

Gerland's Food Fair, Inc.; Gerland's Food Fair, Inc. d/b/a Gerland's Realty, Inc.; Gerland's Food Pantry, Inc. and James Alexander Vargas and Dennis Michael Moore

United Food and Commercial Workers Local Union No. 455, AFL-CIO and James Alexander Vargas and Dennis Michael Moore. Cases 16-CA-14508, 16-CA-14529, 16-CB-3569, and 16-CB-3574

March 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

Upon separate charges filed by James Alexander Vargas and Dennis Michael Moore on March 30 and April 12, 1990,¹ respectively, and later amended on April 23 and 30, respectively, the General Counsel of the National Labor Relations Board issued a consolidated complaint on May 3, against Gerland's Food Fair, Inc., Gerland's Food Fair, Inc. d/b/a Gerland's Realty, Inc., Gerland's Food Pantry, Inc., Respondent Employer, and United Food and Commercial Workers Local Union No. 455, AFL-CIO, Respondent Union, alleging that Respondent Employer violated Section 8(a)(1), (2), and (3) and that Respondent Union violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act. Thereafter, the Respondents filed answers denying the commission of any unfair labor practice.

On June 23, the parties filed a stipulation of facts and a motion to transfer the case to the Board. The parties agreed that the stipulation of facts and attached exhibits shall constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties further waived a hearing before an administrative law judge, the issuance of an administrative law judge's decision, and indicated their desire to submit the case directly to the Board for findings of fact, conclusions of law, and an order.

On August 10, the Board issued its order approving the stipulation and transferring the proceeding to the Board. Thereafter, the General Counsel, Respondent Employer, and Respondent Union filed briefs.

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

On the entire record in the case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Employer, a Texas corporation, with an office and place of business in Houston, Texas, is engaged in the retail sale of groceries and related items. During the 12 months preceding the execution of the stipulation of facts, a representative period, Respondent Employer, in the course and conduct of its business operations, purchased and received goods, materials, products, and supplies valued in excess of \$50,000 directly from points outside the State of Texas. We find that Respondent Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issues presented are whether Respondent Employer violated Section 8(a)(1), (2), and (3) and Respondent Union violated Section 8(b)(1)(A) and (2) by refusing to honor the requests of two employees to revoke their previously executed dues-checkoff authorizations after they had resigned union membership.

A. *Facts*

Respondent Union, by virtue of Section 9(a) of the Act, is the exclusive representative of certain employees of Respondent Employer, including Vargas and Moore. The Respondents were parties to a collective-bargaining agreement, effective by its terms for the period February 2, 1987, through June 24, 1990. The contract does not contain any provision requiring union membership, but provides that the employees could authorize Respondent Employer to deduct initiation fees and regular monthly dues² from their wages and remit them to Respondent Union.³ Dues-checkoff authorizations, which may be revoked, are used by Respondent Union to collect monthly deductions from the employ-

² Union membership requires persons to pay union dues. Additionally, if a member ceases the payment of dues for the requisite period of time that person will lose his union membership in accordance with the procedures established in the Union's constitution and bylaws.

³ Art. 3, sec. 3.01 of the parties' agreement provides:

During the life of this Agreement, the Employer shall deduct initiation fees and regular dues weekly from employees who individually and voluntarily certify in writing on the check-off authorization form for such deductions. Such authorizations shall be binding on the employees for the duration of this Agreement unless the authorization is revoked in accordance with the provisions of the Taft-Hartley Act of 1947, as amended. No deductions shall be discontinued until the Employer has verified through the Union that the employee's request for revocation is timely and proper. The Union shall certify in writing a list of its new members, together with signed authorization cards with an itemized list of such initiation fees and dues to be deducted from such members. The Employer shall promptly remit all sums deducted in this manner to the Union monthly. Timing for such deductions may be worked out locally between the Employer and the Union.

¹ All dates are for the period September 28, 1989, through August 10, 1990, unless otherwise indicated.

ees of Respondent Employer. However, expectancy of compliance with the revocation provisions contained in the authorization agreements themselves permits Respondent Union to project income and budget expenses.

On September 28, Vargas and Moore executed a checkoff authorization form⁴ authorizing Respondent Employer to deduct "Union dues and initiation fees" from their wages and remit them to Respondent Union. About October 15, these authorizations were delivered to Respondent Employer. On December 8, Vargas notified the Respondents that he was resigning his membership in the Respondent Union and that he desired to revoke his checkoff authorization. On March 5, Moore notified the Respondents that he was resigning his membership in the Respondent Union and that he desired to revoke his checkoff authorization.

