

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

HEALTHBRIDGE MANAGEMENT, LLC; 107
OSBORNE STREET OPERATING COMPANY II,
LLC D/B/A DANBURY HCC; 710 LONG RIDGE
ROAD OPERATING COMPANY II, LLC D/B/A
LONG RIDGE OF STAMFORD; 240 CHURCH
STREET OPERATING COMPANY II, LLC D/B/A
NEWINGTON HEALTH CARE CENTER; 1 BURR
ROAD OPERATING COMPANY II, LLC D/B/A
WESTPORT HEALTH CARE CENTER; 245
ORANGE AVENUE OPERATING COMPANY II,
LLC D/B/A WEST RIVER HEALTH CARE
CENTER; 341 JORDAN LANE OPERATING
COMPANY II, LLC D/B/A WETHERSFIELD
HEALTH CARE CENTER,

And

NEW ENGLAND HEALTH CARE EMPLOYEES
UNION, DISTRICT 1199 SEIU, AFL-CIO,

And

CARE REALTY, LLC, PARTY IN INTEREST¹

CASE NOS. 34-CA-12964
34-CA-13064

**RESPONDENTS' ANSWERING BRIEF IN OPPOSITION TO
ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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¹ See discussion *infra* at pp. 1-2 regarding correct name of Party in Interest.

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Pursuant to Section 102.46, Respondent HealthBridge Management, LLC (“HealthBridge”) and Respondents 107 Osborne Street Operating Company II, LLC d/b/a Danbury Health Care Center (correct name) (“Danbury”); 710 Long Ridge Road Operating Company II, LLC d/b/a Long Ridge of Stamford (“Long Ridge”); 240 Church Street Operating Company II, LLC d/b/a Newington Health Care Center (“Newington”); 1 Burr Road Operating Company II, LLC d/b/a Westport Health Care Center (“Westport”); 245 Orange Avenue Operating Company II, LLC d/b/a West River Health Care Center (“West River”); and 341 Jordan Lane Operating Company II, LLC d/b/a Wethersfield Health Care Center (“Wethersfield”) (collectively the “Centers”) submit their Answering Brief in Opposition to Cross-Exceptions filed by the Counsel for the Acting General Counsel (“AGC”) as follows:

I. INTRODUCTION

New England Health Care Employees Union, District 1199 SEIU, AFL-CIO (“Local 1199” or the “Union”) filed unfair labor practice charges against Respondents in case numbers 34-CA-12964 and 34-CA-13064, following which Complaints were issued. (ALJD at 1).² On October 27, 2011, the AGC issued the Complaint in 34-CA-13064, alleging that the Centers violated Section 8(a)(1) and (5) of the Act by ceasing deductions and remittance of Union dues and fees without prior notice to and bargaining with the Union. The AGC simultaneously entered an Order Consolidating Cases 34-CA-12964 and 34-CA-13064 for trial. (ALJD at 1).

At trial, the AGC filed a Notice of Intent to Amend (GCX-2). Pursuant to the terms of the parties’ Joint Stipulation (JTX-7 at ¶ 17) and a Guarantee by Care Realty,

² General Counsel’s Exhibits, Respondents’ Exhibits, and Joint Exhibits will be designated, respectively, as GCX, RX, and JTX. Citations to the trial transcript will be made as (Tr. Vol. ____ at ____), and the ALJ’s decision, JD(NY)-21-12, is cited as (ALJD at ____).”

LLC (JTX-8), the Notice of Intent to Amend removed “Care Realty a/k/a CareOne” as a Respondent from both Complaints and lists “Care Realty, LLC” as the Party in Interest. (GCX-2). Both the Administrative Law Judge (“ALJ”) and the AGC improperly list “Care Realty, LLC a/k/a Care One, Party in Interest” in the style of the case. Because the Notice of Intent to Amend and the Joint Stipulations list “Care Realty, LLC” as the Party in Interest in the Complaints, the Board should correct the ALJ’s Decision to reflect “Care Realty, LLC” as the Party in Interest in these cases.

At the hearing, the parties stipulated that each Center entered into a collective bargaining agreement (“CBA”) with the Union that was effective from December 31, 2004, to March 16, 2011. (ALJD at 2:20–2:24; JTX-1–6; JTX-7 at ¶ 15). The parties also stipulated that without providing notice to the Union, each Center distributed a letter to unit employees on or about March 23, 2011, stating that each Center no longer would deduct Union dues from employee paychecks after the CBAs expired. (JTX-7 at ¶ 16; Tr. Vol. III at 425:24–426:12; GCX-20). The letter explained that “[t]he dues check-off provisions do not survive the expiration of the old contract.” (GCX-20). On March 24, 2011, the first dues deduction date following the expiration of the 2004-2011 CBAs, the Centers ceased making deductions of Union dues and remitting such dues to the Union. (JTX-7 at ¶ 16; Tr. Vol. III at 425:24–426:12).

The CBAs contained essentially identical provisions concerning the deduction and remission of Union dues:

Upon receipt of a written authorization from an Employee in the form annexed hereto as Exhibit A, the Center shall pursuant to such authorization, deduct from the wages due said Employee each month, starting not earlier than the first pay period following the completion of the Employee’s first 30 days of employment; and remit to the Union regular

monthly dues and initiation fee, as fixed by the Union. The initiation fee shall be paid in two consecutive monthly installments beginning the month following the completion of the probationary period.

The Center shall be relieved from making such “check-off” deductions upon . . . (e) revocation of the check-off authorization in accordance with its terms or with applicable law . . .

(JTX-1-6 at Art. 3; JTX-7 at ¶ 14)(emphasis added). Exhibit A, the dues check off authorization, states as follows:

You are hereby authorized and directed to deduct an initiation fee from my wages or salary as required by the New England Health Care Employees Union, District 1199 ***as a condition of membership and in addition thereto***, to deduct each month my monthly membership dues from my wages or salary and to remit all such deductions so made to the New England Health Care Employees Union, District 1199 no later than the tenth of each month immediately following the date of deduction. ***This authorization shall be irrevocable for a period of one year or until the termination of the collective bargaining agreement, whichever is sooner***, and shall, however, renew itself from year to year unless the employee gives written notice addressed to the New England Health Care Employees Union, District 1199 at least 15 days prior to any termination date of the revocation of this authorization.

(JTX-1-6 at Exhibit A) (emphasis added). The 2004-2011 CBAs also contained a Union Security clause that required all employees in the bargaining unit to pay dues to the Union. (JTX 1-6 at Art. 2).

On July 20, 2012, the ALJ issued a Decision and Order finding in favor of Respondents on the 8(a)(1) and (5) claims in the Complaint in 34-CA-13064 and recommending dismissal of the allegation that Respondents violated the Act by ceasing the deduction and remittance of Union dues following the expiration of the CBAs without bargaining with the Union. For all the reasons set forth below, the ALJ’s findings and

conclusions of law are consistent with established Board law and policy and should be affirmed by the Board.

II. ARGUMENT

A. **The Administrative Law Judge Correctly Held that Consistent with Current Board Law the Centers Lawfully Discontinued Collecting and Remitting Union Dues.**

The ALJ correctly concluded that the Centers lawfully ceased deducting and remitting Union dues upon expiration of the CBAs based on the well-established exception to the unilateral change doctrine in *NLRB v. Katz*, 369 U.S. 736 (1962). For the past fifty years, undisturbed and continuously followed Board precedent has been that upon expiration of a collective bargaining agreement containing a union security clause, an employer may discontinue the collection and remittance of union dues unilaterally and without notice or bargaining when the dues checkoff arrangement implements union-security. *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962); *see e.g. Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991) (acknowledging that the Board exempts dues check off from the *Katz* unilateral change doctrine); *Hacienda Hotel Resort and Casino (Hacienda III)*, 355 NLRB No. 154 (2010). Accordingly, dues checkoff is not a term or condition of employment that must be maintained as part of the status quo, and an employer has the right to discontinue collecting and remitting union dues at any time following expiration or termination of a collective bargaining agreement. *Bethlehem Steel*, 136 NLRB at 1500; *see also Hargrove Electric Co.*, 358 NLRB No. 147 (2012) (Board found that the ALJ appropriately applied *Bethlehem Steel* and dismissed dues-deduction allegation in right to work state).

