

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of

WHDH-TV

and

AMERICAN FEDERATION OF  
TELEVISION AND RADIO ARTISTS,  
BOSTON LOCAL, AFL-CIO

Case No. 1-CA-46744

**EXCEPTIONS OF CHARGING PARTY AND BRIEF IN SUPPORT**

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## TABLE OF CONTENTS

<b>Exceptions</b> .....	1
<b>Brief in Support</b> .....	3
I.    Statement of the Case.....	3
A.    The Undisputed Facts .....	3
II.   Statement of the Issues.....	5
III.  Legal Argument .....	5
A. <u>Bethlehem Steel</u> should be overruled .....	5
1.    The Board has faced substantial criticism for excepting dues check-off from the unilateral change doctrine .....	5
2.    The continuance of dues check-off for eleven months post-contract termination is the functional equivalent of continuing dues check-off in a right-to-work state.....	9
3.    The assumption in <u>Bethlehem Steel</u> that union security and dues check-off are intertwined and therefore coterminous is erroneous .....	10
i.    Union security and dues check-off serve different purposes .....	10
ii.   Union security and dues check-off are statutorily distinct.....	12
iii.  Union security and dues check-off are contractually independent in this case	14
4.    The rationale of excepting dues check-off as a “recognized economic weapon” of the employer contravenes Board law and punishes employees .....	15
B.    In the alternative, the Board should find a violation under <u>Tribune</u> .....	16
C.    The Board should order WHDH to pay AFTRA the amount of un-deducted and unremitted dues, with interest.....	19
1.    An order that WHDH pay to AFTRA the amount of the un-deducted and unremitted dues is the appropriate remedy to a violation of Section 8(a)(5).....	20
2.    Application of the remedy is appropriate even if the case turns on a purported change in the law .....	24
IV.   Conclusion .....	25

**TABLE OF AUTHORITIES**

**Statutes**

Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c)(4) ..... 13

Massachusetts Wage Act, M.G.L. c. 149, §§ 148, 150..... 23

**National Labor Relations Board**

87-10 51st Ave. Owners Corp., 320 NLRB 993 (1996) ..... 18

Amer. Nurses Ass’n, 250 NLRB 1324 (1980)..... 11

Ariz. Portland Cement Co., 302 NLRB 36 (1991) ..... 16

AT&T Corp., 325 NLRB 150 (1997) ..... 16

Bethlehem Steel Co., 136 NLRB 1500 (1962) ..... 1, 3, 6, 9, 11, 14

Boise Cascade Corp., 304 NLRB 94 (1991)..... 17

Charles D. Bonanno Linen Serv., 243 NLRB 1093 (1979) ..... 15

Chester Cnty. Hosp., 320 NLRB 604 (1995)..... 15

Frito-Lay, 243 NLRB 137 (1979)..... 6, 9

Full Line Distribs., Inc., 243 NLRB 758 (1979)..... 17

Gadsen Tool, Inc., 340 NLRB 29 (2006)..... 21

Graphic Commc’ns Dist. Council 2 (Data Documents), 278 NLRB 365 (1986)..... 13

Hacienda Resort Hotel & Casino (Hacienda I), 331 NLRB 665 (2000) ..... 6

Hacienda Resort Hotel & Casino (Hacienda II), 351 NLRB 504 (2007) ..... 7

Hacienda Resort Hotel & Casino (Hacienda III), 355 NLRB No. 154 (2010)... 7, 8, 13, 15, 16, 22

Int’l Longshoreman’s Ass’n, 322 NLRB 727 (1996) ..... 11

John Deklewa & Sons, 282 NLRB 1375 (1987)..... 24

Kayser-Roth Hosiery Co., 176 NLRB 999 (1969) ..... 12, 15

Levitz Furniture Co., 333 NLRB 717 (2001) ..... 24

Meekins, Inc., 290 NLRB 126 (1988) ..... 20

Midwest Television, Inc., 343 NLRB 748 (2004) ..... 24

Ogle Prot. Serv., Inc., 183 NLRB 682 (1970) ..... 21

<u>Pattern Makers’ Ass’n of Detroit</u> , 233 NLRB 430 (1977).....	17
<u>Penn Cork &amp; Closures, Inc.</u> , 156 NLRB 411 (1965).....	15
<u>Plymouth Court</u> , 341 NLRB 363 (2004).....	20
<u>Route 22 Auto Sales</u> , 337 NLRB 84 (2001).....	20
<u>Seneca Envtl. Prods.</u> , 243 NLRB 624 (1979).....	21
<u>Shen-Mar Food Prods.</u> , 221 NLRB 1329 (1976).....	11
<u>Sommerville Constr. Co.</u> , 327 NLRB 514 (1999).....	20
<u>Stackpole Components Co.</u> , 232 NLRB 723 (1977).....	21
<u>Tampa Sheet Metal Co.</u> , 288 NLRB 322 (1988).....	6
<u>Texaco Inc.</u> , 264 NLRB 1132 (1982).....	21
<u>Timber Prods. Co.</u> , 277 NLRB 769 (1985).....	20
<u>Tribune Publ’g Co.</u> , 351 NLRB 196 (2007).....	1, 3, 5, 12, 17, 19
<u>Trico Products Corp.</u> , 238 NLRB 1306 (1978).....	12
<u>USIC Locating Servs., Inc.</u> , 6-CA-37328, 2012 WL 76860 (Goldman, ALJ, NLRB Div. of Judges Jan. 10, 2012).....	8, 10
<u>W. Co. &amp; United Steelworkers of Am.</u> , 333 NLRB 1314 (2001).....	18
<u>W. Coast Cintas Corp.</u> , 291 NLRB 152 (1988).....	21
<u>W.J. Holloway &amp; Son</u> , 307 NLRB 487 (1992).....	20
<u>Waco Inc.</u> , 273 NLRB 746 (1984).....	3
<u>WKYC-TV, Inc.</u> , 8-CA-39190, 2011 WL 4543697 (Wedekind, ALJ, NLRB Div. of Judges Sept. 30, 2011).....	8, 18
<u>YWCA of W. Mass.</u> , 349 NLRB 762 (2007).....	20

**Supreme Court of the United States**

<u>Bigelow v. RKO Radio Pictures</u> , 327 U.S. 251 (1946).....	20
<u>Chevron USA, Inc. v. Natural Res. Def. Council, Inc.</u> , 467 U.S. 837 (1984).....	8
<u>Felter v. S. Pacific Co.</u> , 359 U.S. 326 (1959).....	11, 12
<u>Livadas v. Bradshaw</u> , 512 U.S. 107 (1994).....	23
<u>NLRB v. Katz</u> , 369 U.S. 736 (1962).....	6

**United States Court of Appeals**

Armco, Inc. v. NLRB, 832 F.2d 357 (6th Cir. 1987)..... 12

Local Joint Exec. Bd. of Las Vegas v. NLRB (LJEB III), 657 F.3d 865 (9th Cir. 2011).. ... 7, 8, 9,  
10, 12, 13, 14

Local Joint Exec. Bd. of Las Vegas, Culinary Workers Union Local 226 v. NLRB (LJEB I), 309  
F.3d 578 (9th Cir. 2002) ..... 6

Local Joint Exec. Bd. of Las Vegas, Culinary Workers Union Local 226 v. NLRB (LJEB II), 540  
F.3d 1072 (9th Cir. 2008) ..... 7

McClatchy Newspapers, Inc. v. NLRB, 131 F.3d 1026 (D.C. Cir. 1997)..... 13

NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527, 523 F.2d 783 (5th Cir. 1975)  
..... 11, 12

NLRB v. Hardesty Co., 308 F.3d 859 (8th Cir. 2002)..... 22

NLRB v. Warehousemen’s Union Local 17, Int’l Longshoremen’s & Warehousemen’s Union,  
451 F.2d 1240 (9th Cir. 1971) ..... 21

Tribune Publ’g Co. v. NLRB, 564 F.3d 1330 (D.C. Cir. 2009) ..... 19

United Food & Commercial Workers Union, Local 1036 v. NLRB, 307 F.3d 760 (9th Cir. 2002)  
..... 8

**Massachusetts Supreme Judicial Court**

Camara v. Attorney Gen., 458 Mass. 756 (2011) ..... 23

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**EXCEPTIONS OF CHARGING PARTY**

The Charging Party, American Federal of Television and Radio Artists, Boston Local, AFL-CIO (“AFTRA” or “the Union”), pursuant to Section 102.46(a) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “the Board”), hereby excepts to the April 11, 2012 Decision and Order (JD (NY)-10-12) of Administrative Law Judge Raymond P. Green (“ALJ” or “Judge Green”) in the above-captioned matter.<sup>1</sup>

**Exception 1.** The Union takes exception to the continuing validity of Bethlehem Steel Co., 136 NLRB 1500 (1962) and its progeny. ALJD, 2: 21-23. The Union argues that an employer’s unilateral cessation of dues deduction after contract expiration is an unfair labor practice and any precedent to the contrary should be overturned.

**Exception 2.** The Union takes exception to Judge Green’s rejection of the alternate argument offered by the Union under the holding of Tribune Publ’g Co., 351 NLRB 196 (2007).

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<sup>1</sup> Hereinafter, “ALJD, \_\_\_” will reference the page and line in the ALJ’s Decision, JD-10-12. “Compl.” will reference the Complaint. “Ex.” will reference the Joint Exhibits. “R.” will reference the Record.

The Union respectfully argues that the ALJ misinterpreted the Tribune rule and misapplied its holding to the facts presented. ALJD, 2: 25-35.

**Exception 3.** The Union excepts to Judge Green's finding that the Employer did not violate Sections 8(a)(5) and (1) by unilaterally ceasing dues deduction after contract expiration. ALJD, 2: 37.

**Exception 4.** Finally, the Union takes exception to Judge Green's dismissal of the Complaint and believes the appropriate remedy is to order WHDH to pay AFTRA the amount of unlawfully un-deducted and unremitted dues, with interest. ALJD, 3: 7.

Additionally, Counsel for the Charging Party respectfully requests to make an oral argument when the case is heard before the Board.

## **BRIEF OF CHARGING PARTY IN SUPPORT OF EXCEPTIONS**

### **I. Statement of the Case**

AFTRA and the General Counsel seek to reverse Board law as articulated in Bethlehem Steel Co., 136 NLRB 1500 (1962), enf. denied on other grounds, 320 F.2d 615 (3rd Cir. 1963) (“Bethlehem Steel”). Concluding that he was bound by Bethlehem Steel, Judge Green found that WHDH did not violate Sections 8(a)(5) and (1) of the Act by unilaterally ceasing dues check-off without notice to AFTRA or an opportunity to bargain. ALJD, 2: 22-23 (citing Waco Inc., 273 NLRB 746, 749, n. 14 (1984)).

In the alternative, the Union maintains that the Board should find that WHDH violated the Act by unilaterally ceasing dues check-off after it had voluntarily undertaken, and thus tacitly agreed to continue, dues deduction for eleven months following contract termination, under the rule articulated in Tribune Publ’g Co., 351 NLRB 196 (2007), enf’d, 564 F.3d 1330 (D.C. Cir. 2009) (“Tribune”). Judge Green rejected this alternative argument on the incorrect grounds that a dues check-off clause requires the existence of a collective bargaining agreement and that the continuation of dues check-off for eleven months after contract expiration does not constitute an implied agreement to continue deductions. ALJD, 2: 25-35.

AFTRA therefore excepts to the ALJ’s findings and requests that the Board find a violation either by overruling Bethlehem Steel or applying Tribune. Accordingly, AFTRA requests that the Board remedy the violation by ordering WHDH, which is the wrongdoer, to pay AFTRA the amount of unlawfully un-deducted and unremitted dues, with interest.

#### **A. The Undisputed Facts**

WHDH is a television station based in Boston, Mass., and which employs a bargaining unit of on-air staff represented by AFTRA. Compl. and Answer ¶¶ 2, 7; ALJD, 1. WHDH and

AFTRA have been party to a collective bargaining agreement since at least 1980. ALJD, 1. The relevant contract expired by its terms on December 31, 2008, but was mutually extended by WHDH and AFTRA until April 26, 2010, at which time the Station terminated the agreement.

Id.

Article 2 of the agreement (“AFTRA Membership”) is a union security clause that states, in relevant part, “All persons of the category named in Article 1 now or hereinafter employed at the Station shall be members of AFTRA in good standing or become members no later than the thirty-first (31st) day from the date of such employment or the date of this Agreement, whichever comes later, as a condition of continued employment.” Ex. 2, at 1.

Article 17 of the Agreement (“Check-off”) is a dues check-off provision that states, in relevant part, “The Company agrees to deduct from the wages due the individual Artist per pay period all union dues and initiation fees voted or levied by the Boston Local of AFTRA, and to promptly remit the total amount of such deductions to the Treasurer of the Boston Local of AFTRA provided AFTRA notifies the company of the amounts to be deducted at least fifteen (15) days prior to the pay period deductions are to be made and provided AFTRA has supplied the Company with written authorizations by the Artist, and in such form as is required by law.” Ex. 2, at 11.

