

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.

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CONTINENTAL LINEN SERVICES, INC.,

Respondent,

and

Case Nos. 7-CA-52296  
7-CA-52715  
7-CA-52798

CHICAGO AND MIDWEST REGIONAL  
JOINT BOARD, WORKERS UNITED/SEIU,

Charging Union.

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**RESPONDENT CONTINENTAL LINEN SERVICES, INC.'S**  
**RESPONSE TO GENERAL COUNSEL'S OPPOSITION**  
**TO CHARGING UNION'S**  
**MOTION TO WITHDRAW CHARGES**

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## INTRODUCTION

The Joint Board's Motion to Withdraw Charges, when analyzed under the well-established principles announced in *Independent Stave Co.*, 287 NLRB 740 (1987), must be granted. In his Opposition to the Charging Union's Motion to Withdraw Charges, the General Counsel fails to analyze any of the *Independent Stave* factors. General Counsel does not even argue that the unfair labor practice charges alleged in his Complaint, which purportedly form the basis for his Exceptions to the ALJ's Decision, provide a basis for his Opposition. Rather, the General Counsel's opposition is amazingly based on a position that is entirely inconsistent with his position in the underlying action.

In his Exceptions, the General Counsel maintains that the evidence he submitted to the ALJ establishes – contrary to the ALJ's findings – that the Collective Bargaining Agreement required CLS to remit Union dues to the Joint Board and that by its failure to do so, CLS violated the National Labor Relations Act (“the Act” or “the NLRA”). If that is what the General Counsel's position is, there is no basis for his Opposition to the Joint Board's Motion to Withdraw Charges. On the other hand, in his Opposition to the Union's Motion to Withdraw Charges, the General Counsel asserts that the case must continue because CLS's payment of dues to the Charging Union could be unlawful under Section 8(a)(3). If that is what he believes the evidence will show, then there is no basis to maintain the Exceptions he has filed, and they should be withdrawn. Either way – that is, whether the General Counsel in his Exceptions is genuine or his position in his Opposition to the Motion to Withdraw is genuine – the General Counsel has conceded that there is no legitimate basis to continue this matter.

## ANALYSIS

### I. THE BOARD SHOULD APPROVE THE JOINT BOARD'S MOTION TO WITHDRAW CHARGES BECAUSE THE GENERAL COUNSEL'S POSITION IN HIS OPPOSITION IS INHERENTLY INCONSISTENT WITH THE LEGAL THEORY THAT SUPPORTS THE COMPLAINT AND CONSTITUTES AN ATTEMPT TO MANIPULATE THE JUDICIAL PROCESS.

General Counsel's Opposition to the Joint Board's Motion to Withdraw constitutes the only barrier to the end of this litigation that all non-Board parties seek. The Opposition asks the National Labor Relations Board ("the Board" or "the NLRB") to continue this litigation solely to determine whether conduct that General Counsel sought CLS to take in the Second Amended Complaint violated Section 8(a)(3) of the Act. This incredible request – an inherently inconsistent position to that which formed the basis of the Second Amended Complaint – denigrates the underpinnings of American jurisprudence, including the principles that underlie judicial estoppel. As such, the Board should reject the Opposition, and grant the Joint Board's Motion to Withdraw.

"The gist of the doctrine of judicial estoppel is that a party who has successfully asserted one position in a legal proceeding should not be permitted thereafter to assert a clearly inconsistent position in the same or related proceedings." *Pace Industries*, 320 NLRB 661, 663 (1996). A critical piece of the analysis is whether the party asserting the inconsistent positions has "unfairly manipulated the judicial process" such that accepting the inconsistent position would result in the imposition of an "unfair detriment[] on the opposing party if not estopped." *Lincoln Center for the Performing Arts, Inc.*, 340 NLRB 1100, 1127 (2003) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)).<sup>1</sup>

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<sup>1</sup> Admittedly, General Counsel has yet to successfully argue its original position – i.e., the Joint Board is the 9(a) representative of CLS's laundry unit and is entitled to the escrowed dues. Nonetheless, General Counsel continues to assert that position in its Exceptions, as well as the inherently inconsistent position taken in its Opposition – i.e., paying the Joint Board the escrowed dues violates the Act. Therefore, the lack of success to date should not prevent

Prior to his Opposition, the General Counsel's legal position was that the properly collected dues belong to the Joint Board:

- “Since about April 20, 2009, and by at least July 1, 2009, Respondent has failed and refused to remit checked-off union dues to the Charging Union” (Complaint, GC Ex. 1(n), ¶ 10);
- CLS must “[t]ake the following affirmative action: . . . (c). Remit all checked-off dues collected from the Unit since April 2009 to the Charging Union, including all escrowed dues, with interest thereon computed on a quarterly compound basis.” (GC Ex. 1(r), p. 4)<sup>2</sup>;
- “By Refusing to Remit the Union Dues to the Joint Board as Required by the Collective Bargaining Agreement CLS violated Section 8(a)(1) and (5) and 8(d) of the Act.” (GC’s post-hearing brief, pgs. 24-32<sup>3</sup>, argument under quoted title) (emphasis added);
- “THE ALJ ERRED BY FINDING THAT RESPONDENT DID NOT VIOLATE SECTION 8(a)(1) and 8(a)(5) BY REFUSING TO REMIT THE UNION DUES TO THE CHARGING UNION AS REQUIRED BY THE COLLECTIVE BARGAINING AGREEMENT” (GC’s brief in support of exceptions, pgs. 36-43 (argument under the quoted heading (emphasis added)).
- In both briefs, the General Counsel attested to the continuing validity of the dues checkoff cards, noting that “[t]here is no evidence that any employees revoked these authorizations” and that “Respondent has not claimed that any of the employees have revoked these older authorization cards.” (GC post-hearing brief, p. 29; GC’s brief in support of exceptions, p. 42).

