UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

C & G DISTRIBUTING COMPANY, INC.

and Case 9-CA-078875

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES AND SERVICE AND CASINO EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

I. OVERVIEW

This case is before the Board on Counsel for the Acting General Counsel's exceptions to Administrative Law Judge Jeffrey D. Wedekind's decision that Respondent did not violate Section 8(a)(1) and (5) of the Act when it unilaterally ceased deducting and remitting unit employees' union dues to the Union upon expiration of the parties' collective-bargaining agreement. Counsel for the Acting General Counsel respectfully submits for the reasons set forth below, this case presents an appropriate vehicle for the Board to reconsider and overrule *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enf'd denied on other grounds, 320 F.2d 615 (3rd Cir. 1963), cert denied 375 U.S. 984 (1964) to the extent that it holds that dues check off requirements do not survive the expiration of a collective-bargaining agreement. Further, after doing so, the Board should find that Respondent violated Section 8(a)(5) as alleged in the complaint.

II. STATEMENT OF FACTS [1/]

The Union and Respondent were parties to a collective-bargaining agreement in effect from March 15, 2008 to February 24, 2012, and subsequently extended to March 15, 2012. (ALJD pg. 2) Since at least March 15, 2008, the Union has been the designated exclusive collective-bargaining representative of the Unit pursuant to Section 9(a) of the Act, and has been recognized as the representative by Respondent. [2/] (ALJD pg. 2) Article IV, subparagraph 5(c) of the parties' agreement contained a dues checkoff provision that required Respondent to deduct dues from unit employees' pay and remit those dues to the Union. (ALJD pg. 2) Before the contract expired, Unit employees had signed a Checkoff Authorization and Assignment (herein checkoff card) which permitted Respondent to deduct dues and initiation fees from their pay checks. [3/] (ALJD pg. 2) The checkoff cards state, in part:

> This authorization and assignment shall be irrevocable for the term of the applicable contract between the union and the employer or for one year, whichever is the lesser, and shall automatically renew itself for successive yearly or applicable contract periods thereafter, whichever is lesser, unless I give written notice to the company and the union at least sixty (60) days, but not more than seventy-five (75) days before any periodic renewal date of this authorization and assignment of my desire to revoke same. (Jt. Ex. J)

Through March 2012, Respondent regularly deducted dues from Unit employees' pay and remitted those dues to the Union. (ALJD pg. 2) Specifically, on March 2, 2012, Respondent deducted dues; on about March 16, 2012, Respondent remitted these dues to the Union; and on about

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[1] References to the Joint Motion and Stipulation of Facts will be designated as (Jt. M. pg. ___), references to Joint Exhibits will be designated as (Jt. Ex. ___), and references to the Administrative Law Judge's Decision will be designated as (ALJD pg. ___).

[2/] The following employees constitute the Unit within the meaning of Section 9(b) of the Act: All drivers and warehousepersons, excluding office clerical employees, salespersons, professional employees, guards and supervisors as defined in the National Labor Relations Act. (Jt. M. pg. 3)

[3/] The check off cards were executed by Unit employees about May 10, 2006, October 19, 2011, February 26, 2007, June 13, 2011, October 31, 2007, May 3, 2010, and December 20, 2011. (Jt. Ex. J)

March 19, 2012, the Union received such dues. (ALJD pg. 2) Respondent has not deducted or remitted dues to the Union since that time. (ALJD pg. 2)

Thereafter, on April 11, 2012, Respondent's attorney, Ronald L. Mason, sent the Union's attorney, John R. Doll, an email stating, inter alia: "be advised that my client will no longer deduct union dues until there is a valid contract that authorizes such deductions." (ALJD p. 2; Jt. Ex. I) Mason's April 11, 2012 email to Doll was the first time that Respondent notified the Union that it had ceased deducting and remitting Unit employees' dues. (ALJD p. 2)

On August 24, 2012, Counsel for the Acting General Counsel, Respondent, and the Union submitted a Joint Motion and Stipulation of Facts to the Administrative Law Judge. (ALJD pp. 1-2)

