

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

**In the Matter of:**

HARGROVE ELECTRIC CO., INC.,                      **Case No. 16-CA-27812**  
Respondent,

ALMAN CONSTRUCTION SERVICES,                      **Case No. 16-CA-27813**  
LP,  
Respondent,

BOGGS ELECTRIC CO., INC.,                      **Case No. 16-CA-27814**  
Respondent

and

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS LOCAL 20,  
Charging Party.

---

**CHARGING PARTY IBEW LOCAL 20'S BRIEF  
IN SUPPORT OF EXCEPTIONS**

---

G. William Baab, Esq.  
Baab & Denison, L.L.P.  
2777 N. Stemmons Freeway, Suite 1100  
Dallas, Texas 75207  
214.637.0750 Telephone  
214.637.0730 Facsimile  
Email: [gwbaab@baabdenison.com](mailto:gwbaab@baabdenison.com)

Counsel for Charging Party IBEW Local 20

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

**In the Matter of:**

HARGROVE ELECTRIC CO., INC.,  
Respondent,

**Case No. 16-CA-27812**

ALMAN CONSTRUCTION SERVICES, LP,  
Respondent,

**Case No. 16-CA-27813**

BOGGS ELECTRIC CO., INC.,  
Respondent

**Case No. 16-CA-27814**

and

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS LOCAL 20,  
Charging Party.

**CHARGING PARTY IBEW LOCAL 20'S BRIEF IN SUPPORT OF EXCEPTIONS**

International Brotherhood of Electrical Workers Local 20 ("Local 20"), Charging Party in the above consolidated case proceedings, submits the following pursuant to Section 102.46 of the Board's Rules, as its Brief in Support of Exceptions filed herewith:

**THE CONSOLIDATED COMPLAINT AND THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

In summary, the underlying charges and the resulting Consolidated Complaint alleged that Respondents Hargrove Electric Co., Inc. ("Hargrove"), Alman Construction Services, LP ("Alman"), and Boggs Electric Co., Inc. ("Boggs") engaged in coordinated, concerted conduct intended to undermine Charging Party Local 20's status as collective bargaining representative and the related rights of represented employees by unilaterally reducing affected employees'

terms and conditions of employment without first bargaining in good faith to impasse in an established Section 9(a) context.

The Administrative Law Judge, in her decision dated January 13, 2012, found that Respondents had engaged in unlawful conduct violative of Sections 8(a) (5) and (1) of the Act as to all specific allegations except Respondents' unilateral cessation of dues deduction. In that regard, citing *Bethlehem Steel*, 136 NLRB 1500 (1962) and *Hacienda Resort Hotel & Casino* (Hacienda III) 355 NLRB No.154 (2010), the Judge concluded she was constrained to follow existing Board precedent and concluded: "Accordingly, I find that Respondents' unilateral cessation of dues checkoff on or about December 11, 2010, did not violate Section 8(a)(5) of the Act." ALJ Decision at p. 13, ll.1-2. It is solely to this part of the Judge's decision and related Order that we except.

#### **SUMMARY OF RELEVANT FACTS**

As of the beginning of February 2008, each Respondent (Hargrove, Alman and Boggs) was party to a Section 8(f) relationship and collective bargaining agreement with Charging Party Local 20. (R. 14, 46-46; see G.C. Exs. 15-17).

By meaningfully identical letters dated and delivered in early February 2008, each Respondent advised Local 20 that it would not honor the existing 8(f) contract at the conclusion of the contract's term, and that each (Respondent) would at that time unilaterally alter existing terms and conditions of employment in specified respects, reserving the right to set other terms and conditions of employment "at the sole and exclusive discretion of . . . (the individual Respondent). (R. 45 ff.; G.C. Exs. 19-21). The individual letters sent by respective Respondents said nothing about having made a decision to cease dues deduction pursuant to voluntary written authorizations, nor that any Respondent would cease recognizing the contractual grievance procedure. (See G.C. Exs. 19-21).