Inconsistently, the General Counsel’s Opposition alleges the case should move forward because it is necessary “to determine whether the Respondent’s payment to the Charging Union pursuant to the settlement is lawful.” (GC’s Opposition to Motion to Withdraw, p. 3, ¶ 5).

By this statement, General Counsel has now argued that he has a good faith basis to believe that CLS may have violated the Act when it did not pay the dues to the Joint Board (which he

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the Board from recognizing that General Counsel is “unfairly manipul[ing] the judicial process” or that the General Counsel is estopped from asserting the position he is now asserting in his Opposition.

<sup>2</sup> Recently, CLS did exactly what the General Counsel asked by providing the escrowed dues to the Joint Board (through a non-Board settlement of the dispute). That payment, and the Joint Board’s prior, separate and unconditional disclaimer of interest, resolved all the issues in the Second Amended Complaint that remain relevant today.

<sup>3</sup> Copies of cited pages of General Counsel’s Post-Hearing Brief are attached as Attachment 1.

continues to assert in maintaining his Exceptions) and when it did pay the dues to the Joint Board (which he is now asserting in his Opposition).

The manipulative quality of the General Counsel's inconsistent actions is even more problematic when one considers the General Counsel's role in federal labor law. "[T]he Act gives the General Counsel the sole and independent responsibility for investigating charges of unfair labor practices, issuing complaints in cases where his investigators find evidence of violations of the Act, and prosecuting such cases before the Board." *General Motors Corp.*, 109 NLRB 1429, 1438 (1954). And as former Board member Schaumber aptly stated: "the General Counsel's prosecutorial role carries a heightened responsibility to ensure the accuracy of representations in pleadings and briefs filed with the Board." *Field Hotel Associates*, 348 NLRB 1, 2 fn. 7 (2006). That "heightened responsibility" includes the requirement that "[a] complaint must be well founded in all respects since it constitutes the exercise of the General Counsel's final authority." NLRB CASE HANDLING MANUAL, PART I, § 10260 (2011). Moreover, "upon discovering lack of merit once evidence has been introduced during the hearing," the appropriate course of action is for the General Counsel to file a motion to dismiss or withdraw the Complaint. *Cf.* NLRB CASE HANDLING MANUAL, PART I, § 10275.3 (2011) (procedure before ALJ prior to transfer before the Board). Thus, the positions taken by General Counsel on what constitutes a violation of the Act must not be contradictory. Yet they are.

General Counsel's new position ignores and contradicts the necessary implications of his original position. It also ignores the proper procedure for cases where General Counsel later determines that the Complaint lacks merit (i.e., filing a motion to withdraw or dismiss). And, notably, the Opposition has and will continue to impose an unfair detriment on CLS (and the Charging Party, presumably, since it accepted the dues) by forcing it

to continue to defend itself against allegations in a Complaint that have been comprehensively resolved.

Ultimately, if the General Counsel no longer believes his Complaint has merit, as indicated in the Opposition, he should withdraw his Exceptions and the Complaint should be dismissed, consistent with the ALJ's Decision. And if General Counsel believes his Complaint still has merit, which would mean that the Joint Board was owed the dues that CLS paid it, the Opposition does not provide a reason to proceed with this litigation. Either way, the only conclusion is that this action against CLS should be dismissed. The General Counsel therefore should be estopped from opposing the Joint Board's Motion to Withdraw and the Motion should be granted.

**II. THE BOARD SHOULD APPROVE THE JOINT BOARD'S MOTION TO WITHDRAW CHARGES, WHICH IS BASED ON A NON-BOARD SETTLEMENT, BECAUSE THE SETTLEMENT IS NOT REPUGNANT TO THE PURPOSES AND POLICIES OF THE NLRA.**

"The Board's policy favoring the peaceful resolution of disputes without litigation, inter alia, through settlement agreements, is too longstanding and well established to require extensive comment." *Courier-Journal*, 342 NLRB 1148, 1148 (2004). Only settlement agreements that are "repugnant to the Act or Board policy" should be rejected. Memorandum OM 07-27 (citing *Independent Stave*, 287 NLRB 740 (1987)).

The Board analyzes motions to withdraw/dismiss based on non-Board settlements/adjustments according to the principles enunciated in *Independent Stave*. Specifically, "upon a motion of one or both of the parties to defer to a settlement agreement in lieu of further proceedings upon a complaint," the Board "will determine in its own discretion, whether under the circumstances of the case, it will effectuate the purposes and policies of the

Act to give effect to any waiver or settlement of charges of unfair labor practices.”” *Id.* at 741 (citations omitted). This determination is guided by the following factors:

- (1) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement;
- (2) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes;
- (3) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation; and
- (4) whether the charging party, the respondent, and any individual discriminatees have agreed to be bound, and the position taken by the General Counsel regarding the settlement.