III. LEGAL ANALYSIS:

Counsel for the Acting General Counsel asserts that this case presents an appropriate vehicle for the Board to reconsider and overrule *Bethlehem Steel Co.*, 136 NLRB 1500 (1962) to the extent that it holds that dues-checkoff requirements do not survive the expiration of a collective-bargaining agreement. In *Bethlehem Steel Co.*, the Board held that union-security and dues-checkoff arrangements, unlike most terms and conditions of employment, do not survive expiration of a collective-bargaining agreement. *Id.* at 1502. The Board reasoned that unilateral cessation of union security after contract expiration was not only lawful, but mandatory, because union membership cannot be made a condition of employment except under a "*contract* which conforms to the proviso to Section 8(a)(3)." *Id.* (emphasis added). The Board found that "similar considerations" applied to dues-checkoff provisions, because they "implemented the union-security provisions." *Id.* The Board also relied upon a subsidiary rationale for exempting checkoff from the unilateral change doctrine in the absence of an agreement: that the language of the contract ("so long as this Agreement remains in effect") linked the checkoff obligation

with the duration of the contract. *Id.* In a later decision, the Board also based the checkoff exception from the unilateral change rule upon Section 302(c)(4), which permits checkoff only if "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[.]" See, *Hudson Chem. Co.*, 238 NLRB 152, 157 (1981) (adopting ALJ decision without comment). See also *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991) ("[I]t is the Board's view" that checkoff does not survive contract expiration "because of statutory provisions which permit these obligations only when specified by the express terms of a collective-bargaining agreement," including Section 302(c)(4)).

The Ninth Circuit has twice vacated and remanded Board decisions in *Hacienda Resort Hotel & Casino (Hacienda I and Hacienda II)* on the ground that the Board has not articulated a comprehensible rationale for excluding dues checkoff from the unilateral change doctrine in a right-to-work state. *Local Joint Executive Board of Las Vegas v. NLRB,* 309 F.3d 578, 584-585 (9th Cir. 2002), vacating and remanding 331 NLRB 665 (2000); *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.2d 1072, 1082 (9th Cir. 2008), vacating and remanding 351 NLRB 504 (2007). On remand, in *Hacienda III*, 355 NLRB No. 154 (2010), the four members of the Board eligible to participate in the decision deadlocked, reaching different conclusions as reflected in their separate opinions. In their opinion, Chairman Liebman and Member Pearce observed that "the Board has never provided an adequate statutory or policy justification for the holding in *Bethlehem Steel* excluding dues-checkoff from the unilateral change doctrine articulated in *NLRB v. Katz.*" *Id.*, slip op. at 2. Counsel for the Acting General Counsel agrees with that observation, but also asserts that no principled rationale exists for excluding dues-

checkoff from the unilateral change rule. Thus, subsequent to *NLRB v. Katz*, it has become clear that parties are not free to unilaterally change a term or condition of employment upon contract expiration without bargaining to impasse, unless its inclusion in a bargaining agreement is clearly required by statutory language or it involves the surrender, via collective bargaining, of a statutorily guaranteed right. See 369 U.S. 736 (1962). As discussed below, dues checkoff does not satisfy those criteria. Section 8(a)(3) concerns union security, not checkoff, and cases subsequent to *Bethlehem Steel* contradict its finding that checkoff merely implements union security. [4]/ Further, Section 302(c)(4) does not preclude checkoff arrangements following contract expiration. Additionally, the Board's subsidiary rationale in *Bethlehem Steel* – that contract language linked the dues-checkoff obligation only to the duration of the contract – is inconsistent with more recent Board precedent. Therefore, Counsel for the Acting General Counsel respectfully requests that the Board overrule *Bethlehem Steel* to the extent that it holds that dues-checkoff arrangements do not survive contract expiration.

A. The *Katz* unilateral change doctrine is fundamental to the statutory duty to bargain in good faith

The duty to bargain collectively is defined by Section 8(d) as the duty to "meet...and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Therefore, once a term or condition of employment has been established, it cannot be unilaterally changed, absent waiver or a bargaining impasse. A unilateral change is tantamount to a flat refusal to bargain, and thus violates Section 8(a)(5) without an independent

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

inquiry into the employer's subjective good faith. See *NLRB v. Katz*, 369 U.S. 736 at 743, 747 (stating a unilateral change "is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal"). Indeed, unilateral changes deny employees and their representatives the statutorily-guaranteed right of joint participation in the formulation of terms and conditions of employment, frustrate the ability of the parties to reach agreement on a contract by narrowing the range of possible compromises, and undermine the union by signaling to the employees that the union makes no difference. [5/]

Even prior to the Supreme Court's decision in *Katz*, the Board and the Fifth Circuit had recognized that unilateral changes to terms and conditions of employment constitute a fundamental failure of the duty to bargain in good faith. [6/] Moreover, although *Katz* itself involved unilateral changes during bargaining for an initial contract, the unilateral change doctrine also applies to unilateral changes committed after expiration of a collective-bargaining agreement. See *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n. 6 (1988). When the contract expires, the terms and conditions established therein continue by operation of the Act. In other words, they become "terms imposed by law, at

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[5/] See *id.* at 747 (unilateral changes "must of necessity obstruct bargaining, contrary to congressional policy"); *The Little Rock Downtowner, Inc.*, 168 NLRB 107, 108 (1967) (there is "no clearer or more effective way to erode" a union's ability to bargain than for an employer to make unilateral changes), enf'd. 414 F.2d 1084 (8th Cir. 1969); *NLRB v. Hardesty Co.*, 308 F.3d 859, 865 (8th Cir. 2002) (unilateral changes send the message to the employees that their union is "ineffectual, impotent, and unable to effectively represent them").