By letters dated March 14 and April 12, Respondent Union refused and declined to process Vargas' and Moore's revocation requests, although it apparently accepted their requests to withdraw from membership. Respondent Union also notified Respondent Employer that it must continue to deduct union dues from these employees' wages because their revocation requests were untimely under the terms of the checkoff authorization agreements previously executed by them discussed above.

On March 5 and 9, respectively, Respondent Employer notified Vargas and Moore that it was refusing to honor their requests to revoke their checkoff authorizations. Sometime thereafter, Respondent Employer ceased forwarding dues to Respondent Union on behalf of Vargas and Moore.⁵ Respondent Union has not re-

quested that the employment status of any of these employees be affected.⁶

B. *Contentions of the Parties*

The General Counsel offers three alternative theories on which to base violations of Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2). First, by applying the principles of *Pattern Makers v. NLRB*, 473 U.S. 98 (1985), the General Counsel contends that the Respondents' refusal to honor Vargas' and Moore's revocations of their dues-checkoff authorizations was an unlawful restriction on their Section 7 right to resign union membership. Second, the General Counsel urges the adoption of the view taken by former Member Johansen in *Postal Service*, 279 NLRB 40, 42 (1986), enf. denied 827 F.2d 548 (9th Cir. 1987). Under that view, the General Counsel submits that even if these employees' requests to revoke their dues-checkoff authorizations were untimely, as claimed by Respondent Union, their resignations from membership, which the Respondent Union accepted, reduced their dues obligations to zero. Thus, according to this theory, Respondent Union violated the Act by causing Respondent Employer to deduct from these employees' paychecks amounts greater than zero. Finally, the General Counsel contends that the Respondents' conduct was unlawful under the "quid pro quo" analysis of *Machinists Local 2045 (Eagle Signal)*, 268 NLRB 635, 637 (1984), discussed below.

Respondent Employer contends that the checkoff authorization forms executed by Vargas and Moore were revoked, by operation of law, upon their resignations from the Union. Consistent with the General Counsel's third alternative theory, Respondent Employer's argument relies primarily on the "quid pro quo" analysis of *Eagle Signal*. Respondent Employer takes the position that but for the unlawful conduct of Respondent Union it would have ceased making dues deductions from the paychecks of Vargas and Moore.

Respondent Union defends its action on the basis that it could lawfully insist on the continued collection of dues from untimely requested that their checkoff au-

⁴The checkoff authorization form executed reads, in relevant part, as follows:

To: Any Employer Under Contract with United Food & Commercial Workers Union, Local 455, AFL-CIO

You are hereby authorized and directed to deduct from my wages, commencing with the next payroll period, all Union dues and initiation fees as shall be certified by the Secretary-Treasurer of Local 455 of the United Food & Commercial Workers International Union, AFL-CIO, and to remit same to said Secretary-Treasurer.

This authorization and assignment shall be irrevocable for a period of one year from the date of execution or until the termination date of the agreement between the Employer and Local 455, whichever occurs sooner, and from year to year thereafter unless not less than thirty (30) days and not more than forty five (45) days prior to the end of any subsequent yearly period I give the Employer and the Union written notice of revocation bearing my signature thereto.

The Secretary-Treasurer of Local 455 is authorized to deposit this authorization with any Employer under contract with Local 455, and is further authorized to transfer this authorization to any other Employer under contract with Local 455 in the event I should change employment.

Dues	Date Signed	Member's Signature
Init./Reinst	Social Security No.	Please Print Name

⁵On March 21, 1989, Respondent Union filed a grievance concerning the identical issue and alleging that Respondent Employer had violated the parties' collective-bargaining agreement by ceasing dues checkoff for seven other employees: Mario Chavarria, Irene Garcia, Rebecca Miley, Patricia Musgrove, Johnnie Norman, Novita Reimers, and Betty J. Wolf. The grievance was arbitrated on December 7. The arbitrator issued his award on December 8 and

found that Respondent Employer had violated sec. 3.01 of the parties' agreement when it discontinued checkoff for employees Chavarria, Garcia, Miley, Musgrove, Norman, Reimers, and Wolf. The arbitrator ordered a make-whole remedy plus interest. Thereafter, on December 28, Respondent Employer filed a complaint for interpleader and declaratory relief in the United States District Court, Southern District of Texas. On January 24, Respondent Union filed its answer and a counterclaim in this matter. On February 15, Respondent Employer filed its answer to the Respondent Union's counterclaim. The record does not indicate that any further court action has occurred. We note that none of the parties seeks Board deferral of the instant unfair labor practice case to the arbitrator's award.