Subsequent to receipt of identified correspondence, Charging Party Local 20 converted its relationship with each Respondent and each related collective bargaining agreement to Section 9(a) status by utilization of the Act's representation procedure, obtaining certified status as Section 9(a) exclusive collective bargaining representative in an appropriate unit of Respondent Hargrove's employees on or about April 3, 2009 in Case No. 16-RC-10875; in an appropriate unit of Respondent Bogg's employees on or about October 6, 2008 in Case No. 16-RC-10854; and in an appropriate unit of Respondent Alman's employees on or about October 30, 2008 in Case No. 16-RC-10899. (See R. 52-53; G.C. Exs. 22-24).

Prior to expiration of what had now become the parties' Section 9(a) collective bargaining agreements, Local 20 gave timely notice to each Respondent of its intent to negotiate successor Section 9(a) contracts. (See R. 55-57; G.C. Exs. 27-29). Bargaining for successor 9(a) agreements between Local 20 and each Respondent began in late 2010. (R. 30 ff.).

Each Respondent gave notice of intent to terminate the applicable existing contract effective on or about December 10, 2010. (See R. 17; G.C. Exs. 33, 35, 37). On or about December 10, 2010 each Respondent then unilaterally reduced selected terms and conditions of employment of affected bargaining unit employees without first bargaining in good faith to impasse (R. 33-34): Hargrove implemented a reduced wage rate for newly hired employees, ceased dues deductions for employees who had executed valid dues checkoff authorization forms, and ceased recognizing the parties' grievance procedure; Alman implemented a reduced wage rate for new employees, ceased making payments into the National Electrical Benefit Fund, reduced the amount paid on behalf of affected employees into the Local 20 Annuity Fund, ceased dues deduction for employees who had executed valid dues deduction authorization forms, and ceased making vacation deductions and related contributions; and Boggs

implemented a new wage scale for new employees, ceased dues deduction authorization for employees who had executed valid dues checkoff authorization forms, ceased making vacation deductions and related contributions, and ceased recognizing the contractual grievance procedure. (See R. 33-34; 76-80; G.C. Ex. 1\_\_).

The subject charges were filed and the Consolidated Complaint subsequently issued.

**AS A GENERAL PROPOSITION, RESPONDENTS' UNILATERAL CHANGES VIOLATE SECTIONS 8(a) (5) AND (1).**

**1. *NLRB v. Katz* Continues to Apply and Control.**

Long ago, the United States Supreme Court held in *NLRB v. Katz*, 369 U.S. 736 (1962) that an employer violates Section 8(a) (5) of the Act when it implements unilateral changes and terms and conditions of employment without first bargaining in good faith to impasse with a certified representative of bargaining unit employees.

The duty "to bargain collectively" enjoined by § 8(a) (5) is defined by § 8(d) as the duty to "meet\*\*\* and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate *in fact*— "to meet \* \* \* and confer"— about any of the mandatory subjects.<sup>10</sup> A refusal to negotiate *in fact* as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a) (5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a) (5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a) (5) much as does a flat refusal.<sup>11</sup> 369 U.S. at 747.

*Katz* continues to apply and control disposition of this case. As discussed in more detail below, the case law upon which Respondents rely to escape the holding of *Katz* has no applicability here.

**2. Respondents Cannot Successfully Argue That *Katz* Does Not Apply.**

Respondents have relied on *Starcraft Aerospace*, 346 NLRB 1228 (2006), and *SGS Control*, 334 NLRB 858 (2001) (hereafter “the cited cases”) to contend that *Katz* does not control this case. Those cases (*SGS*), without meaningful discussion, hold that an employer did not violate Section 8(a)(5) when, immediately following a Board election which certified for the first time a labor organization as collective bargaining representative, the employer unilaterally implemented a change in employees’ terms and conditions of employment on the basis of a prior (to the election) decision to make such a change. Respondents apparently contend that the referenced case decisions are analogous to their conduct in implementing a 2008 “decision” to change terms and conditions of employment in December of 2010, because the “decision” was announced at a time when the employers were respectively in Section 8(f) bargaining and contractual relationships with Local 20. As the record before the Judge indicates, Local 20 thereafter converted the Section 8(f) relationship and related contracts to Section 9(a) relationships and contracts, well prior to the time the 9(a) contracts expired, consequent 9(a) bargaining began, and the respective employers effected the substantial unilateral changes now at issue.