[6/] See, e.g. *Bonham Cotton Mills, Inc.*, 121 NLRB 1235, 1236, 1259-60 and n. 38 (1958), enf'd. 289 F.2d 903 (5th Cir. 1961) (agreeing with the trial examiner that unilateral changes independently violated Section 8(a)(5) where the trial examiner described such changes as "patently violative," and referenced a "long decisional line which holds that good faith bargaining requires that an employer first consult with and give opportunity to the [union] to negotiate changes before altering rates of pay or conditions of employment"); *Armstrong-Cork Co. v. NLRB*, 211 F.2d 843, 847 (5th Cir. 1954) (finding that employer violated Section 8(a)(5) by unilaterally cancelling planned wage increase and granting merit increases, as this "naturally tended to undermine the [union's] authority," and "[g]ood faith compliance with Section 8(a)(5)...presupposes that an employer will not alter existing 'conditions of employment' without first consulting with the [union]... and granting it an opportunity to negotiate on any proposed changes"). See also the Board's brief to the Supreme Court in *NLRB v. Katz*, 1962 WL 115568, at **33-35 (February 2, 1962).

least so far as there is no unilateral right to change them." See *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 at 206-07.

B. There is no statutory basis exists for excluding dues-checkoff from the unilateral change rule following contract expiration

There is no statutory basis for the Board's holding in *Bethlehem Steel* that a dues-checkoff arrangement does not survive contract expiration. Neither the Section 8(a)(3) proviso nor Section 302(c)(4) supports excepting dues-checkoff from the unilateral change rule. [7]/

1. The Section 8(a)(3) proviso does not warrant excepting checkoff from the unilateral change rule

The Board's primary rationale in *Bethlehem Steel* for exempting checkoff from the unilateral change rule after contract expiration was that dues-checkoff merely implements a union security agreement. Therefore, the Board reasoned, the Section 8(a)(3) proviso's "agreement" requirement for union security applies with equal force to checkoff. However, the plain language and legislative history of Section 8(a)(3), as well as subsequent case law indicating that union security and checkoff are not mutually dependent, demonstrate that the Board's primary rationale in *Bethlehem Steel* was incorrect.

Initially it should be noted that the Section 8(a)(3) proviso does not reference dues-checkoff or any other means by which dues owed pursuant to a union security requirement may be transmitted to a union. It references only agreements between employers and labor organizations that "require as a condition of employment membership therein," i.e. union security. Nor did the legislative history of the Section 8(a)(3) proviso relate to dues-checkoff; the debate focused on the merits of outlawing the "closed shop." Indeed, the original House Bill would have made a checkoff that did not meet certain requirements an unfair labor practice

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[7]/ See generally Joseph R. Weeks, "Continuing Liability Under Expired Collective Bargaining Agreements: Part 1," 15 Okla. City U.L. Rev. 1, 38-39 & n. 108 (1990) (no "coherent rationale" for excluding dues-checkoff arrangements from the unilateral change rule after contract expiration).

under Section 8(a)(2), although that provision was eliminated in conference and from the Bill as finally enacted. *Frito-Lay*, 243 NLRB 137, 138 (1979) (quoting *Salant & Salant, Inc.*, 88 NLRB 816, 817-18 (1950)).

In addition, contrary to the Board's rationale in *Bethlehem Steel*, checkoff does not merely implement union security. In subsequent decades, the Board and courts have indicated that although union security and checkoff often go hand-in-hand, they are markedly different kinds of obligations that should not necessarily be treated as legally inseparable. [8]/ Unlike union security agreements, for example, a checkoff authorization gives rise to an independent wage assignment contract between the employee and employer: the employee assigns to the union a designated part of future wages to be received from the employer. [9]/ The Board has held that such wage assignments survive the expiration of the collective-bargaining agreement when the employee's authorization so intends. See *Lowell Corrugated Container Corp.*, 177 NLRB 169, 172-73 (1969), enf'd. 431 F.2d 1196 (1st Cir. 1970) (employer did not violate Section 8(a)(2) and (3) by continuing to honor unrevoked checkoffs after expiration of the collective-bargaining agreement). While the purpose of union security is to stabilize the collective-bargaining relationship by securing the union's ability to fund its representational activities, the purpose of

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

[9]/ *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 327 (1991) (referencing Restatement (Second) of Contracts §§ 317, 321 and 326 (1981)). See also *Frito-Lay*, 243 NLRB 137 at 137. Of course, an individual employee's checkoff authorization is separate and legally distinct from a checkoff clause, which is a provision in a contract between a union and an employer setting forth the employer's agreement to honor checkoff authorizations executed by employees. Thus, if a contract contains a union security provision and a checkoff clause, but an employee does not authorize checkoff, the employee simply must make other arrangements to satisfy his or her dues obligation.

dues checkoff is "administrative convenience in the collection of union dues." *NLRB v. Atlanta/ Printing Specialties & Paper Products Union 527 (Mead Corp.)*, 523 F.2d 783, 786 (5th Cir. 1975). Finally, checkoff provisions have often appeared in collective-bargaining agreements that have no union security provision. [10]/

2. Section 302(c)(4) does not warrant excluding checkoff from the unilateral change rule

Section 302(c)(4) does not limit checkoff to situations where a contract is in effect. Section 302 generally makes it a crime for an employer to willfully "pay, lend, or deliver" money to a labor organization or for a labor organization to "request, demand, receive, or accept" such payments, except in certain limited circumstances that further legitimate ends. *Frito-Lay*, 243 NLRB 137 at 138 (Section 302's general proscription was intended to deal with labor racketeering. *Id.*) One of those exceptions, Section 302(c)(4), permits dues-checkoff payments so long as the affected employee makes 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." In other words, checkoff is lawful if the employee has the option to revoke the checkoff authorization at least once per year and at contract expiration. Significantly, the fact that a checkoff authorization must be *revocable* by the employee when the contract terminates indicates that it is *not automatically revoked.* Thus, Section 302(c)(4) clearly contemplates dues-checkoff continuing after expiration of the contract. *Tribune Publishing Co. v NLRB*, 564 F.3d 1330, 1335 (D.C. Cir. 2009) ("Section 302 does not require a written collective-bargaining agreement. In order for payroll deduction of union dues to be lawful,

[10]/ In a 1995 review of collective-bargaining agreements, 95 percent were found to contain dues-checkoff provisions whiles 82 percent contained union-security provisions. Bureau of National Affairs, Basic Patterns in Union Contracts 97 (14th ed. 1995). A 1981-82 study of collective-bargaining agreements covering 1,000 or more employees found that 86 percent contained dues-checkoff provisions while 83 percent contained union-security provisions. U.S. Department of Labor Bureau of Labor Statistics, Major Collective Bargaining Agreements: Union Security and Dues Checkoff Provisions (Bulletin 1425-21, May 1982). Further, a 1961 review of collective-bargaining agreements found that 82 percent contained dues-checkoff provisions while 76 percent contained union-security provisions. Bureau of National Affairs, Basic Patterns in Union Contracts 87:5 (5th ed. 1961).

Section 302 requires merely that employees give written consent that is revocable after a year.") Indeed, Senator Taft, speaking in favor of enacting Section 302(c)(4)'s checkoff exception, stated that checkoff authorizations under that provision "may continue indefinitely until revoked" by the employee. See II Leg. Hist. 1311 (LMRA 1947).

This interpretation of Section 302(c)(4) is bolstered by Section 302(c)(5)'s exception for employer contributions to union trust funds. Section 302(c)(5) permits such contributions only if the "detailed basis on which such payments are to be made is specified in a written *agreement* with the employer. . . ." (emphasis added). Thus, Congress included language requiring an "agreement" in Section 302(c)(5) but made no mention of such a requirement in Section 302(c)(4). Moreover, notwithstanding the explicit "written agreement" requirement, the Board and courts have found that an employer's obligation to make payments into union benefit funds survives contract expiration. See *Concord Metal*, 298 NLRB 1096, 1096 (1990) (expired contract is sufficient to satisfy the "written agreement" requirement of Section 302(c)(5)); *Hinson v. NLRB*, 428 F.2d 133, 138-39 (8th Cir. 1970) (trust fund agreements satisfy "written agreement" requirement); *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981) (trust fund agreements and expired contract satisfy "written agreement" requirement). Accordingly, a finding that Section 302(c)(4) precludes dues checkoff after contract expiration would be anomalous because it contains no "agreement" requirement and Section 302(c)(5)'s payments to union trust funds, which specifically requires a "written agreement" for employers to contribute to union trust funds, survive contract expiration.