*See, e.g., Union Local 1814*, 301 NLRB 764 (1991) (citing *Independent Stave*).

An analysis of these factors establishes that the Joint Board’s Motion to Withdraw Charges based on the non-board settlement should be granted.

**A. There is No Evidence of Fraud, Coercion or Duress by Any of the Parties in Reaching the Settlement.**

The only non-Board parties to this dispute – the Joint Board and CLS – entered into a settlement agreement that the Charging Party (i.e., the Joint Board) solicited and the parties negotiated through their attorneys. Thus, the parties were on equal footing and there is no allegation, let alone any evidence, of fraud, coercion or duress.

**B. CLS Maintains a Nearly Spotless Labor Relations History, Including Vindication by ALJ Bogas in the Present Matter.**

The stipulated facts establish that CLS has positively interacted with the past 9(a) representatives of its laundry employees. (Jt. Ex. 26, ¶ 1). This includes a time where 9(a) representative status was properly adjusted by the successorship doctrine from LDCIU, Local 151 to Local 151 (UNITE). (Jt. Ex. 26, ¶ 3; Jt. Ex. 3).

Moreover, it is clear that CLS dealt constructively with the 9(a) representative's agent – the Joint Board – until the Joint Board attempted to assert 9(a) status. (see, e.g., Tr. at 60-62, testimony of Joint Board witness Richard Monje). ALJ Bogas' Decision, which dismissed the Complaint in its entirety, further establishes that CLS properly approaches labor relations.

In short, there is no evidence of any prior unfair labor practice charges filed against CLS, let alone any evidence of charges that were brought to complaint and established as violations of the NLRA by an ALJ or the Board.

**C. The Settlement is Reasonable Because ALJ Bogas Has Dismissed the Complaint in Its Entirety, and the Joint Board's Disclaimer Makes Further Processing of Its Complaint Meaningless.**

This *Independent Stave* prong seeks to ensure that charging parties do not settle meritorious cases in a manner that fails to address actual unfair labor practices. It is not intended to stand in the way of settlements that end the litigation of legally deficient claims. Indeed, when the charging party's allegations have already been dismissed, the charging party's case has significant defects, or the union has already lost at the ALJ level – all of which are the case here, this factor weighs strongly in favor of enforcing the terms of an agreement that precludes further action before the NLRB. See, e.g., *Hughes Christensen Co.*, 317 NLRB 633 (1995) (enforcing an agreement required dismissal of the unfair labor practice charges where “[a]t the time the agreements were signed, the charges filed on behalf of the alleged discriminatees had been dismissed by the Regional Director . . . .”); *BP Amoco*, 351 NLRB 617 (2007) (finding that this factor weighed in favor of precluding further litigation where “there was significant risk that a charge alleging discriminatory selection would not be meritorious” and where after charges were filed “the General Counsel acknowledged weaknesses in the case, conceding that ‘[w]e do not have a smoking gun’ and that many of the alleged discriminatees had work histories which were

‘less than pristine.’”); *Union Local 1814*, 301 NLRB 764 (1991) (granting request to withdraw based on settlement agreement after union lost its case before the ALJ).

Also, through this settlement, the Joint Board has obtained the dues that it sought when it filed charges. Notably, those dues are the only relevant remedy that remained after the Joint Board’s unconditional and voluntary disclaimer of interest. Indeed, after the Joint Board’s disclaimer, the other requested remedies – which sought to require CLS to bargain with, provide information and plant access to, and otherwise recognize the Joint Board as 9(a) representative – became moot. By resolving the only outstanding issue between the parties, the settlement that forms the basis of the Joint Board’s Motion to Withdraw Charges should be recognized, and the Motion should be granted.

**D. The Only Non-Board Parties in This Case Support the Withdrawal of Charges, and the General Counsel’s Opposition Fails to Provide a Rational Basis for Continuing the Litigation.**

**1. The Joint Board Voluntarily Sought the Non-Board Settlement that Resulted in the Motion to Withdraw.**

This case solely concerns CLS’s actions toward the Joint Board after the Joint Board disaffiliated from UNITE HERE in March 2009 and asserted 9(a) status. There are no substantive allegations that CLS violated the NLRA rights of individual unit members, nor is there any evidence in the record indicating that unit employees supported the charges that were filed or the Complaint that was issued in this matter. Stated another way, no individual rights are implicated in this case.

As such, this criterion turns on whether the charging party (i.e., the Joint Board) and the Respondent (i.e., CLS) have agreed to be bound by the settlement. There is no doubt that both parties agreed to be bound. Notably, the Joint Board proposed the settlement after it

unconditionally disclaimed any interest in representing CLS's laundry unit. Under these circumstances, the Joint Board's Motion to Withdraw the Charges should be granted.

**2. The General Counsel's Opposition Ignores the *Independent Stave* analysis and Offers a Non-Sensical Basis for Continuing This Litigation.**

General Counsel's Opposition cites *Independent Stave* only once, and that citation merely follows the General Counsel's conclusory assertion that the non-Board settlement is "repugnant to the purposes and policies of the Act." (GC's Opposition, p. 5). There is no analysis of the *Independent Stave* factors. Nor is there an allegation that the actual charges in the Complaint remain unremedied.