We are aware of Board case law articulating the Section 8(f) “right” to walk away from a bargaining relationship at the conclusion of an 8(f) contract. See *John Deklewa & Sons*, 282 NLRB 1375 at 1378 (1987) enf’d *sub nom* 843 F.2d 770 (3<sup>rd</sup> Cir. 1988), *cert. denied*, 488 U.S. 889 (1988). However, Board case law governing conversion of 8(f) relationships and contracts to 9(a) relationships and contracts contemplates that in all respects, once the conversion

occurs, the contract and the relationship must be respected and treated according to the law governing 9(a). See, e.g., *Staunton Fuel & Material, Inc.*, 335 NLRB 717 at 719 (2001); *VFL Technology Corp.*, 329 NLRB 453 at 458 (1999).

*Starcraft* and *SGS Control* are inapplicable to the issues presented here because of the conversion of Local 20's relationship and contracts with Respondents to 9(a) status. Those cases do not involve, speak to, or discuss the factual circumstance of conversion from Section 8(f) relationships and contracts to Section 9(a) relationships and contracts. We find no other case law applying the discrete holding of those cited cases in the 8(f) conversion to 9(a) context.

The factual predicate for the cited case decisions differs from the facts here in one crucial aspect: in the cited cases, at the time each employer made the “decision” to implement the change at issue, it had **then** the **absolute, untrammelled right to make a unilateral change** – there was no identified bargaining representative, and no collective bargaining or contractual relationship or context. When, in calendar year 2008, Hargrove, Allman and Boggs announced their intended “decision” they had **no legal right to effect the change at that time**: each was involved in a consensual Section 8(f) relationship and each was bound by a collective bargaining agreement which, by its nature and legal effect, prohibited alteration of terms and conditions of employment for the term of the contract. The 2008 announced “decision”<sup>1</sup> was in each case a blatant attempt to take advantage **in advance** of the Section 8(f) “escape hatch” intended to protect employees.<sup>2</sup> The “right” of each of these employers to effect a unilateral change in terms and conditions of employment in calendar 2010 was completely dependent on contingencies: (a) the continuation of its relationship with Local 20 as an 8(f) relationship; and

---

<sup>1</sup>/ The best face that can be put in the 2008 letters which are characterized as the employers’ “decision” is that they are extraordinarily early notification of intent to change the applicable contract pursuant to Section 1.02 of that document. As otherwise noted, this intent to change must be bargained in good faith in the 9(a) context existing in 2010.

<sup>2</sup>/ See *VFL Technology Corp.*, *supra* at 459 (1999).

(b) the expiration of the Section 8(f) contract. These contingencies were never satisfied: the relationship was converted to a Section 9(a) relationship and the contract was converted to a 9(a) contract. Summarized, the crucial difference between the cited cases and the pending charges is that in the cited cases the implemented changes had their genesis in an absolute “right” to make the change at the time the decision to change was made; here, the charged employers had absolutely no “right” to effectuate the proposed changes at the time of their 2008 “decision.”

*Katz* and its progeny form a crucial lynchpin in the larger body of the law of good faith bargaining – requiring employers to bargain in good faith to impasse before unilaterally implementing changes in affected employees’ terms and conditions of employment. The cited cases can only be viewed as a tiny loophole in the general protection *Katz* principles provide. The cited cases must be restricted to their singular facts. As noted, the charges now before the Judge do not match those facts.

Stripped bare, Respondents’ claim of right to act unilaterally, without bargaining to impasse, equates to a claim of right to possess and exercise 8(f) status – to “walk away” from 9(a) bargaining obligations – despite admitted 9(a) conversion and status. To permit these employers to escape their 9(a) bargaining obligation(s) by nothing more than their premature articulation of the hope (their 2008 “decision(s)”) that they would enjoy 8(f) status and rights in 2010 would be to ignore both *Katz* and the law which governs 8(f) to 9(a) conversion. Such a result could never be justified.

The Administrative Law Judge has agreed with this analysis, and her findings that Respondents violated Sections 8(a)(5) and (1) of the Act reflect her reasoning in that regard. See ALJ decision at pp. 3-10.

However, we do not agree that the Judge should have followed the Board's decisions in *Bethlehem Steel and Hacienda III* to determine that Respondents did not violate Sections 8(a)(5) and (1) when they unilaterally ceased dues checkoff without first bargaining in good faith to impasse. Rather, we believe the Ninth Circuit's subsequent decision in *Local Joint Executive Board v. N.L.R.B.*, 657 F. 3d 865 (9<sup>th</sup> Cir. 2011) should become the prevailing law on this point.