A few courts have misconstrued Section 302(c)(4) to prohibit checkoff in the absence of a current agreement between the employer and union. See *Sullivan Brothers Printers, Inc. v.* NLRB, 99 F.3d 1217, 1232 (1st Cir. 1996); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869 (7th Cir.

1993); *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 254-55 (D.C. Cir. 1991); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986). Counsel for the Acting General Counsel asserts that those decisions do not provide any reasoned explanation for that interpretation. Moreover, the two D.C. Circuit decisions are inconsistent with that Court's subsequent finding in *Tribune Publishing Co.* that Section 302(c)(4) "does not require a written collective-bargaining agreement." See 564 F.3d 1330 at 1335. It is noted that the Supreme Court has merely observed that the "Board's view" is that Section 302(c)(4) precludes checkoff absent a collective-bargaining agreement, but has not endorsed that view. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 at 199.

C. All exceptions to the unilateral change rule other than checkoff are creatures of contract due to statutory mandate or the contractual surrender of a statutory right

Considering the unilateral change rule's essential role in giving effect to the *statutory* bargaining obligation following contract expiration, any exceptions to that rule should have a statutory basis. As shown below, all of the recognized exceptions to the unilateral change rule – other than dues-checkoff – are "statutorily dependent upon an existing collective-bargaining agreement" or stem from the surrender, in a collective-bargaining agreement, of a "statutorily guaranteed right." [11]/

1. Union security: statute requires an "agreement"

Union security requirements do not survive contract expiration because Section 8(a)(3) permits an employer to discriminate against employees who fail to pay union dues only if it has a

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[11]/ *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1113-14 (D.C. Cir. 1986) (rejecting employer's contention that the reason some terms and conditions of employment do not survive contract expiration is that they concern the institutional "employer-union" relationship in addition to the "employer employee" relationship, and finding that hiring hall provision survives expiration of contract). See also *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578 at 584-85 (reviewing potential statutory bases for excluding dues checkoff from the unilateral change doctrine in concluding that the Board has not articulated a cogent rationale).

union security "agreement" with the union. *Bethlehem Steel Co. (Shipbuilding Div.),* 136 NLRB 1500 at 1502. See also *Litton Financial Printing Div.*, 501 U.S. 190 at 199-200. Indeed, an employer that continues to enforce a union security requirement after contract expiration would violate Section 8(a)(3). Therefore, union security requirements are exempted from the unilateral change rule after contract expiration because they are statutorily dependent upon an existing agreement between the union and the employer.

2. Arbitration: surrender of parties' statutory right to make final determination regarding terms and conditions of employment and to use economic weaponry

Final and binding arbitration constitutes a surrender of the statutory right of parties to make their own final determination as to which terms and conditions of employment they will accept, and how to interpret already agreed-upon terms. *Indiana & Michigan Electric Co.*, 284 NLRB 53, 57-58 (1987). [12]/ As the Board observed in *Indiana & Michigan Electric Co.*, Congress ultimately rejected a version of Section 8(d) that would have included in the definition of "to bargain collectively" language requiring compulsory arbitration over the interpretation or application of the contract. See *id.* at 57. Under Section 8(d) as finally enacted, each party to the bargaining relationship is the "final arbiter of its own best interest," absent mutual consent to the contrary. *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970). See also *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974). An arbitration agreement also typically represents the parties' mutual consent to relinquish economic weapons to resolve disputes, such as strikes and lockouts, which are "otherwise available under the Act." *Indiana & Michigan Electric Co.*, 284 NLRB 53 at 58. Therefore, arbitration is a creature of contract, and parties can unilaterally refuse to arbitrate a

[12]/ See also, Section 8(d) (duty to bargain "does not compel either party to agree to a proposal or require the making of a concession").

dispute arising after the expiration of a contract containing an arbitration provision. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 at 206.

3. No-strike provisions: surrender of the statutory right to strike

Because a no-strike provision represents the surrender of the statutory right to strike, [13]/ parties to a bargaining relationship are not required to abandon that right when there is no agreement to waive it in effect. As mentioned above, the Supreme Court has observed that no-strike provisions are generally coterminous with an obligation to arbitrate. *Gateway Co. v. United Mine Workers*, 414 U.S. 368 at 382.

