UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OSF HEALTHCARE SYSTEM d/b/a
ST. FRANCIS HOSPITAL

Case 30-CA-105167

and

MICHIGAN NURSES ASSOCIATION

COUNSEL FOR GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS

Submitted By:
Renée M. Medved
Counsel for General Counsel
National Labor Relations Board
Region 18 – Sub-Region 30
310 W. Wisconsin, Suite 450W
Milwaukee, Wisconsin 53203

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Renée M. Medved, Counsel for General Counsel, respectfully submits this Answering Brief to Respondent's Exceptions to the Decision of Administrative Law Judge Eric M. Fine ("ALJ").

I. INTRODUCTION

The parties agreed that the sole issue to be decided in this matter was whether OSF St. Francis d/b/a St. Francis Hospital (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by unilaterally ceasing dues checkoff upon expiration of the parties' collective-bargaining agreement on May 1, 2013. There are no factual disputes, as this matter was submitted to the ALJ pursuant to a stipulated record.[1] This matter is very clearly governed by *WKYC-TV, Inc.,* where the National Labor Relations Board (Board) explicitly held that dues-checkoff provisions survive the expiration of collective-bargaining agreements. 359 NLRB No. 30 (2012). Given this clear holding, Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally ceased dues checkoff upon expiration of the parties' collective-bargaining agreement.

Respondent attempts to circumvent the Board's clear holding in *WKYC-TV, Inc.* by arguing in its exceptions that it was compelled to cease dues checkoff upon expiration of the agreement because of a Michigan state law and the language in the dues-checkoff provision in the parties' collective-bargaining agreement. As examined more fully below, the ALJ properly rejected both of these arguments.

[1] All references to the Stipulated Record are noted by "Stip. R. at __," followed by the paragraph number(s). All references to the Exhibits are noted as "Ex. __," followed by the exhibit number(s). All references to the ALJ's decision will be referred to as "ALJD at ___," followed by the page number and line numbers.

II. FACTS

A. History of the Parties

The Union represents a unit of all full-time and regular part-time registered nurses, including charge nurses and per diem registered nurses, at Respondent's Escanaba, Michigan facility. (Stip. R. at 9; Ex. 4.) Since 2003, and at all material times, Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit. (Stip. R. at 11.) This recognition has been embodied in successive collective-bargaining agreements. (Stip. R. at 10.) The most recently expired collective-bargaining agreement, at issue in this matter, had effective dates of May 1, 2009 through April 30, 2013. (Stip. R. at 12; Ex. 4.)

B. The History and Practice of Dues Checkoff at Respondent

The parties negotiated a dues-checkoff provision during bargaining for their first collective-bargaining agreement in 2003. (Stip. R. at 19.) During those negotiations, the Union made its initial proposal for dues checkoff. (Stip. R. at 19.) The parties expressly stipulated that this proposal included language concerning authorization for dues deduction based on the language of Section 302(c)(4) of the Taft-Hartley Act. (Stip. R. at 19.) Section 302(c)(4) provides that written assignments from employees for purposes of dues checkoff "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[.]"

Also, during the 2003 negotiations, Respondent proposed adding the language "whichever is sooner" to the dues-checkoff section for fuller consistency with Section 302(c)(4). (Stip. R. at 19.) The final language read as follows:

> The Employer agrees to make deductions from the pay of employees covered by this Agreement, pursuant to the Union's deduction authorization form signed by the employee. The authorization for the payroll deductions shall remain in full force and effect for a period of one (1) year or until termination of this agreement, whichever is sooner.

(Stip. R. at 13, 19 and 20; Ex. 4.) The 2003 dues-checkoff language remained the same through two subsequent successor collective-bargaining agreements, including the agreement that expired on April 30, 2013, which is at issue in this matter. (Stip. R. at 20.)

Respondent had *never* ceased its practice of deducting dues pursuant to individual dues authorization forms until May 1, 2013. (Stip. R. at 23.) Until May 1, 2013, Respondent always deducted dues pursuant to dues-checkoff authorization forms which were filled out by unit employees. (Stip. R. at 22; Ex. 5.) The authorization forms themselves contain no date or time limitations as to when they expire. (Ex. 5.) Prior to May 1, 2013, Respondent *never* required unit employees to fill out new authorization forms on a yearly basis. (Stip. R. at 22 and 23.) Until May 1, 2013, Respondent also *never* required that new authorization forms be submitted upon contract expiration in order to continue dues checkoff. (Stip. R. at 22 and 23.) Rather, Respondent continued to check off dues pursuant to employees' initial authorization forms, even during a prior contract hiatus period sometime in 2009. (Stip. R. at 21, 22 and 23.)

