rolader. Case 07–CA–228413

March 18, 2022

ORDER[1]

BY MEMBERS KAPLAN, WILCOX, AND PROUTY

The Charging Party's Motion to Voluntarily Dismiss Her ULP Charge and Withdraw Her Briefs is granted. Accordingly, the charge is withdrawn and the complaint is dismissed.[2]

Dated, Washington, D.C. March 18, 2022

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

Contrary to my colleagues, I would deny the Charging Party's Motion to Voluntarily Dismiss Her ULP Charge and Withdraw Her Briefs. Section 102.9 of the Board's Rules and Regulations provides that after a case has been transferred to the Board, a charging party may withdraw an unfair labor practice charge only with the Board's consent. See, e.g., *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957), enfd. 251 F.2d 639 (6th Cir. 1958). As the Board has recognized:

> It is well established that the Board's power to prevent unfair labor practices is exclusive, and that its function is to be performed in the public interest and not in vindication of private rights. Thus, the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned." *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957) (footnote omitted), enfd. 251 F.2d 639 (6th Cir. 1958); see also *Flyte Tyme Worldwide*, 362 NLRB 393, 393 (2015) (citing *Robinson Freight Lines*, supra); *Retail Clerks, Local 1288 (Nickel's Pay-Less Stores)*, 163 NLRB 817, 817 fn. 1 (1967) ("When a matter has ripened to the point of being before the . . . Board for decision, we must of course give paramount weight to the public interest affected by withdrawal of the underlying charge."), enfd. 390 F.2d 858 (D.C. Cir. 1968).

800 River Road Operating Co., LLC d/b/a Care One at New Milford, 368 NLRB No. 60, slip op. at 1 (2019).

Here, the Board and the parties have expended considerable resources in the litigation of this case, and the parties have fully briefed the issues. More significantly, the case presents an important legal question as to whether the Respondent unlawfully denied the Charging Party's requests to revoke her dues-checkoff authorization after the expiration of the Respondent's collective-bargaining agreement with the Union. In this respect, former General Counsel Peter Robb, the Respondent, and the Charging Party have urged us to overturn the Board's decision in *Frito-Lay*, 243 NLRB 137 (1979), and its progeny, and to adopt a new standard to permit an employee to revoke a dues-checkoff authorization agreement during contractual hiatus periods consistent with Section 302(c)(4) of the Labor Management Relations Act (LMRA).

Section 302(c)(4) of the LMRA allows employers to deduct union dues from an employee's pay and remit them to the union if the employee has executed 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 [bargaining] agreement*, whichever occurs sooner." (Emphasis added). However, despite the clear statutory language to the contrary, the Board in *Frito*-Lay found that, under Section 302(c)(4), an employer and union may lawfully continue to implement the terms of a dues-checkoff authorization agreement, including the limits on revocation, when no collective-bargaining agreement is in effect. 243 NLRB at 137–138. In dissent, former Member Murphy would have found that, "as a matter of law, under the clear mandate of the proviso to Section 302(c)(4) of the Act, a dues-checkoff authorization is revocable" at will when a collective-bargaining agreement is not in effect. Id. at 139.

Member Murphy's position was consistent with the holding of several courts that had found that Section 302(c)(4) unambiguously created an unconditional statutory right for employees to revoke their dues-checkoff authorizations upon cessation of a collective-bargaining agreement**.** See *Anheuser-Busch, Inc. v. Int'l Broth. of*

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] In light of the Charging Party's unopposed motion to dismiss her charge, which reflects the absence of any continuing controversy in this matter, we disagree with our dissenting colleague's opinion that it would effectuate the purposes of the Act to expend further administrative resources on this matter.

Teamsters, Local 822, 584 F.2d 41, 43–44 (4th Cir. 1978) (holding that Section 302(c)(4) "guaranteed the employees the right to revoke their checkoff authorizations at will during the hiatus between collective bargaining agreements," and that "revocations tendered during the period between the expiration of one bargaining contract and the execution of the next one were effective."); *NLRB v. Atlanta Printing Specialties*, 523 F. 2d 783, 788 (5th Cir. 1975) ("[W]hen there is no collective bargaining agreement in effect, dues checkoff authorizations are revocable at will."); *Murtha v. Pet Dairy Products Co*., 44 Tenn.App. 460, 314 S.W.2d 185, 190 (1957) (cited with approval at 584 F.2d at 44; 523 F.2d at 588). And recently, in *Stewart v. NLRB*, 851 F. 3d 21 (D.C. Cir. 2017), Judge Silberman, in dissent, criticized the Board's interpretation of Section 302(c)(4) in *Frito-Lay*, observing that:

> [t]he difference between a right to revoke during a limited pre-termination window and a right to revoke at will upon termination of an agreement is not an insignificant difference. Employees might well decide to revoke their authorizations . . . only after termination of an applicable agreement, because of the then-existing unsatisfactory status of relations between the union and employer.

Id. at 34. He concluded that "the Board's interpretation of section 302 is flatly wrong . . . The Board has engaged in a blatant attempt to rewrite a statute in which Congress spoke plainly—at least on the crucial issue." Id. at 35.

I agree that Section 302(c)(4) of the LMRA, on its face, establishes that dues checkoff authorizations are revocable at will, and that, therefore, the Board's holding in *Frito-Lay* and its progeny cannot be reconciled with the express language of that statute. Because this case provides the Board with the opportunity to reconsider *Frito-Lay*, I do not believe that it would effectuate the policies of the Act to dismiss the complaint. Accordingly, I would deny the Charging Party's Motion.

Dated, Washington, D.C. March 18, 2022

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD