MORGAN, BROWN & JOY LLP
ATTORNEYS AT LAW
200 STATE STREET
BOSTON, MASSACHUSETTS 02109-2605
TELEPHONE (617) 523-6666
FACSIMILE (617) 367-3125

SEAN P. O'CONNOR
*also admitted in NY

DIRECT DIAL (617) 788-5057
E-FAX (617) 977-9241
soconnor@morganbrown.com

May 23, 2012

By Federal Express

Mr. Lester A. Heltzer
Executive Secretary
National Labor Relations Board
Office of the Executive Secretary
1099 14th Street, N.W.
Washington, D.C. 20570

Re: WHDH-TV and American Federation of Television And Radio Artists, Boston Local
Case No. 1-CA-046744

Dear Mr. Heltzer:

Enclosed for filing are the original and eight (8) copies of Respondent WHDH-TV's Answering Brief to Exceptions of General Counsel and Charging Party in the above-entitled matter.

Very truly yours,

Sean P. O'Connor

Enclosure

cc: Robert P. Joy
Don C. Firenze
James A.W. Shaw

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of WHDH-TV and AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, BOSTON LOCAL	Case No. 01-CA-046744

RESPONDENT WHDH-TV'S ANSWERING BRIEF TO EXCEPTIONS OF GENERAL COUNSEL AND CHARGING PARTY

Dated: May 23, 2012

Robert P. Joy
Sean P. O'Connor
MORGAN, BROWN & JOY, LLP
200 State Street, 11th Floor
Boston, MA 02109
(617) 523-6666

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Respondent WHDH, pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, submits its Answering Brief to the Exceptions filed by General Counsel and Charging Party, American Federation of Television and Radio Artists, Boston Local, (the "Union" or "AFTRA").

I. STATEMENT OF THE CASE

On or about August 21, 2011, the Regional Director for the First Region issued a Complaint and Notice of Hearing alleging that WHDH-TV (the "WHDH" or "Respondent") violated Sections 8(a)(1) and (5) of the National Labor Relations Act by discontinuing dues checkoff for employees represented by AFTRA following the expiration of their collective bargaining agreement. Respondent duly filed its Answer denying the allegations of the Complaint. A hearing was held in Boston, Massachusetts before Administrative Law Judge Raymond P. Green (hereinafter "Judge Green" or "ALJ") on February 27, 2012. On April 11, 2012, Judge Green issued his Decision in this case, dismissing the Complaint.

II. FACTS

WHDH is a business licensed in the Commonwealth of Massachusetts engaged in the operation of a television station. (Complaint and Answer, ¶ 2). The following employees of WHDH (hereinafter referred to as the "Unit") constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All persons, staff and freelance (herein referenced to as "Artists"), who perform before the microphone or camera for the Employer, excluding producers, supervisory employees, and all other employees as defined in the Labor Management Relations Act of 1947

(*Id.* at ¶ 7). Since at least 1980, and at all material times, AFTRA has been the designated exclusive collective-bargaining representative of the Unit, and since that time, AFTRA has been recognized as the representative by WHDH. (*Id.* at ¶ 8). This recognition has been embodied in

successive collective-bargaining agreements. (*Ibid.*). The most recent of these collective-bargaining agreements was effective from January 1, 2004 to December 31, 2008 (the "CBA"). (Complaint and Answer, ¶ 8; GC Exh. 2).

The CBA contains both a union security provision and a dues checkoff provision. (GC. Exh. 2, pp. 1, 11). Specifically, Article 2 of the CBA addresses union security, providing:

> 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 not 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. AFTRA will accept into membership any Artist the Company wishes to employ or use, subject to the imposition of AFTRA's terms and conditions of membership. AFTRA will not impose unreasonable fees, dues or assessments.

(*Id.* at p.1). Article 17 of the CBA, addressing dues checkoff, provides:

> 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, in such for as is required by law. It is understood and agreed that the Company assumes no responsibility or liability for deducting such dues and/or initiation fees other than that of collecting the amounts indicated for the designated payroll period and promptly remitting to AFTRA the amounts so deducted.

(GC Exh. 2, p. 11).