4. Waiver: mutual renunciation of union's statutory right to bargain

Similarly, a waiver by a union of its statutory right to bargain over mandatory subjects does not survive contract expiration. See *Ironton Publications*, 321 NLRB 1048, 1048 (1996) (provision granting the employer sole discretion to award merit increases did not survive contract expiration). The rule that a contractual waiver must be "clear and unmistakable" to be effective is based on the proposition that the bargaining obligation continues even when a contract is in effect. *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). A contractual waiver reflects the "mutual intention" of the parties to permit unilateral employer action with respect to a particular employment term, notwithstanding the continuing statutory duty to bargain during the contract that would otherwise apply. *Id.* Because a contractual waiver represents the parties' agreement that the Union will relinquish its statutory bargaining rights regarding a particular subject, the waiver does not survive contract expiration absent evidence of the parties' intent to the contrary. See 321 NLRB 1048 at 1048.

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[13]/ Section 8(d); Section 13. See also *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111 at 1114; *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 at 199.

5. Checkoff: no contractual surrender of a statutorily guaranteed right

Any argument that checkoff is a "creature of contract" because an individual checkoff authorization is a contract or implicates Section 7 rights should be rejected by the Board. Unlike arbitration, no-strike commitments, and contractual waivers, checkoff arrangements do not involve the surrender by a *party to the bargaining relationship* of any statutorily guaranteed right. A checkoff arrangement in a collective-bargaining agreement simply reflects the parties' agreement to honor checkoff authorizations voluntarily executed by individual employees. The fact that an employee's checkoff assignment is a "contract" with his or her employer has no bearing on whether the separate and legally distinct checkoff arrangement between the union and employer is subject to the statutory bargaining obligation after the contract has expired. Furthermore, to the extent that the periodic irrevocability of dues-checkoff implicates the Section 7 right to "refrain from" assisting a union, Section 302(c)(4) already ensures to employees the right to revoke checkoff authorizations after contract expiration.

D. The subsidiary, contract-language rationale in *Bethlehem Steel* should also be overruled

The Board's subsidiary rationale in *Bethlehem Steel* – that contract language linked the checkoff obligation only to the duration of the contract – is inconsistent with more recent Board precedent. Thus, regardless of such limiting terminology in an agreement, an employer ordinarily has a statutory duty to bargain with the employees' collective-bargaining representative before making changes in terms and conditions of employment. All terms and conditions of employment set forth in a collective-bargaining agreement are linked to the agreement's term by virtue of the duration clause; nonetheless, these terms survive the contract's expiration. *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 131-132 (D.C. Cir. 2001) (general durational clause, without more, does not defeat unilateral change doctrine). Moreover, the

language of the *Bethlehem Steel* checkoff provision ("so long as this Agreement remains in effect") would not satisfy the Board's current "clear and unmistakable" standard for finding a contractual waiver of the right to bargain over a mandatory subject following contract expiration. [14]/ If a union and employer want to negotiate a contract that provides for checkoff to cease after contract expiration, the Board's post-*Bethlehem Steel* precedent provides ample guidance. See, *Cauthorne Trucking*, 256 NLRB 721, 722 (1981) (contractual language stating that "at the expiration" of the contract the pension trust agreement "shall terminate" constituted a clear and unmistakable waiver of the union's right to bargain regarding an employer's cessation of payments into a pension trust fund after the contract expires). The Board should, therefore, confirm that its current contract-waiver standards apply to checkoff.

In the present case, Respondent does not assert in its Answer that the checkoff provision provides that its obligation to deduct dues terminates when the contract expires. Like the language of the *Bethlehem Steel* checkoff provision, the checkoff provision in the present case clearly does not evince a clear and unmistakable waiver under *Cauthorne Trucking*. See *id.* Of course, the Board will consider evidence in addition to contract language, if available, in determining whether a clear and unmistakable waiver has occurred. See *Provena St. Joseph Medical Center*, 350 NLRB 808 at 815.

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[14]/ See *Natico, Inc.*, 302 NLRB 668, 685 (1991) (language stating that pension fund provision will "remain in effect for the term of this agreement" not clear and unmistakable waiver); *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 366 (1987) (language requiring that employer contributions to pension fund be "in accordance with" a pension agreement did not specifically state that employer's obligation to contribute to pension fund ended at contract expiration); *KMBS, Inc.*, 278 NLRB 826, 849 (1986) (language requiring contributions to be made "as long as a Producer is so obligated pursuant to said collective bargaining agreements" insufficient because language did not "deal with the *termination* of the employer's obligation to contribute to the funds").

E. Summary

The *Katz* unilateral change rule, which precludes parties to a bargaining relationship from unilaterally changing terms and conditions of employment without first bargaining to impasse, is fundamental to implementing the statutory duty to bargain in good faith. All exceptions to the unilateral change rule following the expiration of a collective-bargaining agreement, other than dues-checkoff arrangements, are statutorily dependent upon an existing collective-bargaining agreement or stem from the surrender in a collective-bargaining agreement of a statutorily guaranteed right. No statutory basis exists, however, for excluding dues-checkoff. Indeed, as discussed above, neither the proviso to Section 8(a)(3) nor Section 302(c)(4) support excluding dues-checkoff arrangements from the unilateral change rule. Moreover, contract language that merely links a checkoff obligation to the duration of the contract does not waive a union's right to bargain, post-expiration, over changes to the parties' checkoff arrangement. Although checkoff has been excluded from the unilateral change rule for nearly 50 years, the Board has never provided a principled rationale for doing so.