Since at least January 1, 2004, the start date of the relevant CBA, employees paid union dues using dues check-off, and check-off continued even after WHDH terminated the agreement on April 26, 2010. See ALJD, 1. It was not until March 30, 2011 that WHDH discontinued dues check-off for bargaining unit members. Id. This occurred without prior notice to AFTRA and without affording AFTRA an opportunity to bargain over either the decision to discontinue check-off or the effects of that decision. Compl. and Answer ¶ 12. WHDH admits, as it must,

that the question of dues check-off is a mandatory subject for the purposes of collective bargaining. Compl. and Answer ¶ 11. At the hearing on February 27, 2012, the parties stipulated to a list of affected employees and the amount of un-deducted (and thus unremitted) dues during the relevant period for each employee. Ex. 3; R. at 6. The parties also stipulated that one employee on that list, Jonathan Hall, paid his dues directly to the Union during the relevant period. Id.

The General Counsel has charged that the Station's unilateral change in ceasing dues check-off on March 30, 2011 violated Sections 8(a)(5) and (1) of the Act. Compl. ¶¶ 13-14. WHDH denies only the legal conclusion. Answer ¶¶ 13-14.

## **II. Statement of the Issues**

1. Whether the Board should overrule Bethlehem Steel, which holds that an employer does not violate Sections 8(a)(5) and (1) of the Act by unilaterally ceasing dues check-off post-contract termination (Exception 1).
2. Alternatively, whether WHDH violated the Act by voluntarily undertaking to continue dues deduction post-contract termination and then unilaterally reneging on its implied agreement without prior notice to AFTRA and without affording AFTRA an opportunity to bargain over the decision or its effects (Exception 2).
3. Whether, under either theory, WHDH violated Sections 8(a)(5) and (1) of the Act by unilaterally ceasing dues check-off after contract expiration, and, if so, what the appropriate remedy is (Exceptions 3-4).

## **III. Legal Argument**

### **A. Bethlehem Steel should be overruled**

#### **1. The Board has faced substantial criticism for excepting dues check-off from the unilateral change doctrine**

Board law is clear that “[e]mployee payroll deductions are mandatory subjects of bargaining,” and that this includes deductions for union dues. Tribune, 351 NLRB at 197. The Board has long held that an employer may lawfully continue deducting dues following the

expiration of a CBA. Frito-Lay, 243 NLRB 137, 137-38 (1979). It is a labor-law mantra that “an employer may not discontinue [a mandatory subject] without first bargaining with the union to impasse or agreement.” Id. (citing NLRB v. Katz, 369 U.S. 736 (1962)).

Despite what should be a straightforward application of Katz, the Board in the past has held inexplicably that dues check-off, although a mandatory subject, is not sheltered by the rule of Katz. See, e.g., Bethlehem Steel, 136 NLRB at 1502 (“The Union’s right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force. . . . Consequently, when the contracts terminated, the [Employer] was free of its checkoff obligations to the Union”); Tampa Sheet Metal Co., 288 NLRB 322, 326, n.15 (1988) (“[The employer] did not violate Sec. 8(a)(5) of the Act by ceasing union dues checkoff. An employer’s duty to check off union dues is extinguished upon the expiration of the collective-bargaining agreement.”); Hacienda Resort Hotel & Casino, 331 NLRB 665, 667 (2000) (“Hacienda I”) (an employer’s obligation to deduct and remit dues does not survive contractual expiration) (with dissent). However, beyond restating the result over the years, the Board has made no serious, and certainly no successful, effort to articulate a reasonable basis for maintaining this glaring exception to Katz. This doctrinal façade began to crumble starting in the early 2000s.

In the Hacienda line of cases, the Board was roundly criticized by the Ninth Circuit for failing to articulate a defensible rationale to exempt dues check-off from the no-unilateral-change rule of Katz. See Local Joint Exec. Bd. of Las Vegas, Culinary Workers Union Local 226 v. NLRB, 309 F.3d 578, 585 (9th Cir. 2002) (“LJEB I”) (reviewing Hacienda I, the court concluded “that the Board’s rationale for excluding dues-checkoff from the unilateral change doctrine cannot reasonably be discerned”). Even on remand, the Board could not offer an acceptable

rationale to exclude check-off. See Hacienda Resort Hotel & Casino, 351 NLRB 504 (2007) (“Hacienda II”). In response, the Ninth Circuit again vacated the Board’s decision. Local Joint Exec. Bd. of Las Vegas, Culinary Workers Union Local 226 v. NLRB, 540 F.3d 1072, 1082 (9th Cir. 2008) (“LJEB II”) (“We again instruct the Board to explain the rule it adopted in Hacienda I, or abandon Hacienda I to adopt a different rule and present a reasoned explanation to support it.”).

On remand, the Board deadlocked 2-2 and left the issue unresolved. Hacienda Resort Hotel & Casino, 355 NLRB No. 154 (2010) (“Hacienda III”). In announcing the deadlock, Chairman Liebman and Member Pearce indicated their willingness to abandon this unjustified and unsupportable doctrine, stating that “[i]n an appropriate case, we would consider overruling Bethlehem Steel and its progeny, including Tampa Sheet Metal, 288 NLRB 322, 326 fn. 15 (1988).” Id., at 2 (Liebman and Pearce, concurring). The case again reached the Ninth Circuit, which, observing that the Board had yet again failed to offer a reasonable basis for its Bethlehem Steel rule, finally declared enough is enough and ordered relief in favor of the union. Local Joint Exec. Bd. of Las Vegas v. NLRB, 657 F.3d 865, 876 (9th Cir. 2011) (“LJEB III”) (“the Board has three times failed to provide a workable rule, and the parties cannot be expected to wait any longer”) (emphasis added).

What may have been considered as “established” Board precedent for 40 years following Bethlehem Steel has thus unwoven over the last decade under the Hacienda cases. In the Hacienda III concurring opinions, Board members on each side were in agreement as to one central point—the Board has never provided an adequate justification for excluding dues check-off from the unilateral change doctrine. Hacienda III, 355 NLRB No. 154, at 2 (Liebman and Pearce, concurring) (“[T]he Board has never provided an adequate statutory or policy

justification for the holding in Bethlehem Steel excluding dues-check-off from the unilateral change doctrine..."); Id., at 4 (Schaumber and Hayes, concurring) (“[W]e are unable to offer a majority rationale that would respond to the court in the manner it directed...however, we respectfully maintain that application of the Board’s rule regarding post-contract expiration of the dues-check-off obligation is warranted for important legal, policy, and equitable reasons, albeit reasons that we may have failed to adequately explain previously.”) (emphasis added).