Instead, the General Counsel believes this case should continue because CLS may have been right all along. Specifically, the General Counsel believes that 9(a) status of the Joint Board from March 2009 to March 2010 must be established because, if CLS was right from the beginning, the payment of escrowed dues to the Joint Board as part of the non-Board settlement violates the Act. As detailed in Section I of the Analysis, General Counsel is estopped from forwarding this inherently inconsistent position that seeks to manipulate the judicial process. But even if this argument was available, General Counsel's position is irrational for four reasons.

First, the Joint Board's clear, unequivocal and unconditional disclaimer renders the only dispute in this matter – whether CLS must recognize the Joint Board as 9(a) representative – a moot issue. Indisputably, CLS has no current obligation to recognize the Joint Board. Accordingly, the reason for determining the 9(a) status – as that status relates to the actual charges before the Board – no longer exists, and the General Counsel has not argued otherwise.

Second, the remedies sought in the underlying litigation have been rendered moot by the disclaimer of interest and the non-Board settlement. In his Complaint and in the Exceptions filed with the Board, the General Counsel seeks a remedy that requires CLS to:

- Recognize the Joint Board as the 9(a) representative;
- Bargain with the Joint Board;
- Discuss grievances with the Joint Board;
- Provide information to the Joint Board;
- Provide the Joint Board with access to CLS's facilities; and
- "Remit all checked-off union dues collected from the Unit since April 2009 to Charging Union, including all escrowed dues, with interest thereon computed on a quarterly compound basis." (GC Ex. 1(r), Second Amended Complaint, pgs. 2-4; GC's brief in support of exceptions, pgs. 34-42).

Each of those remedies are moot. The dues have been paid by CLS to the Joint Board, and because the Joint Board has disclaimed interest, there is no need for the Joint Board to be provided information, access, bargaining rights or any other benefit that comes with being recognized as the 9(a) representative.

Third, regardless of General Counsel's conflicting thoughts on the issue, the propriety of the payment of dues to the Joint Board is not before the Board. No party has filed an unfair labor practice over the payment, no investigation has taken place, no complaint has been issued, no hearing has occurred, and no decision by any ALJ has been issued. Thus, the General Counsel's plea for the Board to "determine whether payment to the Charging Union pursuant to the settlement is lawful under Section 8(a)(3)" is untimely, improper and baseless, and if recognized, turns the long-settled principle of due process on its head. *See, e.g., United*

*Mine Workers of America, District 29*, 308 NLRB 1155, 1158 (1992) (noting that even “the simple presentation of evidence important to an alternative claim does not satisfy a requirement that any claim at variance from the complaint be ‘fully and fairly litigated’ in order for the Board to decide the issue without transgressing [the respondent’s] due process rights.”) (citations omitted) (emphasis added). Here, no evidence concerning this new, inherently inconsistent allegation is on the record. Thus, the Board cannot determine whether this uncharged allegation has merit.

Fourth, even if the Board had the authority (which it does not) at this juncture to determine whether an uncharged 8(a)(3) violation had occurred, General Counsel’s assertion that the settlement payment violated 8(a)(3) is legally deficient. To support the position that if the Joint Board is not the 9(a) representative, the payment violated 8(a)(3) and “the employees are entitled to reimbursement of the escrowed dues,” General Counsel cites *Crown Cork & Seal Co.*, 182 NLRB 657 (1970) and *Cowles Communications, Inc.*, 170 NLRB 1596, 1596 n.3 (1968). (GC’s Opposition to Motion to Withdraw, p. 3, ¶ 6). Those cases have no application to this matter.

In those cases, the Board issued a reimbursement of dues remedy because the dues were collected pursuant to illegal collective bargaining agreements entered into by the employer with prematurely recognized unions – i.e., contracts that improperly coerced employees to become members of those unions. *See Crown Cork*, 182 NLRB at 657; *Cowles*, 170 NLRB at 1596 n.3. And, importantly, in each case the NLRB rejected the request to reimburse employees who had voluntarily joined the union prior to the unfair labor practices at issue. *Crown Cork, Id.* (“Reimbursement will not be ordered, however, for those employees who voluntarily joined the Sheet Metal Workers prior to April 11, 1969, the date upon which the

union-security clause was executed.”); *Cowles, Id.* (“Employees Luke and Whedbee were already members of Respondent International Union prior to their application for employment with the Employer. Consequently, they did not join Respondent Union as a result of any coercion involved herein and it would be inappropriate to order reimbursement of dues as to them.”). This distinction is consistent with the U.S. Supreme Court’s decision in *NLRB v. Local 60, United Brotherhood of Carpenters*, 365 U.S. 651 (1961), which the ALJ in *Crown Cork* properly cited for the legal principle that the NLRB cannot issue a reimbursement remedy when “there is a history of voluntary [union] membership on the part of the employees.” *Crown Cork*, 182 NLRB at 663 (citing *Local 60*).

In the present matter, there is no dispute that a valid contract existed through March of 2010 and that pursuant to that contract and the contracts that proceeded it there is a history of voluntary union membership on the part of the employees of CLS. In fact, the last two contracts and the dues checkoff cards are stipulated exhibits that the General Counsel has used throughout this litigation to attempt to force CLS to pay the Joint Board the escrowed dues. (Jt. Exs. 1, 7 & 17). The escrowed dues were collected pursuant to a valid dues-checkoff provision. CLS and the Joint Board’s settlement agreement had nothing to do with forcing employees to pay dues; instead, the cards establish that all of the employees had voluntarily become union members and had paid dues long before the date of the settlement agreement. Therefore, the cases cited by General Counsel in no way support the argument that the dues were improperly paid.