**RESPONDENTS' UNILATERAL CESSATION OF DUES DEDUCTION, WITHOUT BARGAINING TO GOOD FAITH IMPASSE, PRESENTS AN INDEPENDENT VIOLATION OF SECTIONS 8(A) (5) AND (1).**

**1. Respondents' Cessation of Dues Deduction is Not Protected by the Defense They Present as to Other Unilateral Changes.**

Above, we have distinguished the case law (*SGS Control*) upon which Respondents rely to attempt to justify their unilateral alteration of affected employees' terms and conditions of employment without first bargaining to good faith impasse. Even if that case law were otherwise applicable – and we have shown that it is not – it would not justify Respondents' unilateral cessation of dues deduction. Simply put, Respondents did not propose – or as they put it, announce – in their February 2008 letters that they would cease deducting dues in December of 2010. Cessation of dues deduction was not a decision “reached” or “announced” in the 8(f) context, and such a “decision” was not the basis for their subsequent unlawful unilateral refusal to continue dues deduction. The cited case law does not apply, factually or legally, to Respondents' cessation of dues deduction in December of 2010.

**2. The Evolving Law Concerning Unilateral Cessation of Dues Deduction Authorizations Should be Applied Here.**

In *Bethlehem Steel Co.*, 136 NLRB 1500 (1962) and *Tampa Sheet Metal Co.*, 288 NLRB 322 (1988) the Board held as a general proposition that termination of dues checkoff is an exception to the rule articulated in *Katz supra*. In *Hacienda Resort Hotel & Casino*, 355 NLRB

No. 154 (2010) (*Hacienda III*) a four member Board panel continued to apply *Bethlehem Steel* and *Tampa Sheet Metal*.

But in their concurring opinion, Chairman Liebman and member Pearce wrote that they believed the Board's prior holdings in *Bethlehem Steel Co.*, *supra* and *Tampa Sheet Metal Co.*, *supra*, should be overruled. 355 NLRB at \_\_\_\_; 189 LRRM at 1035 ff. They joined their colleagues Schaumber and Hayes in holding otherwise solely out of deference to existing Board tradition "The power to overrule precedent will be exercised only by a 3-member majority of the Board." (*Ibid.*). They wrote, however, that there was simply no sound legal rationale for exempting employers' unilateral cessation of dues deduction from the larger *Katz* rationale. First, they concluded, that a contractual provision providing for dues deduction stood on no different basis than other contractual provisions providing terms and conditions of employment. Secondly, they noted that statutory language contained in Section 302(c) (4) embodied a presumption that dues deduction would survive the expiration of a collective bargaining agreement. See 355 NLRB at \_\_\_\_; 189 LRRM at 1035. Finally, they refuted the employer argument that an employer's right to cease dues deduction was an "economic weapon" which should be exempted from *Katz*' prohibition against unilateral change without first bargaining in good faith to impasse, noting explicitly that it is not the Board's statutory mandate to "balance economic weapons . . ." 189 LRRM at 1036, citing *Charles D. Bonanno Linen Service*, 243 NLRB 2093, 1093, 1097, *enfd.* 630 F.2d 25 (1<sup>st</sup> Cir. 1980), *aff'd.* 454 U.S. 404 (1982). Concluding, they found no sense nor merit in employer-side Board members' attempt to distinguish dues deduction from other terms and conditions of employment reflected and covered by the *Katz* rationale, noting that *Katz* had been applied to employers' unilateral change regarding other mandatory subjects of bargaining "where no money changes hands and which have no greater effect on wages, hours and working conditions . . ." 355 NLRB \_\_\_\_; 189

LRRM at 1036. This concurrence provides a template for Board reversal of *Tampa Sheet Metal* and similar cases when this case and others like it are submitted for Board decision.