Following agreed-upon extensions, the CBA expired on April 26, 2010. (Complaint and Answer, ¶ 8, GC Exh. 2). On or about March 30, 2011, WHDH discontinued dues checkoff for employees in the Unit after notifying AFTRA of its intention to do so. (Complaint and Answer,

¶ 10; Tr. 7). WHDH subsequently resumed dues checkoff for the employees in the Unit on or about August 22, 20110. (Tr. 7).[1]

III. ARGUMENT

A. The ALJ Correctly Concluded That Respondent Did Not Violate Section 8(a)(1) Or Section 8(a)(5) Of The Act

It has been well-established law for almost 50 years that employers do not violate the Act by unilaterally discontinuing dues checkoff following the expiration of their collective bargaining agreements. This exception to the general prohibition against unilateral changes to mandatory bargaining subjects has been repeatedly recognized and reaffirmed by the Board and Courts of Appeals, and it has even been acknowledged by the Supreme Court. It remains valid law today and as such, it is the controlling legal principle for this action. Thus, whereas the CBA between WHDH and AFTRA expired on April 26, 2010, WHDH did not violate the Act by unilaterally ceasing dues checkoff on March 30, 2011. Accordingly, the ALJ correctly concluded that WHDH's cessation of dues checkoff was lawful.

1. The ALJ Correctly Concluded That WHDH Did Not Violate The Act By Unilaterally Ceasing Dues Checkoff Following Expiration Of The CBA Because Well-Established Law Dictates That It Had The Right To Do So

Section 8(a)(5) and 8(d) of the Act generally make it unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees" with respect to "wages, hours and other terms and conditions of employment." Section 8(a)(5) also provides that unless the parties have bargained in good faith to impasse, employers are generally barred from unilaterally changing terms and conditions that involve mandatory bargaining

---

[1] General Counsel's Exhibit 3 contains a list of the employees in the Unit who are relevant to the case, and it identifies the amounts of dues which they were liable for between March 30, 2011 and August 22, 2011. (Tr. 6). Of these employees, Jonathan Hall is the only one who paid his dues during this period, making such payments directly to the union on his own. (Tr. 6).

subjects. *NLRB v. Katz*, 369 U.S. 736, 737 (1962). This prohibition on unilateral changes also generally applies to the terms and conditions of an expired collective bargaining agreement. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

Thus, it is not disputed "that most contractually-established terms and conditions of employment ... cannot be changed unilaterally on contract expiration ...." *Hacienda Hotel, Inc. Gaming Corp.*, 331 NLRB 665, 666 (2000) ("*Hacienda I*"). However, it is equally undisputed that certain contractual terms and conditions of employment have been historically treated as exceptions to this general rule. *Id.* (*citing Southwestern Steel & Supply v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986), enfg. 276 NLRB 1569 (1985); *Indiana & Michigan Electric Co.*, 284 NLRB 53, 54-55, 58-59 (1987)); *see also Litton Financial*, 501 U.S. at 199.

As stated above, one of these well-established exceptions is that an employer does not violate the Act by unilaterally discontinued the checkoff of union dues following the expiration of its collective-bargaining agreements with the union. The Board first established this precedent nearly 50 years ago through its decision in *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), aff'd in relevant part sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3rd Cir. 1963). In that case, the Board was faced with the issue of whether union security and dues checkoff provisions survived expiration of the parties' collective bargaining agreement. *Id.* Initially, the Board acknowledged that both union security and dues checkoff provisions were matters related to "'wages, hours, and other terms and conditions of employment' within the meaning of Section 8(d) of the Act and, therefore, are mandatory subjects for collective bargaining." *Id.*

The Board then held that, notwithstanding their status as mandatory bargaining subjects, there was nothing unlawful in the employer's unilateral cessation of these provisions'

enforcement following the expiration of the collective bargaining agreement. *Id.* The Board first explained its rationale with respect to union security provisions, stating:

> 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). So long as such a contract is in force, the parties may, consistent with its union-security provisions, require union membership as a condition of employment. However, upon the termination of a union-security contract, the union-security provisions become inoperative and no justification remains for either party to the contract thereafter to impose union-security requirements. Consequently, when, upon expiration of its contracts with the Union, the Respondent refused to continue to require newly hired employees to join the Union after 30 days of employment, it was acting in accordance with the mandate of the Act.

Id. The Board then held that "similar considerations" applied to dues checkoff provisions, providing that "[t]he 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." *Id.* The Board therefore concluded that "when the contracts terminated, the [employer] was free of its checkoff obligations to the Union." *Id.*

The Third Circuit Court of Appeals agreed with the Board's reasoning and affirmed its holding with respect to the employer's cessation of the union security and dues checkoff provisions. *Marine & Shipbuilding Workers*, 320 F.2d at 619. In doing so, the Court stated that "[t]he right to require union membership as a condition of employment is dependent upon a contract which meets the standards prescribed in [Section] 8(a)(3)." *Id.* Thus, "[t]he checkoff is merely a means of implementing union security." *Id.* So whereas "there was no contract in existence when the company discontinued these practices, its action was in conformity with the law." *Id.*

"Since 1962, the holding of *Bethlehem Steel* that an employer's checkoff obligation terminates with contract expiration has been cited numerous times in Board decisions."

Hacienda I, 331 NLRB at 666 (*citing Teamsters Local 70 (Sea-Land of California)*, 197 NLRB 125, 128 (1972), enfd. per curiam 490 F.2d 87 (9th Cir. 1973); *Peerless Roofing Co.,* 247 NLRB 500, 505 (1980), enfd. 641 F.2d 734 (9th Cir. 1981); *Ortiz Funeral Home Corp.*, 250 NLRB 730, 731 fn. 6 (1980), enfd. on other grounds 651 F.2d 136 (2nd Cir. 1981), cert. denied 455 U.S. 946 (1982); *Robbins Door & Sash Co.,* 260 NLRB 659, 659 (1982); *Petroleum Maintenance Co.*, 290 NLRB 462, 463 fn. 4 (1988); *R.E.C. Corp.*, 296 NLRB 1293, 1293 (1989); *Xidex Corp.,* 297 NLRB 110, 118 (1989), enfd. 924 F.2d 245, 254-255 (D.C. Cir. 1991); *AMBAC*, 299 NLRB 505, 507 fn. 8 (1990); *U.S. Can Co.*, 305 NLRB 1127, 1127 (1992), enfd. 984 F.2d 864, 869 (7th Cir. 1993); *J. R. Simplot Co.*, 311 NLRB 572, 572 (1993), enfd. mem. 33 F.3d 58 (1994), cert. denied513 U.S. 1147 (1995); *Sonya Trucking, Inc.*, 312 NLRB 1159, 1160 (1993); *Katz's Deli*, 316 NLRB 318, 334 fn. 23 (1995), enfd. on other grounds 80 F.3d 755 (2nd Cir. 1996); *Sullivan Bros. Printers,* 317 NLRB 561, 566 fn. 15 (1995), enfd. 99 F.3d 1217, 1231 (1st Cir. 1996); *Spentonbush/Red Star Cos.*, *Cos.*, 319 NLRB 988, 990 (1995), enf. denied on other grounds 106 F.3d 484 (2nd Cir. 1997); *87-10 51st Ave. Ownership Corp.*, 320 NLRB 993 (1996); *Talaco Communications, Inc.*, 321 NLRB 762, 763 (1996); *Able Aluminum Co.,* 321 NLRB 1071, 1072 (1996); *Valley Stream Aluminum, Inc.*, 321 NLRB 1076, 1077 (1996)); *see also Syscon Intern., Inc.*, 322 NLRB 539, 544 fn. 5 (1996); *Cotter & Co.*, 331 NLRB 787, 790 (2000); *Wilkes Telephone Membership Corp.*, 331 NLRB 823 (2000); *Nicholas County Health Care Center, Inc.*, 331 NLRB 970, 988 (2000); *In re West Co. and United Steelworkers of America, AFL-CIO*, 333 NLRB 1314, 1319-20 (2001); *In re Miller Waste Mills, Inc.*, 334 NLRB 466, 479 (2001); *In re Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 502-03 (2001); *In re Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 654 (2001); *In re Bulkmatic Transport Co.*, 340 NLRB 621, 625 (2003); *Tribune Publishing Co.*, 351 NLRB 196, 203 (2007); *Hacienda*

Hotel, Inc. Gaming Corp., 351 NLRB 504 (2007) ("*Hacienda II*"); *Hacienda Hotel, Inc. Gaming Corp.*, 355 NLRB No. 154 (2010) ("*Hacienda III*"). Indeed, even the Supreme Court has recognized the validity of the Board's holding in *Bethlehem Steel*. *See Litton Financial*, 501 U.S. at 199 ("the Board has identified some terms and conditions of employment ... which do not survive expiration of an agreement," including union security and dues checkoff provisions).

"Most often, the holding is stated broadly by the Board and courts for the well-settled proposition that an employer's dues-checkoff obligation does not survive contract expiration, and is not tied to any discussion of union security." *Hacienda I*, 331 NLRB at 667. While the state of Massachusetts, where WHDH is located, is not a right-to-work jurisdiction,[2] it is still worth noting that the Board has "explicitly applied this line of precedent in a right-to-work context where dues checkoff could not lawfully be linked with union-security arrangements to find that the check-off obligation therein did not survive contract expiration." *Id.* (*citing Tampa Sheet Metal Co.*, 288 NLRB 322, 326 fn. 15 (1988)).[3] So "although the precedent that checkoff does

---

[2] Section 14(b) of the Act entitles any state or territory to prohibit the "execution or application of agreements requiring membership in a labor organization as a condition of employment." Massachusetts has not enacted any such prohibition.

[3] *Hacienda I* is the first case in the so-called "*Hacienda* trilogy" of cases which involved an employer in Nevada – a right-to-work jurisdiction. 331 NLRB at 665. Following the Board's ruling in *Hacienda I*, the Ninth Circuit Court of Appeals reviewed and remanded the case back to the Board for further proceedings, explaining that it was "unable to discern the Board's rationale for excluding dues-checkoff from the unilateral change doctrine in the absence of union security." *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 309 F.3d 578, 580 (9th Cir. 2002). On remand, the Board again affirmed its determination that the employer did not violate the Act by unilaterally ceasing dues checkoff after the contract's expiration. *Hacienda II*, 351 NLRB 504. Once again, the Ninth Circuit Court of Appeals reviewed and remanded the case back to the Board for further proceedings. *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 540 F.3d 1072, 1075 (9th Cir. 2008). Following the second remand, the Board unanimously agreed that existing Board precedent established in *Bethlehem Steel* and *Tampa Sheet Metal* compelled the conclusion that the employer did not violate the Act by unilaterally ceasing dues checkoff. *Hacienda III*, 355 NLRB No. 154. The decision was once again reviewed by the Ninth Circuit Court of Appeals. *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865 (2011). This time, the Court rejected the Board's decision, holding on its own that "in a right-to-work state, where

not survive contract expiration initially developed in the context of a contract containing both union security and dues checkoff, it has clearly come to stand for the general rule that an employer's dues-checkoff obligation terminates at contract expiration." *Id.*

As demonstrated above, this "well-established rule has been cited and relied on in numerous Board and court decisions." *Id.* Furthermore, practitioners have come to rely on that principle as well. *Id.* "Thus, this bright-line rule has been the law for [49] years and is both well settled and well understood." *Id.* In sum, it is undisputed that the Board has held for decades that it is not a violation of the Act for employers to unilaterally discontinue dues checkoff following the expiration of the parties' collective bargaining agreements. Here, the CBA between the parties expired on April 26, 2010. On March 30, 2011 – following the expiration of the CBA – WHDH informed AFTRA of its intent to cease dues checkoff and then did so. Per the precedent established by *Bethlehem Steel* and its progeny of cases, WHDH did not violate the Act in taking such actions. Accordingly, the AJD correctly concluded that WHDH acted lawfully.[4]

---

dues-checkoff does not exist to implement union security" employers violate Section 8(a)(5) of the Act by unilaterally terminating dues checkoff. Whereas Massachusetts is not a right-to-work state, this holding is inapplicable to the instant action. *See WKYC-TV, Inc.*, Case No. 8-CA-39190, 2011 WL 4543697 (NLRB Div. of Judges Sept. 30, 2011).

[4] In the event the Board decides to overturn the long-standing precedent established by *Bethlehem Steel*, it should decline to apply a new rule retroactively in this case. Indeed, the Board has already recognized that it would be improper to retroactively apply such a rule. *See Hacienda III*, 355 NLRB No. 154 ("even if a majority existed to overrule the Board's longstanding precedent [from *Bethlehem Steel*] ... we would decline, for equitable reasons, to apply a new rule retroactively to impose an affirmative remedy in this case."). As the Board noted in that case, "[t]he Respondent's conduct was lawful under our clearly articulated precedent and imposing sanctions at this point would work a manifest injustice." *Id.* (*citing Wal-Mart Stores, Inc.*, 351 NLRB 130, 134-36 (2007)). Therefore, if the Board overturns *Bethlehem Steel*, it must not apply such any new rule retroactively in this case.