C. Respondent's Unilateral Cessation of Dues Checkoff on May 1, 2013

The parties' collective-bargaining agreement expired on April 30, 2013. (Stip. R. at 12.) On May 1, 2013, without prior notice or bargaining with the Union, Respondent ceased dues checkoff. (Stip. R. at 16 and 17.) This decision was announced directly to the unit via email by the Director of Human Resources, Elizabeth Zorza. (Stip. R. at 7

and 15; Ex. 6.) This email states in relevant part:

> The collective bargaining agreement between the Hospital and the Michigan Nurses Association (MNA) expired at midnight on April 30, 2013. Under the contract, employees were required to pay dues to the MNA; however, when the contract expired, the authorization form you signed also expired. Thus, no deductions can legally be made for union dues until the Hospital and MNA agree to a new authorization form.
>
> As you may be aware, there is a new law in Michigan (Michigan Freedom to Work Act) that prohibits employees from being required to become a union member in order to keep their jobs. In addition, the new law prohibits employees from being forced to pay union dues.

(Ex. 6.) Only upon reaching a successor agreement with the Union did Respondent resume dues checkoff on February 1, 2014.[2] (Stip. R. at 18.)

III. LEGAL ARGUMENT

A. The ALJ Properly Found that Respondent Violated Section 8(a)(5) and (1) of the Act by Unilaterally Ceasing Dues Checkoff Upon Expiration of the Parties' Collective-Bargaining Agreement.

On May 1, 2013, Respondent unilaterally ceased dues checkoff upon expiration of the parties' collective-bargaining agreement. (Stip. R. at 16 and 17.) There is no dispute that this was done without prior notice to, or bargaining with, the Union. (Stip. R.

[2] Respondent asserts in its fifth exception that the ALJ erred in finding that Respondent resumed checkoff again in 2014 when it entered into a successor agreement without requiring employees to sign a new dues-checkoff authorization form. Respondent now asserts, for the first time in its brief, that it did require employees to sign a new and different authorization form beginning February 1, 2014. Counsel for General Counsel moves to strike Respondent's claim that it required employees to sign a new authorization form as this claim is not part of the stipulated record in this matter. Furthermore, Respondent's actions as it relates to the successor agreement reached on February 1, 2014, are completely irrelevant as to whether it violated the Act on May 1, 2013.

at 17.) This action is a blatant violation of the Board's unambiguous holding in *WKYC-TV, Inc.,* where the Board held that an employer's obligation to check off union dues continues after the expiration of a collective-bargaining agreement. 359 NLRB No. 30, slip op. at 1 (2012). In *WKYC-TV, Inc.*, the Board expressly overruled *Bethlehem Steel* and its progeny which had previously held that an employer may unilaterally cease dues checkoff upon expiration of a collective-bargaining agreement. *Bethlehem Steel,* 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB,* 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964); *WKYC-TV, Inc.,* 359 NLRB No. 30, slip op. at 1 (2012).

In *WKYC-TV, Inc.*, the Board found that requiring employers to honor dues-checkoff arrangements after expiration of the contract is consistent with the language of the Act, its relevant history, and the general rule against unilateral changes in terms and conditions of employment. 359 NLRB No. 30, slip op. at 2. In reaching its conclusion, the Board noted that dues-checkoff provisions have previously been found to be a matter related to wages, hours and other terms and conditions of employment within the meaning of the Act and a mandatory subject of bargaining. *Id.* at 3, citing *Tribune Publishing Co.,* 351 NLRB 196, 197 (2007) enfd. 564 F.3d 1330 (D.C. Cir. 2009). The Board explained that dues-checkoff arrangements are no different than other voluntary checkoff arrangements, such as contributions towards charity or savings accounts, that are an "administrative convenience" for employees and survive the expiration of the collective-bargaining agreement. 359 NLRB No. 30, slip op. at 4, citing *Quality House of Graphics,* 336 NLRB 497 n. 3 (2001). Furthermore, in *WKYC-TV, Inc.*, the Board distinguished dues-checkoff provisions from other provisions which expire with the

contract—such as arbitration provisions, no-strike provisions and management rights provisions—on the basis that those provisions involve waivers of rights that parties would have otherwise enjoyed in the interest of reaching an agreement. 359 NLRB No. 30, slip op. at 4.