Similarly, there is simply no basis for General Counsel’s assertion that the Joint Board was only entitled to dues if it was the 9(a) representative. (GC’s Opposition to Motion to

Withdraw, p. 5, ¶ 9). Notably, in this case, the transcript establishes that the Joint Board and UNITE HERE were each receiving dues prior to the disaffiliation:

Q: What did the Joint Board do with the dues once they were paid into its account by Continental Linen Service or once they received the check?

A: Some of it goes to different places. Some of it – much of it stays with the Joint Board, and then we make a per capita payment to the umbrella national organization.

Q: Which was UNITE HERE<sup>4</sup> for a period of time?

A: Yes.

(Tr. at 68-69, testimony of Richard Monje).

In reality, if General Counsel's position were true, nearly every labor contract in America would be the subject of an 8(a)(3) inquiry. It is axiomatic that union dues are split between more than one affiliated union, irrespective of 9(a) status.

### CONCLUSION

The Charging Party has filed a Motion to Withdraw Charges based on a settlement agreement and prior independent disclaimer of interest that comprehensively resolves the issues that led the Charging Party to file charges. General Counsel's Opposition contradicts the legal theory that supports the Complaint, and it asks the Board to continue the case solely to make a determination that the Board cannot make at this time. The facts and the law require that

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<sup>4</sup> The ALJ was clear in his decision that he found that the General Counsel failed to establish that the Joint Board was the 9(a) representative and nothing more, stating: "I find only that the General Counsel has failed to meet its burden of showing, by a preponderance of the evidence, that the Charging Party was the Section 9(a) bargaining representative at the relevant time. This should not be interpreted as encompassing a finding that any particular entity was, or was not, the Section 9(a) representative." (ALJ Bogas' Decision, pgs. 9-10 fn. 7).

this matter end. CLS therefore respectfully requests that the Board grant the Joint Board's Motion to Withdraw Charges.

Respectfully submitted,

MILLER JOHNSON  
Attorneys for Continental Linen Services, Inc.

Dated: February 25, 2011

By /s/ David M. Buday (P43087)  
David M. Buday (P43087)  
Jeffrey C. Melville (P71267)  
Business Address:  
Rose Street Market Building  
303 North Rose Street, Suite 600  
Kalamazoo, MI 49007-3850  
Telephone: (269) 226-2952  
Email: [budayd@millerjohnson.com](mailto:budayd@millerjohnson.com)

**ATTACHMENT 1**

TO

RESPONDENT CONTINENTAL LINEN SERVICES, INC.'S  
RESPONSE TO GENERAL COUNSEL'S OPPOSITION  
TO CHARGING UNION'S  
MOTION TO WITHDRAW CHARGES

(CITED PAGES OF GENERAL COUNSEL'S POST-HEARING BRIEF  
– PGS. 24 TO 32)

**D. By Refusing to Meet and Bargain for A Successor Collective Bargaining Agreement and By Refusing To Provide the Joint Board with Necessary and Relevant Information, Respondent Violated Section 8(a)(1) and (5) of the Act.**

After Respondent sent its notice of its intent to terminate the collective bargaining agreement on December 23, 2009, Joint Board Representative Richard Monje on January 19, 2010 sent CLS a letter requesting that they commence bargaining as soon as possible. (GC Ex. 2, and G.C. Ex. 4) On the same date, he also sent CLS a request for information for the upcoming contract negotiations, including an up-to-date seniority list with telephone numbers, addresses, classifications, labor grades, current wage rates, and dates of hire of unit employees. Respondent has admitted that it has refused to meet and bargain for a successor agreement, and it has refused to provide the Joint Board with the requested information. The information requested was presumptively relevant. *Laurel Baye Health Care of Lake Lanier LLC*, supra at p. 161

Inasmuch as the Joint Board continued to be the exclusive collective bargaining representative of the unit employees, Respondent violated Section 8(a)(1) and (5) of the Act, both by refusing to meet and bargain with the Joint Board for a successor agreement and by refusing to provide information necessary and relevant information. See, e.g., *May Department Stores Co.*, supra at p. 666. The refusal to bargain for a successor agreement, the refusal to provide information, the refusal to grant access and the refusal to process grievances amounted to a *de facto* withdrawal of recognition. See *Control Services, Inc.*, 303 NLRB 481, 493 (1991), enfd. mem. 961 F.2d 1568 and 975 F.2d 1551 (3d Cir. 1992).