IV. RESPONDENT'S AFFIRMATIVE DEFENSES, STATEMENT OF POSITION AND BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Respondent asserts in its Amended Answer as an affirmative defense that it relied upon Board precedent when it ceased deducting dues from employees' pay and remitting those dues to the Union, and, as such, cannot be found retroactively to have violated Section 8(a)(1) and (5) of the Act. Additionally, Respondent asserts as an affirmative defense that, had it continued to deduct dues in the absence of a collective-bargaining agreement with the Union, it would have violated the Act. To the extent that Respondent is asserting that it would be manifestly unjust to apply to it any new rule, such an assertion is without merit. The Board's general rule is that new policies apply to all pending cases at whatever stage. See *Electrical Workers IUE Local 444*

(Paramax Systems), 311 NLRB 1031, 1042 enf'd. denied 41 F.3d 1532 (D.C. Cir. 1994) (quoting *Delux Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958)). The Board's policy is to apply changes retroactively "even though the Board's decision in overruling a prior case may be silent on this point." *Stackpole Corp.*, 271 NLRB 329 (1984) (citing *Serendippity-On-Ltd. & Tigerrr, Inc.*, 203 NLRB 768 (1982)). The exception to the general rule is when retroactive application would result in a manifest injustice. See *Paramax Systems*, 311 NLRB 1031 at 1042 (quoting *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993)). Respondent has not asserted any meritorious basis for the Board to refrain from retroactively applying the new rule that it is being urged to adopt.

In its Statement of Position and Brief to the Administrative Law Judge, Respondent asserts that the complaint is *ultra vires* because the Acting General Counsel did not lawfully hold the office at the time he directed the complaint to be filed and the Board does not have legal authority to render a decision because its members do not constitute a lawful quorum. The Board has found that it is not appropriate for it to decide whether Presidential appointments are valid. Instead, the Board applies the well-settled "presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary." *Lutheran Home at Moorestown,* 334 NLRB 340, 341 (2001) (citing *U.S. v. Chemical Foundation,* 272 U.S. 11. 14-15 (1926)); see also *Center for Social Change,* 358 NLRB No. 24 (2012). Accordingly, the Board should presume the validity of the Acting General Counsel's and its members' appointments.

V. REMEDY

Counsel for the Acting General Counsel seeks a remedy that requires Respondent to reimburse the Union for any dues that it failed to withhold and transmit to the Union, with

interest, and precludes the Employer from recouping from employees any dues amounts it is required to pay to the Union. The standard remedy for an employer's unlawful failure to check off dues requires the employer to reimburse the union for any dues it failed to withhold and transmit to the union, with interest, where employees have individually signed checkoff authorizations. See, e.g., *YWCA of Western Massachusetts,* 349 NLRB 762, 764-65 (2007); *Plymouth Court,* 341 NLRB 363, 363 (2004); and *Sommerville Construction,* 327 NLRB 514, 514 & n.2 (1999), enf'd. 206 F.3d 752 (7th Cir. 2000). In addition, the Board has found that employers may not recoup from employees the amount of dues they are required to reimburse the union. For example, in *West Coast Cintas Corp.,* an employer violated Section 8(a)(5) by unilaterally ceasing checkoff before the results of a union-security deauthorization vote were certified. See 291 NLRB 152, 156 (1988). The Administrative Law Judge, in a decision adopted by the Board, ordered the employer to reimburse the union for the unpaid dues, and further stated that the "financial responsibility for making the [u]nion whole ... rests entirely on the [employer] and not the employees." *Id.* at 156 n. 6. Similarly, in *Texaco Inc.,* an employer unlawfully terminated a collective-bargaining agreement containing a dues checkoff provision and ceased deducting and remitting dues. 264 NLRB 1132, 1145-46 (1982), enf'd. 722 F.2d 1226 (5th Cir. 1984). The Administrative Law Judge, in a decision adopted by the Board, ordered the employer to reimburse the Union for the unpaid dues, and further stated that the employer "cannot collect reimbursement from the employees" for the past dues owed. *Id.* at 1146. In both cases, the Board reasoned that the employer, not the employees, incurred the risk that its failure to withhold and transmit dues would be found unlawful and that, as the wrongdoer, it alone should bear the burden of reimbursing the union. *West Coast Cintas,* 291 NLRB 152 at 156, n. 6; *Texaco Inc.,* 264 NLRB 1132 at 1146; see also *Gadsden Tool, Inc.,* 340 NLRB 29, 29 n. l, 34 (2003), enf'd.