In addition to this grievance, Respondent Union also filed, on April 19, an unfair labor practice charge in connection with Respondent Employer's refusal to deduct union dues and remit them to the Respondent Union. The charge was dismissed by the Regional Director, and this dismissal was subsequently upheld on appeal to the General Counsel.

⁶The parties stipulated that such action would not be required because the parties' collective-bargaining agreement does not contain any provision mandating that employees be union members and pay union dues.

thorizations be revoked. In this regard, Respondent Union urges that the Board reject *Eagle Signal* and instead adopt the principle that, in the absence of a union-security clause, a checkoff authorization voluntarily signed by an employee is irrevocable except according to the terms of, and at the intervals stated by, the authorization agreement itself. In the alternative, if the Board continues to apply the analysis of *Eagle Signal*, Respondent Union urges the Board to find that the language of the checkoff authorizations at issue does not show that the authorizations themselves made payment of dues a quid pro quo for union membership. Thus, Respondent Union takes the position that, even applying *Eagle Signal*, it acted lawfully in rejecting the revocation requests submitted by Vargas and Moore.

C. Discussion

In *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*,⁷ the Board acknowledged judicial criticism of the *Eagle Signal* analysis⁸ and set forth a new test for determining the effect of an employee's resignation from union membership on that employee's dues-checkoff authorization. The Board in *Lockheed* found that an employee may voluntarily agree to continue paying dues pursuant to a checkoff authorization even after resignation of union membership. In fashioning a test to determine whether an employee has in fact agreed to do so, the Board recognized the fundamental policies under the Act guaranteeing employees the right to refrain from belonging to and assisting a union, as well as the principle set forth by the Supreme Court that waiver of such statutory rights must be clear and unmistakable.⁹ In order to give full effect to these fundamental labor policies, the Board stated that it would:

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. Explicit 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 had bound himself or herself to pay the

dues even after resignation of membership. [Id. at 328–329.]¹⁰

Applying the analysis of *Lockheed* to the stipulated facts in this case, we find the Respondents have failed to show that the dues-checkoff authorizations the two employees signed obligated them to pay dues after they effectively resigned union membership. As in *Lockheed*, all that Vargas and Moore clearly agreed to do was allow certain sums to be deducted from their wages and remitted to Respondent Union for payment of their “union dues and initiation fees.” They did not clearly agree to have deductions made even after they had submitted their resignation from union membership. We thus find that these partial wage assignments made by Vargas and Moore were conditioned on their union membership and were revoked when they ceased being union members. We therefore find that the Respondent Employer's refusal to discontinue payroll deductions of union dues for Vargas and Moore was unlawful assistance to a labor organization and restrained and coerced these employees in the exercise of their Section 7 rights. Accordingly, we find that Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act. We further conclude that Respondent Union's refusal to accept these employees' revocation requests and its demand that Respondent Employer continue to check off their membership dues restrained and coerced these employees in the exercise of their Section 7 rights. Accordingly, we find that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act.

CONCLUSIONS OF LAW

1. By refusing to honor the revocation of dues-checkoff authorizations previously executed by James Alexander Vargas and Dennis Michael Moore, after these employees resigned membership in the Union, where the terms of the voluntarily executed checkoff authorizations did not clearly and explicitly impose any postresignation dues obligation on the employees, Respondent Union has restrained and coerced employees in the exercise of their Section 7 rights and has violated Section 8(b)(1)(A) of the Act.

2. By causing and/or attempting to cause the Employer, by virtue of dues-checkoff authorizations that do not clearly and explicitly impose any postresignation dues obligations on the employees, to continue to honor dues-checkoff authorizations from employees who have resigned union membership, Respondent Union has violated Section 8(b)(2) of the Act.

3. By refusing to discontinue dues deductions from the wages of James Alexander Vargas and Dennis Mi-

⁷ 302 NLRB 322 (1991).

⁸ See *NLRB v. Postal Service*, 833 F.2d 1195 (6th Cir. 1987); *NLRB v. Postal Service*, 827 F.2d 548 (9th Cir. 1987).