In applying the extant law, the ALJ properly distinguished the circumstances in

this case from those in the *Hacienda-type* cases, noting that

It is important to note that the General Counsel's arguments regarding *Hacienda* must be considered in relation to the fact that those cases were decided in a "right-to-work" state where union security clauses conditioning employment upon membership in a union are prohibited, and therefore, dues checkoff could not lawfully be linked with union security arrangements in those states. . . . In the instance case, Connecticut is not a right-to-work state, and therefore, the union security clause here may be considered, consistent with *Bethlehem*, to have been properly linked with the dues checkoff provisions.

(ALJD at 21). As the ALJ noted, despite the AGC's request, he lacked the authority to overturn *Bethlehem Steel*; rather, the extent of his authority was to apply Board precedent to the matter at hand, which he did. (ALJD at 20–21). By urging the ALJ (and now the Board) to overrule *Bethlehem Steel*, the AGC conceded that Respondents' cessation was lawful under Board law. Applying existing law to this case, the ALJ properly concluded that Respondents lawfully ceased deducting and remitting Union dues following the expiration of the CBAs.

B. The Board Should Not Overrule the Established Law Regarding Cessation of Dues Checkoff

The AGC argues for the reversal of the current law which privileges the cessation of dues checkoff following contract termination. The AGC advances various arguments in support of its position. However, these arguments are unavailing for various reasons. First, the Board's dues checkoff standard is based upon reasoned decision making and supported by statutory provisions which treat dues checkoff as a creature of contract distinct from wages, hours, and other terms of employment. Second, the statutory provisions addressing dues checkoff and union security, including Section 302(c)(4), support the current Board law. Third, the AGC fails to establish that dues checkoff

clauses do not implement union security. Fourth, the Act's mandate regarding freedom of contract also supports the Board's dues checkoff standard, and requiring dues checkoff in the absence of a valid CBA would trample an employee's Section 7 rights. Fifth, the Board's standard finds support in the economic policies underlying the Act, namely that parties are free to exercise economic weapons unencumbered by the Board and courts. Sixth, the AGC has not presented compelling justification to overturn longstanding precedent, so the Board should honor the doctrine of stare decisis. Finally, even if the Board should overturn *Bethlehem Steel*, it should do so prospectively and deny the AGC's request for retroactive application of the proposed remedy.

1. The Board's Ruling in *Bethlehem Steel* is Based Upon Reasoned Decision Making.

The Board's decision in *Bethlehem Steel*, as relied upon by the ALJ, was the product of reasoned decision making and it should be upheld. In *NLRB v. Katz*, 369 U.S. 736, 747 (1962), the Supreme Court held that as a general rule, employers cannot unilaterally change terms and conditions of employment that constitute mandatory subjects of bargaining following the expiration of a collective bargaining agreement. In stating this general proposition, the Court left open the possibility that there may be instances when such unilateral action is permitted without running afoul of the Act, stating that "we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action." *Id.* at 748. In the same year as *Katz*, the Board, in *Bethlehem Steel*, established such an exception. Specifically, the Board held that an employer is permitted to discontinue unilaterally an expired contract's dues checkoff provision because it implemented the union security exception stated in Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (hereinafter

“Section 8(a)(3)”. *Bethlehem Steel*, 136 NLRB at 1502. The Board expressed its ruling as follows:

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.

...

Similar considerations prevail with respect to Respondent’s refusal to continue to check off dues after the end of the contracts. The checkoff provisions to Respondent’s contracts with the union implemented the union-security provisions. 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 as long as the contracts remained in force.

Id.

The Board’s reasoning is correct. In creating this exception, the Board first noted that union security and checkoff are compulsory subjects of bargaining, citing its earlier decision in *United States Gypsum Co.*, 94 NLRB 112, *amended*, 97 NLRB 889 (1951), *modified*, 206 F.2d 410 (5th Cir. 1953). In *United States Gypsum*, the Board overruled the trial examiner, noting that earlier authority disputing whether checkoff was a mandatory subject of bargaining predated the passage of the Labor-Management Relations Act. *Id.* at 113, n. 7. The Board then held that:

[W]e are satisfied from the language and legislative history of the 1947 amendments that Congress intended that the bargaining obligation contained in Section 8(a)(5) should apply to checkoff. H.R. 3020, 89th Congress, 1st Sess., p. 10; H.R. Rep. No. 245, pp. 29, 71; H.R. Conf. Rep. No. 510 on H.R. 3020, p. 34.

Id. It is critical to note that the 1947 Amendments included both Section 8(a)(3) and Section 302(c), 29 U.S.C. 186(c)(4) (hereinafter “Section 302(c)(4)”), thus linking them

in the Board's view, to establish that checkoff is a mandatory subject of bargaining. Further, and equally critical, is that the legislative history cited by the Board includes the unequivocal statement from Representative Hartley that dues checkoff is "a form of 'union security.'" (H.R. Rep. No. 245, 80th Cong., 1st Sess., at 29 (1947)).

Subsequently, the Supreme Court provided a more detailed explanation of the legislative history, which makes clear that the union security provisions of Section 8(a)(3) are inextricably intertwined with dues checkoff. This history, discussed at length in *Communications Workers of America v. Beck*, 487 U.S. 735, 746-54 (1988), can be summarized in relevant part as follows: "Th[e] legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payments of union dues and fees." *Id.* at 749 (citing *Radio Officers' Union v. NLRB*, 347 U.S. 17, 41 (1954)). The Court further stated that "Congress' decision to allow union-security agreements *at all* reflects its concern that ... the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them." *Id.* at 750 (citing *Oil, Chemical and Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976)). In view of this legislative history, the Board in *Bethlehem Steel* was on solid ground in concluding that a dues checkoff requirement in a collective bargaining agreement – which provides the union with assurance that dues will be paid automatically and on a regular basis, and the employees with assurance that they will meet the requirement of paying dues (a condition of continued employment) – implements the union security provision of the agreement. Thereafter, in *NLRB v. Penn. Cork & Closures, Inc.*, 376 F.2d 52 (2d Cir. 1967), the Second Circuit approved the

Board's position that dues checkoff and union security are directly related. The Court stated that:

[t]he Board asserts that where a union shop exists under the authority of 8(a)(3), it is logical to infer that employees authorizing dues checkoffs do so under its influence. This inference is particularly compelling where, as here, the collective bargaining agreement obliges the company to dismiss a worker within three days of being notified by the union of his failure to maintain his good standing; under such an agreement an employee is likely to authorize a dues checkoff for fear that without it he may forget to make the payments and risk dismissal for failure to pay union dues.

Id. at 55.

