UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

C & G DISTRIBUTING COMPANY, INC.	:	
	:	
Respondent	:	
	:	
and	:	Case No. 9-CA-78875
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GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES AND SERVICE AND CASINO EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	
	:	
Charging Party	:	
	:	

RESPONDENT C & G DISTRIBUTING COMPANY, INC.'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE JEFFREY WEDEKIND'S DECISION

Respectfully submitted,

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I. INTRODUCTION

Contrary to Counsel for the General Counsel's ("General Counsel") assertions otherwise, the Honorable Jeffrey D. Wedekind, Administrative Law Judge ("ALJ Wedekind") correctly determined that Respondent, C & G Distributing Company, Inc.'s ("C & G," "the Company" or "Respondent") "unilateral cessation of dues checkoff in April 2012, following termination of the parties' collective-bargaining agreement on March 15, 2012, did not violate Section 8(a)(5) and (1) of the Act." See, Decision, p. 3. General Counsel's arguments are misguided and contrary to Board precedent. Essentially, General Counsel asserts that fifty (50) years of Board precedent is erroneous.

Additionally, General Counsel's Brief in Support of its Exceptions does not comport with the requirements set forth in Sec. 102.46 of the Board's Rules and Regulations. Specifically, Sec. 102.46(j) states "[w]here any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited." General Counsel's Brief in Support of its Exceptions clearly exceeds 20 pages and it clearly does not contain a subject index with page references and an alphabetical table of cases and other authorities cited. Accordingly, General Counsel's Exceptions should be stricken for failure to comport with Sec. 102.46.

II. AN EMPLOYER'S OBLIGATION TO CONTINUE DUES CHECKOFF EXPIRES WITH THE CONTRACT

Current Board law unequivocally holds that an employer's obligation to continue a dues check off agreement expires with the contract that created said obligation. See, *Public Service Co. of Oklahoma*, 334 NLRB 487, 502-503 (2001), citing *Bethlehem Steel Co.,* 136 NLRB 1500 (1962), enfd. in relevant part, 320 F.2d 615 (3rd. Cir. 1963), cert. denied 375 U.S. 984 (1964). The Board's decision in *Hacienda III*, 335 NLRB 742 (2010) and *Hargrove Elec. Co., Inc.*, 358

NLRB No. 147 (2012)[1] has done nothing to alter *Bethlehem Steel*. Notably, in *Hargrove Elec.*, the Board stated that the ALJ appropriately applied *Bethlehem Steel* in dismissing the dues-deduction allegation. Id. at FN 2.

Admittedly, an employer who has a bargaining relationship with a union cannot unilaterally change the existing terms and conditions of employment without bargaining, even if the existing contract has expired. See, *M & M Parkside Towers,* 2007 NLRB LEXIS 27, *26 (2007), citing *NLRB v. Katz,* 369 U.S. 736 (1962). For instance, an employer cannot unilaterally change the wage rates or other terms and conditions of employment as they exist prior to the start of negotiations because the existing wage rates and terms and conditions of employment have been established by the expired contract and, as such, said terms and conditions continue in effect as the status quo. Id. at *27. Notwithstanding, provisions in the expired contract which can have no legality except by virtue of the existence of a contract, i.e., union security clauses and dues check off provisions, do not survive the contract's expiration because they are purely creatures of contract. Id., citing *Indiana & Michigan Elec. Co.*, 284 NLRB 53, 59 (1987). Specifically, "[t]he exception . . . 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 of § 8(a)(3).'" See, *Indiana & Michigan Elec. Co.,* 284 NLRB at 55 (quoting *Bethlehem Steel,* 136 NLRB at 1502).