On petition for review, the Ninth Circuit found employer-side Board members' attempt to defend employer conduct unilaterally ceasing dues deduction without bargaining first to good faith impasse "arbitrary and capricious." The Ninth Circuit held that an employer violates Section 8(a) (5) of the Act where, in a right to work state such as Texas, an employer unilaterally ceases dues deduction at the conclusion of a collective bargaining agreement without first bargaining to good faith impasse. The Ninth Circuit distinguished between that situation (dues deduction pursuant to voluntary authorization in a right to work state) with a dissimilar situation, where dues deduction is accomplished pursuant to union security, and concluded that *Katz* must apply in the factual circumstance presented here. The Court wrote:

Where the dues-checkoff provisions do not implement union security, however, but instead exist as a free-standing, independent convenience to willingly participating employees, the reasoning of *Bethlehem Steel* loses its force. We see nothing in the NLRA that limits the duration of a CBA in the absence of union security. Moreover, other statutory provisions suggest the opposite. For instance, the Labor Management Relations Act provides that "a written assignment [for dues-checkoff] shall not be irrevocable . . . beyond the termination date of the applicable collective agreement." 29 U.S.C. § 186(c)(4). This provision would surplusage if Congress believed that dues-checkoff automatically terminated upon the expiration of a CBA. See *Nw. Forest Res. v. Glickman*, 82 F.3d 825, 834 (9<sup>th</sup> Cir. 1996) ("We have long followed the principle that '[s]tatutes should not be construed to make surplusage of any provision.'") (citation omitted).

Accordingly, we conclude that in a right-to-work state, where dues-checkoff does not exist to implement union security, dues-checkoff is akin to any other term of employment that is a mandatory subject of bargaining. Because each affected

employee individually requested dues-checkoff, the Employers' actions in this case were an unlawful termination of a bargained benefit to employees, not merely the cessation of a provision that automatically terminated along with the CBA and union security. The Employers' unilateral termination of dues-checkoff in this case was thus "in effect a refusal to negotiate... which reflected a cast of mind against reaching agreement."

*Local Joint Executive Board v. NLRB*, 657 F.3d at 867-68 (9<sup>th</sup> Cir. 2011).

Application of the Ninth Circuit's rationale and holding to this case requires the conclusion that Respondents' unilateral cessation of dues deduction and payment, without bargaining to good faith impasse, violated Section 8(a) (5).

**3. Respondents Have Not Raised a Viable Issue Concerning Whether Applicable Dues Deduction Authorizations Were Voluntary.**

At hearing, Respondents seemingly sought to contend that dues deduction authorizations concerning which dues deduction and payment were unilaterally terminated in December of 2010 were not "voluntary." (See R. 91-92; see also R. 86 ff.; Respondents' Exs. 3, 4, 5, 6, 7, 8).

Respondents' "evidence" seeking to raise a question concerning the voluntary character of dues deduction authorizations is nothing more than six (6) authorization forms. (See R. 86-89; Respondents' Exs. 3-8). Nothing in the forms' respective wording nor attendant evidence suggests that the forms were not voluntarily executed.

Record evidence demonstrates that Respondents have uniformly deducted dues amounts from employees' wages and then paid those amounts to Local 20 in each month of calendar years 2009 and 2010 prior to the unilateral cessation. (See R. 79). During that time frame (calendar years 2009 and 2010, prior to the December 2010 unilateral cessation of

deduction and payment of dues) Respondents never questioned the voluntary nature – or other validity or legality – of the authorizations upon which deduction and payment was based. (See R. 80). When certain of Respondents<sup>3</sup> resumed paying dues, yet again they (affected Respondents) raised no question or claim to the effect that written authorizations were not valid, or otherwise legal. (See R. 80).

Respondents have not raised a legitimate question concerning whether, as a general matter, implicated dues deduction authorizations were “voluntary.” Questions concerning the validity of individual authorizations can be resolved at the compliance stage. *Stuckpole Components Company*, 232 NLRB 723 (1977).