Furthermore, the Board's position in *Bethlehem Steel* has been recognized, without question, by the Supreme Court in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991) (stating, "it is the Board's view that union security and dues checkoff are excluded from the unilateral change doctrine because of statutory provisions which permit these obligations only when specified by the express terms of a collective bargaining agreement") and upheld by numerous Courts of Appeals. See, e.g., *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986) ("[t]he well established exceptions for union-shop and dues checkoff provisions are rooted in § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), and § 302(c)(4) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(4), which are understood to prohibit such practices unless they are codified in an existing collective bargaining agreement") (citations omitted); see also *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1030 (D.C. Cir. 1997) ("[i]nsofar as dues checkoff and union security clauses are exceptions to the post-impasse rule, however, it is not because the Board has authority to treat them as such; rather, the NLRA requires that these clauses be exceptions because they are

legal only if authorized by a collective bargaining agreement”) (citations omitted); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869 (7th Cir. 1993) (“Checkoff of dues and other payments from the employer to the union, like the enforcement of a union security clause, depend on the existence of a real agreement with the union”).³

In his haste to overturn 50 years of Board precedent, the AGC impermissibly ignores the factual record in the instant matter, which exemplifies the Board’s reasoning in *Bethlehem Steel*. Here, the dues checkoff provision of the CBA clearly implements union security. Article 2 of the CBA, which contains the dues checkoff obligation, is entitled “Union Security.” (JTX 1-6 at Art. 2). A plain reading of Article 3 provides no reasonable alternative interpretation of the purpose of dues checkoff other than to implement union security. Specifically, Article 2 provides in sequence that: (1) all bargaining unit employees must be members of the Union in good standing to work for the Respondent; (2) Union members who do not fulfill their financial obligations to the Union are not in good standing and subject to discharge; and (3) employees can ensure their “good standing” by participating in the dues checkoff arrangement the Union

³ In addition, on numerous occasions the Board has reaffirmed its holding in *Bethlehem Steel*. See *Hacienda Hotel (Hacienda I)*, 331 NLRB 665 (2000); *West Co.*, 333 NLRB 1314 (2001); *Valley Stream Aluminum, Inc.*, 321 NLRB 1076, 1077 (1996); *Able Aluminum Co.*, 321 NLRB 1071, 1072 (1996); *Talaco Commc’ns, Inc.*, 321 NLRB 762, 763 (1996); *87-10 51st Ave. Ownership Corp.*, 320 NLRB 993 (1996); *Spentonbush/Red Star Cos.*, 319 NLRB 988, 990 (1995), *enf’d*, denied on other grounds, 106 F.3d 484 (2d Cir. 1997); *Sullivan Bros. Printers*, 317 NLRB 561, 566 n. 15 (1995), *enf’d*, 99 F.3d 1217, 1231 (1st Cir. 1996); *Katz’s Deli*, 316 NLRB 318, 334 n. 23 (1995), *enf’d* on other grounds 80 F.3d 755 (2d Cir. 1996); *Sonya Trucking, Inc.*, 312 NLRB 1159, 1160 (1993), supplemented by 315 NLRB No. 79 (1994); *J.R. Simplot Co.*, 311 NLRB 572, 572 (1993), *enf’d* mem, 33 F.3d 58 (9th Cir. 1994); *U.S. Can Co.*, 305 NLRB 1127, 1127 (1992), *enf’d*, 984 F.2d 864, 869 (7th Cir. 1993); *AMBAC, Int’l*, 299 NLRB 505, 507 n. 8 (1990); *Xidex Corp.*, 297 NLRB 110, 118 (1989), *enf’d*, 924 F.2d 245, 254-255 (D.C. Cir. 1991); *R. E. C. Corp.*, 296 NLRB 1293, 1293 (1989); *Petroleum Maintenance Co.*, 290 NLRB 462, 463, n. 4 (1988); *Robbins Door & Sash Co.*, 260 NLRB 659, 659 (1982); *Ortiz Funeral Home Corp.*, 250 NLRB 730, 731 n. 6 (1980), *enf’d* on other grounds, 651 F.2d 136 (2d Cir. 1981); *Peerless Roofing Co.*, 247 NLRB 500, 505 (1980), *enf’d*, 641 F.2d 734 (9th Cir. 1981); *Teamsters Local No. 70*, 197 NLRB 125, 128 (1972), *enf’d* per curiam, 490 F.2d 87 (9th Cir. 1973) and 525 F.2d 333 (9th Cir. 1975).

bargained for, and included within, the CBA's union security framework. (JTX 1-6 at Art. 2). The explicit and comprehensive connection between dues checkoff and union security clearly demonstrates that the dues checkoff provision implements, and is inseparable from, the CBA's union security clause.

2. Section 302(c)(4) Does Not Prevent an Employer from Unilaterally Discontinuing Dues Checkoff After the Expiration of a Collective Bargaining Agreement

To the extent the AGC alleges that Section 302(c)(4) precludes the Board from concluding that dues checkoff expires with the collective bargaining agreement (*see* AGC Cross-Exceptions Brief at 9–11), he is simply incorrect. As an initial matter, there are two requirements that must be met before an employer can lawfully check off union dues on behalf of their employees. First, the employer and union must agree to include a dues checkoff provision in their collective bargaining agreement. Second, after the parties agree to include checkoff in their collective bargaining agreement, an employer may checkoff dues only after the employee signs a dues checkoff authorization that meets the requirements of Section 302(c)(4). If either of these factors is not present, an employer has no duty to check off dues. The Board in *Bethlehem Steel* did not rely on Section 302 to justify its holding. Rather, the Board examined the employer's right to unilaterally discontinue dues checkoff after the expiration of the collective bargaining agreement purely through the lens of Section 8(a)(3).

The fact that Section 302(c)(4) does not provide for automatic expiration of dues checkoff upon contract expiration does not govern the issue of whether the employer's duty to check off continues. Rather, Section 8(a)(3) governs the employer's responsibilities in that regard. *Bethlehem Steel*, 136 NLRB at 1502. By ruling that an

employer does not violate the Act by discontinuing checkoff after contract expiration, the Board does not render Section 302(c)(4) meaningless. The Board has recognized the employer's right to agree to continue checkoff during post-expiration negotiations. See *Lowell Corrugated Container Corp.*, 177 NLRB 169, 173 (1969) ("a checkoff authorization which has not been revoked ... may be honored during its term by the Employer involved notwithstanding that the contract sanctioning the authorization has expired"), *enfd*, 431 F.2d 1196 (1st Cir. 1970); see also *87-10 51st Ave Owners Corp.*, 320 NLRB 993 (1996). In such circumstances, however, an employee would be able to exercise his or her right under Section 302(c)(4) to revoke a checkoff authorization. The AGC's reliance upon Senator Taft's statement that under Section 302, checkoff authorization "may continue indefinitely until revoked" (AGC Cross-Exceptions Brief at 10, citing Legislative History of the Labor Management Relations Act 1947, Volume II, at 1311 (NLRB 1948)) is misplaced for the same reason. Thus, the AGC cannot show that Section 302(c)(4) prevents an employer from unilaterally discontinuing dues checkoff after the expiration of a collective bargaining agreement

3. The Statutory Provisions Addressing Dues Checkoff and Union Security Agreements Support the Current Board Law.

A lawful dues checkoff arrangement requires a written collective bargaining agreement between an employer and union, as well as an affected employee's written assignment. These requirements are established by Sections 8(a)(3) and 302(c)(4) of the Act. Section 8(a)(3) permits an employer and union to enter into an agreement requiring all employees in the bargaining unit to pay union dues as a condition of

employment.⁴ Section 302 prohibits employer payments to unions subject to certain enumerated exceptions. One of the exceptions, set forth in Section 302(c)(4), permits an employer to deduct union dues pursuant to an employee's written assignment.⁵

The Developing Labor Law provides a notable explanation of the treatment of dues checkoff as a union security device and the interplay of Sections 8(a)(3) and 302. With respect to Section 8(a)(3)'s treatment of union-security, the authors explain that "[l]ike other union security-devices, the checkoff is a product of collective bargaining." Higgins, *The Developing Labor Law* (6th ed. 2012) Volume II, Chapter 26 VI, p. 2289. Regarding Section 302(c)(4), the authors state that "checkoff is not compulsory; even if the employer agrees to the checkoff of dues, Section 302 of the LMRA further conditions its legality upon written authorizations from individual employees." *Id.* at 2289–90.