Despite the Board’s own acknowledgment that there is no existing precedent supported by a valid majority rationale, administrative law judges, including Judge Green, have declined to find in favor of the General Counsel because of a perceived need to adhere to Bethlehem Steel. See, e.g., WKYC-TV, Inc., 8-CA-39190, 2011 WL 4543697 (Wedekind, ALJ, NLRB Div. of Judges Sept. 30, 2011) (“I am bound by Board precedent unless and until it has been reversed by the Supreme Court.”). Nonetheless, they have done so with reluctance. See USIC Locating Servs., Inc., 6-CA-37328, 2012 WL 76860 (Goldman, ALJ, NLRB Div. of Judges Jan. 10, 2012) (“The collapse of the two very different concepts of union security and dues check-off into one, as articulated by the Board in Bethlehem Steel, is not compelling. They are different provisions, different concepts, grounded in different portions of the Act, and with different purposes. If these concepts are to be excepted from the general Katz rule, each exception should stand on its own grounds.”).<sup>2</sup>

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<sup>2</sup> The Charging Party maintains that the ALJ was not bound to follow Bethlehem Steel. Under the Supreme Court’s guiding Chevron principles, Bethlehem Steel was rendered moribund by the Board’s deadlocked decision in Hacienda III and the Ninth Circuit’s refusal to defer to Bethlehem Steel in LJEB III. See Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); United Food & Commercial Workers Union, Local 1036 v. NLRB, 307 F.3d 760, 766 (9th Cir. 2002) (en banc) (courts must defer to the Board’s interpretation of the Act only if its interpretation is rational and consistent). Because Hacienda III did not survive Chevron deference, the ALJ’s mechanical application of the Bethlehem Steel rule – despite the Board’s own admission in 2010 that the doctrine had not been rationally supported – was in error. See LJEB III, 657 F.3d at 871, 874 (noting the Board’s failure to “offer a reasoned explanation for its rule or abandon it,” the Ninth Circuit was “forced to interpret the statute as if the Board had not spoken at all”); Hacienda III, 355 NLRB No. 154, at 2 (Liebman and Pearce, concurring) (“[T]he

Dues check-off is a mandatory subject of bargaining. This case requires confronting the question of why check-off should singularly be exempted from one of labor-law's most important rules – the Katz doctrine against unilateral changes. Given the Board's repeated failure to articulate a sound basis to exclude check-off from the Katz rule, the acting General Counsel has determined it appropriate to request that the Board finally overrule Bethlehem Steel. For the reasons that follow, there is no legitimate basis for the Board to maintain such an exception.

**2. The continuance of dues check-off for eleven months post-contract termination is the functional equivalent of continuing dues check-off in a right-to-work state**

In a right-to-work state, although union security arrangements are unlawful, employers can nonetheless agree to deduct dues. In non-right-to-work states, “the acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso to Section 8(a)(3).” Bethlehem Steel, 136 NLRB at 1502. However, as in a right-to-work state, employers may lawfully agree to deduct dues following the expiration of a CBA. Frito-Lay, 243 NLRB at 137-38.

The legality of the union security clause in the WHDH-AFTRA agreement expired with the contract on April 26, 2010. See ALJD, 1. WHDH nonetheless continued to voluntarily check off dues until March 30, 2011. Id. Over that eleven-month period, WHDH acted like an employer in a right-to-work state by agreeing to deduct dues in the absence of any functioning union security provision, and was thus prohibited under LJEB III from unilaterally ceasing dues check-off. In LJEB III, the Ninth Circuit held<sup>3</sup> that where dues check-off provisions “exist as a

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Board has never provided an adequate statutory or policy justification for the holding in Bethlehem Steel excluding dues-checkoff from the unilateral change doctrine...”).

<sup>3</sup> The Ninth Circuit concluded it should decide the case in the first instance, rather than remand it again, because of the General Counsel's admission at oral argument that no holding was articulated in Hacienda III. LJEB III, 657 F.3d at 874, n.8.

freestanding, independent convenience to willingly participating employees,” as in right-to-work states, an employer violates the Act by unilaterally stopping dues check-off. LJEB III, 657 F.3d at 875. WHDH acted in the absence of any lawful union security clause but nonetheless continued to check off dues, allowing member employees the benefit of that service. Such conduct mirrors that under dues check-off arrangements present in right-to-work states.

The notion that dues check-off provisions “implement” union security and therefore expire with union security, as explained infra, is a fiction. In reality, dues check-off provisions facilitate union membership, not implement union security, and employees can choose to continue being members and paying dues post-contract termination. See USIC Locating Servs., Inc., 6-CA-37328, 2012 WL 76860 (Goldman, ALJ, NLRB Div. of Judges Jan. 10, 2012) (“Dues-checkoff arrangements between employers and unions, premised in every case, as here, on voluntary authorizations executed by individual employees, do not compel union membership or financial support as do union security provisions. And it is clear that a lawful checkoff arrangement can exist independent of and in the absence of union security and, unlike union security, may remain in effect after expiration of the labor agreement should the employer permit it.”). Assuming, arguendo, that dues check-off provisions “implement” union security, it would be illogical for any employer to lawfully continue dues check-off in the absence of union security, as WHDH did for nearly a year. The distinction drawn in dicta in LJEB III between dues check-off arrangements in right-to-work states and non-right-to-work states is thus specious, and the Board should find no distinction between the right-to-work situation in LJEB III and the situation presented by WHDH’s post-contract termination conduct.

**3. The assumption in Bethlehem Steel that union security and dues check-off are intertwined and therefore coterminous is erroneous**

**i. Union security and dues check-off serve different purposes**

Union security and dues check-off provisions serve different purposes and are not intertwined. Amer. Nurses Ass'n, 250 NLRB 1324, 1324, n.1 (1980) (union security and dues check-off are “separate and distinct matters”); NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527, 523 F.2d 783, 786 (5th Cir. 1975) (union security and dues check-off provisions “have a totally different purpose and rationale”); see also Felter v. S. Pacific Co., 359 U.S. 326, 333 (1959) (under the Railway Labor Act, union security and dues check-off are separate entities, the latter a matter of “individual freedom of decision” for the employee). Bethlehem Steel, however, inexplicably concluded that union security and dues check-off arrangements are so interrelated that to enforce dues check-off in the absence of a contract would violate Section 8(a)(3), even though Section 8(a)(3) makes no mention of dues check-off. See Bethlehem Steel, 136 NLRB at 1502. The Board’s conclusory finding that “[t]he check-off provisions in Respondent’s contracts with the Union implemented the union-security provisions” cannot be supported. See id.

Although dues authorized to be “checked off” may be dues required under a union security provision, unlike union security provisions, employees cannot be compelled to partake in dues check-off even where union security is present. Int’l Longshoreman’s Ass’n, 322 NLRB 727, 729-30 (1996). Nor is the existence of a dues check-off provision dependent on the existence of a union security provision (e.g., in right-to-work states). Shen-Mar Food Prods., 221 NLRB 1329, 1330 (1976), enfd as modified 557 F.2d 396 (4th Cir. 1977) (check-off authorizations are not union security devices, which a state can prohibit under § 14(b) of the Act, because they do not “impose membership or support as a condition required for continued employment”). Even when both provisions are present, however, they continue to serve separate functions. Union security clauses primarily protect unions; they are designed to stabilize the

collective bargaining relationship by securing the union's ability to fund representational activities. Atlanta Printing, 523 F.2d at 786 (noting that employees can be discharged for failure to comply with union security clauses). While dues check-off provisions assist the union administratively in the collection of dues, "the emphasis is on protection of the employee, not the union." Id.; Armco, Inc. v. NLRB, 832 F.2d 357, 364 (6th Cir. 1987) ("It is well settled that the dues check-off provisions are intended to be an area of voluntary choice for the employee."); Kayser-Roth Hosiery Co., 176 NLRB 999, 1000-01 (1969) ("[W]hen a union proposes a dues check-off contract provision, it is the employees who are asking, it is they who want the employer to forward dues as a convenience for the workmen."); see also LJEB III, 657 F.3d at 868 ("The dues-check-off provision also benefited participating employees, who did not incur the cost and effort of submitting dues to the Union themselves.").