Respondent's unilateral cessation of dues checkoff for employees is in plain contradiction to the Board's well-reasoned decision that an employer must continue to honor a dues-checkoff arrangement until the parties have reached agreement or a valid impasse. Accordingly, the ALJ properly applied *WKYC-TV, Inc.*, and found that Respondent violated Section 8(a)(5) and (1) of the Act.

B. The ALJ Properly Rejected Respondent's Argument that Michigan State Law Permits Respondent to Unilaterally Cease Dues Deduction.

Respondent attempts to evade the Board precedent in *WKYC-TV, Inc.* by arguing in its fourth exception that it was compelled to cease dues checkoff pursuant to Michigan state law. This argument was properly rejected by the ALJ. This argument fails for three reasons: (1) nothing in Michigan state law required or permitted Respondent to cease dues deduction upon expiration of the agreement; (2) the Board has already made clear that dues-checkoff obligations survive the expiration of an agreement even in states with similar legislation; and (3) even if something in Michigan state law conflicted with Board law, Board law preempts state law.

Michigan Public Acts No. 348 of 2012 (Mich. Comp. Laws §423.14 et seq.) which is also referred to by Respondent as the "Michigan Freedom to Work Act," became effective March 28, 2013, approximately a month prior to the expiration of the parties' collective-bargaining agreement. (Stip. R. at 24; Ex. 7.) The law applies to non-public collective-bargaining agreements in the State of Michigan, including the

collective-bargaining agreement between Respondent and the Union. (Stip. R. at 24.) In its exceptions, Respondent cites to the provision of the state law which prohibits employers from requiring employees as a condition of employment to "...pay any dues, fees, assessments, or other charges or expenses of any kind or amount or provide anything of value to a labor organization." (Mich. Comp. Laws §423.14). Neither that provision, nor anything else in Mich. Comp. Laws §423.14 et seq., references dues checkoff. Instead, the law concerns itself solely with the elimination of union security, which requires that bargaining unit employees become union members or pay "fair share" fees to a union pursuant to a union-security clause in a collective-bargaining agreement. (Ex. 7.)

The ALJ properly found that dues checkoff is a voluntary act on the part of an employee for administrative convenience and *not* a condition of employment. (ALJD at 10:1-3.) The ALJ further properly found that there was no contractual vehicle for the Union to request the termination of an employee for having ceased their participation in dues checkoff. (ALJD at 10:9-11.) Indeed, it is well-settled that, unlike union-security provisions, dues checkoff is *never* compulsory for employees in any state.[3] E.g. *Bluegrass Satellite, Inc.,* 349 NLRB 866, 867 (2007) (employees cannot be required to authorize dues checkoff as a condition of employment even where collective-bargaining agreement contains a union-security provision); *Electrical Workers IUE Local 601 (Westinghouse Electric Corp.),* 180 NLRB 1062,1062 (1970) (an employee has the "right to select or reject the checkoff system as the method by which to pay his periodic

[3] Respondent certainly was aware of an employee's right to pay dues in a form other than dues checkoff since the dues authorization forms submitted to Respondent contain three alternative methods of paying dues—electronic transfer, credit card charge or check—all of which solely involve individual action and absolutely no action on Respondent's part. (Ex. 5.)

dues to the Union.")