The argument that Sections 8(a)(3) and 302(c)(4) must be read together finds support in Board and court treatment of dues checkoff before those provisions were added to the Act. Under the Wagner Act, the Board and courts divided on whether dues checkoff was a condition of employment subject to collective bargaining. *Compare Hughes Tool Co. v. NLRB*, 147 F.2d 69, 74 (5th Cir. 1945) (concluding that dues

⁴ Section 8(a)(3) states in relevant part, "nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any section defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement." 29 U.S.C. § 158(a)(3).

⁵ The dues checkoff exception is set forth in Section 302(c)(4) which states: "(c) The provisions of this section shall not be applicable ... (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." 29 U.S.C. § 186(c)(4).

checkoff was not a condition of employment); *with M.T. Stevens & Sons Co.*, 68 NLRB 229, 230 (1946) (concluding that checkoff was a “proper subject of collective bargaining.”). After the passage of the Taft-Hartley amendments added Sections 8(a)(3) and 302(c)(4), the Board concluded, “we are satisfied from the legislative history of the 1947 amendments that Congress intended the bargaining obligation contained in Section 8(a)(5) should apply to the checkoff.” *United States Gypsum Co.*, 94 NLRB 112, 113 n. 7 (1951).

In *Bethlehem Steel*, the Board concluded that union security and dues checkoff were creatures of contract and, therefore, an employer could cease giving effect to those provisions upon contract expiration. 136 NLRB at 1502. The Board noted that under Section 8(a)(3) union security can only be made a condition of employment pursuant to a written collective bargaining agreement. The Board reasoned that the requirement of a written contract applied to dues checkoff as well because checkoff was a means to implement union security. *Id.*

In his Cross-Exceptions, the AGC argues that *Bethlehem Steel* and its progeny incorrectly link the written collective bargaining agreement requirement for union security to dues checkoff. The AGC states that Section 8(a)(3) requires a written collective bargaining agreement for union security but not for dues checkoff. The AGC further states that Section 302(c)(4) requires a written assignment but not a collective bargaining agreement. General Counsel accuses the Board of conflating the written requirement for union security with the requirement of a written assignment for dues checkoff. The AGC mischaracterizes the Board’s decisions.

The Board in *Bethlehem Steel* did not conflate Sections 8(a)(3) and 302 because

the Board was addressing only the requirement of a collective bargaining agreement under Section 8(a)(3), not the additional requirement of a written assignment under Section 302(c)(4). The Board's point in *Bethlehem Steel* and its progeny regarding Section 8(a)(3) is that checkoff and union security become conditions of employment only through a collective bargaining agreement; unlike wages, benefits, and hours which are conditions of employment independent of a contract. *Id.*; see also *Hacienda Hotel Resort and Casino (Hacienda III)*, 335 NLRB No. 154, slip op. at 4-5 (2010) (Members Schaumber and Hayes concurring). The written assignment requirement of Section 302(c)(4) becomes operative only if there is a current collective bargaining agreement. *Bethlehem Steel*, 136 NLRB at 1502.

Several Courts of Appeals have concluded that dues checkoff arrangements require a written collective bargaining agreement and a written employee assignment based on Sections 8(a)(3) and 302(c)(4). See *Sullivan Bros. Printers, Inc. v. NLRB*, 99 F.3d 1217, 1232 (1st Cir. 1996) ("the Labor Management Relations Act, 29 U.S.C. § 186(c)(4), permits dues checkoff arrangements only as part of a valid collective bargaining agreement."); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869 (7th Cir. 1993) ("Checkoffs of dues and other payments from the employer to the union, like the enforcement of a union security clause, depend on the existence of a real agreement with the union."); *Microimage Display Div. of Xidex Corp v. NLRB*, 924 F.2d 245, 254–55 (D.C. Cir. 1991) ("Section 8(a)(3) of the NLRA and Sections 302(a)(2) and 302(c)(4) of the Labor Management Relations Act, 29 U.S.C. §§ 186(a)(2), 186(c)(4), permit an employer to make payments to a union only under a dues check-off provision contained in an effective collective bargaining agreement."); *Southwestern Steel & Supply Inc. v.*

NLRB, 806 F.2d 111, 1114 (D.C. Cir. 1986) (“The well established exceptions for union-shop and dues-checkoff provisions are rooted in § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) and § 302(c)(4) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(4), which are understood to prohibit such practices unless they are codified in an existing collective-bargaining agreement.”).

The Board’s decisions in the *Burns*⁶ successor employer line of cases also firmly establish checkoff clauses as tied to and dependent upon a written contract in effect between the employer and the union. Under the *Burns* doctrine, a successor employer may have an obligation to recognize and bargain with a pre-existing union but does not necessarily assume the collective bargaining agreement and its obligations. That is, of course, unless the new employer takes actions manifesting that it has accepted and adopted the pre-existent collective bargaining agreement.

Several factors have been identified by the Board as clear and convincing evidence that the preceding collective bargaining agreement has been assumed and adopted by the new employer. One is continuation of dues checkoff. According to the Board, and the enforcing Courts of Appeals, continuation of dues checkoff is clear and convincing evidence of assumption of the preceding collective bargaining agreement because, according to the Board, checkoff is strictly a creation of a written contract and cannot exist without a written, effective collective bargaining agreement.

This line of Board cases begins in 1972 with *S-H Food Service, Inc.*, 199 NLRB 95 n. 2 (1972), wherein the Board stated “[c]heckoff, being solely a contractual obligation did not carry over as an existing term or condition of employment.” It continues with *Ekland’s Sweden House Inn, Inc.*, 203 NLRB 413 (1973), wherein the

⁶ *NLRB v. Burns Int’l Sec. Servs.*, 406 U.S. 272 (1972).

Board cited three actions by the successor employer that were in direct reliance on the written collective bargaining agreement and evidence that the successor had accepted that previous contract. One of those was the continued checkoff of union dues. *Id.* at 418.

In *U.S. Can Co.*, 305 NLRB 1127 (1992), *enf'd* 984 F.2d 864 (7th Cir. 1993), the Board stated,

We agree with the judge, for the reasons set forth by her, that the Respondent by its conduct adopted and became bound to its predecessor's contract. In this regard, we note particularly that the Respondent honored the union security and checkoff provisions of the predecessor's contract. These are matters which are dependent on the existence of a current contract.

Id. at 1127 (citing *S-H Food Service*, 199 NLRB 95 n. 2 (1972)). The Seventh Circuit enforced the Board's decision, stating,

But U.S. Can has a problem. To keep union officials happy it deducted union dues from its employees' checks and remitted the money to the union, as Continental had done, and enforced the union security clause of the existing agreement. Checkoff of dues and other payments from the employer to the union, like the enforcement of a union security clause, depend on the existence of a real agreement with the union. [Citations omitted.] Otherwise the payment of money is a subvention barred by 29 U.S.C. § 186(a)(2), and the requirement to join the union (or pay dues to it) coerces employees in a way forbidden by 29 U.S.C. § 158(a)(3). Having done things that are lawful only if a collective bargaining agreement is enforced, U.S. Can is in a pickle.

U.S. Can Co., 984 F.2d at 869. The same result obtained for the same reason in *Rockwood Energy and Mineral Corp.*, 299 NLRB 1136 (1990). In its 2002 decision in *Brookfield Healthcare Center*, 337 NLRB 1064 (2002), the Board stated in pertinent part,

Second, Russell's un rebutted testimony is that the Respondent complied with all terms of the contract, which

included a union security and dues checkoff provision. Because these last provisions are entirely features of a binding contract between the employer and a union, the Board has found a successor employer's continued implementation of such provisions a basis for inferring an employer's adoption of the predecessor's contract by its conduct.

