Enterprise Leasing Company of Florida, LLC d/b/a Alamo Rent-A-Car *and* Teamsters Local Union No. 769, affiliated with International Brotherhood of Teamsters. Cases 12–CA–026588, 12–CA–026637, 12–CA–026660, 12–CA–026706, 12–CA–026723, 12–CA–026820, and 12–CA–027057

June 25, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On July 2, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB 1373. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein, as modified below. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB 1373, which is incorporated herein by reference.[1] The Order is set forth in full below.[2]

[1] In agreeing that the Respondent lawfully ceased honoring the dues-checkoff arrangement after the parties' collective-bargaining agreement expired, we do not rely on the incorporated decision's citation to *WKYC-TV, Inc.*, 359 NLRB 286 (2012), a decision issued when the Board lacked a quorum. Instead, for institutional reasons, we apply the rule of *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), affd. in relevant part sub nom. *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964), without passing on whether that case was correctly decided.

Moreover, we do not rely on the vacated decision's citations to three other decisions issued when the Board lacked a quorum: *Latino Express*, 359 NLRB 518 (2012)—in support of compensating employees for the adverse tax consequences of receiving a lump-sum backpay award and requiring the Respondent to file a report with the Social Security Administration allocating the awards to the appropriate calendar quarters—and *Best Century Buffet Inc.*, 358 NLRB 143 (2012), and *Teamsters Local 727*, 358 NLRB 718 (2012)—in support of providing a make-whole remedy for any losses employees suffered as a result of the Respondent's unlawful elimination of the short-term disability benefit. Instead, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014) (tax compensation and report-filing remedies), and *Plumbers Local 32 (Alaska Continental Pipeline)*, 312 NLRB 1137, 1139 (1993) (leaving to compliance whether any employees suffered loss), enfd. 50 F.3d 29 (D.C. Cir. 1995), cert. denied 516 U.S. 974 (1995). The amended remedy section of the incorporated decision is amended accordingly.

We note that the remedy requiring the Respondent to reimburse the Union for dues it unlawfully failed to deduct and remit to the Union (after the Respondent unlawfully withdrew recognition from the Union and before the collective-bargaining agreement expired), with interest and without recouping the dues amounts from employees, is consistent with prior decisions, even if it has not been uniformly granted. See, e.g., *Space Needle, LLC*, 362 NLRB 35, 39 fn. 12 (2015); *A.W. Farrell & Son*, 361 NLRB 1487, 1487 (2014) (collecting cases). The reimbursement requirement will be limited to employees who authorized checkoff and will be offset by the amount of any dues the Union collected over the compliance period from employees covered by the dues payment order. *A.W. Farrell & Son*, supra at fn. 3. We are aware of no case, and our dissenting colleague cites none, in which the Board has affirmatively rejected a recoupment bar.

We reject the view of our dissenting colleague that the bar on recoupment by the Respondent is impermissibly "punitive." The remedy, rather, is intended to make the Union whole for the consequences of the Respondent's unfair labor practice. As the Board has explained, in cases like this, where the "loss of dues . . . has resulted from the Respondent's unfair labor practices," the "financial responsibility for making the Union whole for dues it would have received but for Respondent's unlawful conduct rests entirely on the Respondent and not the employees." *West Coast Cintas Corp.*, 291 NLRB 152, 156 fn. 6 (1988). The purpose of Board remedy is to "recreate the conditions and relationships that would have been had there been no unfair labor practice." *Carpenters v. NLRB*, 365 U.S. 651, 657 (1961). See also *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998) (same), enfd. in relevant part sub nom. *Sever v. NLRB*, 231 F.3d 1156 (9th Cir. 2000). Toward that end, the Board may place the burden of uncertainty on the wrongdoer, without exceeding its authority under the Act. E.g., *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 544 (1943).

Our remedy properly presumes that the Union would have received the dues payments had the employer complied with the dues-checkoff provision, and it permits the Respondent to offset from its liability any payments that the Union actually received from employees, despite the Respondent's failure to comply. Meanwhile, permitting the Respondent to recoup *back* dues payments from *future* wages paid to employees—presumably while deducting *current* dues—would fail "to effectuate the policies of th[e] Act" (in the words of Sec. 10(c)). It would impose an additional burden on employees, for which they might well blame the Union, undermining its standing—and exacerbating the consequences of the Respondent's unlawful conduct. Permitting recoupment would also deprive the remedy of any deterrent effect: the Respondent could repeat the violation knowing that employees and the Union would again pay the full cost of it. The Board may take into account the deterrent effect of its remedies. See, e.g, *NLRB v. Williams Enterprises, Inc.*, 50 F.3d 1280, 1290 (4th Cir. 1995) (Board acted properly in selecting remedy "best calculated to cure the effects of the employer's unlawful conduct and to deter its future misconduct"): *Peoples Gas System v. NLRB*, 629 F.2d 35, 50 (D.C. Cir. 1980) ("Deterrence is, of course, a legitimate remedial purpose").

Contrary to our dissenting colleague, Sec. 302 of the Taft-Hartley Act does not require us to permit recoupment here. While that provi-

We find, for the reasons stated in the incorporated decision, that the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally eliminated the bargaining unit's short-term disability (STD) benefit.[3] We also find this violation on an alternative, independently sufficient basis.[4] The Respondent acquired the Miami International Airport Alamo Rent-A-Car, the facility at issue in this case, when the Respondent acquired Vanguard Car Rental, USA (Vanguard), in August 2007. Vanguard provided STD benefits to employees pursuant to a Vanguard STD Plan, which the Respondent continued unaltered for the unit employees until August 1, 2009.[5] Respondent's vice president of employee benefits Dana Beffa testified that the Respondent terminated the Vanguard STD plan on August 1, 2009.[6] The Respondent then self-administered STD benefits for represented employees until it eliminated those benefits on January 1, 2010.

The Respondent principally argues that it was privileged to eliminate the STD benefit unilaterally on January 1, 2010, because article 23, section 3 of the then-effective collective-bargaining agreement (CBA) waived bargaining over the "Employer's Comprehensive Group Insurance Plan," and the group insurance plan documents allowed the Respondent to make unilateral changes to the plan. Even assuming the Respondent's waiver arguments might otherwise have merit, they fail here because, after August 1, 2009, Respondent did not provide STD benefits pursuant to any "plan," or at least not pursuant to one of the Vanguard plans referenced in the CBA. Article 23, section 1 of the CBA referred to the Vanguard "Comprehensive Group Insurance Plan" (which encompassed short-term disability benefits specified in a subsidiary STD plan), and article 23, section 2 referred to the Vanguard "401(k) Plan." In turn, article 23, section 3 stated that "[n]o matter respecting the provisions of *the above Plans* shall be subject to the grievance, arbitration, or negotiation procedure established hereunder." But the Respondent terminated the Vanguard STD plan on August 1, 2009. Accordingly, the Respondent cannot rely on article 23, section 3 because the Respondent's January 1, 2010 discontinuation of STD benefits was independent of the "above plans."[7] And because the Vanguard STD Plan did not exist when STD benefits were discontinued, the Respondent also cannot reasonably contend that the discontinuation was authorized by any reservation-of-rights provisions contained in the plan documents. On January 1, 2010, therefore, when the Respondent unilaterally eliminated the short-term disability benefit for unit employees, there was no colorable contractual waiver of bargaining by the Union in force. Consequently, the Respondent unlawfully changed a term and condition of

sion generally bars employers from making payments to unions, it permits several types of legitimate payments, including payments "in satisfaction of a judgment of any court." 29 U.S.C. 302(c)(2). A remedial Board order, enforceable by a federal court of appeals, clearly falls within this category.

[2] We shall substitute a new notice in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

[3] The judge found that some of the Respondent's statements to employees concerning the termination of STD benefits violated Sec. 8(a)(1). Contrary to our dissenting colleague's implication, we adopt this finding not only because the Respondent's managers told unit employees that they were losing the benefit "because of their union contract," but also because they confirmed that nonunion employees would retain the benefit in a different form. Under those circumstances, unit employees would reasonably believe they were being targeted due to their union representation.

Also contrary to our dissenting colleague's characterization, we do not find that the Respondent "unlawfully assisted" employee Cirilo Garcia's decertification campaign. We rather adopt the judge's finding that two supervisors' statements to Cirilo that the number of petition signatures he had gathered "wasn't enough, to go back and get more," was unlawfully coercive. Even assuming the conversation was friendly, this direct exhortation from management could only have further impelled Cirilo to continue his campaign.