**ii. Union security and dues check-off are statutorily distinct**

Beyond having separate and distinct purposes, there is no statutory basis for concluding that union security and dues check-off provisions are intertwined and therefore coterminous. The Supreme Court has articulated that "the Act makes no formal relationship between a union-shop arrangement and a checkoff arrangement." Felter, 359 U.S. at 337; see also Atlanta Printing, 523 F.2d at 786 (dues check-off section of the Act is "far from being a union security provision" and dues check-off provisions "are intended to be an area of voluntary choice for the employee"). Unlike union security under the proviso to Section 8(a)(3), there is no statutory requirement that dues check-off provisions be embodied in collective bargaining agreements, or that they be coterminous with union security provisions. Trico Products Corp., 238 NLRB 1306, 1308 (1978) (unlike most terms and conditions of employment, a union-security clause does not survive post-termination); Tribune, 564 F.3d at 1335 (as explained more fully below, "Section 302 does not

require a written collective bargaining agreement ... [it] merely requires that employees give written consent that is revocable after a year.”); Graphic Commc’ns Dist. Council 2 (Data Documents), 278 NLRB 365, 367-68 (1986) (“Because of the distinction between union security and check-off, a revocation of the latter must ‘be accomplished during the time periods set out in the check-off authorization itself, even during the hiatus between contracts.’”) (quoting Steelworkers Local 7450 (Asarco Inc.), 246 NLRB 878, 882 (1979)). Contrary decisions cited by Members Schaumber and Hayes in Hacienda III misinterpret the clear language of Section 302(c)(4). See, e.g., McClatchy Newspapers, Inc. v. NLRB, 131 F.3d 1026, 1030 (D.C. Cir. 1997) (incorrectly stating that “the NLRA requires that these [dues check-off] clauses be exceptions, because they are legal only if authorized by a collective bargaining agreement”).<sup>4</sup>

The language of Section 302(c)(4) governing dues check-off arrangements suggests that Congress anticipated that employees who did not revoke their authorizations would continue to have dues checked off post-contract expiration.<sup>5</sup> 29 U.S.C. § 186(c)(4) (written assignments “shall not be irrevocable for a period of more than a year, or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner”); LJEB III, 657 F.3d at 875-76 (“This provision would be surplusage if Congress believed that dues-checkoff

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<sup>4</sup> Members Schaumber and Hayes also mistakenly claim that the “Supreme Court has likewise acknowledged the special status of dues check-off provisions as an exception to the Katz rule.” Hacienda III, 355 NLRB No. 154, at 5, n.6 (citing Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 199 (1991)). However, the reference in Litton is dicta, and in no way represents a holding of the U.S. Supreme Court.

<sup>5</sup> Members Schaumber and Hayes, concurring in Hacienda III, reference Section 302(c)(4) to argue that dues check-off arrangements are “uniquely of a contractual nature” and therefore expire with the contract. Hacienda III, 355 NLRB No. 154, at 4. Chairman Liebman and Member Pearce correctly note that this distinction is “nonexistent,” as dues check-off is a term and condition of employment no less contractually dependent than wages, pension benefits, and other provisions contained in an agreement. Id., at 2. Moreover, contributions to pension and welfare funds under Section 302(c)(5) can only be paid if “the detailed basis on which such payments are to be made is specified in a written agreement.” Section 302(c)(4), on the other hand, requires only a “written assignment” and no “detailed basis” or “agreement.” Dues check-off is actually less “contractual in nature” than pension benefits, which are indisputably subject to the no-unilateral-change doctrine.

automatically terminated upon expiration of a CBA.”). Bethlehem Steel, contrary to Section 302(c)(4), transfers employee control over dues check-off to employers. Although no longer compelled to pay union dues once a union security clause extinguishes, employees may nonetheless wish to continue their membership and avail themselves of the benefit of a dues check-off arrangement. The distinction noted in LJEB III between a dues check-off provision tied to a union security clause and an independent dues check-off provision in a right-to-work state, therefore, is a distinction without a difference—in both scenarios “the unilateral cessation of check-off by the Employers ...strip[s] employees of a contractual right that they had expressly exercised by requesting dues check-off.” LJEB III, 657 F.3d at 875. Such a result contravenes the clear language and legislative intent of the Act that dues check-off arrangements exist as a matter of “individual freedom of decision” by employees.

**iii. Union security and dues check-off are contractually independent in this case**

It is also notable that the agreement between WHDH and AFTRA contains separate union security and dues check-off articles, neither of which refers to, nor is dependent on, the other, ex. 2, at 1, 11, indicating that the parties did not intend for the provisions to be interdependent. Moreover, the dues check-off article in the AFTRA-WHDH agreement, unlike the article in Bethlehem Steel expressly limiting the contractual dues check-off provision to the duration of the parties’ agreement, contains no temporally limiting language. Ex. 2, at 1, 11; Bethlehem Steel, 136 NLRB at 1502. As such, there is no contractual basis for finding that dues check-off extinguished with union security upon expiration of the agreement. Absent an explicit contractual basis, there can be no statutory basis to conclude that union security is intertwined with dues check-off. The fact that the WHDH CBA differs from the CBA in Bethlehem Steel in this respect is sufficient distinguishing grounds to rule in AFTRA’s favor here.

#### **4. The rationale of excepting dues check-off as a “recognized economic weapon” of the employer contravenes Board law and punishes employees**

An employer’s intent in ceasing dues check-off is to inflict economic pressure on the union. See Hacienda III, 355 NLRB No. 154, at 5 (Schaumber and Hayes, concurring) (“[L]ike strikes and lockouts, an employer’s ability to cease dues checkoff upon contract expiration has become a recognized economic weapon in the context of bargaining for a successor agreement...”). Members Schaumber and Hayes thus concluded that “to strip employers of that opportunity [to cease dues check-off upon contract expiration] would significantly alter the playing field.” Id. This rationale contravenes the principle that “the Board’s statutory mandate is to balance not economic weapons, but conflicting legitimate interests,” Charles D. Bonanno Linen Serv., 243 NLRB 1093, 1097 (1979), enf’d, 630 F.2d 25 (1st Cir. 1980), aff’d, 454 U.S. 404 (1982) (internal quotations and citations omitted), as well as the reality that unilateral cessation of dues check-off does more than inflict economic pressure on the union—it punishes employees.