Id. at 1065. It is important to point out here that in these cases the Board uses an elevated standard of proof -- clear and convincing evidence before finding a successor employer to have assumed a contract. *See Id.* at 1064 ("the Board has held that a successor employer's adoption of a predecessor's contract with a union may be inferred from conduct; however, that inference must be based on clear and convincing evidence."). Thus, when the Board refers to continuation of dues checkoff as a term that is derived exclusively from a contract in effect between the parties, it is stating that in a most emphatic way. Checkoff is not merely suggestive of or loosely related to a written contract, it is clearly and convincingly tied to a written contract.

These cases address the same question at the core of the instant case -- to wit, is a dues checkoff clause necessarily tied to a written collective bargaining agreement in effect between the parties. Although the question at its core is the same, the cessation of dues checkoff cases (such as the instant case) and the continuation of dues checkoff cases (such as the successor employer cases) are reciprocals of each other from the perspective of the union interest versus the employer interest. In the *Hacienda*-type cessation of dues checkoff cases, the union has an interest in positioning checkoff as a term or condition that is not contract dependent and that can exist without a written effective collective bargaining agreement. Contrast that to the successor/assumption of contract cases where the union will universally be interested in tying the checkoff clause to the written contract so that the continuation of checkoff compels the assumption of

the written contract.

The AGC in its brief makes no reference to this related issue or line of cases. However, the two lines of cases do appear to be directly related. First, the theories of *Bethlehem Steel*, *Hacienda*, and *Southwestern* are all consistent with and supported by the successor in interest, assumption of contract cases. Secondly, if the Board in the instant case elects to overrule *Bethlehem Steel* and find that a written effective collective bargaining agreement is not a necessary predicate for the checkoff of union dues, then it must also necessarily overrule *S-H Food Service, Inc.*, *Ekland's Sweden House Inn*, and the line of cases following.

The AGC asserts that the Courts of Appeals have "misconstrued Section 302(c)(4) to prohibit checkoff in the absence of a current agreement between an employer and union." (AGC Cross-Exceptions Brief at 11). The AGC misstates these decisions because the courts did not state that Section 302(c)(4) alone required a written collective bargaining agreement. Instead the courts based their conclusions on a combined reading of Sections 8(a)(3) and 302(c)(4). The AGC cites *Tribune Publishing Co. v. NLRB*, 564 F.3d 1330, 1335 (D.C. Cir. 2009), in which the D.C. Circuit stated that 302(c)(4) did not require a written collective bargaining agreement. *Tribune* is not in conflict with the other appellate court decisions because *Tribune* was addressing 302(c)(4) alone and did not address 8(a)(3).

The AGC also cites Board and Courts of Appeals' decisions for the proposition that dues checkoff is not a union security device but, rather, an administrative convenience for the collection of dues.⁷ See *Shen-Mar Food Products, Inc.*, 221 NLRB

⁷ The Board itself has disagreed on whether checkoff is a mere administrative convenience or a means for an employer to provide financial assistance to a union. For example, in *Hacienda*

1329, 1330 (1976); *NLRB v. Atlanta Printing Specialties and Paper Products Union*, 523 F.2d 783, 786-87 (5th Cir. 1975). The AGC's argument is misguided. These decisions arose in right-to-work states; in these cases checkoff could not have been an adjunct to a union security clause.⁸ These cases simply do not speak to the situation in the instant case where the expired agreement included a union security clause supported by the dues checkoff. Further, *Atlanta Printing* concluded that the employer could not deduct dues for two reasons -- the collective bargaining agreement had expired and the affected employees had revoked their authorizations. *Atlanta Printing*, 523 F.2d at 786-87. This supports Respondents' position that the Centers' checkoff obligation ended when the CBAs terminated. Finally, if checkoff is nothing more than an administrative convenience for the union, then it should not be a condition of employment and, thus, a mandatory subject of bargaining subject to *Katz*.

While the United States Supreme Court has not decided whether checkoff survives contract termination, the Court's treatment of checkoff in other cases is instructive. See *Litton*, 501 U.S. 190 (1991); *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). In *Litton*, the Court stated, "it is the Board's view that union security and dues checkoff provisions are excluded from the unilateral change doctrine because of statutory provisions which permit these obligations only when specified by the express terms of a collective-bargaining agreement." *Litton*, 501 U.S. at 199. The Court itself cited to *Indiana and Michigan Electric Co.*, 284 NLRB 55, 57-58 (1987), as well as

Hotel (Hacienda II), 351 NLRB 504, 506 (2007), former Chairman Battista stated that "[a] checkoff clause is a means by which an employer provides economic assistance to a union by deducting dues from the paychecks of willing employees, and forwarding the money to the union."

⁸ *Shen-Mar* arose in Virginia and *Atlanta Printing* in Georgia.

Section 302(c)(4). *Id.*⁹

In *H.K. Porter*, the Court rebuffed the Board's effort to force dues checkoff upon an unwilling employer. The Board had ordered the employer to agree to the union's dues checkoff proposal. The Supreme Court reversed the Board on the ground that the Board was "without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." 397 U.S. at 102. The AGC in this case attempts to force a dues checkoff arrangement on the Respondents without their agreement. Such a result would flout the prohibition of *H.K. Porter*.

The connection between dues checkoff and union security also finds support in Supreme Court cases addressing union security. The Court has repeatedly held that "[t]he legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *Communication Workers of America v. Beck*, 487 U.S. 735, 749 (1988) (citing *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954)). Since union security is limited to compelling union dues and fees, it is reasonable to conclude that a dues checkoff provision, which compels an employer's collection of dues and fees, is subject to the same requirements of Section 8(a)(3).

4. The AGC Fails to Establish that Dues Checkoff Clauses Do Not Implement Union Security

The AGC argues that union security clauses and dues checkoff clauses serve

⁹ In *Indiana & Michigan*, the Board stated that "permitting unilateral abandonment of union-security and checkoff arrangements after contract expiration is based on the fact, noted in *Bethlehem Steel*, that '[t]he 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).' This term and condition is thus inherently and solely a contractual matter, and an employer's refusal to enforce a union-security provision without a proper contractual basis is 'in accordance with the mandate of the Act.'" 284 NLRB at 55.

different purposes and may exist independently of one another. (AGC Cross-Exceptions Brief at 6–9). The AGC draws the unwarranted conclusion that checkoff does not implement union security because the two clauses are not “mutually dependent.” (AGC Cross-Exceptions Brief at 6). In his effort to divorce dues checkoff from union security, the AGC incorrectly paraphrases a study conducted by the Bureau of National Affairs (AGC Cross-Exceptions Brief at 9) and a number of decisions by the Board and reviewing Courts of Appeals. None of the cited authority supports the AGC’s position

To begin, the fact that the Act does not formally link dues checkoff and union security is immaterial. As noted above, Congress provided the Board with broad discretion to interpret the Act. That discretion is limited by the duty to adopt rules that are “rational and consistent with the Act.” *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) (internal citation omitted). The legislative history cited above makes clear that Congress intended that union security provisions would have the purpose of making sure that all employees paid for union representation. Checkoff clauses, as exemplified by the one at issue here, implement that purpose by providing a mechanism through which dues are paid regularly, thereby ensuring an employee’s good standing with the union and continued employment. Therefore, the Board clearly did not abuse its authority to interpret the Act by excluding dues checkoff from the unilateral change rule enunciated in *Katz*.