⁹ *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

¹⁰ In *Lockheed*, the Board left open the question of how its waiver rule would apply in the context of a lawful union-security provision. In the absence of a union-security clause requiring union membership here, the *Lockheed* test is applicable to this case.

chael Moore after they ceased being union members and had requested that the Respondents cancel their checkoff authorizations, Respondent Employer has unlawfully assisted Respondent Union and has restrained and coerced employees in the exercise of their Section 7 rights, thereby violating Section 8(a)(1), (2), and (3) of the Act.

REMEDY

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

The Respondents must give full force and effect to the employees' revocation of their checkoff authorizations. In addition, the Respondents jointly and severally shall make employees Vargas and Moore whole for any moneys deducted from their wages for the period following their union membership resignations, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that

A. Respondent Employer, Gerland's Food Fair, Inc., Gerland's Food Fair, Inc. d/b/a Gerland's Realty, Inc., and Gerland's Food Pantry, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to honor revocation of dues-checkoff authorizations after employees have resigned membership in the Union, where the terms of the executed checkoff authorizations do not clearly and explicitly impose any postresignation dues obligation on the employees and where there is no valid union-security clause in effect.

(b) Deducting, by virtue of dues-checkoff authorizations that do not clearly and explicitly impose any postresignation dues obligation on the employees, union membership dues from the wages of employees who have resigned their union membership.

(c) In any like or related manner interfering with, 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 jointly and severally with United Food and Commercial Workers Local Union No. 455, AFL-CIO, employees James Alexander Vargas and Dennis Michael Moore for any dues deductions from their wages for the period following their resignations from union membership, with interest as set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facilities in Houston, Texas, copies of the attached notice marked "Appendix A."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent Employer's authorized representative, shall be posted by Respondent Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Post at the same places and under the same conditions as set forth in paragraph A.2.(c), above, as soon as forwarded by the Regional Director, copies of the attached notice marked "Appendix B."

(e) Mail signed copies of the attached notice marked "Appendix A" to the Regional Director for posting by Respondent Union.

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

B. Respondent Union, United Food and Commercial Workers Local Union No. 455, AFL-CIO, Houston, Texas, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to honor any employee's revocation of dues-checkoff authorization after the employee has resigned membership in the Union, where the terms of the voluntarily executed checkoff authorization do not clearly and explicitly impose any postresignation dues obligation on the employee and where there is no valid union-security clause in effect.

(b) Causing and/or attempting to cause Respondent Employer, by virtue of a dues-checkoff authorization that does not clearly and explicitly impose any postresignation dues obligation on the employee after resignation of union membership, to deduct union membership dues from the wages of any employee who has resigned union membership.

(c) 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.

¹¹ 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."

(a) Make whole, jointly and severally with Respondent Employer, employees James Alexander Vargas and Dennis Michael Moore for any dues deductions from their wages for the period following their resignations from union membership, with interest as set forth in the remedy section of this decision.

(b) Post at its offices and meeting halls in Houston, Texas, copies of the attached notices marked "Appendix B."¹² Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent Union's authorized representative, shall be posted by Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to ensure that the notices are not altered, defaced, or covered, by any other material.

(c) Post at the same places and under the same conditions as set forth in paragraph B,2,(b), above, as soon as forwarded by the Regional Director, copies of the attached notice marked "Appendix A."

(d) Sign and return to the Regional Director sufficient copies of the notice marked "Appendix B" for posting by Respondent Employer at all places where notices to employees are customarily posted.

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

¹²See fn. 11 above.

APPENDIX A

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to honor revocations of dues-checkoff authorizations after the employees have resigned membership in the Union, where the terms of the executed checkoff authorizations do not clearly and explicitly impose any postresignation dues obligation on the employees and where there is no valid union-security clause in effect.

WE WILL NOT deduct, by virtue of dues-checkoff authorizations that do not clearly and explicitly impose any postresignation dues obligation on the employees, union membership dues from the wages of employees who have resigned their union membership.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, jointly and severally with United Food and Commercial Workers Local Union No. 455, AFL-CIO, employees James Alexander Vargas and Dennis Michael Moore for any dues deductions from their wages for the period following their resignations from union membership, with interest.

GERLAND'S FOOD FAIR, INC.;
GERLAND'S FOOD FAIR, INC. D/B/A
GERLAND'S REALTY, INC.; GERLAND'S
FOOD PANTRY, INC.