The Board noted that the distinction between dues-checkoff provisions and union-security agreements are "illustrated most clearly in 'right-to-work' states." *WKYC-TV, Inc.* 359 NLRB No. 30, slip op. at 7 (2012). In *WKYC-TV, Inc.,* the Board concluded that union-security and dues-checkoff arrangements "can, and do often exist independently of one another." *Id.* As a result, even in states with similar legislation that prohibit union-security agreements, an employer must still continue dues-checkoff after expiration of a collective-bargaining agreement. See *Enterprise Leasing Co. of Florida, LLC d/b/a Alamo Rent-A-Car,* 359 NLRB No. 149 (2013), where the Board did not find a violation where the employer in a "right-to-work" state failed to honor a dues-checkoff arrangement after expiration of the collective-bargaining agreement solely on the basis that the cessation occurred prior to the Board's decision in *WKYC-TV, Inc.* which the Board held was only to apply prospectively. Also see *WKYC-TV, Inc.* 359 NLRB No. 30 slip op. at 7, where the Board disavowed a prior Board decision, *Tampa Sheet Metal,* 228 NLRB 322 (1988), where a previous Board held that dues-checkoff arrangements did not survive contract expiration in a "right-to-work" state.

Moreover, Respondent could not lawfully suspend its dues-checkoff arrangement upon contract expiration even assuming *arguendo,* that state law regulated dues-checkoff agreements. Such a law would clearly contravene Section 302(c)(4) which specifically provides a mechanism for dues checkoff and further provides that dues authorizations "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." Under the Constitution's Supremacy Clause, state laws that interfere with, or are

contrary to, federal law are preempted.[4]

The only case cited by Respondent in support of its argument that Michigan state law preempted Board law relates exclusively to a state's right to enforce state laws which bar the execution and enforcement of union-security agreements, and is, accordingly, completely inapposite. *Retail Clerks International Association, Local 1625, AFL-CIO v. Schermerhorn,* 375 U.S. 96 (1963). Again, as already noted above, state laws which prohibit union security agreements do not implicate dues checkoff, as dues checkoff arrangements are always voluntary for employees.

Indeed, relying on federal preemption, the Board has already rejected an employer's argument that dues-checkoff authorizations were invalid under state law because they could not be revoked at any time. *Syscon, Int'l,* 322 NLRB 539, 539 n.1 (1996). There, the Board stated that Sec. 302(c)(4) of the Labor Management Relations Act permits dues-checkoff authorizations so long as they are not irrevocable for longer than the period set forth in Sec. 302(c)(4) and that "fundamental principles of federal preemption require that state law must yield to the statutory provisions of the Act." *Id.*

Lastly, while Respondent may have chosen to disregard the preemption doctrine, the same cannot be said of the Michigan Legislature. The law contains a disclaimer which states that if any portion of the law is found to contradict federal law, the act will be implemented to the maximum extent permitted and that any provision held to be invalid or inoperative shall be severable from the remaining portions of the state law. Mich. Comp. Laws §423.22.

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[4] "[T]he laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Constitution, Art. VI, Clause 2.

C. The ALJ Properly Found that the Language of the Dues-Checkoff Provision in the Parties' Expired Agreement Did Not Allow Respondent to Unilaterally Cease Dues Checkoff.

In its first and third exceptions, Respondent attempts to circumvent clear Board precedent by arguing that the dues-checkoff language in the expired agreement "compelled" it to unilaterally cease dues checkoff upon expiration of the agreement. Respondent concedes that it ceased dues checkoff upon expiration of the agreement without any bargaining or notification to the Union. (Stip. R. at 17.) For this action to be found lawful, the Board in *WKYC-TV, Inc.* is very clear that the Union must have waived its statutory right to post-expiration bargaining over dues checkoff. 359 NLRB No. 30 slip op. at 10, 10 n. 31 (2012). Furthermore, any such waiver must be "clear and unmistakable." *Id.* citing *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983). As detailed below, no "clear and unmistakable" waiver exists in this matter.

In *Metropolitan Edison Co. v. NLRB,* the Supreme Court held that it would not infer that the parties intended to waive a statutorily protected right unless the undertaking is "*explicitly stated.*"[5] 460 U.S. 693 at 708 (emphasis added). Where, as in this case, the language does not specifically mention the action at issue, the Board will interpret the parties' agreement considering such things as the wording of the section at issue, the parties' past practice, the relevant bargaining history and any other relevant provisions of the collective-bargaining agreement. See *Johnson-Bateman,* 295 NLRB 180, 184 (1989); *American Diamond Tool,* 306 NLRB 570, 570 (1992). In analyzing each of these factors, it is apparent that the Union did not clearly and unmistakably

[5] Consistent with this requirement, the Board in *WKYC-TV, Inc.* noted that its holding "does not preclude parties from *expressly and unequivocally* agreeing that, following contract expiration, an employer may unilaterally discontinue honoring a dues-checkoff arrangement established in the expired contract, notwithstanding an employer's statutory duty to maintain the status quo." 359 NLRB No. 30 slip. op at 10, n. 31 (2012) (emphasis added).

waive its right to post-expiration bargaining over dues checkoff.