The study conducted by the Bureau of National Affairs in the chapter entitled “Union Security” in *Basic Patterns in Union Contracts* (14th ed. 1995) upon which the AGC relies, should not be considered because it is not in the record in this case. Even

if the Board were to examine the document, however, the authors of the study expressly acknowledge the proposition that Respondents assert throughout this Brief: that “[u]nion security provisions include[e] check-off” and hiring arrangements. *Basic Patterns in Union Contracts* at 97. Similarly, the AGC neglected to include the book’s own cautions concerning use of the studies reported therein. *Id.* The authors advise that the findings are based on only 400 collective bargaining agreements from a variety of manufacturing and non-manufacturing industries. *Id.* at v-vi. The statistics cited by the AGC (see AGC Cross-Exceptions Brief at 9) are not reliable in this context because: (1) the study concedes that its results and totals include contracts from both right-to-work and non right-to-work states and no attempt is made to distinguish the findings based on that factor, which could well explain the discrepancy between the number of contracts with union security clauses and the number with checkoff; and (2) the Respondents’ industry, health care, is not included among the industries studied. *Id.* at 97-100.

The AGC inaccurately cites *Shen-Mar Food Products, Inc.*, 221 NLRB 1329, 1330 (1976), *enf’d* in relevant part, 557 F.2d 396 (4th Cir. 1977), for the proposition that “checkoff authorizations could not properly be viewed as union security devices... because they did not ‘impose membership or support as a condition required for continued employment.’” (AGC Cross-Exceptions Brief at 7-8). Far from pronouncing such a broad statement, the Board in *Shen-Mar Food Products* simply stated that “the dues checkoff herein does not, in and of itself, impose union membership or support as a condition required for continued employment.” 221 NLRB at 1330. This ruling is consistent with *Bethlehem Steel*, which held that checkoff *implements* union security,

not that it imposes it. Additionally, the AGC conveniently leaves out the fact that *Shen-Mar Food Products* arose in a right-to-work state, thereby ensuring, as a matter of law, that dues checkoff does not implement union security in that case.

Furthermore, *Shen-Mar Food Products* is inapposite to the instant matter because it concerns the discontinuance of dues checkoff during the term of a valid collective bargaining agreement. *Id.* As a result, the Board in *Shen-Mar Food Products* considered far different legal and factual questions than those before the Board in the instant matter. In fact, neither the Board nor the ALJ in *Shen-Mar Food Products* even mentioned *Bethlehem Steel*, let alone relied upon it as a basis for their decision. In the instant matter, the Centers and the Union, acting in a non right-to-work state, negotiated a collective bargaining agreement in which they included dues checkoff to implement the Article on union security.

Based on the foregoing, the ACG's conclusion that checkoff clauses do not implement union security is completely unfounded and illogical. (AGC Cross-Exceptions Brief at 7-9). The ACG ignores the factual record here and presents generalized arguments without any supporting record evidence to justify his request that the Board overturn such a longstanding and reasonable interpretation of the Act.

5. Requiring Dues Checkoff in the Absence of a Valid Collective Bargaining Agreement Would Trample Employees' Section 7 Rights.

Under Section 7 of the Act, employees have the right to financially assist labor organizations as well as the right to refrain from such assistance. 29 U.S.C. § 157.¹⁰

¹⁰ Section 7 of the Act states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other

Section 7's prohibition against coerced assistance to a union contains an exception for union security agreements under Section 8(a)(3). *Id.* As noted above, the coerced assistance permitted under Section 8(a)(3) is limited to financial support in the form of dues and fees, and then only in the context of a valid union security clause. See *Communication Workers of Am. v. Beck*, 487 U.S. 735, 749 (1988). Employee rights against coerced assistance under Section 7 and 8(a)(3) are reinforced by Section 302(c)(4)'s requirement for a specific written authorization which shall not be irrevocable beyond the termination date of the collective bargaining agreement. See *Hacienda III*, 355 NLRB No. 154, slip op. at 5, n. 10 (2010) (Member Schaumber concurring); and *IBEW, Local No 2088*, 302 NLRB 322, 328 (1991) (holding that a dues checkoff clause that made checkoff irrevocable for successive yearly periods infringed on employees' Section 7 rights to refrain from assisting a union). As the 7th Circuit stated in *U.S. Can Co.*, "... the requirement to join the union (or pay dues to it) coerces employees in a way forbidden by 29 U.S.C. § 158(a)(3)." 984 F.2d at 869.

The AGC's real objective here is to force Respondents' employees to continue to fund the Union after contract termination. The AGC's Cross-Exceptions make plain that coercing employees is the real motive. Leaving aside whether the Union can discipline or sue its members to collect dues after contract expiration without violating Section 8(b)(2), the Union cannot lawfully "challenge their employment status" because a union security provision does not survive contract termination pursuant to Section 8(a)(3). 29

concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring a membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157.

U.S.C. § 158(a)(3).

The AGC has argued to the Board on other occasions that Section 7 requires that the checkoff obligation cease upon contract termination. In its Statement of Position to the Board in *Hacienda II* and *Hacienda III* following the Ninth Circuit's remands in 2003 and 2009, the AGC stated, "the General Counsel believes that the Section 7 analysis set forth above provides a rational basis for excepting dues-checkoff from the *Katz* rule, and such a finding is consistent with the longstanding view of the labor management community." See Statement of Position of General Counsel on Remand, p. 16. (May 15, 2003 and January 12, 2009)

6. The NLRA's Policy of Freedom of Contract Supports the Current Dues Checkoff Standard.

The Supreme Court has stated that one of the fundamental policies of the Act is "freedom of contract." *H.K. Porter*, 397 U.S. 99, 108 (1970). Consistent with the fundamental policy of freedom of contract, the Centers and the Union executed the collective bargaining agreements, which are now terminated. The collective bargaining agreements contained a union security provision and a dues checkoff provision. (JTX 1-6 at Art. 2 and Art. 3) The union security provision stated that employees must pay union dues and initiation fees. (JTX 1-6 at Art. 2). The dues checkoff provision stated that these dues and initiation fees will be deducted for employees that execute a written authorization. (JTX 1-6 at Art. 3). The written authorization stated that it was "irrevocable for a period of one (1) year or until the termination of the collective bargaining agreement, whichever is sooner ..." (JTX 1-6 at Exhibit A). These contract provisions make clear that the Centers' obligation with respect to dues checkoff was linked to the union security provision and to the existence of a current collective

bargaining agreement.

Basic contract principles also require a conclusion that the dues checkoff obligation ceased when the contract terminated. The Board has held that "[i]t is axiomatic that contract negotiations occur in the context of existing law, and, therefore, a contract provision must be read in light of the law in existence at the time the agreement was negotiated." *Hacienda I*, 331 NLRB 665, 667 (2001). Here, the Centers negotiated the dues checkoff and union security provisions in the context of the existing law that checkoff does not survive contract termination. The checkoff provisions in the collective bargaining agreements tie checkoff to the existence of a current collective bargaining agreement. The dues checkoff provision mirrored existing law and the Board must interpret the provision accordingly.

7. The Economic Policies Underlying the Act Support the Board's Dues Checkoff Standard.

In *H.K. Porter*, the Supreme Court held that the Board could not order an employer to agree to checkoff. 397 U.S. 99 (1970). The Court also stated, "[i]t cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." *Id.*

The Board has held that "[t]he Act is premised on the view that in arms-length economic relationships, there can be areas of conflict between employers and employees that, if the parties cannot reach agreement, can be resolved through a contest of economic strength in the collective-bargaining process if the employees choose to bargain collectively." *Brevard Achievement Center, Inc.*, 342 NLRB 982, 985 (2004). Further, "[n]either party can strip the other of the benefits of the economic weapons to which each is entitled beyond the term of the agreement." *Sheet Metal*

Workers' Int'l. Assoc., Local Union No. 115 v. Alliance Mech. Corp., 2010 U.S. Dist. LEXIS 13586, 189 L.R.R.M. 3233 (2010) .