#### **4. General Counsel’s Supplemental Arguments.**

In her Brief filed below, Counsel for General Counsel presented additional, internally reasoned arguments asking the Administrative Law Judge to overrule *Bethlehem Steel* and its progeny. We adopt and present those points here, word for word as Counsel for General Counsel presented them there:

The Board’s holding in *Bethlehem Steel* should be reversed because its primary rationale was that checkoff merely implemented a union security agreement and that the proviso in Section 8(a)(3) “agreement” requirement applies with equal force to checkoff. Such a reading disregards the plain language of Section 8(a)(3). The Section 8(a)(3) proviso does not reference dues checkoff or any other means of sending dues owed under a union security clause to a union. Rather, the Section references only the union security issue, not the transmission of dues. Also, contrary to the holding in *Bethlehem Steel*, dues checkoff does not merely implement union security. Even though dues checkoff and union security often occur in the

---

<sup>3</sup>/ Reference in the transcript was to Respondents Boggs and Hargrove resuming paying dues. (See R. 81). In fact, Respondents Boggs and Alman resumed paying dues in early 2011.

same context, they are different types of obligations that should not be treated as inseparable. See, e.g., *Shen-Mar Food Products*, 221 NLRB 1329, 1330 (1976), enfd. as modified 557 F.2d 396 (4th Cir. 1977) (checkoff authorization could not properly be viewed as union security devices, which the state was permitted to prohibit under Section 14(b), because they did not “impose membership or support as a condition required for continued employment.”); *NLRB v. Atlanta Printing Specialties & Paper Products Union 527 (Mead Corp.)*, 523 F.2d 783, 786 (5th Cir. 1975) (union security clauses are governed by a section of the Act totally removed from the section governing dues checkoff and which have a totally different purpose and rationale.”); *American Nurses Assn.*, 250 NLRB 1324, fn. 1 (1980) (resignation from union ordinarily does not revoke checkoff authorization; “union security and dues checkoff are distinct and separate matters.”).

A checkoff authorization, unlike union security arrangements, gives rise to an independent wage assignment contract between the employee and the employer where the employee assigns to a union part of his future wages. *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 327 (1991) (relying on Restatement (Second) of Contracts, Sections 317, 321 and 326 (1981)). The Board has determined such wage assignments survive contract expiration when the employee’s authorization card shows such intent. See *Lowell Corrugated Container Corp.*, 177 NLRB 169, 172- 173 (1969), enfd. 431 F.2d 1196 (1 Cir. 1970) (employer did not violate Section 8(a)(2) and (3) by continuing to honor unrevoked checkoff authorizations after contract expiration.)

Also, the purpose of a dues checkoff authorization is distinct from that of union security. While a union security clause is used to stabilize the collective bargaining relationship by securing the union’s ability to fund its representational activities, a dues checkoff authorization is for “administrative convenience in the collection of union dues.” *Atlanta Printing Specialties &*

*Paper Products Union 527 (Mead Corp.)*, *supra* at 786. In addition, as in the instant case, dues checkoff language will frequently appear in a collective bargaining agreement that does not contain a union security clause. (GC Exh.18).

Moreover, Section 302(c)(4) does not limit dues checkoff to instances where a contract is in effect. In fact, Section 302 criminalizes an employer's willful payment, lending or delivering of money to a union or for a union to "request, demand, receive or accept" such payments, except in limited circumstances that further legitimate ends and is aimed at combating labor racketeering. *Frito-Lay*, 243 NLRB137, 138 (1979) (citing *Salant & Salant, Inc.*, 88 NLRB 816, 817-818 (1950). Section 302(c)(4) permits dues checkoff payments as long as the employee's authorization "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." The fact that Section 302(c)(4) mandates that a checkoff authorization be revocable by the employee when the contract terminates indicates that it is not automatically revoked and, accordingly, the Section contemplates dues checkoff continuing after contract expiration. *Tribune Publishing Co. v. NLRB*, 564 F.3d 1330, 1335 (D.C. Cir. 2009) ("Section 302 does not require a written collective bargaining agreement. In order for payroll deduction of union dues to be lawful, Section 302 merely requires that employees give written consent that is revocable after a year.")

Unlike Section 302(c)(4), Section 302(c)(5) contains an exception for employer contributions to union trust funds and allows such contributions only if the "detailed basis on which such payments are to be made is specified in a written agreement with the employer." Therefore, Congress included a requirement under Section 302(c)(5) requiring an agreement, but made no such requirement in Section 302(c)(4). Payments to union benefit funds survive contract expiration. *Concord Metal*, 298 NLRB 1096 (1990) (expired contract is sufficient to

satisfy the “written agreement” requirement of Section 302(c)(5)); *Hinson v. NLRB*, 428 F.2d 133, 138-139 (8th Cir. 1970) (trust fund agreements satisfy “written agreement” requirement); *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981) (trust fund agreements and expired contract satisfy “written agreement” requirement). Therefore, a determination that Section 302(c)(4) precludes the continuation of dues deductions after contract expiration would be anomalous, considering that it contains no “agreement” requirement, while Section 302(c)(5) explicitly requires a “written agreement” for employers to contribute to union benefit funds, such contributions survive contract expiration.