The provision at issue, read in its entirety, states as follows:

> Article 7 Payroll Deductions for Union Dues or Service Fees
>
> Section 7.1 – Authorization for Deductions
>
> The Employer agrees to make deductions from the pay of employees covered by this Agreement, pursuant to the Union's deduction authorization form signed by the employee. The authorization for the payroll deductions shall remain in full force and effect for a period of one (1) year or until termination of this agreement, whichever is sooner.

(Ex. 4.) First, in examining the actual language of the provision at issue, there is nothing that would indicate that the Union waived its right to bargain over dues checkoff after expiration. The provision at issue contains two parts. The first part of this provision – "the Employer agrees to make deductions from the pay of employees covered by this Agreement, pursuant to the Union's deduction authorization form signed by the employee"—establishes Respondent's checkoff obligation. This obligation contains *no reference* to the duration of the checkoff obligation. The only apparent temporal reference is in the second part of the provision. The second part of the provision refers only to an individual employee's deduction form itself, which, incidentally, contains no expiration date. (See Ex. 5.) As discussed below, although the temporal reference is not the most artfully drafted, it deals solely with the period of revocability of the authorization. Hence, a mere temporal restriction on an individual's ability to revoke his or her authorization simply cannot be read as a waiver of Respondent's statutory obligation to maintain the status of quo of checking off dues after expiration of the contract.

Respondent's analysis of this provision, in fact, completely ignores the distinction

between this statutory obligation and a mere contractual obligation in the Board's clear and unmistakable analysis. This distinction is very succinctly set forth in *Finley Hospital*, 359 NLRB No. 9 (2012), a case that Respondent cites in its brief.[6] In *Finley Hospital,* the Board elaborated on the difference between an employer's contractual obligation and an employer's statutory obligation to continue the status quo upon expiration of a collective-bargaining agreement, and noted that while the contractual right does not survive, the statutory right typically does. *Id.* at 3. In keeping with that analysis, the Board held that parties may intentionally preclude a provision from having an *contractual* force after a contract expires, but this does not permit an employer to change a term established by the contract unless "it also amounts to a clear and unmistakable waiver of the union's separate *statutory right* to maintenance of the status quo." *Id.* at 3 (emphasis added). In that case, the parties' agreement provided that raises would be given on employees' anniversary dates "for the duration of this Agreement." *Id.* at 1. After the contract expired, the employer discontinued annual wage increases, relying on the temporal limit in the contract. *Id.* The Board found that the purported "waiver" did not address the "employer's postexpiration conduct or obligations or authorize unilateral employer action of any kind." *Id.* at 5. Similarly, in this matter, the contract language dealing with dues checkoff contains no reference to the employer's postexpiration rights, nor does it authorize any postexpiration unilateral employer action with regards to dues checkoff of any kind. As a result, since Section 7.1 contains no language governing Respodnent's post-expiration conduct, it is simply

[6] The Board recently re-affirmed its *Finley Hospital* analysis in *SW General, Inc.,* 360 NLRB No. 109, slip op. at n. 1 (2014).

impossible to find that there has been any clear and unmistakable waiver.[7] Accordingly, the ALJ properly found that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally ceased dues checkoff as of May 1, 2013.[8]

Furthermore, the parties' bargaining history shows that the duration language in the second part of the provision was merely intended to mirror the requirements of Section 302(c)(4) of the Taft-Hartley Act, which states that employees' authorizations for dues checkoff may not be irrevocable for more than a year or beyond the expiration of the contract, whichever occurs sooner. This was clearly understood by both parties when they bargained this provision. Logically, it was the Union that made this initial proposal on dues checkoff which included the language based on Section 302(c)(4). Respondent proposed "whichever is sooner" to make the language more fully compliant with Section 302(c)(4). (Stip. R. at 19.) There is no evidence that either party contemplated that this language would permit Respondent to unilaterally cease dues deductions. Moreover, the Board's interpretation of the language in Section 302(c)(4) is

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[7] Because a statutory waiver is at issue in this case, Respondent's third exception, based solely on a traditional contract term analysis, is not relevant.