The Supreme Court has held that the Board is not empowered to "pass judgment on the legitimacy of any particular economic weapon used in support of genuine negotiations." *NLRB v. Katz*, 369 U.S. 736, 747 (citing *NLRB v. Insurance Agents*, 361 U.S. 477 (1960)). In the absence of proof of unlawful motivation, there are many economic weapons which an employer may use that may interfere in some measure with concerted employee activities, or which in some degree discourage union membership, and yet the use of such weapons does not constitute conduct that is within the prohibition of Sections 8(a)(1) and (3). *NLRB v. Brow*, 380 U.S. 278 (1965).

The Board has not forbidden the use of checkoff as a weapon, and in *Hacienda III*, one of the concurring opinions observed that "like 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. The ability of parties to wield such weapons is 'part and parcel' of the system that the Wagner and Taft-Hartley Acts envisioned." 355 NLRB No. 154, slip op. at 5 (Members Schaumber and Hayes concurring). Chairman Liebman and Member Pearce, in their concurrence in *Hacienda III*, agreed, stating, "[t]o strip employers of that [weapon] would significantly alter the playing field that labor and management have come to know and expect." *Id.* at 3.

The NLRA is designed to maintain a balance in labor relations. Respondents' position is straightforward. A Union can engage in coercive activity, as the Union has done here, but employers should not be required to collect and remit dues to the union

to fund this activity after the expiration of the collective bargaining agreement. Reversal of *Bethlehem Steel* would be inherently unfair because it would force an employer to collect money to fund post-contract union activities.

C. The Board Should Honor The Doctrine Of Stare Decisis And Not Overturn Longstanding Precedent Without A Compelling Justification.

The doctrine of stare decisis requires that once a question of law is decided by a court or administrative agency, the decision forms a precedent that should be followed in subsequent cases. Stare decisis should be a consideration for the Board in all cases applying Board precedent because "there are values that are inherent in the doctrine of stare decisis. These values include stability, predictability, and certainty of the law. In the context of labor relations law, these values are outweighed only upon a clear showing that extant law is contrary to statutory principles, disruptive to industrial stability, or confusing." *Levitz Furniture Company of the Pacific, Inc.*, 333 NLRB 717, 731 (2001) (Member Hurtgen concurring).

The Board should abide by the doctrine of stare decisis in the instant case. The Board's rule announced in *Bethlehem Steel* has been in effect for half a century and has provided stability, predictability, and certainty with respect to the negotiation, implementation, and termination of dues checkoff provisions. The Board's longstanding commitment to the rule enunciated in *Bethlehem Steel* is evidence enough that the rule is not contrary to statutory principles, and comports with the language of the legislative history to the 1947 Amendments to the Act, which expressly links dues checkoff and union security. Given the Board's long term commitment to the decision, and the numerous decisions of reviewing courts affirming the Board's interpretation, overturning

the decision on the theory that it is unsupported by statutory principles is unjustified.

Discontinuance of dues checkoff following contract expiration does not promote industrial strife and is a clear and rational interpretation of the statute. The Board's longstanding commitment to *Bethlehem Steel* has served as an uncommonly steady guide to parties negotiating collective bargaining agreements. A decision to overturn *Bethlehem Steel*, on the other hand, is likely to be disruptive of industrial relations, as parties to collective bargaining agreements would then negotiate in the face of a wholly new doctrine concerning dues checkoff. It may well be that employers will be less willing to agree to checkoff clauses if they cannot ultimately cease checkoff following contract expiration during subsequent bargaining.

Finally, the rule enunciated in *Bethlehem Steel* is not confusing. As evidenced by the many cases citing *Bethlehem Steel*, it is commonplace that parties to collective bargaining agreements recognize that the unilateral discontinuance of dues checkoff after the expiration of a contract is valid under the law. See *In re Bulkmatic Transportation Co.*, 340 NLRB 621, 625 (2003) ("the parties do not dispute the well-established precedent that an employer's obligation to continue a dues-check-off arrangement expires with the contract that created the obligation"). Moreover, the value of stare decisis is not outweighed by other considerations. *Bethlehem Steel* is not contrary to other principles in the NLRA. Indeed, the NLRA's principles of economic independence, freedom of contract, and employee free choice all support the holding of *Bethlehem Steel*.

D. The AGC's Request For Retroactive Application of Proposed Remedies Should Be Denied .

The AGC does not make a specific request for retroactive application of any

remedy sought, but “urge[s] the Board to . . . issue the requisite remedial order.” (AGC Cross-Exceptions Brief at 18). The AGC requested a similar “requisite remedial order” in his post-trial brief to the ALJ. (AGC Brief to the ALJ at 71). Despite acknowledging here that it seeks to have the Board overrule *Bethlehem Steel*, the AGC in other cases before the Board addressing this same issue has argued that the requested relief should be retroactive. Respondents here assert that by failing to request retroactive application of the new standard sought, the AGC has waived any such remedy. Nevertheless, in the alternative, Respondents assert that in the event the Board reverses *Bethlehem Steel*, the new rule should not be applied retroactively so that Respondents are required to pay the Union dues not deducted and remitted.

In *Levitz Furniture Company of the Pacific, Inc.*, 333 NLRB 717 (2001), the Board reversed its long-standing legal standard regarding unilateral withdrawal of recognition, but the Board expressly declined to apply the new standard retroactively because employers did not have “adequate warning” of the change in the Board’s position. *Id.* at 729. The Board should follow the same rationale here. If the Board reverses *Bethlehem Steel*, it will be declaring that conduct which has been permissible for fifty years now is an unfair labor practice. Certainly, Respondents are entitled to “adequate warning” of such a momentous reversal of established law.

Further, the Board will not apply an arguably new rule retroactively to the parties in the case where the new rule is announced if to do so will work a “manifest injustice.” *Wal-Mart Stores, Inc.*, 351 NLRB 130, 134 (2007); *SNE Enters., Inc.*, 344 NLRB 673 (2005). In determining whether retroactive application will cause manifest injustice, the Board balances three factors: (1) the reliance of the parties on preexisting law; (2) the

effect of retroactivity on accomplishment of the purposes of the Act; and (3) any particular injustices arising from retroactive application. *SNE Enters., Inc.*, 344 NLRB at 673. Examination of these three factors in the instant case leads to the inescapable conclusion that retroactive application of any new rule would create manifest injustice.

First, the AGC admittedly seeks to create a new rule. In 1962, the Board clearly ruled, “[c]onsequently, when the contracts terminated, Respondent was free of its checkoff obligations to the Union.” *Bethlehem Steel*, 136 NLRB at 1502. In the intervening fifty years, the Board and reviewing courts have followed this ruling to find that an employer does not violate the Act by unilaterally ceasing dues checkoff after its agreement with a union expires. *See e.g., Southwestern Steel; Wilkes Tel. Membership Corp.*, 331 NLRB 823 (2000); and decisions cited above in this Brief at p. 10, n. 2. Here, the AGC is seeking to reverse that long-standing rule and make such a unilateral action a violation of Section 8(a)(5) of the Act. Accordingly, a Board reversal of *Bethlehem Steel* clearly would create a “new rule.”

Second, Respondents relied upon *Bethlehem Steel*, the law in effect at the time, when the Centers stopped dues checkoff on March 24, 2011, after expiration of the CBAs. (JTX-1–6; JTX-7 at ¶ 15; GCX-20). By letter, each Center notified unit employees that the Center no longer would deduct Union dues from employee paychecks. (JTX-7 at ¶ 16; Tr. Vol. III at 425:24–426:12; GCX-20). The letter explained that “[t]he dues check-off provisions do not survive the expiration of the old contract” (GCX-20), reflecting the Centers’ reliance on the Board’s decision in *Bethlehem Steel* to assert that a dues checkoff provision did not survive the expiration of a collective bargaining agreement.