Dues check-off offers member employees “the convenience of paying membership dues effortlessly through wage deductions.” Penn Cork & Closures, Inc., 156 NLRB 411, 414 (1965); see also Chester Cnty. Hosp., 320 NLRB 604, 622 (1995) (“[D]ues check-off is not simply an accommodation to the Union. It is equally important as a convenience and benefit to the unit employees.”); Kayser-Roth Hosiery Co., 176 NLRB 999, 1000-01 (1969) (“[W]hen a union proposes a dues check-off contract provision, it is the employees who are asking, it is they who want the employer to forward dues as a convenience for the workmen.”). When WHDH, or

another employer, unilaterally strips employees of this benefit, employees are less able to properly budget their wages to keep up with union dues.<sup>6</sup>

As an example, consider the benefit of dues check-off to a low-wage worker living paycheck to paycheck and concerned with overcoming life's many economic hardships. This employee, already stretched thin, may lack the wherewithal to make regular payment of union dues without the simplifying structure of dues check-off. Despite his desire to retain union membership, this employee would run the risk of jeopardizing his membership and its attendant benefits because of the Bethlehem Steel rule. Contrary to the opinion of Members Schaumber and Hayes, cessation of dues check-off thus operates as an economic weapon against employees and does not provide any valid explanation for excepting dues check-off from the no-unilateral-change doctrine.

**B. In the alternative, the Board should find a violation under Tribune**

Regardless whether the Board overrules Bethlehem Steel, the Board should find that WHDH violated the Act by voluntarily undertaking, and thus tacitly agreeing, to continue dues deduction post-contract termination. By unilaterally reneging on its implied agreement without prior notice to AFTRA and without affording AFTRA an opportunity to bargain over the decision or its effects, WHDH violated Sections 8(a)(5) and (1) of the Act.

The most recent contract between AFTRA and WHDH expired by its terms on December 31, 2008, but was extended until April 26, 2010, at which time WHDH terminated the

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<sup>6</sup> Another argument advanced by Members Schaumber and Hayes, equally without merit, is that dues check-off provisions “do not mandate monetary payments by employees or otherwise affect the wages, hours, and conditions under which employees work.” Hacienda III, 355 NLRB No. 154, at 6. Dues check-off does affect employee wages by allowing them a mechanism for budgeting expenses. Moreover, many mandatory subjects of bargaining have no effect on wages, hours, or working conditions but have not been carved out as exceptions to the Katz rule. See, e.g., Ariz. Portland Cement Co., 302 NLRB 36 (1991) (union bulletin boards); AT&T Corp., 325 NLRB 150 (1997) (check-cashing services).

agreement. ALJD, 1. WHDH continued to engage in dues check-off for eleven months following April 26, 2010. Id. In continuing payroll deductions for nearly a year, WHDH voluntarily and effectively agreed to conduct check-off post-expiration and thus violated the Act. See Tribune, 351 NLRB at 198 (concluding that “the deduction and direct deposit of union dues became the new status quo” after the employer mistakenly re-started dues check-off post-termination for a period of eleven days). In Tribune, the employer temporarily ceased deductions upon contract expiration but subsequently agreed to directly deposit dues from its payroll into the union’s account. Id. at 196. The Board found that such deductions were not subject to unilateral rescission. Id. at 198. The Board has held in other cases that an employer’s voluntary undertaking benefitting employees is the legal equivalent of an agreement that binds the employer. See Full Line Distribs., Inc., 243 NLRB 758, 761 (1979) (employee garaging) (“Even if there were no formal agreement to store his truck at Respondent’s warehouse, there was a tacit agreement to do so; and, if there were no tacit agreement, at the minimum, there was an established practice permitting [the employee] to receive free garaging.”); Pattern Makers’ Ass’n of Detroit, 233 NLRB 430, 433 (1977) (job referral system) (“In situations where contracts did not provide explicitly that job-referral clauses made the labor organizations the exclusive referral source, the Board nonetheless found such exclusive arrangements existed either by implication or tacit agreement derived from the surrounding circumstances.”) (internal citations omitted); see also Boise Cascade Corp., 304 NLRB 94, 96 (1991) (grant of gift certificates to employees) (“When benefits are in the hands of employees and the only unlawfulness in their original grant is that the union was not consulted, it makes sense to leave it at the option of the union whether to leave things as they are or to reopen the subject and bargain over the particular grant.”).

The cases cited by WHDH's counsel at the February 27, 2012 hearing in an effort to distinguish Tribune include 87-10 51st Ave. Owners Corp., 320 NLRB 993 (1996) (seven-month delay); W. Co. & United Steelworkers of Am., 333 NLRB 1314 (2001) (three-month delay); and WKYC-TV, Inc., 2011 WL 4543697 (sixteen-month delay). R. at 15. The first two cases cited, Owners Corp. and West Coast, were decided before Tribune and thus have been superseded. In the last case cited, WKYC-TV, ALJ Wedekind also relied on those same pre-Tribune cases in finding no violation by an employer who ceased dues check-off sixteen months post-contract termination.

In WKYC-TV, ALJ Wedekind distinguished Tribune on the ground that the employer there violated the Act by discontinuing dues check-off after previously agreeing post-termination to a direct deposit arrangement. This distinction is without legal significance. The employer in Tribune started and ceased dues check-off for eleven days post-expiration, and the Board found a violation. WHDH has continued to check off dues for eleven months post-expiration. When measured in terms of reliance, WHDH's continuance of dues check-off for nearly a year following contract expiration indicates as much of a promise to maintain the "status quo" as the employer's express reinstatement of dues check-off for less than two weeks in Tribune.

ALJ Wedekind was also wrong to assume there is any legal distinction between an employer's explicit agreement to offer a benefit such as check-off and its implicit agreement to do so via a voluntary undertaking. This erroneous assumption led ALJ Wedekind to improperly fail to apply Tribune, and ALJ Green repeated this mistake in the instant case. Judge Green found "no evidence that the Company made any agreement, express or implied, to extend that contract provision [dues check-off] after the expiration date in the absence of a new collective bargaining agreement" and concluded that the continuation of dues deduction by the Employer

should not be construed as “some kind of tacit agreement.” ALJD, 2: 30-32 (emphasis added). Judge Green failed to explain why the continuation of an employee benefit for eleven months post-contract expiration does not amount to evidence of an implied agreement to continue to provide that benefit. See Tribune, 351 NLRB at 198 (deduction and direct deposit of dues after contract expiration “became the new status quo”). Moreover, Judge Green misstates the law in reaching this conclusion, noting that “a union security clause and a concomitant dues check-off clause requires, pursuant to Section 8(a)(3), the existence of a collective bargaining agreement.” ALJD, 2: 25-27 (citing Tribune at the end of that paragraph). Tribune, of all cases to cite, states unequivocally that “Section 302 [governing dues check-off] does not require a written collective bargaining agreement ... [it] merely requires that employees give written consent that is revocable after a year.” Tribune, 564 F.3d at 1335 (rejecting the employer’s claim on appeal that the union dues can only be deducted pursuant to a CBA containing a provision authorizing dues deduction) (emphasis added). The ALJ’s failure to explain why the continuance of dues deduction eleven months after contract expiration does not constitute an implied agreement to maintain the status quo, as well as his clear misstatement and misapplication of the law, leaves the Board with no basis for adhering to his conclusions regarding the applicability of Tribune to the instant case.