**E. By Refusing to Remit the Union Dues to the Joint Board as Required by the Collective Bargaining Agreement CLS violated Sections 8(a)(1) and (5) and 8(d) of the Act.**

The 2005-2010 collective bargaining contains a dues-checkoff provision that specifically requires Respondent to remit the union dues directly to the Joint Board. (Jt. Ex. 7, Art. 3, p. 2-3) During the term of this agreement and dating back to sometime in 2003, CLS has remitted the Union dues directly to the Joint Board each month at its main office on 333 South Ashland Ave in Chicago.<sup>9</sup> However, on April 20, 2009, without first obtaining the consent of the Joint Board, Respondent stopped complying with this provision of the collective bargaining agreement, and began placing the deducted dues in an escrow account. Respondent continued to give new employees checkoff authorization forms to sign, and continued to deduct dues and place them in escrow from April 20, 2009 until the contract expired on March 1, 2010. By placing the dues in an escrow account and by refusing to remit the dues to the Joint Board, Respondent has violated Section 8(a)(1) and (5) and 8(d) of the Act. *Able Aluminum Co., Inc.*, 321 NLRB 1071, 1072 (1996); *Advanced Technologies, Inc.*, 341 NLRB 317, 318 (2004)

Article 3 of the 2005-1010 collective bargaining agreement states in pertinent part:

Section 3. Checkoff. The Company shall deduct weekly from the wages of the members upon written authorization of the members, Union dues and initiation fees (initiation fees will be deducted from two different pay periods). The Company agrees to provide and collect Union authorization forms to/from new members at the time of hire. These forms will be in effect after the probationary period ends. The amounts deducted and the authorization forms shall be transmitted at monthly intervals to the properly designated official of the Union, together with a list of names of the members from whom

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<sup>9</sup> Starting in about 2003, and throughout the term of the current 2005-10 contract until Respondent began escrowing the dues in April 2009, the Respondent remitted the dues each month to the Joint Board's office in Chicago. In turn, the Joint Board used a portion of the dues to make per capita payments to UNITE HERE until its disaffiliation in March 2009. Initially Joint Board also gave a portion of the dues to Local 151, but stopped doing this in about 2005 (Tr. 69-70, 162)

the deductions were made. Members who receive less than eight (8) hours of compensation for the week shall not be obligated for the weekly dues for that week.

Section 4. The Company will remit to the Chicago & Midwest Regional Joint Board, UNITE HERE, 333 S. Ashland Avenue, Chicago, IL 60607, the amounts so deducted within one (1) month after the deduction is made. (Jt. Ex. 7, Art.3, p. 2)

The “Union” referred in the dues checkoff provision, as the first sentence of the collective agreement makes clear, is Joint Board. The opening sentence states, “This agreement is entered into ... by and between the Chicago and Midwest Regional Joint Board, UNITE HERE (hereinafter referred to as the ‘Union’) ...” and CLS. (Jt. Ex. 7 p. 1)<sup>10</sup> The reference to UNITE HERE in the collective bargaining agreement simply describes the Joint Board’s affiliation with UNITE-HERE at the time.<sup>11</sup> In practice, the Respondent had been remitting dues directly to the Joint Board at Chicago address during the term of the most recent contract until April 20, 2009, and not to UNITE HERE.<sup>12</sup>

Thus, Respondent’s claim that it did not know whether it was obligated to remit the dues to either UNITE HERE or the Joint Board following the disaffiliation is not persuasive. While UNITE HERE suggested in various letters sent to “UNITE HERE Employers” that it was entitled to the per capita dues, that the affiliated locals were entitled to the dues, and that the dues should be paid to the affiliated or local or be placed in escrow (Jt. Exs. 19-22), the Joint Board’s Attorney’s letter of March 30, 2009 specifically advised CLS to continue remitting dues to the Joint Board as it had before. (Jt. Ex. 15) Respondent was required by the specific language in

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<sup>10</sup> At the time the contract was entered into this was the correct legal name of the Joint Board; the Constitution of the Joint Board, then in effect, states in its first sentence, “The name of the union is Chicago and Midwest Regional Joint Board, UNITE HERE.” (Jt. 9, Art. 1, Section 1)

<sup>11</sup> Immediately following the disaffiliation, the Joint Board’s constitution was amended to delete the reference to UNITE. (Jt. Ex. 11)

<sup>12</sup> Each month Respondent sent a check to the Joint Board at the above address for dues deducted from employees checks during the previous month. While the checks were made out to “UNITE HERE” they were made out to the attention of Martha Rucker. Rucker is employed by the Joint Board. (Jt. Ex. 26, par. 12 , Tr. 69-70) The invoices that the Joint Board sent to the Respondent each month had “Chicago and Midwest Regional Board, UNITE HERE, written across the top. (Jt. Ex. 18)

collective bargaining agreement to remit the dues to the Joint Board at its Chicago facility, and it was not free to change this provision without the consent of the Joint Board. *Spectrum Health-Kent Community Campus*, supra.

Although there has been Federal litigation concerning the disaffiliation, the details of this litigation are not set forth on the record. Respondent presented no evidence to establish that it had been ordered by any court to place the dues in escrow or to turn over the dues to UNITE HERE or court documents indicating that any court was considering such a remedy. In any event Respondent is protected from potential liability because the checkoff provision in the collective bargaining agreement contains an indemnification provision.<sup>13</sup>

Finally, the authorization cards signed by the employees provide a basis for deducting the dues and remitting them to the Joint Board. The Board has ruled that a checkoff authorization is a contract between the employee and the employer that authorizes the employer to assign a portion of the employee's wages to the employee's collective bargaining representative.

*Electrical Workers IBEW 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991).

However, the Board in analyzing checkoff authorizations, as it does with collective bargaining agreements, looks not only towards principles of contract interpretation for guidance, but also looks towards statutory principles and Federal labor policy. *Id.* at p 327-328.