The AGC implies that Respondents cannot rely on *Bethlehem Steel* because the “*Hacienda/LJEB*” line of cases put the law regarding unilateral changes in checkoff in flux. That argument is pure poppycock. Despite the lengthy litigation of the “*Hacienda/LJEB*” cases, the Board, to date, has not reversed its ruling in *Bethlehem Steel*. To the contrary, most recently in *Hargrove Elec. Co., Inc.*, 358 NLRB No. 147 (2012), the Board held that “[t]he judge appropriately applied *Bethlehem Steel Co.*” in dismissing the dues deduction allegation in the complaint in a case arising in a right-to-work state. The Board noted that “[a]lthough Board members have questioned whether *Bethlehem Steel* was correctly decided, we decline to revisit that issue under the circumstances in this case.” (internal citations omitted). In both *Hacienda I and II*, a majority of the Board upheld *Bethlehem Steel*. Thus, in March 2011, when the Centers ceased dues checkoff, *Bethlehem Steel* was the law. The fact that two members of the Board dissented from a decision is not “adequate warning” of a change in Board law. The Board has not reversed *Bethlehem Steel*, and the Centers’ reliance on it weighs against retroactive application of any new rule.

Moreover, the most recent decision of the Ninth Circuit in the *Hacienda/LJEB* line of cases is expressly limited to the application of *Bethlehem Steel* in right-to-work states and was decided after Respondents ceased deducting and remitting dues. As the court stated:

the question squarely in front of the Board is whether dues-checkoff ***in right-to-work states*** is subject to unilateral change, or whether, under such circumstances, dues-checkoff is a mandatory subject of bargaining.

Local Joint Executive Bd. of Las Vegas (LJEB III), 657 F.3d 865, 870 (citing *Local Joint Executive Bd. of Las Vegas (LJEB II)*, 540 F.3d at 1075) (emphasis added). The instant

case arose in Connecticut, which is not a right-to-work state. The Ninth Circuit's decisions, therefore, provided no notice to Respondents that *Bethlehem Steel*, as applied in a non right-to-work state, was being questioned by a reviewing court. *Id.* at 876 ("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"). Further, *LJEB III* was decided on September 13, 2011, six months after the Centers ceased dues checkoff and its ruling is expressly limited to the application of *Bethlehem Steel* in right-to-work states.

Finally, retroactive enforcement of a new rule would not support, and will likely have a negative impact on, the purposes of the Act and would work an injustice on Respondents. In attempting to distinguish dues checkoff from union security under a collective bargaining agreement, the AGC describes dues checkoff as an "administrative convenience," noting that stopping dues checkoff did not terminate either a union's right to collect dues from employees or any obligation of the employees to pay dues. However, retroactive application of a new dues checkoff rule in a non right-to-work state would have an immensely negative impact on the Board's accomplishment of the purposes of the Act because of its impact on employee rights. As Board Members Liebman and Walsh stated in their dissent in *Dana Corporation*, "[t]he ultimate object of the National Labor Relations Act, as the Supreme Court has repeatedly stated, is 'industrial peace.'" 351 NLRB 434, 444, *overruled on other grounds*, (2007). In this regard, "[t]he Board seeks to maximize and balance two sometimes competing goals: 'preserving a free employee choice of bargaining representatives, and encouraging the collective-bargaining process.'" *Id.* In this case, to permit retroactive application would

only serve to disrupt and negatively impact the free choice of those employees who have elected to stop supporting the Union financially, which augurs against retroactive application. *Cf. Wal-Mart Stores, Inc.*, 351 NLRB 130, 135 (2007). Similarly, to require an employer to pay all such dues would be equally unfair.

E. The Board Is Currently Without Authority To Rule on the AGC's Cross-Exceptions

The Act establishes the NLRB as a five member board, 29 U.S.C. § 153(a). Under Section 3(b), the power of the Board may be delegated to three members as a quorum. 29 U.S.C. § 153(b); *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2638-40 (2010) (“Interpreting the statute to require the Board’s powers to be vested at all times in a group of at least three members is consonant with the Board quorum requirement, which requires three participating members ‘at all times’ for the Board to act”). Once the Board’s membership drops below three, it is no longer vested with the power of the Board, and no longer able to act. *New Process Steel, L.P.*, 130 S. Ct. at 2640 (finding that Section 3(b) requires “that the delegee group maintain a membership of three in order for the delegation to remain valid”); *NLRB v. County Waste of Ulster, LLC*, 665 F.3d 48, 51 (2d Cir. 2012) (stating that Section 3(b) of the Act “does not permit a two member panel of the Board to decide a case when the Board itself consists only of two members”) (citation omitted).

In 2011, the Board consisted of members Brian E. Hayes, Chairman Mark Gaston Pearce, and Craig Becker. (See www.nlr.gov, “Board Members Since 1935”, available at <http://nlrb.gov/who-we-are/board/board-members-1935> (last visited October 1, 2012.)) As of January 3, 2012, however, Member Becker’s term expired and only two members remained. *Id.* Two members are without authority to act with the power of the

NLRB, or to overrule precedent. *Hacienda III*, 355 NLRB No. 154 (Liebman and Pearce, concurring) (“It is the tradition of the Board that the power to overrule precedent will be exercised only by a three-member majority of the Board.”); *New Process Steel, L.P.*, 130 S.Ct. at 2645 (“If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress’ decision to require that the Board’s full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances.”). Consequently, the Board, as presently constituted, may not consider or issue a ruling on the AGC’s Cross-Exceptions. See *County Waste of Ulster*, 665 F.3d at 48 (vacating the Board’s February 2009 decision because it was issued by a two member panel); *St. George Warehouse, Inc. v. N.L.R.B.*, 394 F. App’x 902, 902 (3d Cir. 2010) (vacating a November 2008 Decision and Order because the two-member panel was without “authority to enter a decision and order”).

On January 4, 2012, President Obama announced the appointment of three new members to the NLRB by way of “recess appointments.” (See www.nlr.gov, “White House announces recess appointments of three to fill Board vacancies,” available at <http://nlrb.gov/news/white-house-announces-recess-appointments-three-fill-board-vacancies> (last visited October 1, 2012.)) Under Article II, Section 2 of the United States Constitution, the President has the “power to fill up all vacancies that may happen during the recess of the Senate.” U.S. Const. Art. II, Section 2 (“Recess Clause”). The Senate, however, was not in recess when these appointments were made. See Daily Digest, Resume of Congressional Activity, Congressional Record of the 112th Congress, at D2-3 (Jan. 3, 2012). Thus, the purported appointments were

unconstitutional and have no effect on the quorum requirement of the Act.

The President's attempts to circumvent the recess requirement of the Recess Clause are stymied by his own administration. The Department of Justice has opined that a recess must be longer than 3 days for a recess appointment to be valid. During oral argument before the Supreme Court on March 23, 2010, Neal K. Katyal, Deputy Solicitor General represented that "the recess appointment power can work in – in a recess. I think our office has opined the recess has to be longer than 3 days."¹¹ See *New Process Steel, L.P. v. NLRB*, Case 08-1457, pg. 50:3-5 (U.S. Mar. 23, 2010). For these reasons, the Board's membership remains at two, and it cannot act until another member is properly appointed.

III. CONCLUSION

For the reasons set forth herein, Respondents respectfully request that the AGC's Cross-Exceptions be dismissed in their entirety and that the ALJ's Decision be affirmed.

¹¹ The Department of Justice has recently attempted to backtrack from these statements. Nonetheless, the agency acknowledges the risk of the NLRB appointments made while the Senate convened in pro forma sessions because "[t]he question is a novel one." *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, The United States Department of Justice, Office of Legal Counsel, Jan. 6, 2012 available at, <http://www.justice.gov/olc/memoranda-opinions.html> (last visited October 1, 2012).

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Answering Brief in Opposition to Acting General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge was served upon the following persons, this the 5th day of October, 2012, in the manner indicated:

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