[8] Although the contract language clearly contains no temporal limit on Respondent's checkoff obligations, it also should be noted that the Board has held that even where there are temporal limits restricting certain provisions to the contract's term, an employer, nonetheless, still ordinarily has a statutory duty to bargain with the employees' collective-bargaining representative before making changes in terms and conditions of employment. See, e.g., *Natico, Inc.,* 302 NLRB 668, 685 (1991) (language stating that pension fund provision will "remain in effect for the term of this agreement" is not clear and unmistakable waiver); *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" is insufficient because language did not "deal with the termination of the employer's obligation to contribute to the funds."); *Allied Signal Aerospace,* 330 NLRB 1216, 1216-1217 (2000) (contract clause stating that the agreement shall "remain in effect until the expiration date, but not thereafter unless renewed or extended in writing by the parties" does not privilege the employer to unilaterally discontinue severance benefits post-expiration). Consequently, any arguable temporal limitation on the dues-checkoff language remains subject to Respondent's duty to maintain the status quo. Therefore, Respondent was obliged to continue dues checkoff after expiration of the agreement.

also instructive in determining whether a "clear and unmistakable" wavier can be established through the language in the parties' agreement.[9] The Board has held that the scope of this language is very limited and concerns *only* an "*individual employee's right* to withdraw his checkoff authorization." *WKYC-TV, Inc.,* 359 NLRB No. 30 slip op. at 5 (2012) (emphasis in original). Importantly, the Board held that nothing in Section 302(c)(4) "even remotely" suggests that Congress intended to permit employers to unilaterally revoke checkoff arrangements upon expiration of a collective-bargaining agreement.[10] *Id.* The Board also cited favorably to a Ninth Circuit decision, *Local Joint Executive Board of Las Vegas v. NLRB,* which held that there is "nothing in the NLRA that limits the duration of dues-checkoffs to the duration of a CBA." 657 F.3d 865 (9th Cir. 2011).[11] Consequently, the language of the provision at issue, which the parties stipulated was based on Section 302(c)(4), cannot be found to "unequivocally and specifically express [the parties'] mutual intention" to allow Respondent to unilaterally cease dues checkoff post-contract expiration, "notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center,* 350 NLRB 808, 811 (2007).

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[9] While the Board is not responsible for enforcing Section 302 of the Taft-Hartley Act, the Board may consider arguments concerning Section 302 to the extent they support or raise a defense to unfair labor practice allegations. *BASF Wyandotte Corp.,* 274 NLRB 978, 978 (1985), enfd. 798 F.2d 849 (5th Cir. 1986).

[10] Indeed, the Board stated that "had Congress intended that dues-checkoff arrangements would automatically expire upon contract expiration, there would have been no need to say that employees can revoke their checkoff authorizations at contract expiration. Simply put, if dues checkoff expired with the contract, there would be nothing left thereafter for an employee to revoke." *WKYC-TV, Inc.* 359 NLRB No. 30 slip op. at 6 (2012).

[11] The ALJ also cited to this case in finding that the dues checkoff language in this matter was similar to the checkoff language before the Ninth Circuit in *Local Joint Executive Board of Las Vegas,* which contained a provision which stated that checkoff "shall be continued in effect for the term of the Agreement." There, in a right-to-work state, the Ninth Circuit found the employer's unilateral post-expiration cessation of dues checkoff violated Section 8(a)(5) and (1) of the Act. Supra at 875-876.

Moreover, the time period during which this language was bargained is also relevant to the bargaining history of this provision. The language at issue was bargained in 2003. (Stip. R. at 19.) In 2003, the Board's holding in *Bethlehem Steel,* which permitted an employer to unilaterally cease dues checkoff upon expiration of a collective-bargaining agreement, had been good law for approximately forty years. *Bethlehem Steel,* 136 NLRB 1500 (1962). In 2003, Respondent would have been within its right to unilaterally cease dues check off upon expiration of the agreement without any waiver at all. Given this, there would have been no reason for the parties to have even contemplated including any sort of waiver concerning dues checkoff after expiration of the contract at that time.