Notwithstanding, Counsel for the General Counsel has brought to Complaint eight (8) cases with similar (if not identical) circumstances in its quest to overturn long established board precedent which would necessarily result in the disruption of industrial peace and stability in

[1] In both *Hacienda III* and *Hargrove Elec. Co., Inc,* the Board reaffirmed its holding in *Bethlehem Steel*.

labor relationships. In each case, the ALJ dismissed the Complaint citing *Bethlehem Steel*. See, *Danbury HCC*, 2012 NLRB LEXIS 445 (2012) (*Bethlehem Steel* remains current Board precedent and, as such, the Company's unilateral cessation of dues checkoff upon expiration of the contract did not violate § 8(a)(1) and (5) of the Act); *WHDH-TV*, 2012 NLRB LEXIS 193 (2012) (Company's unilateral cessation of dues checkoff upon expiration of the contract did not violate § 8(a)(1) and (5) of the Act because *Bethlehem Steel* remains current Board law); *Alamo Rent-A-Car*, 2012 NLRB LEXIS 191 (2012) (Company's unilateral cessation of dues checkoff upon expiration of the contract did not violate § 8(a)(1) and (5) of the Act because *Bethlehem Steel* remains current Board law); *C-Town Supermarket,* 2012 NLRB LEXIS 118 (2012) (Relying upon *Bethlehem Steel*, ALJ determined that the Company's unilateral cessation of dues checkoff after expiration of the contract was lawful, as it is for the Board, not the judge, to determine whether precedent should be varied);[2] *Hargrove Elec. Co., Inc.,* 2012 NLRB LEXIS 19 (2012) (Company's unilateral cessation of dues checkoff upon expiration of the contract did not violate § 8(a)(1) and (5) of the Act because *Bethlehem Steel* remains current Board law); *USIC Locating Services, Inc.,* 2012 NLRB LEXIS 16 (2012) (Board precedent continues to hold that dues checkoff is an obligation that does not fall within the *Katz* unilateral change rule. Accordingly, Employers are permitted to cease dues checkoff at the expiration of the contract and are not in violation of § 8(a)(1) and (5) when doing so); *Nebraskaland, Inc.,* 2011 NLRB LEXIS 658 (2011) (Company was no longer required to remit dues to the union once the contract expired based upon the Board's ruling in *Bethlehem Steel*); and *WKYC-TV, Inc.,* 2011 NLRB LEXIS 562 (2011) (Company's unilateral cessation of dues checkoff upon expiration of the

[2] On appeal, General Counsel did not raise an exception with respect to the to the ALJ's finding that the Employer did not violate the Act when it unilaterally ceased dues deductions upon the expiration of the contract.

contract did not violate § 8(a)(1) and (5) of the Act because *Bethlehem Steel* remains current Board precedent).

Here, the contract expired on March 15, 2012 and the Company subsequently notified the union on April 11, 2012 that it would no longer collect dues because there was no contract between the parties authorizing such deductions. The checkoff provisions in a collective bargaining agreement ("CBA") implement the union security agreement. These are contractual rights which continue to exist so long as a contract is in effect. When the contract terminates an employer is no longer obligated to deduct union dues from employees' pay and remit said dues to the union. Additionally, current law dictates that a union security clause and a affiliated dues checkoff clause requires, pursuant to § 8(a)(3) of the Act, the existence of a CBA containing provisions consistent with what is permitted under said section of the statute. Here, the CBA had expired so no CBA existed as is required by § 8(a)(3) of the Act. Consequently, akin to all the Employers noted above, the Company was no longer lawfully required to remit union dues. Thus, the Company did not violate § 8(a)(1) and (5) of the Act when it unilaterally ceased doing so due to the Board's ruling in *Bethlehem Steel*.

III. THE LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS DECISIONS ARE SPECIFICALLY LIMITED TO RIGHT-TO-WORK STATES

The decisions issued by the United States Courts for the Ninth Circuit did nothing to alter the Board's decision and rationale set for the in *Bethlehem Steel* regarding the issue presented herein. Specifically, the Ninth Circuit determined that the Board's rationale in *Bethlehem Steel* was not applicable because Nevada is a right to work state and, as such, in the absence of a union security provision an employer's obligation to abide by a dues checkoff provision survived the expiration of the contract under the *Katz* unilateral change doctrine. See, *Local Joint Executive*

Board of Las Vegas v. NLRB, 309 F.3d 578 (9th Cir. 2002) ["*LJEB I*"]; *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008) ["*LJEB II*"]; and *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865 (9th Cir. 2011) ["*LJEB III*"].

In *LJEB I* the Court stated:

> In its decision enforcing the Board's order in *Bethlehem Steel*, the Third Circuit described the Board's rationale as follows:
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> The Board concluded that Bethlehem did not violate the statute when, upon the expiration of the 1956 agreement, it discontinued enforcement of the union shop and checkoff. In this court the union does not seriously press its contention that this was error. In any event, we agree with the reasoning of the Board. The right to require union membership as a condition of employment is dependent upon a contract which meets the standards prescribed in § 8(a)(3). The checkoff is merely a means of *implementing* union security. Since there was no contract in existence when the company discontinued these practices, its action was in conformity with the law.
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> Here, the collective bargaining agreements between the Employers and the Union do not contain union security provisions. Therefore, such reasoning would not support the rule that the Board applies in this case.

LJEB I, 309 F.3d at 584 (internal citation omitted) (emphasis in original). Accordingly, the Ninth Circuit vacated the Board's decision and remanded to the Board for the sole purpose of articulating a reasoned explanation of applying *Bethlehem Steel* in a right to work state, or adopting a different rule with a reasonable explanation that supports it. Id. at 585.

In *LJEB II*, the Court noted as follows:

> In our prior decision in this case we granted the Union's petition, vacated the Board's decision and remanded to the Board with instructions because we could not discern the Board's rationale for excluding, in the absence of union security, dues-checkoff from *Katz'* unilateral change doctrine. In particular, we found that if [t]he checkoff is merely a means of *implementing* union security [as in *Bethlehem Steel*] . . . such reasoning would not support the rule that the Board applies in this case. We asked the Board to articulate a reasoned explanation for the rule it adopted, or [to] adopt a different rule and present a reasoned explanation to support it.

LBEJ II, 540 F.3d at 1075, (internal citations and quotations omitted) (italics and brackets in original). Nevertheless, on remand, the Board reaffirmed its dismissal of the Complaint but did not reply upon *Bethlehem Steel*. Id. Instead, the Board relied upon the express language of the contract and determined that the union had explicitly waived any right of employees to claim dues check-off after the contract expired. Id. The Court concluded that the union did not clearly and unmistakably waive its claim to protection from unilateral change following the expiration of the contract. Id. at 1082. The Court ultimately remanded the case back to the Board for a second time. The Court reasoned as follows:

> In *Katz,* the Supreme Court affirmed the Board's determination that an employer violates *sections 8(a)(5)* and *8(a)(1)* of the Act if it makes a unilateral change in a term or condition of employment--so-called mandatory subjects of bargaining--without first bargaining to impasse over the relevant term. See, e.g., *Litton,* 501 U.S. 190, 111 S. Ct. 2215, 115 L. Ed. 2d 177.
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> Most mandatory subjects of bargaining fall within the prohibition on unilateral change. The Board has carved out exceptions to the unilateral change rule including union-security and dues-checkoff provisions, and arbitration and no-strike clauses, *see Litton,* 501 U.S. at 198-200. As we held in *LJEB I,* however, the Board has not explained [ ] why dues-checkoff in the absence of union security should be excluded from the unilateral change doctrine. *LJEB I,* 309 F.3d at 582-84. The Board expressly declined to provide such an explanation in *Hacienda II,* but our holding requires the Board to provide a reasoned basis for its rule excluding dues-checkoff from the unilateral change doctrine in the absence of union security.
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> [T]he 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.

Id. at 1078-1079 & 1082 (internal quotations omitted) (citations included in original). The Court's instruction was expressly limited the court's inquiry to right-to-work states.

In the second remand the Board ultimately followed *Bethlehem Steel* because its four (4) members were deadlocked and, as such, was unable obtain a three member majority needed to overrule precedent. See, *Hacienda Resort Hotel and Casino* ("*Hacienda III*"), 355 NLRB 742 (2010). Consequently, the Court in *LJEB III* concluded that the employer violated § 8(a)(5) of the Act when it ceased dues checkoff without bargaining to impasse. The Court reasoned that in a right-to-work state, dues checkoff does not exist to implement union security and, thus, is similar to any other term of employment that is a mandatory subject of bargaining. See, *LBEJ III*, 657 F.3d at 867. Specifically, the Court stated as follows:

> In comparing this case to the facts of *Bethlehem Steel*, we conclude that there is no justification for carving out an exception to the unilateral change doctrine for dues-checkoff in the absence of union security. [ ] Where a union security agreement is present, as in *Bethlehem Steel*, automatic dues-checkoff is forced upon all employees whether they wish to be part of the union or not. This arrangement serves to keep a union funded even though individual workers might otherwise choose to enjoy the benefits of a union-negotiated CBA without paying union dues. In a right-to-work state, on the other hand, dues are deducted from an employee's paycheck only if the employee specifically requests the employer to do so. Dues-checkoff is thus not a benefit to the union forced upon employees, but rather is a benefit to those employees who choose to be part of the union and also choose a checkoff.
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> This distinction is crucial. In *Bethlehem Steel*, the dues-checkoff arrangement was compelled under the terms of the CBA just as the employees' membership in the union had been compelled pursuant to the union security agreement in the CBA. In this case, however, union membership was not a condition of employment, and each employee whose dues were being checked off signed a request that the Employers deduct dues from their pay and submit the dues to the Union. Thus, unlike in *Bethlehem Steel*, where the unilateral cessation of dues-checkoff merely terminated a contractual arrangement that individual employees and employers alike were compelled to accept, the unilateral cessation of checkoff by the Employers in this case stripped employees of a contractual right that they had expressly exercised by requesting dues-checkoff.
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> Without expressing an opinion on the wisdom of the rule of *Bethlehem Steel*, we see why the Board would treat dues-checkoff in the same manner as union security where both are present. As the Board has stated, "[t]he exception . . . 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 [NLRA].'" *Ind. & Mich. Electric Co.,* 284 NLRB 53, 55 (1987) (quoting *Bethlehem Steel,* 136 NLRB at 1502). In other words, if union security provisions are limited by statute to the duration of an existing CBA, dues-checkoff provisions that "implement[ ] the union-security provisions" are limited in the same manner. *Bethlehem Steel,* 136 NLRB at 1502.
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> Where the dues-checkoff provisions do not implement union security, however, but instead exist as a free-standing, independent convenience to willingly participating employees, the reasoning of *Bethlehem Steel* loses its force. We see nothing in the NLRA that limits the duration of dues-checkoffs to the duration of a CBA in the absence of union security.

Id. at 874-875. As noted previously, there is nothing in *LJEB I, II or III* which suggests that rationale of *Bethlehem Steel* is flawed as applied to non-right-to-work states. If the Board does ultimately decide to overrule *Bethlehem Steel* the Board will no doubt be before a United States Circuit Court having to articulate a reasoned explanation for reversing 50 years of Board precedent related to the administrative convenience to collect union dues.

IV. THE COMPANY WOULD HAVE VIOLATED THE ACT HAD IT CONTINUED TO DEDUCT DUES IN THE ABSENCE OF A CONTRACT

The Board, several Circuit Courts, and the United States Supreme Court have concluded that Section 302(c)(4) of the Labor Management Relations Act ("LMRA") prohibits checkoff in the absence of current contract between the employer and the union. For example, in *United States Can Co. v. NLRB*, 984 F.2d 864, 869 (7th Cir. 1992), the court cited 29 U.S.C. § 186(c)(4) and noted that dues checkoff and other payments from an employer to a union require the existence of an agreement with the union, similar to union security. If no agreement existed, the payment of money is a "subvention" prohibited by 29 U.S.C. § 186(a)(2) and, the requirement to join the union and pay dues "coerces" employees in a way prohibited by 29 U.S.C. § 158(a)(3). Id. See also, *Sullivan Bros. Printers, Inc. v. NLRB*, 99 F.3d 1217, 1230 (1st Cir. 1996) (Court upheld the Board's decision to refuse to order the employer to obey the dues checkoff provision in the expired contract because it is well settled that dues checkoff obligation does not survive the expiration of the contract); *Microimage Display Division v. NLRB,* 924 F.2d 245, 254 (D.C. Cir. 1991) (Board did not error in failing to order the employer to pay the union the money it would have received had the dues checkoff provision in expired contract remained in effect because § 8(a)(3) of the Act and §§ 302(c)(4) of the LMRA permit an employer to make payments to a union only under a dues checkoff provision set forth in an effective contract); *Southwestern Steel and Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir.1986) (The well established premise that dues checkoff and union security do not survive the expiration of the contract is rooted in §8(a)(3) of the Act and § 302(c)(4) of the LMRA which are understood to proscribe such customs unless they are contained in an *existing* contract) (emphasis in original); *Litton Financial Printing Division*, 501 U.S. 190, 199 ("The Board's view is 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.")