Section 302(c)(4) of the Labor Management Relations Act, 29 U.S.C. 186(c)(4), allows employers to deduct dues from employees' paychecks and transmit them to their collective

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<sup>13</sup> The 2010 collective bargaining agreement states at Article 4, Section 6 (Jt. Ex. 7, p. 3):

The Union shall indemnify and save the Company and the Member harmless against any and all claims, demands, suits, or forms of liability which may arise out of, or by reason of, action taken by the Member in relying upon any written authorization furnished by the Member by the Union, the Union assumes full responsibility for the disposition of funds so deducted they have turned over to the Officer Designated by the Union.

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 of the collective bargaining agreement." As the Sixth Circuit Court of Appeals in *United Carpenters and Joiners of America, Dresden Local No. 267 v. Ohio Carpenters Health and Welfare Fund*, 926 F. 2d 550 (6<sup>th</sup> Cir. 1991) observed in analyzing Section 302(c)(4) of the LMRA:

As a general matter, the statute forbids any payment from an employer to a union, 29 U.S.C. § 186(a) & (b), including the payment of checkoff dues. Subsection (c)(4), however, makes an exception to this general rule by permitting such payment, provided that each employee authorizes it by signing the statutory "assignment" form. Hence, the form, properly construed, is the employee's consent to the employer's role as agent for the union in the collection of dues. It is not the source of the obligation of the employee to pay dues, nor of the right of the union to receive them. That is a matter of internal union policy. It is not the source of the employer's duty to collect the dues and pay them to the union.

The authorizations cards in the instant case, which were introduced into evidence (Jt. Ex. 17), authorize the Respondent to deduct union dues from the employees' paychecks and to remit the dues to their current collective bargaining representative, the Joint Board. (Jt. Ex. 17) Three different types of authorization cards have been relied upon by Respondent to deduct union dues from their payments.

First, the majority of the cards were signed by employees hired during the term of the 2005-2010 collective bargaining agreement. Between August 2006 and August 2009, approximately 44 of the current unit employees signed checkoff authorizations containing the heading, "UNITE HERE! Chicago & Midwest Regional Joint Board". The authorizations also state, "I have voluntarily accepted membership in the Union UNITE HERE, and designate said Union as my bargaining agency in all matters pertaining to wages, hours and other terms and conditions of employment. I hereby authorize my Employer (the above named company) to

deduct from my wages my initiation fees, dues and assessments to said Union." The authorizations are irrevocable for one year or the termination date "of the collective bargaining agreement between my Employer and the Union," whichever occurs sooner. The authorizations are automatically renewed for successive periods of one year or for the period of each "succeeding collective bargaining agreement between my Employer and the Union," absent timely written notice to revoke. There is no evidence that any employees revoked these authorizations.<sup>14</sup>

Second, between September 2003 and January 2005, about nine of the current unit employees signed checkoff authorizations stating, "I have voluntarily accepted membership in the Union of Needletrades, Industrial and Textile Employees (AFL-CIO) (UNITE), and designate said Union as my bargaining agency in all matters pertaining to wages, hours and other terms and conditions of employment. I hereby authorize my Employer (the above named company) to deduct from my wages my initiation fees, dues and assessments to said Union." These checkoff authorizations were being obtained during the term of the last Local 151, LDCIU contract (Jan 1, 2000 to Feb 1, 2005) and after the LDCIU department of UNITE informed the Employer that Local 151, UNITE was a lawful successor to Local 151, LDCIU and was now affiliated with the Joint Board. These authorizations contain the same irrevocability and automatic renewal language as the most recent authorizations.<sup>15</sup> There is no that evidence that any employees revoked these authorizations.

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<sup>14</sup> This type of authorization contains a space labeled, "Local No. \_\_\_\_", but only about half of the employees even bothered to fill in "151" as the Local's number, which is also probably a reflection of the fact that Local 151 was no longer functioning as bargaining agent. This reference to Local 151 which appears on only some of the cards certainly does not provide a basis for remitting the dues to the Local, and indeed Respondent has not remitted the dues directly to Local 151 since about 2003.

<sup>15</sup> These cards also contain a blank space for the signer to include the Local; five cards list Local No. 151, and four cards leave the space blank. However, for the reasons set forth above, the reference to the Local does not indicate intent to have the dues remitted to Local 151.

Third, about sixteen of the current unit employees, including Barbara Lipsey, among others, signed checkoff authorizations between 1984 and 2004 authorizing the Employer to deduct monthly dues from their wages and to remit them to the secretary-treasurer of "my Local Union affiliated with AFL-CIO Laundry and Dry Cleaning International Union." The authorizations were "irrevocable for a period of one year or until the termination of the collective bargaining agreement between my Local Union and my Employer, whichever occurs sooner," and they were renewed and irrevocable for "successive periods of one year each or for the period of each succeeding applicable collective bargaining agreement with the Union, whichever shall be shorter," unless the employee provided timely written notice to revoke the authorization. Respondent presented no evidence that employee has sought to revoke any of the above cards.