[4] In finding that the Respondent violated Sec. 8(a)(5) and (1), Chairman Pearce relies solely on the rationale set forth in the incorporated decision.

[5] The earlier Board decision incorrectly stated that, "as of 2009, the Respondent had discontinued the Vanguard plan altogether and substituted its own plan." 359 NLRB 1373, 1373–1374 fn. 6. Although that was true as to other Vanguard plans, the Vanguard Short-Term Disability Plan had not been discontinued "as of 2009." This is evident from Respondent's 2009 "National Car Rental Alamo Rental Car Benefits Summary Plan Description" booklet (hereinafter National/Alamo SPD), which included a description of the "Vanguard Car Rental USA Inc. Health and Welfare Plan—Short-Term Disability." In addition, the Respondent's vice president of employee benefits, Dana Beffa, testified that the Vanguard STD Plan, as described in the National/Alamo SPD, was in effect for part of 2009. However, Beffa testified that the "old Vanguard short-term disability plan" was terminated August 1, 2009.

We adhere to the position set forth in the earlier Board decision that the Respondent cannot rely on language from the Vanguard plan as a basis for waiver because the Respondent had replaced the Vanguard plan with its own National/Alamo plan.

[6] The judge stated that the Respondent "took over the administration of *the plan*" on August 1, 2009 (emphasis added). But it appears that the judge used "plan" and "benefit" interchangeably throughout his decision. We interpret this passage to mean that the Respondent took over the administration of the *benefit* on that date. As indicated in fn. 5, supra, the uncontroverted testimony of VP of Employee Benefits Beffa was that the Respondent terminated the Vanguard Short-Term Disability Plan on August 1, 2009.

[7] In our dissenting colleague's view, the contract's exemption of the "above Plans" from the "grievance, arbitration, or negotiation procedure" would have waived the Union's right to bargain over the termination of the STD had that plan remained in force. As noted in the previous decision, however, that language did not provide even an arguable basis for such an interpretation, let alone a clear and unmistakable waiver of the Union's right to bargain. See *Provena St. Joseph Medical Center*, 350 NLRB 808, 808–816 (2007).

employment constituting a mandatory subject of bargaining without giving the Union notice and an opportunity to request bargaining—a violation of Section 8(a)(5) of the Act.[8]

ORDER

The National Labor Relations Board orders that the Respondent, Enterprise Leasing Company of Florida, LLC, d/b/a Alamo Rent-A-Car, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that their short-term disability benefits were being terminated because they were represented by Teamsters Local Union No. 769, affiliated with International Brotherhood of Teamsters (the Union).

(b) Coercively interrogating employees about their union membership or support.

(c) Encouraging employees to circulate a petition to decertify the Union as their bargaining representative.

(d) Soliciting employees to withdraw their membership in the Union.

(e) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(f) Interfering with the Union's contractual right of access to the facility.

(g) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of its employees in the following unit:

> All full-time and regular part-time Bus Drivers, Cashiers, Custodians, Damage Clerks, Greeters, Inventory Clerks, Lead Bus Drivers, Lead Service Agents, Lost & Found Clerks, Parts Clerks, Phone Operators, Rental Agents, Return Agents, Service Agents, and Technicians A, B and C, employed by the Employer at its facility at 3355 NW 22nd Street, Miami, Florida; excluding: all other employees, including office clerical employees, confidential employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

(h) Refusing to bargain with the Union regarding grievances.

(i) Failing and refusing to deduct and remit dues to the Union pursuant to the dues-checkoff provision during the term of any collective-bargaining agreement.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Restore the short-term disability benefits for unit employees that were in effect before January 1, 2010, and make the employees whole for any losses suffered as a result of the unlawful elimination of benefits in the manner set forth in the amended remedy section of the decision reported at 359 NLRB 1373 as amended in this decision.

(c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Upon request, process the grievance filed by the Union over the discharge of employee Paul Garcia.

(e) Reimburse the Union for all dues that, following the unlawful withdrawal of recognition, it failed to deduct and remit pursuant to the dues-checkoff provision of the collective-bargaining agreement before it expired on March 31, 2010, in the manner set forth in the amended remedy section of the decision reported at 359 NLRB No. 149.

(f) Upon request, rescind the wage increase that was implemented on October 29, 2010, and the benefits improvements that were implemented on January 1, 2011.

(g) Within 14 days after service by the Region, post at its Miami, Florida facility copies of the attached notice marked "Appendix"[9] in English, Spanish, and Haitian Creole. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices

[8] Member McFerran joins Member Miscimarra in finding it unnecessary to pass on the judge's finding that the Respondent also violated Sec. 8(a)(3) and (1) when it eliminated the short-term disability benefit, as such a finding would not materially affect the remedy.

Chairman Pearce would find that the Respondent also violated Sec. 8(a)(3) and (1) by eliminating the short-term disability benefit for unit employees because the Respondent expressly cited union representation as its reason for eliminating the benefit, while it continued to provide the same benefit for unrepresented employees. See *Tocco*, 323 NLRB 480, 480, 487–488 (1997).

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 2009.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER MISCIMARRA, concurring in part and dissenting in part.

This case involves multiple alleged violations, one of which is whether the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally eliminated short-term disability benefits for represented employees on January 1, 2010.[1] Short-term disability (STD) benefits provide employees limited time off from work while they continue receiving their compensation in whole or in part. STD benefits can be provided in two ways. One way is pursuant to a welfare benefit "plan"—either an STD plan or a broader plan that includes STD benefits. The Employee Retirement and Income Security Act (ERISA) recognizes the enforceability of "welfare benefit" plans, and the existence of a "plan" has other consequences under ERISA.[2] However, STD benefits can also be provided without any type of "plan"[3]—for example, pursuant to a time-off policy, formal or informal, under which employees are excused from work for certain reasons with a continuation of all or part of their compensation.

The instant case illustrates both ways in which STD benefits can be provided. The record establishes that initially, the Respondent's represented employees received STD benefits pursuant to the "Vanguard Car Rental USA Inc. Health and Welfare Plan," which included a "Vanguard Car Rental USA Inc. Short-Term Disability Plan."[4] Subsequently, the Respondent terminated the Vanguard STD Plan, but it continued to provide STD benefits for its unrepresented employees, without any "plan," under its "time-off" policy.

The Respondent is alleged to have violated Section 8(a)(5) when it unilaterally discontinued STD benefits for represented employees on January 1, 2010. The Respondent defends its elimination of STD benefits without bargaining based on the language of article 23 in the parties' collective-bargaining agreement (CBA), which states:

> Section 1: All full-time employees covered by this agreement will be eligible for participation under the Employer's *Comprehensive Group Insurance Plan*. All employees who elect to participate in *said plan* shall contribute on a pre-tax weekly contribution basis. The amount of said contribution shall be determined by the Employer consistent with what is charged to other employees in Miami, Florida upon each annual enrollment.
>
> Section 2: All full-time employees covered by this Agreement will be permitted to elect to participate in the Employer *401(k) Plan* subject to the terms and conditions of the Plan and shall be permitted elections given other employees under the terms of the Plan.
>
> Section 3: No matter respecting provisions of the above Plans shall be subject to the grievance, arbitration or negotiation procedure established hereunder.[5]

[1] Although short-term disability benefits were eliminated for represented employees, they were continued for unrepresented employees under the Respondent's "time-off" policy applicable to unrepresented employees.

[2] ERISA "defines welfare benefits plans as plans, funds, or programs established or maintained to provide participants with additional benefits, such as life insurance and disability coverage." *M&G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926, 933 (2015) (citing 29 U.S.C. § 1002(1)). Benefit plans providing "welfare" benefits are covered by many of the same ERISA provisions that apply to "pension" plans, except only "pension" plans are subject to the "elaborate minimum funding and vesting standards for pension plans." Id.

[3] The Supreme Court has stated that a welfare "plan" typically exists when there is a need for "an ongoing administrative program to meet the employer's obligation," which may entail a "host of obligations" such as "determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9, 11 (1987). In contrast, the Court indicated that a "plan" may not be required when the provision of welfare benefits does not entail these types of recurring administrative actions. See, e.g., id. at 12 ("To do little more than write a check hardly constitutes the operation of a benefit plan.").

[4] GC Exh. 6, pp. 21–24 ("Vanguard Car Rental USA Inc. Health and Welfare Plan" summary plan description); R. Exh. 42 ("Vanguard Car Rental USA Inc. Short-Term Disability Plan" summary plan description); Hearing Transcript (Tr.) 619–621, 627–628; see also *Alamo Rent-A-Car*, 359 NLRB 1373, 1380 (2013) (stating that the Vanguard Health and Welfare Plan included a "short-term disability benefit"). Hereinafter, the "Vanguard Car Rental USA Inc. Short-Term Disability Plan" is referred to as the "Vanguard STD Plan."

[5] *Alamo Rent-A-Car*, 359 NLRB 1373, 1379–1380 (quoting GC Exh. 2, art. 23, p. 14) (emphasis added).

The Respondent also relies on the reservation-of-rights language contained in the Vanguard group insurance documents, which recognized Vanguard's right to amend or terminate any component of the plan.[6]

I disagree with my colleagues' reading of article 23, section 3 stating "[n]o matter respecting the provisions of the above Plans shall be subject to the grievance, arbitration *or negotiation procedure* established hereunder" (emphasis added). The Respondent relies on this language to argue that the Union waived bargaining over the change implemented on January 1, 2010. My colleagues reject the Respondent's defense because article 23, section 3 states the "Plans" are not subject to the "negotiation procedure established hereunder," and my colleagues adopt the rationale expressed in the prior Board decision that the CBA "did not include any reference to negotiation, let alone any provision that could be characterized as a 'negotiation procedure.'"

I disagree with this rationale because the CBA contained a recognition clause, by which the Respondent recognized the Union "as the exclusive bargaining representative for the bargaining unit," [7] and this can fairly be described as the "negotiation procedure established hereunder." In my view, the language in article 23, section 3 reflects an intention to eliminate all obligations to engage in "negotiation" over any matter "respecting the provisions of the above Plans," including any obligation to bargain pursuant to the "negotiation procedure established hereunder" (i.e., resulting from the Respondent's recognition of the Union). I believe the majority's interpretation unreasonably disregards and nullifies the "negotiation procedure" language in article 23, section 3, contrary to the "cardinal principle of contract construction" that an agreement "should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995).[8]

Although I disagree with my colleagues' interpretation of the "negotiation procedure established hereunder" language in article 23, section 3, I believe the record nonetheless establishes that Respondent violated Section 8(a)(5) and (1) by unilaterally eliminating STD benefits for represented employees on January 1, 2010. Here, Member McFerran and I adopt the "additional rationale" described in the majority opinion—namely, CBA article 23, section 3 does not provide a defense to the Respondent's unilateral discontinuation of STD benefits on January 1, 2010, because (i) at most, section 3 obviates bargaining "respecting the provisions of *the above Plans*," including the Vanguard "Comprehensive Group Insurance Plan" and the Vanguard "401(k) Plan"; (ii) prior to August 1, 2009, Vanguard's STD benefits were provided pursuant to the Vanguard "Comprehensive Group Insurance Plan," which encompassed the Vanguard STD Plan; and (iii) the Respondent's vice president of employee benefits, Dana Beffa, testified that the Respondent *terminated the Vanguard STD Plan* on August 1, 2009, *5 months before* the January 1, 2010 unilateral discontinuation of STD benefits at issue here.[9] Although represented employees continued to receive STD *benefits* after August 1, 2009, these were self-administered by the Respondent without being provided pursuant to any "plan," and certainly not the Vanguard STD plan referenced in the CBA. Accordingly, the Respondent cannot rely on article 23, section 3 to excuse its failure to satisfy its Section 8(a)(5) bargaining obligations because the Respondent's elimination of STD benefits for represented employees effective January 1, 2010, did not involve "provisions of the above Plans" as to which unilateral action was permitted.[10] For similar reasons, I agree that reser-

[6] Id., slip op. at 1–2 fn. 6 ("Respondent further contends that the parties' collective-bargaining agreement incorporated by reference predecessor Vanguard's group insurance plan documents, which stated that Vanguard had the right to amend or terminate any component of the plan.").

[7] GC Exh. 2, art. 1, p. 2.

[8] See also *Supreme Sunrise Food Exchange, Inc.*, 105 NLRB 918, 920 (1953) ("A primary principle of contract construction is that the contract be read as a whole, and that every part therein be interpreted in relation to the entire instrument. Other fundamental rules require . . . that the contract be construed, if possible, so that its provisions are valid rather than invalid" and "that a reasonable meaning be accorded to all its terms. . . .").