General Counsel maintains that these decisions are flawed and, that the decisions reached in *Microimage, supra* and *Southwestern Steel, supra* are inconsistent with decision reached in *Tribune Publishing Co. v. NLRB*, 564 F.3d 1330 (D.C. Cir. 2009). First, none of the cases cited above have been overturned/overruled and the D.C. Circuit Court in *Tribune Publishing* did not even mention *Microimage* and *Southwestern Steel*, let alone reverse them. Secondly, *Tribune Publishing* is inapposite to this case due to its unique set of facts.

In *Tribune Publishing* the contract expired on November 30, 2001 but the Company continued dues checkoff until December 19, 2001 when it sent each employee a letter indicating that the Company was exercising its legal right to discontinue the payroll deduction of union dues because the contract had expired. Id. at 1331. Consequently, the union began collecting dues from the individual employees. Id. During this same time period, Company policy provided direct deposit of employee paychecks and also allowed the employees to pay loans and make deposits to other accounts. Id. Accordingly, the union obtained direct deposit authorization forms for the employees to fill out in order to use direct deposit for union dues. Id. The Company accepted the forms and subsequently effectuated the direct deposit of union dues. Id. Immediately thereafter, the Company discontinued the direct deposit of union dues because dues checkoff had previously been discontinued and the direct deposit essentially reinstated dues checkoff. Id. at 1332. Subsequently, the union filed an unfair labor practice against the Company and the Board issued a complaint against the Company alleging a violation of § 8(a)(5) and (1) of the Act by unilaterally discontinuing the direct deposit of union dues. Id. Both the ALJ and the Board determined that the Employer violated the Act. Id. Specifically, the Board noted that the Company's agreement with the union to use direct deposit created a *new* term and condition of employment and, as such, the Company was required to bargain with the union before it could terminate the *new* direct deposit agreement. Id. Here, the Company discontinued dues upon the expiration of the Agreement and has never reached subsequent, *new* agreement with the union to deduct dues.

Accordingly, the Company's fourth affirmative defense must not be rejected as it relied in good faith upon Board, Circuit Court and United States Supreme Court case law holding that § 8(a)(3) of the Act and § 302(c)(4) of the LMRA permit an employer to make payments to a union only under a dues checkoff provision set forth in an *existing* contract. See, *Southwestern Steel and Supply*, *supra*.

V. THE COMPANY WOULD SUFFER MANIFEST INJUSTICE IF IT WERE FOUND TO HAVE RETROACTIVELY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT.

If the Board determines to exercise its right to overturn *Bethlehem Steel* it must apply the new rule prospectively as ill effects that would result from retroactivity outweigh other concerns. Admittedly, the Board's usual practice is to apply all new policies and standards to "all pending cases in whatever stage." See, *Levitz Furniture Co.,* 333 NLRB 717, 729 (2001). Specifically, the Board uses the following approach:

> Under *Securities & Exchange Commission v. Chenery Corp.,* 332 U.S. 194, 203 (1947), the propriety of retroactive application is determined by balancing any ill effects of retroactivity against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.
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> Pursuant to this principle, the Board has stated that it will apply an arguably new rule retroactively to the parties in the case in which the new rule is announced and to parties in other cases pending at that time so long as this does not work a manifest injustice.
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> In determining whether the retroactive application of a Board rule will cause manifest injustice, the Board will consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.

See, *Wal-Mart Stores, Inc.,* 351 NLRB 130, 134 (2007) (internal quotations omitted), citing *SNE Enterprises, Inc.,* 344 NLRB 673, 673 (2005) (citations omitted). Using the parameters set forth above, if the Board decides to overturn 50 years of precedent it should only apply its new rule prospectively just as it did in *Levitz Furniture Co*., *supra*.