Accordingly, application of the Tribune rule mandates that the discontinuation of dues check-off by WHDH on March 30, 2011, without prior notice to AFTRA and without affording AFTRA an opportunity to bargain over that decision or its effects, be deemed a violation of Sections 8(a)(5) and (1) of the Act.

**C. The Board should order WHDH to pay AFTRA the amount of un-deducted and unremitted dues, with interest**

**1. An order that WHDH pay to AFTRA the amount of the un-deducted and unremitted dues is the appropriate remedy to a violation of Section 8(a)(5)**

To appropriately remedy the unlawful actions of WHDH, the General Counsel “seeks an order requiring [WHDH] to reimburse the Union for amounts equal to the dues that would have been deducted from the checks of employees who had previously authorized dues check-off, had [WHDH] not ceased dues check-off.”<sup>7</sup> Compl., at 3. This requested remedy is the only appropriate one. Because of Bethlehem Steel and its progeny, there are no cases addressing the remedy to a unilateral cessation of check-off following the expiration of a CBA. However, there are numerous cases that address the appropriate remedy where an employer either repudiates a CBA or wrongly determines a CBA does not apply, and therefore does not comply with an extant check-off requirement.

As the Supreme Court has explained, in a decision often quoted by the Board, the “most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.” Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265 (1946) (quoted in Texaco Inc., 264 NLRB 1132, 1146 (1982)). Without exception, the Board has ordered the offending employer to make the victim union whole by paying to the union an amount equal to the un-deducted and unremitted dues, with interest. See, e.g., YWCA of W. Mass., 349 NLRB 762, 764-65 (2007); Plymouth Court, 341 NLRB 363, 363-64 (2004); Route 22 Auto Sales, 337 NLRB 84, 86-87 (2001); Sommerville Constr. Co., 327 NLRB 514, n. 1 (1999); W.J. Holloway & Son, 307 NLRB 487, 487, n. 3 (1992); Meekins, Inc., 290 NLRB 126 (1988); Timber Prods. Co., 277 NLRB 769, 771 (1985); Texaco Inc., 264 NLRB 1132, 1146

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<sup>7</sup> AFTRA seeks this remedy for all dues-paying members except Jonathan Hall, the one employee who paid his dues directly to the Union. WHDH should be ordered to recompense Jonathan Hall, rather than the Union, for those particular dues. Otherwise, Mr. Hall will have been penalized for his effort to pay his dues.

(1982); Seneca Envtl. Prods., 243 NLRB 624, 624 (1979); Ogle Prot. Serv., Inc., 183 NLRB 682, 683 (1970). If the Board fails to require the standard make-whole remedy, WHDH will be “permitted to retain the fruits of unlawful action, [and] the Act is rendered meaningless.” NLRB v. Warehousemen’s Union Local 17, Int’l Longshoremen’s & Warehousemen’s Union, 451 F.2d 1240, 1243 (9th Cir. 1971).

The Board should reject as intolerable any recoupment remedy that has employees shoulder the burden of recompensing AFTRA for WHDH’s violation. In determining that the wrongdoing employer, and not employees, should pay the dues owed, the Board has explained that “[e]xecution of a check-off authorization constitutes a tender of dues required under § 8(a)(3). Consequently, Respondent’s employees have fulfilled their contractual obligations. The loss of dues to the Union has resulted from the Respondent’s unfair labor practices. Therefore, the financial responsibility for making the Union whole for dues it would have received but for Respondent’s unlawful conduct rests entirely on the Respondent and not the employees.” W. Coast Cintas Corp., 291 NLRB 152, 156, n.6 (1988) (internal citation omitted) (emphasis added); see also Stackpole Components Co., 232 NLRB 723, 723 (1977) (ordering the employer to remit dues owed for each employee who executed a dues-deduction authorization, with interest).<sup>8</sup>

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<sup>8</sup> Similarly, in Gadsen Tool, Inc., 340 NLRB 29, 34 (2006), the Board found that the Employer violated the Act by failing to execute a CBA, and thus failed to implement a contractual dues check-off provision. The Board ordered the employer to pay to the Union the amount of un-deducted/unremitted dues. There was no recoupment. The Employer will likely claim it is unfair to order it to pay an amount equal to dues, given that the employees have signed authorizations to pay dues themselves through payroll deduction. Notably, in Gadsen, the Board ordered the payment even though the employees had not yet signed and submitted check-off authorizations. There is no rule – either prudential or legal – that would favor recoupment from employees simply because they had previously submitted authorizations (as is the case here). More to the point, as the ALJ stated in Gadsen, as affirmed by the Board: “To the extent Respondent argues general unfairness of the Board’s remedy because Respondent is unable to deduct the dues from the employees’ wages, and will be obliged to pay the dues itself, I find that this is not a ground for excusing its compliance with the Board’s order. Respondent itself incurred the risk that this situation might occur.” Id. at 34.

Such a remedy would not only fail to remedy the instant unfair labor practice, but would incentivize employers to commit such violations. By ceasing dues check-off, an employer seeks to inflict economic harm on the union. See Hacienda III, 355 NLRB No. 154, at 5 (Members Schaumber and Hayes); NLRB v. Hardesty Co., 308 F.3d 859, 865 (8th Cir. 2002) (unilateral changes undermine unions by signaling to employees that their union is “ineffectual, impotent, and unable to effectively represent them”). From the employer’s perspective, a remedy that requires employees to pay months of union dues all at once is a desirable outcome because it is one that deepens, not cures, the injury the employer first sought to inflict on the union by driving a wedge between the union and its members. Thus, a decision to effectively force employees to provide the funding to make their employer’s unfair labor practice whole is not only squarely against Board precedent, but unfair on its face. As discussed above, such a remedy would also deny employees the positive benefit of being able to pay their union dues in an incremental, budgeted fashion. The effect would be to force employees to pay a large lump sum in the form of a recoupment (even if over a period of time), which is exactly what dues check-off seeks to avoid. Rather than a remedy, this would be a deepening of the original violation.