The parties' past practice cements the fact that there was no clear and unmistakable waiver of the Union's right to bargain concerning dues checkoff after expiration of the parties' agreement on April 30, 2013. Never before had Respondent required employees to fill out new authorization forms upon expiration of a collective-bargaining agreement, which happened on two occasions prior to April 30, 2013. (Stip. R. at 20, 22 and 23.) Nor did Respondent require employees to submit new authorization forms on an annual basis. (Stip. R. at 22 and 23.) Remarkably, Respondent did not cease dues checkoff even when it was privileged to do so according to Board law at the time during a hiatus period in 2009. (Stip. R. at 21 and 23.)

In its exceptions, Respondent conveniently and repeatedly ignores stipulated facts concerning the parties' bargaining history and past practice. While Respondent now asserts that it was compelled by the "clear" language to take unilateral action, the

stipulated facts reflect it had *never* done so before pursuant to this language in its ten-year bargaining relationship. Following Respondent's logic of the language as "self-executing," Respondent would likewise have been required to cease checking off dues upon the expiration of a one-year period after the authorization was executed, upon expiration of any of the prior collective-bargaining agreements under which the authorization was signed, and during a prior contractual hiatus period. If, as Respondent asserts, the contract language clearly and unmistakably compelled it to cease dues checkoff, it is astonishing how many times Respondent repeatedly failed to do so prior to May 1, 2013. More explicably, Respondent's practice prior to May 1, 2013, is consistent with both the language of the provision itself, the parties' understanding of the provision and the parties' bargaining history which reflect that the language addresses the revocability of the authorizations, and does not permit unilateral action by the Respondent. Respondent's newly-invented interpretation of this language conveniently coincides with the passage of Michigan Public Acts. No. 348 of 2012, which Respondent seizes upon as a misconstrued "excuse" for its unlawful actions.

Finally, there is no other language contained in the contract that would support the argument that this provision is a waiver. Rather, the other sections of Article 7, where the provision at issue is located, clearly envision that dues deductions are to be made regularly and provide a precise procedure for changes in dues and service fees as well as remittance of the fees by Respondent. (Ex. 4.) Section 7.4 includes an indemnification clause in which the Union agrees to hold Respondent harmless and indemnify it "regarding any liability, costs and/or legal fees" it could incur related to this Article. (Ex. 4.) None of these provisions support the proposition that Respondent could

unilaterally stop deducting dues upon expiration of the agreement on May 1, 2013.

To the extent that Respondent argues that it was attempting to protect employees' right to revoke their authorization upon expiration of the contract under Section 302(c)(4), the Board has already explicitly rejected that argument. *WKYC-TV, Inc.,* 359 NLRB No. 30, slip op. at 9 (2012). In doing so, the Board noted the Supreme Court's acknowledgement that "[t]he Board is...entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union...There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." *Auciello Iron Works, Inc. v. NLRB,* 517 U.S. 781, 790 (1996). There is no dispute that employees were free to revoke their dues-checkoff authorizations upon expiration of the agreement. However, Respondent's unilateral action denied employees their right to make that decision for themselves.

D. Regardless of the Contractual Language, Respondent Cannot Unilaterally Deviate From the Undisputed Past Practice of Dues Checkoff.

Even if Respondent could establish that the language of the provision allowed it to unilaterally cease dues checkoff, this would constitute a significant deviation from the parties' ten years of past practice as it relates to this provision. As Respondent has stipulated, it has *never before* unilaterally ceased dues deduction either upon expiration of a collective-bargaining agreement or after a one year period pursuant to Section 7.1 of the parties' agreement. (Stip. R. at 21 and 22.) Further, Respondent has never before asserted that the dues authorization forms "expire." Rather, over its ten year history with the Union, Respondent has indisputably maintained a practice of indefinitely honoring employees' initial authorization forms. (Stip. R. at 22.)