In *Levitz*, the Board changed the rule with respect to when an employer could lawfully withdraw recognition unilaterally from an incumbent union. The old rule provided that an employer could unilaterally withdraw recognition on the basis of good faith doubt as to the unions continued majority. Id. at 725. The new rule provided that an employer could unilaterally withdraw recognition "only on a showing that the union has, in fact, lost the support of the majority of the employees in the bargaining union." Id. Notwithstanding, the Board decided to apply the old standard and determined that the withdrawal of recognition was lawful. Id. at 730. In determining to apply the new rule prospectively, rather than retroactively, the Board reasoned as follows:

> Having ruled that employers may withdraw recognition unilaterally only by showing that unions have actually lost majority support, we must decide whether to apply the new rule retroactively, i.e., in all pending cases, or only prospectively. The Board's usual practice is to apply all new policies and standards to all pending cases in whatever stage. The propriety of retroactive application, however, is determined by balancing any ill effects of retroactivity against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.
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> We find that there would be ill effects from retroactivity and that they outweigh other concerns. *Celanese* was the law for nearly half a century. Employers clearly relied upon it in assessing whether it was lawful to withdraw recognition. That standard was significantly more lenient than the one we have announced in this decision. Under *Celanese*, employers did not have to show that unions had, in fact, lost majority support. [ ] Employers who withdrew recognition in reliance on *Celanese* and thereafter unilaterally changed the terms and conditions of employment for unit employees could be liable for significant amounts of make whole relief if we were to apply our new standard in pending cases.

Id. at 729 (internal quotations omitted). Similar to the employer in *Levitz*, C & G exercised its rights to take certain action, relying upon long established Board precedent. In doing so, C & G could be liable for significant amounts of make whole relief if the Board were to ultimately overrule *Bethlehem Steel* and apply a new standard in all pending cases.

Accordingly, the Company's third affirmative defense must not be rejected as it relied in good faith upon long established Board precedent permitting an employer cease dues deductions upon the expiration of the contract. Applying any new standard retroactively would result in a manifest injustice which outweighs any other concerns.

1. The Company Will Suffer Manifest Injustice If The Board Overrules *Bethlehem Steel* and Subsequently Adopts General Counsel's Proposed Remedy

General Counsel is seeking a punitive remedy against the Company. Specifically, General Counsel is requesting a remedy requiring the Respondent to reimburse the Union for any dues it failed to withhold and remit to the union with interest, while precluding the Company from recouping said monies from its employees. General Counsel's Exceptions, pp. 17-18. General Counsel maintains that "[t]he standard remedy for a company's unlawful failure to checkoff 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." Id., p. 18. First, C &G did not "unlawfully" fail to checkoff dues as the contract had expired and, current Board law still dictates that Company's actions are lawful. Secondly, General Counsel's misguided assertions that the case law it cites in its Exceptions actually supports such a remedy in this particular case, is wholly disingenuous.

Each of the cases relied upon by General Counsel involve an employer who either unlawfully repudiated an *existing* contract and subsequently unilaterally ceased dues checkoff to the union,[3] unilaterally ceased dues checkoff before employees revoked such authorization as a result of a deauthorization vote,[4] or an employer who failed to execute a collective bargaining agreement which both parties had a already agreed to.[5] These cases are irrelevant as C & G did not unlawfully unilaterally cease dues checkoff during the term of an *existing* agreement.

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[3] See, *Young Women's Christian Assoc.,* 349 NLRB 762 (2007). See also, *Plymouth Court,* 341 NLRB 363 (2004); *Sommerville Construction Co.,* 327 NLRB 514, (1999) and *Texaco, Inc.,* 264 NLRB 1132 (1982).

[4] See, *West Coast Cintas Corp.,* 291 NLRB 152 (1988).

[5] See, *Gadsen Tools, Inc,* 340 NLRB 29 (2003).