Furthermore, the recognized exceptions to the unilateral change rule are “statutorily dependent upon an existing collective bargaining agreement” or are derived from the surrender, in a collective bargaining agreement of a “statutorily guaranteed right.” *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d at 1113-1114. One such exception is union security, which statutorily requires an “agreement”. Another exception is arbitration, which involves the surrender of a statutory right of the parties to make a final determination regarding terms and conditions of employment and how to interpret contractual *terms*. *Indiana & Michigan Electric Co.*, 284 NLRB 53, 57-58 (1987). Also, arbitration agreements also frequently display the parties’ agreement to relinquish economic weapons such as strikes and lockouts, to resolve disputes, which are “otherwise available under the Act.” *Id.* at 58. A no-strike provision, which is another recognized exception, involves the surrender of the right to strike<sup>4</sup> and the parties to a bargaining relationship are not required to abandon that right when there is no agreement to waive that right. Similarly, a union’s waiver of a statutory right to bargain over mandatory subjects of bargaining does not survive contract expiration. *Ironton Publications*, 321 NLRB 1048 (1996).

Dues checkoff provisions, unlike the exceptions discussed above, involve no such contractual surrender of a statutory right. Rather, these provisions merely reflect the parties' agreement to honor individual employees' voluntary checkoff authorizations. The fact that an executed dues checkoff authorization is a contract between the employee and the employer has no bearing on whether the separate and legally distinct checkoff arrangement between the union and employer is subject to the statutory bargaining obligation after the contract expired. Moreover, to the extent that periodic irrevocability of dues checkoff implicates the Section 7 right to refrain from assisting a union, Section 302(c)(4) already ensures an employee's right to revoke check off authorizations after contract expiration.

In addition, the Board's rationale in *Bethlehem Steel* that contract language linked the checkoff obligation only during the term of the contract is inconsistent with Board law. Regardless of such limiting language in a contract, an employer ordinarily has a statutory duty to bargain with the union before making changes to terms and conditions of employment. All terms and conditions of employment contained in an expired contract survive the contract's termination. *Honeywell int'l, Inc. v. NLRB*, 253 F.3d 125, 131-132 (D.C. Cir. 2001) (general durational clause, without more, does not defeat unilateral change doctrine). Indeed, the dues checkoff language contained in the contract at issue in *Bethlehem Steel*, ("so long as this Agreement remains in effect") would not satisfy current Board law that any waiver of the right to bargain over a mandatory subject after contract expiration must be "clear and unmistakable." See *Natico, Inc.*, 302 NLRB 668, 685 (1991) (language requiring that pension fund provision will "remain in effect for the term of this agreement", not clear and unmistakable waiver); *Schinidt-Tiago Construction Co.*, 286 NLRB 342, 366 (1987) (language requiring that employer contributions to pension fund, be "in accordance with" a pension agreement did not specifically

---

<sup>4</sup>/ *Southwestern Steel*, *supra* at 1114.

state that employer's obligation to contribute to pension fund ended at contract expiration); *KMBS, Inc.*, 278 NLRB 826, 849 (1986) (language requiring contributions to be made "as long as a Producer is so obligated pursuant to said collective bargaining agreements" insufficient because language did not "deal with the termination of the employer's obligation to contribute to the funds").

Finally, should the parties wish to negotiate a provision that provides checkoff deductions cease upon expiration of a collective bargaining agreement, they may do so. *Cauthorne Trucking*, 256 NLRB 721, 722 (1981).

#### 4. The Appropriate Remedy.

It is well established that the appropriate remedy in a case such as that presented here is to require the subject employer to "reimburse the union for dues deduction payments that it has unlawfully refused to make." See, e.g., *Sommerville Construction Co.*, 327 NLRB 514 at fn. 2 (1999); *W.J. Holloway & Son*, 307 NLRB 487, fn.3 (1992). Cited case law seems to contemplate that an offending employee should be required to make this reimbursement without deducting equivalent amounts from employees' current or future wages.<sup>5</sup> Clearly, the proper remedy here must foreclose any claim of right on the part of Respondents to recoup dues reimbursement amounts from affected employees.