[9] As the judge found, the Respondent's outside administrator stopped administering its STD Plan benefits on August 1, 2009, but the Respondent continued providing STD benefits to represented employees. Beffa testified that, in 2009, the STD benefits for represented employees were provided pursuant to the "Vanguard Car Rental USA Inc. Health and Welfare Plan—Short-Term Disability" (the Vanguard STD Plan), described in a consolidated 2009 "National Car Rental Alamo Rental Car Benefits Summary Plan Description" booklet (hereinafter National/Alamo SPD). See GC Exh. 7, pp. 4, 142–143; Tr. 621–623. Thus, on and for a time after January 1, 2009, STD benefits for represented employees were provided pursuant to the Vanguard STD Plan, described in the 2009 National/Alamo SPD. However, Beffa testified that the "old Vanguard short-term disability plan" was terminated August 1, 2009. Tr. 631. As the judge found, the Respondent was self-insured for these benefits, and the Respondent's outside administrator for STD benefits, Matrix Absence Management, Inc., also stopped administering the STD benefits for the Respondent's represented employees after August 1, 2009. *Alamo Rent-A-Car*, 359 NLRB No. 149, slip op. at 8. In short, after August 1, 2009, the Respondent continued to provide self-administered STD benefits for the remainder of 2009, but not pursuant to the discontinued Vanguard STD Plan.

[10] Because I believe CBA article 23, section 3 cannot colorably be relied upon by the Respondent in relation to the STD benefit discontinuation on January 1, 2010, I need not reach or pass on whether the Board's traditional waiver analysis is applicable in the instant case or whether bargaining might be excused under the contract coverage standard adopted by some courts of appeals.

vation-of-rights language contained in the Vanguard STD plan cannot be relied upon by the Respondent, since the Vanguard STD Plan was not in effect when the Respondent discontinued STD benefits.

Several additional violations necessarily follow from the Respondent's unlawful elimination of the STD benefits. I agree with the judge that, under *Master Slack Corp.*, 271 NLRB 78 (1984), the unlawful elimination of STD benefits tainted the decertification petition upon which the Respondent relied when it withdrew recognition, rendering the withdrawal of recognition unlawful. And because the withdrawal of recognition violated Section 8(a)(5) and (1), I agree with the judge, for the reasons he states, that the Respondent violated the same sections of the Act, after the withdrawal, by making unilateral changes to terms and conditions of employment, by failing to process a grievance, and by ceasing dues checkoff before the collective-bargaining agreement expired. The judge also properly found that, under *Bethlehem Steel Co.*, 136 NLRB 1500 (1962),[11] the Respondent's failure to deduct and remit union dues after the collective-bargaining agreement expired was lawful.[12]

However, I disagree with my colleagues in the following additional respects.

1. *Statements Describing the Elimination of Short-Term Disability Benefits*. The judge found that when the Respondent fielded employee questions about why they were losing their short-term disability benefits, employees were told that the Respondent was eliminating the benefits "because of their union contract." The judge found, and my colleagues agree, that this statement violated Section 8(a)(1). But the quoted language is the judge's paraphrase of the Respondent's statement, and I do not find that paraphrase to be a fair characterization of the credited testimony. As to what the Respondent told employees, the judge credited employees Marjorie Wisecup, Sara Rivera, and Wanda Rivera. Wisecup agreed during cross-examination that the grievance form she filed a few days after the relevant events accurately described the Respondent's statement. The form recounted that "[t]hey informed us that the reason for this decision is the fact that the bargaining agreement does not specify that [the short-term disability benefit] has to be given to employees." The Riveras' testimony was consistent with Wisecup's description.

In my view, eliminating a benefit *because the contract does not require it* is materially different from eliminating the benefit *because of a union contract.* What the Respondent said conveyed the message that the Respondent was simply sticking to the contract, not that the benefit was being eliminated because of the employees' union membership.[13] As explained above, I agree that the Respondent violated the Act by eliminating the disability benefit (and thus the Respondent's explanation was incomplete, at best), but I do not find that the credited testimony concerning what the Respondent said supports an 8(a)(1) violation. In my view, the Respondent's statements would not "reasonably tend to interfere with, threaten, or coerce employees in the exercise of their rights under Section 7 of the Act." *Bridgestone Firestone South Carolina*, 350 NLRB 526, 529 (2007) (internal quotation marks omitted).