2. The ALJ Correctly Concluded That WHDH Did Not Forfeit Its Right To Cease Dues Checkoff Following The CBA's Expiration By Continuing To Deduct And Remit Dues For 11 Months

At the hearing on February 27, 2012, the Union asserted that because WHDH voluntarily continued dues checkoff for approximately 11 months following the CBA's expiration, it forfeited its right to cease doing so. As support for this argument, the Union cited to the Board's holding in *Tribune Publishing Co.*, 351 NLRB 196 (2007), enfd. 564 F.3d 1330 (D.C. Cir. 2009). This precise argument was recently reviewed and rejected in *WKYC-TV, Inc.*, Case No. 8-CA-39190, 2011 WL 4543697 (NLRB Div. of Judges Sept. 30, 2011). For the same reasons explained in *WKYC-TV, Inc.*, ALJ correctly concluded that the Union's argument fails with respect to this action.

In *WKYC-TV, Inc.*, the General Counsel argued that even if the employer "had a right under *Bethlehem Steel* to cease dues checkoff upon contract expiration, it forfeited the right by continuing to deduct and remit dues for 16 months thereafter ...." *Id.* However, this argument was quickly rejected as meritless by the Administrative Law Judge who pointed to the Board's decision in *Hacienda I* as support for his decision. *Id.* Specifically, the Administrative Law Judge stated that "the employer in *Hacienda* likewise did not cease dues checkoff until over a year after the contact expired." *Id.* (*citing Hacienda I*, 331 NLRB at 665, 673; *West Co.*, 333 NLRB 1314, 1315 fn. 6, 1319-20 (2001) (employer lawfully ceased dues checkoff three months after the contract expired); *87-10 51st Ave. Owners Corp.*, 320 NLRB 993 (1996) (employer lawfully ceased dues checkoff seven months after the contract expired)).[5]

---

[5] *WKYC-TV, Inc.* also noted that there was no indication that the employer had previously proposed eliminating dues checkoff during the parties' unsuccessful negotiations. 2011 WL 4543697. Respondent notes that neither the Union nor the General Counsel has alleged that it made any such proposals during negotiation. Indeed, WHDH represents that it did not make any proposals concerning the elimination of dues checkoff during negotiations.

The Administrative Law Judge in *WKYC-TV, Inc.* also rejected the argument that *Tribune Publishing Co.* warranted a different conclusion. *Id.* He noted that the case was "clearly distinguishable" because "[i]n that case, the Board found that the employer violated Section 8(a)(5) by discontinuing direct deposit of union dues after previously agreeing, during the hiatus between collective-bargaining agreement, to permit direct deposit of union dues." *Id.* In fact, this distinction was emphasized by the Board in its decision:

> [T]he issue before us is not whether the Respondent had the right to unilaterally cease dues checkoff after the collective-bargaining agreement expired. Rather, the issue is whether the Respondent, after unilaterally ceasing dues checkoff but later reaching a new agreement with the Union to allow employees to use direct deposit for the deduction of their union dues, could unilaterally terminate the use of direct deposit for that purpose.

Tribune Publishing Co. 351 NLRB at 197.

So in sum, the Board has repeatedly held that employers do not forfeit their right to unilaterally cease dues checkoff following a contract's expiration if they voluntarily continue such for a period of time thereafter. *WKYC-TV, Inc.*, 2011 WL 4543697. In particular, the Board has held that it was not a violation of the Act for an employer to continue dues checkoff after a contract's expiration for a longer period of time than WHDH did in this instance. *See Hacienda I*, 331 NLRB at 665, 673. Accordingly, the ALJ correctly concluded that the Union's argument is without merit and that WHDH acted lawfully.

IV. CONCLUSION

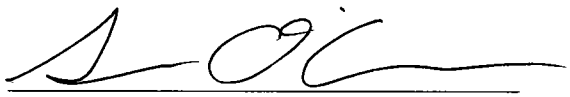
Based upon the foregoing, and the entire record, Respondent respectfully requests that the Board adopt the ALJ's Decision dismissing the Complaint.

Dated: May 23, 2012

Respectfully submitted,

WHDH-TV

By its Attorneys,



Robert P. Joy
Sean P. O'Connor
MORGAN, BROWN & JOY, LLP
200 State Street
Boston, MA 02109
(617) 523-6666
rpjoy@morganbrown.com
soconnor@morganbrown.com

Certificate of Service

I, Sean P. O'Connor, hereby certify that I have on this 23rd day of May, 2012, served the within pleading, by first-class mail upon Don Firenze at the National Labor Relations Board, First Region, Thompas P. O'Neill, Jr. Federal Building, 10 Causeway Street, Boston, MA 022222-1072 and James A.W. Shaw, Segal Roitman, LLP, 111 Devonshire Street, Floor 15, Boston, MA 02109-5407.

Sean P. O'Connor