---

<sup>5</sup> We have not found a specific discussion of this point in Board case law. There is a body of federal law and arbitral authority holding that where an employer wrongly fails to deduct dues on the basis of bad faith bargaining conduct or in violation of a collective bargaining agreement, the appropriate remedy is to require payment of an amount equivalent to the dues money the employer failed to deduct **without** resort to deduction of those amounts from employees' pay. In *Valmac Industries, Inc. v. Meat Cutters Local 425*, 528 F.2d 217 (8<sup>th</sup> Cir. 1975), senior Supreme Court Justice Tom Clark, writing *per curiam* for the panel, rejected the employer's claim that requiring it to pay an amount equivalent to dues money without deducting from employees' pay was a "windfall to its employees" and remarked that "any reduction (in monetary payment by resort to employees' as an offset) would encourage the very conduct the Act sought to discourage – "bad faith" bargaining." 528 F.2d at 219, 91 LRRM at 2060. Otherwise, federal courts have repeatedly held that requiring the employer to pay an amount equivalent to back dues money **without** resort to deduction from employees' current pay is "consistent with arbitral authority providing that the remedy for a failure to deduct dues must be imposed on the employer, rather than the employees." *Humility of Mary Health's Partners v. Teamsters Local 377*, 896 F. Supp. 2d 840 at 850 (N. D. Ohio 2003) citing *Washington Post v. Washington-Baltimore Newspaper Guild*, 787 F.2d 604, 607 (DC Cir. 1986). See also *United Steelworkers of America v. United States Gypsum Co.*, 492 F.2d 713, 734 (5<sup>th</sup> Cir. 1974).

## CONCLUSION AND PRAYER

For the reasons discussed, the Board should hold that Respondents violated Sections 8(a) (5) and (1) of the Act by unilaterally ceasing dues checkoff without first bargaining to good faith impasse. As remedy, Respondents should be required to reimburse Charging Party Local 20 in an amount equivalent to voluntarily authorized dues amounts which Respondents unilaterally failed and refused to deduct and pay to Local 20 during the identified time frame, without resort to deducting such amounts from affected employees' wages. Interest should be applied to all monetary remedies.

DATED this 8th day of February, 2012.

Respectfully submitted,

s/G. William Baab

G. William Baab

BAAB & DENISON, L.L.P.  
2777 N. Stemmons Freeway, Suite 1100  
Dallas, Texas 75207  
214.637.0750 Telephone  
214.637.0730 Facsimile  
Email: [gwbaab@baabdenison.com](mailto:gwbaab@baabdenison.com)

**ATTORNEY FOR CHARGING PARTY  
IBEW LOCAL 20**

## CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2012, the foregoing Charging Party  
IBEW Local 20's Brief in Support of Exceptions was filed as follows:

*Electronically and Original and seven (7) copies by UPS Next Day Air:*

Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW  
Washington, DC 20570

*Copies electronically and by US Certified Mail, Return Receipt Requested to:*

**US CM-RRR 7011 1570 0003 0302 7410**  
Martha Kinard, Regional Director  
National Labor Relations Board Region 16  
819 Taylor Street, Room 8A24  
Fort Worth, Texas 76102-6178  
Email: [martha.kinard@nrlb.gov](mailto:martha.kinard@nrlb.gov)

**US CM-RRR 7011 1570 0003 0302 7427**  
Linda M. Reeder, Esq.  
David Foley, Esq.  
National Labor Relations Board Region 16  
819 Taylor Street, Room 8A24  
Fort Worth, Texas 76102-6178  
Email: [linda.reeder@nrlb.gov](mailto:linda.reeder@nrlb.gov)

**US CM-RRR 7011 1570 0003 0302 7434**  
Howard M. Kastrinsky, Esq.  
King & Ballow Law Office  
1100 Union Street Plaza  
315 Union Street  
Nashville, Tennessee 37201  
Email: [hmk@kingballow.com](mailto:hmk@kingballow.com)

s/G. William Baab  
G. William Baab