2. *Supervisors' Statements to Cirilo Garcia About the Decertification Petition*. The record reveals that employee Cirilo Garcia, on his own initiative, began circulating a decertification petition on January 1, 2010. Sometime before January 13, 2010, Garcia approached supervisor Rudolfo Browne to inform him about the petition. On January 13, an employee observed a brief interaction between Garcia and two supervisors, Browne and Larry Elsass. The supervisors asked Garcia how many signatures he had and told him "it wasn't enough, to go back and get more." The judge found that the Respondent violated Section 8(a)(1) during that interaction by coercively interrogating Garcia and encouraging him to collect more signatures. My colleagues correctly recognize, contrary to the judge, that Garcia was not coercively interrogated. Garcia was openly leading the decertification effort. The supervisors—one of whom Garcia had previously informed about the petition—asked him a single question that did not probe into the identities of the signatories, and Garcia readily answered. Under the totality of the circumstances, the question was not coercive. See *Rossmore House*, 269 NLRB 1176, 1178 fn.

I do not pass on whether the Respondent's discontinuation of STD benefits for represented employees constituted antiunion discrimination in violation of Sec. 8(a)(3) and (1) because such a violation would not materially affect the remedy, given my finding that the Respondent violated Sec. 8(a)(5) and (1).

[11] Affd. in relevant part sub nom. *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

[12] I also agree, for the reasons stated by the judge, that the Respondent's interference with union agent Eddie Valero's access to the facility on January 4, 2010, violated Sec. 8(a)(5) and (1) and that the question posed to employee Vanessa Gonzalez on January 15 or 16, 2010, did not violate Sec. 8(a)(1).

[13] To find the violation, my colleagues rely not only on the judge's mischaracterization of the credited testimony, but also on the fact that the Respondent "confirmed that nonunion employees would retain the benefit in a different form." But the Respondent was free to tell its represented employees about benefits received by its unrepresented employees, so long as did not promise that employees would receive those benefits if they gave up union representation. See, e.g., *Unifirst Corp.*, 346 NLRB 591, 593 (2006). My colleagues find no such promise, and neither do I.

20 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

I disagree, however, with my colleagues' affirmation of the judge's finding that the Respondent's supervisors unlawfully assisted the decertification effort. The record contains no evidence that the Respondent instigated the petition. Garcia was spearheading the decertification effort on his own initiative. There is no indication that he would have stopped seeking signatures absent these supervisors' isolated statement to "go back and get more" signatures. In my view, the statement was "minimal support or approval" that does not cast doubt on whether the petition was the "uncoerced act of the employees." *Eastern States Optical Co.*, 275 NLRB 371, 371–373 (1985) (finding that the employer did not violate the Act when it helped word the decertification petition, responded when asked that it thought six signatures were sufficient, and permitted an employee to sign the petition after the employer received it, because these acts merely helped employees accomplish their predetermined objectives). Accordingly, I also disagree with my colleagues' alternative finding that the petition the Respondent relied upon when withdrawing recognition was tainted not only by a prewithdrawal unfair labor practice but also by the Respondent "direct[ing] Garcia to obtain more signatures."

3. *The Dues Reimbursement Remedy*. My colleagues order the Respondent to reimburse the Union for the dues that it unlawfully failed to deduct and remit pursuant to the dues-checkoff provision of the collective-bargaining agreement *without recouping that amount from its employees*.[14] I disagree with my colleagues and with the decisions they cite. From the earliest days of the Act, the Supreme Court has held that our powers under Section 10(c) are remedial, not punitive. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–236 (1938). The majority's Order requires the Respondent to pay out of its own pocket employees' union dues it did not owe without recouping those amounts from the employees who did owe the dues. This is punitive, not remedial.[15]

Under dues-checkoff arrangements, an employer when authorized by the employee deducts dues from that employee's wages and remits them to the union. The employer's role is administrative. It is undisputed that the

[14] Although the Respondent neglected to respond to the General Counsel's exception urging the Board to prohibit recoupment, whether the Respondent opposes the remedy is irrelevant. See *Mezonos Maven Bakery, Inc.*, 362 NLRB No. 41, slip op. at 3 (2015) ("Remedial matters are traditionally within the Board's province and may be addressed by the Board in the absence of exceptions.").