It will be familiar to the Board that one tactic anti-union employers use during union organizing campaigns is to give employees two paychecks. See, e.g., Kalin Const. Co., Inc., 321 NLRB 649, 650 (1996) (“This is not the first opportunity we have had to address whether it is objectionable for an employer to issue employees ‘dual’ or ‘split’ paychecks and to change its method and location for distributing them, all for the purpose of influencing the outcome of a Board election. Over the past several decades, the Board has been presented repeatedly with cases raising this issue.”). The first is for the amount of dues employees would pay upon joining the union, and the second makes up the remainder of owed wages. A recoupment scheme would

be an even greater weapon. If recoupment is authorized here, WHDH would be able to massively increase employee dues deductions by between 33% and 489% for a hypothetical period of recoupment of six months, not simply highlight the amount of dues through dual checks.<sup>9</sup> Ex. 3 (list of employees, each with different amounts of dues owed). There can be little doubt that this remedy would engender substantial hostility by the members toward AFTRA.

More to the point, the Board lacks legal authority to issue an order that would allow WHDH to, in effect, cut employees' wages by allowing the Employer to recoup the dues (regardless of the length of the recoupment). A Board order authorizing recoupment would result in the Employer being allowed to cut employees' wages without agreement from the employees or AFTRA. Any deduction that WHDH would make as part of a recoupment effort would be unauthorized by the employees *qua* wage-earners. Because the deduction would be unauthorized, this would represent a unilateral cut in employee wages below the promised wage, which violates the Massachusetts Wage Act, M.G.L. c. 149, §§ 148 and 150. See Camara v. Attorney Gen., 458 Mass. 756 (2011). The Massachusetts Wage Act is quite clear that employers cannot pay less than was agreed to. Because the state wage law is a minimum standard of employment, the state law is not preempted by federal law, and certainly cannot be preempted by a Board order to which the employees are not party. Livadas v. Bradshaw, 512 U.S. 107 (1994). By virtue of violating state wage law, recoupment is an unlawful remedy under the Act because an administrative agency of the federal government lacks the authority to re-write state wage law.

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<sup>9</sup> It puzzles the mind how a low-wage worker in another case, living paycheck to paycheck, could even afford such a dues increase and continue to pay necessary bills such as rent and groceries.

It should be emphasized that the wages of almost all unit employees at WHDH are set by Personal Service Contract, which neither AFTRA nor the Employer may modify.<sup>10</sup> In Article 6 of the CBA, the parties agreed that the Employer can enter into personal contracts with employees, so long as those contracts do not include terms and conditions of employment that are less than those required by the CBA. Ex. 2, at 3-4. The only voluntary deductions that the Employer can make from employee wages are those “agreed to by AFTRA.” *Id.* Neither AFTRA nor its members have agreed to any such recoupment.

Therefore, the remedy here should be to require WHDH to pay to AFTRA, with the exception of Jonathan Hall who should be recompensed directly, the amount of money necessary to recompense AFTRA for the un-deducted and unremitted dues, plus interest.

## **2. Application of the remedy is appropriate even if the case turns on a purported change in the law**

WHDH may argue that it acted on the law as it understood it at the time, and that any order favoring AFTRA and the General Counsel should not be applied retroactively. This argument fails for at least three reasons.

First, the Board’s general policy is to apply new rules retroactively. *See, e.g., John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987), and the Board will apply a new rule only prospectively only if retroactive enforcement would create unfair prejudice. *See, e.g., Levitz Furniture Co.*, 333 NLRB 717, 729 (2001).

Second, in this case, WHDH voluntarily undertook payroll deductions for eleven months following the expiration of the CBA. As discussed above, WHDH had impliedly undertaken the obligations of dues check-off, notwithstanding the expiration of the CBA. Thus, even under

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<sup>10</sup> Personal Service Contracts are common in the television news industry. *See, e.g., Midwest Television, Inc.*, 343 NLRB 748 (2004).

existing precedent, WHDH committed a violation notwithstanding Bethlehem Steel and its progeny. See Tribune, 351 NLRB at 197. WHDH should have anticipated the finding of a ULP on Tribune grounds.

Third, at the time the Employer ceased check-off, it was in no way clear that WHDH's actions were legal. Only months before WHDH's March 30, 2011 letter ending check-off, two members of the Board (Liebman and Pearce, both of whom remained on the Board at the time the Employer ceased check-off) had announced that they would overrule Bethlehem Steel in an appropriate case. Hacienda III, 355 NLRB No. 154. This followed a decade of brutal judicial critique of the doctrine of which WHDH should have been aware. It would be disingenuous for WHDH to argue it was caught unaware by the General Counsel's position here. It would hardly be unfair to hold WHDH accountable for its gamble that Bethlehem Steel would survive, particularly given that WHDH's bet was against the odds, and made with the hope of pressuring AFTRA through the economic injury WHDH knew it was inflicting.

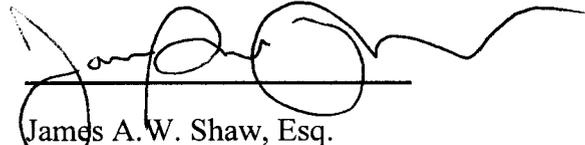
#### **IV. Conclusion**

AFTRA respectfully requests that the Board overrule Bethlehem Steel and its progeny and accordingly find that WHDH violated Sections 8(a)(5) and (1) of the Act by unilaterally ceasing dues deduction after contract expiration. In the alternative, AFTRA requests that the Board find that WHDH's conduct constituted an unfair labor practice under Tribune. AFTRA seeks an order compelling WHDH to pay AFTRA the amount of unlawfully un-deducted and unremitted dues, with interest, with the exception of dues paid by member Jonathan Hall, who should be recompensed by WHDH directly.

Respectfully submitted,

AMERICAN FEDERATION OF TELEVISION AND  
RADIO ARTISTS, BOSTON LOCAL, AFL-CIO

By its attorney,

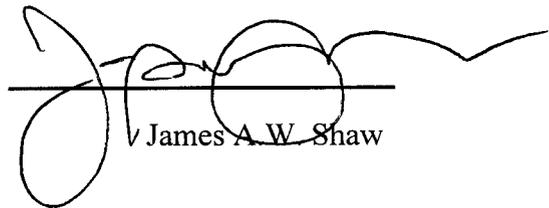


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Dated: April 30, 2012

**CERTIFICATE OF SERVICE**

I hereby certify, pursuant to 29 CFR 102.114, that I have served a copy of the above document to the Respondent WHDH through its attorney Robert P. Joy, Esq., at [rpjoy@morganbrown.com](mailto:rpjoy@morganbrown.com), and to Attorney Don Firenze, at [don.firenze@nrlb.gov](mailto:don.firenze@nrlb.gov), by e-mail service on this, the 30th day of April, 2012 .



James A. W. Shaw