Moreover, General Counsel maintains that "[b]ecause 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" and, as such, it bears the burden alone of reimbursing the union. General Counsel's Exceptions, pp. 18-19. Again, General Counsel's assertions are flawed. First, General Counsel cites to the *Hacienda* litigation and to Advice Memorandums from General Counsel. Id., p. 19. Notably, the contracts at issue in *Hacienda* and the Advice Memorandums did not contain union security clauses as the employers were in right-to-work states and such clauses are prohibited. And, as noted earlier, the *Hacienda* decisions are expressly limited to contracts in right-to-work states. Ohio, unfortunately for its citizens, is not a right-to-work state and, as such, workers are forced to pay union dues and/or fees as a condition of employment. Consequently, the contract in this case does contain a union security clause which is implemented by the dues checkoff provision. Secondly, the cases cited by General Counsel in support of its argument are, once again, irrelevant. In each of those cases, an *existing* contract was in place requiring dues checkoff and, but for the employer's violations of *established* Board precedent,[6] the employer should have been abiding by the dues-checkoff provisions contained in the contract. In this matter, the contract had expired and the Company was simply exercising its lawful right, as explicitly set forth in 50 years of Board precedent, to

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[6] See, *Texaco, Inc., supra* (Employer unlawfully repudiated contract through a tainted decertification and/or deauthorization petition and subsequently stopped paying dues). See also, *West Coast Cintas Corp., supra* (Employer unlawfully repudiated dues-checkoff after a deauthorization vote, but before the results were certified and before any employees requested that the employer cease remitting dues to the union); and *Gadsen Tools, Inc, supra* (Employer failed to execute a contract which both parties agreed to and said contract contained a dues checkoff).

stop remitting dues to the union. General Counsel is unable to comprehend this crucial distinction.

VI. GENERAL COUNSEL'S COMPLAINT IS *ULTRA VIRES*

The Complaint is *ultra vires* because the Acting General Counsel of the NLRB did not lawfully hold the office of Acting General Counsel at the time he directed that the Complaint be filed against C & G.[7] The Act provides that, "[i]n case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy." See, 29 U.S.C. § 153(d). Furthermore, the statute places an express limitation on this authority to designate an Acting General Counsel: "[N]o person or persons so designated shall so act . . . for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate . . . ." Id.

The President designated Lafe Solomon as Acting General Counsel but failed to submit a nomination to the Senate to fill the position of the General Counsel within 40 days of that designation. Accordingly, the Act prohibited Mr. Solomon from serving as Acting General Counsel more than forty (40) days after his appointment and, as such, he lacked authority to direct the complaint to be filed against C & G in this matter.

VII. THE BOARD LACKS A QUORUM OF THREE MEMBERS

The Board has no legal authority to function when it lacks a quorum of three members. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010).[8] Naturally, persons appointed to the Board in violation of the Appointments Clause of the U.S. Constitution do not count towards this

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[7] Respondent is aware of the Board's ruling in *Lutheran Home at Moorestown*, 334 NLRB 340 (2001). Respondent is merely preserving the record for an appropriate court of appeals, should that review be necessary.

[8] Respondent is aware of the Board's ruling in *Center for Social Change, Inc.,* 2012 NLRB LEXIS 167 (2012). Respondent is merely preserving the record for an appropriate court of appeals, should that review be necessary.

necessary quorum. *Cf. Ryder v. United States,* 515 U.S. 177 (1995); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

The Board currently lacks a quorum because Sharon Block and Richard Griffin are not lawful members of the Board. On January 4, 2012, President Obama announced "recess" appointments for these individuals. However, the United States Senate was in session at the time of these purported appointments.[9] The President did not obtain the advice and consent of the Senate that Article II, Section 2, Clause 2 of the U.S. Constitution requires. Consequently, the appointments of Block and Griffin to the Board are invalid under Articles I and II of the U.S. Constitution.

The President's claim that these appointments were valid "recess" appointments is inconsistent with Article II, Section 2, Clause 3 of the Constitution, which requires that the Senate actually be in recess when such appointments are made. See, *Evans v. Stephens,* 387 F. 3d 1220, 1224 (11th Cir. 1994) (requiring a "legitimate Senate recess" to exist in order to uphold a recess appointment); see also, *Wright v. United States,* 302 U.S. 583 (1938); and *Kennedy v. Sampson,* 511 F. 2d 430 (D.C. Cir. 1974) (finding that intra-session adjournments do not qualify as Senate recesses sufficient to deny the President the authority to veto bills, provided that arrangements are made to receive presidential messages). Article I, Section 5, Clause 2 provides that each Congressional chamber is the master of its own rules. Because neither the House nor the Senate declared themselves in recess under their rules, the purported recess appointments are invalid.