The most recent authorization card authorizes CLS to deduct dues and remit them to the Joint Board during the term of the collective bargaining agreement. Printed across the top of the most recently-used authorization card is "UNITE HERE Chicago and Midwest Regional Joint Board." This is very similar to the to the correct legal name of the Joint Board ("Chicago and Midwest Regional Joint Board, UNITE HERE") that appears in the first sentence of the 2010 collective bargaining agreement as well as in the Constitution of the Joint before March 2009 disaffiliation. (Joint Ex. 7, p. 1, Jt. Ex. 6) However, the body of the card does refer to the Union as "UNITE HERE".

Because of this ambiguity it is appropriate to consider parole evidence. See, e.g., *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1036 (2003). The overall language of the card when considered with the parole evidence and the statutory principles involved indicate that card can be most reasonably interpreted as authorizing the Respondent to deduct the dues and

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remit them to the Joint Board, and the reference to "UNITE HERE" in the card is simply a short-hand reference to full name of the Joint Board, which until March 2009 was affiliated with UNITE HERE.

Thus, language of the most recent card, tracking Section 302(c)(4) of the LMRA, refers to deducting the dues during the term of the collective bargaining agreement between the Employer and the Union. The collective bargaining agreement, as its opening sentence makes clear, is between the CLS and the Joint Board. The December 2007 Agreement to Reaffirm the collective bargaining agreement which refers also to Chicago and Midwest Regional Board, UNITE HERE also supports this interpretation. This name, as has been pointed out earlier is the correct legal name of the Joint Board from the time of the UNITE HERE merger in 2004 until the March 2009 disaffiliation. More importantly, the collective bargaining agreement itself, which was ratified by the employees, specifically provides that the dues were to be remitted to the Joint Board at its address in Chicago, and Respondent followed this provision until April 20, 2009.

Finally, as detailed in Section III A., above, the Joint Board has been the exclusive 9(a) representative, and negotiated and administered the collective bargaining agreement on a day-to-day basis since early 2005. Representatives of the International Union UNITE HERE played no role in actually representing the employees of Respondent, and Local 151 was no more than a shell organization.

From all the evidence it appears that the purpose of the cards when considered with the extrinsic evidence and the statutory policy was to authorize CLS to deduct the dues and remit them to the employees' current collective bargaining representative, which as of April 20 2009, was still the Joint Board.

The other two types of cards, described above, that Respondent has relied upon to deduct dues during the 2005- 2010 collective bargaining agreement were signed during the terms of earlier collective bargaining agreements before the Joint Board became the exclusive bargaining representative. Nevertheless, they should also be interpreted as providing a basis for deducting dues and remitting them to the Joint Board as the current collective bargaining representative. While these older cards obviously do not refer to the Joint Board, they do state that they are effective during the collective bargaining agreement and subsequent collective bargaining agreements between their employer and union. They also provide for automatic renewal and Respondent has not claimed that any of the employees have revoked these older authorization cards. Moreover, as discussed above, the dues checkoff provision in the most recent collective bargaining agreement, which was ratified by the employees, provides for deducting dues from those employees who have signed voluntarily signed authorization card, and for remitting the dues to the Joint Board at its office in Chicago.

Thus, the language of these cards along with the extrinsic evidence, including that Joint Board was the employees' exclusive bargaining agent during the term of 2010 contract, that the contract provides that dues should be remitted to the Joint Board, and Respondent followed this contractual provision until April 20, 2009, support the conclusion that these cards authorized the Respondent to deduct the dues and initiation fees from the checks of these employees and remit them to the Joint Board.

Thus, by failing to remit the deducted dues to the Joint Board as required by the collective bargaining agreement Respondent violated Section 8(a)(5) and 8(d) of the Act. *Able Aluminum Co., Inc.*, supra at p. 1072 (1996); *Advanced Technologies, Inc.*, supra at p. 318 (2004).

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

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CONTINENTAL LINEN SERVICES, INC.,

Respondent,

and

Case Nos.   7-CA-52296  
              7-CA-52715  
              7-CA-52798

CHICAGO AND MIDWEST REGIONAL  
JOINT BOARD, WORKERS UNITED/SEIU,

Charging Union.

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I certify that on February 25, 2011, I filed **Respondent Continental Linen Services, Inc.'s Response to General Counsel's Opposition to Charging Union's Motion to Withdraw Charges** via e-file, and that a copy was served on the following parties of record by email at their respective email addresses as set forth below:

Ronald M. Willis  
Attorney for Charging Union  
Dowd, Bloch & Bennett  
8 South Michigan Ave., Ste. 1900  
Chicago, IL 60603  
[rwillis@dbb-law.com](mailto:rwillis@dbb-law.com)

Ira Jay Katz  
Attorney for Charging Party  
Associate General Counsel  
Workers United, SEIU  
49 West 27<sup>th</sup> Street, 3<sup>rd</sup> Floor  
New York, NY 10001  
[ira.katz@workers-united.org](mailto:ira.katz@workers-united.org)

Amy J. Roemer  
Counsel for Acting General Counsel  
National Labor Relations Board  
Resident Office  
Region 7  
477 Michigan Avenue, Room 300  
Detroit, MI 48226-2569  
[Amy.Roemer@nlrb.gov](mailto:Amy.Roemer@nlrb.gov)

/s/ David M. Buday (P43087)

David M. Buday  
MILLER JOHNSON  
Attorneys for Respondent  
303 North Rose Street, Suite 600  
Kalamazoo, MI 49007  
[budayd@millerjohnson.com](mailto:budayd@millerjohnson.com)