memo 116 Fed. Appx. 245 (11th Cir. 2004) (ordering employer to reimburse union for dues it failed to deduct and transmit after its unlawful failure to execute agreed-upon contract containing a dues checkoff provision, and rejecting employer's argument that order was unfair because employer was unable to deduct the dues from employees' wages and would be obliged to pay the dues itself, because "Respondent itself incurred the risk that this situation might occur"). In applying the above principles, Respondent is solely responsible for reimbursing the Union, without recoupment from employees, because Respondent unilaterally ceased dues checkoff. Further, although extant Board law permitted Respondent to unilaterally cease checkoff following contract expiration, nothing *required* it to do so. [15]/

Because the question of whether dues-checkoff requirements survive contract expiration has been an issue in and the subject of litigation for nearly 20 years, Respondent bore the risk that its decision to unilaterally cease dues checkoff would be found unlawful. See, e.g., *Hacienda Resort Hotel & Casino,* 331 NLRB 665 (2000), vacated and remanded 309 F.3d 578 (9th Cir. 2002), on remand to 351 NLRB 504 (2007), vacated and remanded 540 F.2d 1072 (9th Cir. 2008), on remand to 355 NLRB No. 154 (2010), vacated 657 F.3d 865 (9th Cir. 2011); see also *Hacienda Hotel & Casino,* Cases 28-CA-13274, et al., Advice Memorandum dated October 10, 1995 (arguing that dues checkoff requirement survives contract expiration in right-to-work state); *AppleTree Markets,* Case 16-CA-15652-10, Advice Memorandum dated February 26, 1993 (same).

Furthermore, recoupment would undermine the policies of the Act. It would adversely affect the unit employees, who have fulfilled their end of a contract with Respondent (that the latter would transmit their tender of dues to the Union) at the time they executed checkoff

[15] Section 302(c)(4) does not limit checkoff to situations where a contract is in effect. See *VWR, Inc.,* Case 20-CA-35202, Advice Memorandum dated March 11, 2011, at pp. 8-9.

authorizations, by further reducing their future paychecks. *West Coast Cintas,* 291 NLRB 152 at 156 n. 6. Moreover, cases permitting employers to offset back dues owed to a union from *backpay* owed to individual employees are distinguishable from the instant case, where there is no backpay remedy from which to offset dues. Compare *Ogle Protection Service, Inc.,* 183 NLRB 682, 683 (1970) (permitting offset against backpay); *Dura-Vent Corp.,* 257 NLRB 430, 433 (1981) (same). Because employees might blame the Union for the effective pay cut, further undermining the Union's representational status, rather than effectuating the policies of the Act, recoupment would exacerbate the harmful effects of the violation. See *HLRB* v. *Hardesty Co.,* 308 F.3d 859, 865 (8th Cir. 2002) (unilateral changes undermine unions by signaling to employees that their union is "ineffectual, impotent, and unable to effectively represent them"). Finally, a remedy that expressly leaves the issue of recoupment to bargaining between the parties would not be appropriate, because resolving an unfair labor practice is not a mandatory subject of bargaining. See *Magic Chef,* 288 NLRB 2, 10 (1988) (withdrawal of pending unfair labor practice charges and settlement of proceedings pending before the Board are nonmandatory subjects of bargaining).

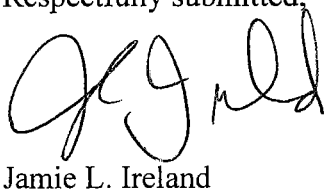
In addition to the above request, Counsel for the Acting General Counsel requests that the Board order Respondent to continue to deduct and remit Unit employees' dues to the Union and issue a bargaining order requiring that Respondent bargain in good faith with the Union as the exclusive bargaining representative of the Unit with respect to dues checkoff. Counsel for the Acting General Counsel further seeks all relief as may be just and proper to remedy the unfair labor practices alleged.

VI. CONCLUSION

Accordingly, based on the foregoing and the record as a whole, the Board should grant Counsel for the Acting General Counsel's exceptions to the Administrative Law Judge's Decision and find that Respondent violated Section 8(a)(1) and (5) of the Act.

Dated at Cincinnati, Ohio this 13th day of November 2012.

Respectfully submitted,



Jamie L. Ireland
Counsel for the Acting General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271