Where a practice has developed that is a change from a contractual provision,

that practice becomes a term and condition of employment. *Frontier Homes Corp.*, 153 NLRB 1070, 1070 n. 2 (1965), enfd. in part 371 F.2d 974 (8th Cir. 1967). Respondent may not, absent an impasse or waiver by the Union, unilaterally change established practices with respect to mandatory subjects of bargaining, even if these practices may have constituted a deviation from the letter of the parties' expired agreement. *Sacramento Union,* 258 NLRB 1074 at 1074 (1981). The Board's finding in *Frontier Homes Corp.,* is directly applicable to the instant case:

> Where in fact, as here, a practice has developed, that practice is, in substance, a change in the contract provisions, and a change in practice is a change in the terms and conditions of employment. It is not excused by arguing that an expired contract, had it been followed, would have justified the action. Where the parties themselves did not enforce the contract literally *during* its term, we see no basis for resort to the parol evidence rule to justify literal adherence to the contract after expiration.

Frontier Homes Corp., supra (emphasis in original). Therefore, even assuming the language in the contract was in contradiction to Respondent's practice, Respondent could not lawfully unilaterally abandon its practice of indefinitely honoring employees' initial authorization forms.

IV. THE ALJ PROPERLY ORDERED RESPONDENT TO REIMBURSE THE UNION FOR LOST DUES

The ALJ appropriately ordered Respondent to reimburse the Union for any lost dues, with interest, that it would have otherwise been required to withhold and transmit but for the unlawful change. (ALJD at 11:10-26.) This remedy is consistent with Board precedent. E.g. *YWCA of Western Massachusetts,* 349 NLRB 762, 764 (2007); *Plymouth Court,* 341 NLRB 363, 363 (2004). Recoupment from unit employees would undermine the policies of the Act, in that it would adversely affect unit employees, who

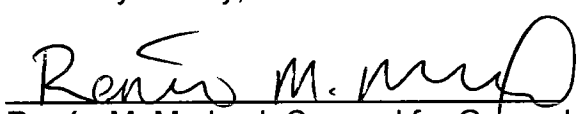
have done nothing wrong. E.g. *West Coast Cintas Corp.,* 291 NLRB 152, 156 (1988); *Texaco Inc.,* 264 NLRB 1132, 1145-46 (1982), enfd. 722 F.2d 1226 (5th Cir. 1984). As ordered by the ALJ, the appropriate remedy also includes interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The ALJ appropriately rejected Respondent's argument, which it makes again in its second exception, that it should not have to remit dues to the Union on behalf of employees that failed to remit dues through other means. First, Respondent does not cite to any legal precedent in support of its contention. Second, as the ALJ correctly noted, it cannot be established which, if any, employees would have voluntarily terminated their checkoff authorization absent the Respondent's unlawful conduct. While it is true that employees were free to revoke their authorization after expiration of the contract, Respondent's unilateral cessation of dues checkoff robbed employees of their choice in the matter. As such, Respondent cannot now argue that it should not be held responsible for the ambiguity that its own unlawful actions created.

V. CONCLUSION

For the foregoing reasons, the ALJ properly found Respondent violated Section 8(a)(5) and (1) when it unilaterally ceased dues checkoff upon expiration of the parties' collective-bargaining agreement.

Respectfully submitted this 21st day of May, 2014.



Renée M. Medved, Counsel for General Counsel
National Labor Relations Board
Region 18 – Sub-Region 30
310 West Wisconsin Avenue, Suite 450W
Milwaukee, Wisconsin 53203

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OSF HEALTHCARE SYSTEM d/b/a
ST. FRANCIS HOSPITAL

Case 30-CA-105167

and

MICHIGAN NURSES ASSOCIATION

AFFIDAVIT OF SERVICE

I hereby certify that I have served the attached COUNSEL FOR GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS on the parties listed below on May 21, 2014.

E-Filed
Gary Shinners, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Email Only
Richard Yorke
Michigan Nurses Association
2310 Jolly Oak Road
Okemos, Michigan 48864
Rick.Yorke@minurses.org

Email Only
Mark Nelson
Drinker Biddle Reath LLP
191 North Wacker Drive
Suite 3700
Chicago, Illinois 60606-1615
mark.nelson@dbr.com

Renée M. Medved
Counsel for General Counsel
National Labor Relations Board, Subregion 30
310 W. Wisconsin Avenue, Suite 450W
Milwaukee, WI 53203