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[9] By unanimous consent, the Senate voted to remain in session for the period of December 20, 2011 through January 23, 2012. Sen. Ron Wyden, "Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012," remarks in the Senate, Congressional Record, vol. 157, part 195 (Dec. 17, 2011, pp. S8783-S8784). Moreover, the House of Representatives never gave its consent to a Senate recess of more than three days, as would have been required by Art. I, Section 5, Clause 4 of the Constitution.

Moreover, the longstanding view of the Attorneys General who issued opinions on this issue, before the current appointments, has been that the term "recess" includes only those intra-session breaks that are of "substantial length."[10] The Obama Administration's Solicitor General stated on the record at the U.S. Supreme Court during the oral argument in *New Process Steel* that a recess must be longer than three days in order for a recess appointment to occur. Transcript of Oral Argument in *New Process Steel, L.P. v. NLRB*, Case No. 08-1457 (Mar. 23, 2010).

Similarly, the opinion of Attorney General Daugherty in 1921 opined that for recess appointments to be made, the recess must be of such duration that the Senate could "not receive communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen. 20, 24 (1921). No such break has occurred in the present circumstances. Indeed, the Senate was in session during the period when the appointments were made and was able to receive communications and participate in the appointment process. This is conclusively proven by the fact that only days before the Obama recess appointments were made, during its ongoing *pro forma* sessions, the Senate passed the payroll tax bill and communicated with the President and the House with regard to that important legislation. See, 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The President signed that legislation, never protesting that it was invalidly enacted due to a congressional recess.[11]

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[10] See, Memorandum Opinion for the Deputy Counsel to the President (Jan. 14, 1992), available at http://www.justice.gov/olc/schmitz.10.htm (18-day recess).

[11] On January 6, 2012, a political appointee of the Attorney General's office issued a Memorandum Opinion purporting to justify the President's recess appointments. The Opinion was not made public until January 12, 2012. See, Memorandum Opinion For The Counsel To The President (Jan. 6, 2012), available at http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf. In this Opinion, the Attorney General's Office declares for the first time that the Senate's convening of periodic *pro forma* sessions does not have the legal effect of interrupting an intra-session recess otherwise long enough to qualify as a recess of the Senate under the Recess Appointments Clause. This Opinion is contrary to the Constitutional power vested in the Senate to "determine the Rules of its Proceedings." U.S. Const. Article I, Section 5, Clause 2. By declaring the Senate's on-going *pro forma*

Accordingly, the appointments of Block and Griffin to the Board are invalid. As a result, the Board lacks a quorum under *New Process Steel* and cannot adjudicate this case until such time as it attains a proper quorum.

VIII. CONCLUSION

For the reasons outlined above and in accordance with the evidence, Respondent respectfully requests that Board affirm ALJ Wedekind's ruling, finding and conclusion that it did not violate Sections 8(a)(5) and (1) of the Act when it ceased deducting dues and remitting said dues to the Union upon the expiration of the contract. Therefore, the Complaint should be dismissed.

Dated at Dublin, Ohio on this 11th day of December, 2012

Respectfully submitted,

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sessions to be ineffective to prevent a recess, the Opinion implicitly declares the Senate to be in violation of the Constitutional requirement that neither House shall adjourn without the consent of the other for more than three days. U.S. Const. Article I, Section 5, Clause 4. In making this declaration, the Attorney General's Opinion for the Executive Branch grievously disrespects the proceedings of a co-equal branch of government. The Opinion is also contradicted by the actual experience of *pro forma* sessions of the Senate, as noted above, which demonstrate that the Senate was in fact available to fulfill its constitutional duties to consider any appointments that the President wished to put forward for advice and consent. Thus, the unprecedented Opinion of the Attorney General fails to justify the President's attempted recess appointments and should not be adopted by any court.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 11, 2012, an electronic original of Respondent C & G Distributing Company, Inc's Answering Brief was transmitted the National Labor Relations Board, Office of the Executive Secretary, via the Department Of Labor, National Labor Relations Board electronic filing system and, further, that copies of the foregoing Answer were transmitted to the following individuals by electronic mail:

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