[15] My colleagues rely on *Space Needle, LLC*, 362 NLRB 35, 39 fn. 12, which reasons that the wrongdoer should bear financial responsibility for the loss it created, and *A.W. Farrell & Son*, 361 NLRB 1487, 1487 (2014), which claims that recoupment of dues payments is not permitted "when an employer has unlawfully repudiated a collective-bargaining agreement." Neither case addresses the reality that prohibiting an employer from recouping union membership dues that are lawfully payable *only* by employees is punitive and therefore beyond our remedial discretion. Indeed, the Board in *A.W. Farrell* acknowledged that "[t]he Board customarily directs that dues owed to a union be deducted from employees' backpay," 361 NLRB No. 162, slip op. at 1, but it then exempted contract-repudiation cases from this rule. The Board did not explain how or why an impermissible punitive remedy at variance from the Board's customary practice somehow becomes permissible for one specific category of cases. Instead, the Board simply cited cases—one of which *contradicts* the holding for which it is cited. See *Williams Pipeline Co.*, 315 NLRB 630, 633 (1994) (ordering employer to "[d]educt union dues as of the date of its repudiation of the collective-bargaining agreement for all employees who executed dues-checkoff authorizations and remit those dues to the [u]nion"). The Board issued the same "deduct and remit" order in another contract-repudiation case, which the Board in *A.W. Farrell* apparently overlooked. See *Bebley Enterprises*, 356 NLRB 328, 329 (2010) (ordering employer, which repudiated CBA, to "deduct[] dues pursuant to valid checkoff authorizations and remit[] amounts deducted to the [u]nion"). My colleagues say that the Board "explained" why recoupment should be barred "in cases like this" in *West Coast Cintas Corp.*, 291 NLRB 152 (1988), but the so-called explanation they quote from that case is no explanation at all but simply a conclusory declaration. My colleagues also base their holding on the principle that "[t]he Board may place the burden of uncertainty in this regard on the wrongdoer," but there is no uncertainty here: had the Respondent complied with the Act, it would have *deducted* dues from employees' paychecks and remitted them to the Union. Moreover, my colleagues say that permitting the Respondent to deduct dues payments from employees' paychecks "would . . . deprive the remedy of any deterrent effect," but that does not make the majority's dues-payment obligation permissible. Punitive measures may have a deterrent effect, but they remain impermissible under the Act. As the Supreme Court held in *Republic Steel*, supra, 311 U.S. at 12, the Board is *not* "free to set up any system of penalties which it would deem adequate" to "have the effect of deterring persons from violating the Act." Finally, the Respondent may lawfully remit dues to the Union *only* after deducting them from employees' pay. Sec. 302 of the Labor Management Relations Act (LMRA) broadly prohibits, with certain exceptions, employer payments to any union, and the exception relating to union dues only permits an employer to remit to a union "money *deducted from the wages of employees* in payment of membership dues in a labor organization." LMRA Sec. 302(c)(4) (emphasis added). Although my colleagues note that Sec. 302(c)(2) allows employer payments to unions to satisfy court judgments (including court-enforced Board orders), this does not give the Board carte blanche to require employers to make whatever monetary payments to unions the Board deems appropriate. As the Supreme Court held in *Consolidated Edison*, supra, 305 U.S. at 235–236, Sec. 10(c) "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose . . . even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." See also *Republic Steel*, 311 U.S. at 11 ("We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act."). Sec. 302(c)(4) demonstrates Congress intended to permit an employer to remit dues to a union *only* when they are "deducted from the wages of employees," and Congress did not contemplate employers would pay union membership dues for employees from the employer's own funds.

Respondent, after withdrawing recognition, unlawfully failed to provide the deduction-and-remittal services it agreed to provide. I do not agree, however, that the Respondent should be held liable for the amount of the unremitted dues; those dues were owed by union members, not by the Respondent. I believe ordering the Respondent to pay the amount of the unremitted dues extends beyond the Board's remedial authority, which does not include punitive remedies and which is limited to remedies that bear a reasonable relation to the nature of the violation. I would order the Respondent to remit past dues that, in turn, are deducted from unit employees' wages or otherwise recouped by the Respondent.[16]

Accordingly, I concur in part and dissent in part regarding the above issues.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you that your short-term disability benefits are being terminated because you are represented by Teamsters Local Union No. 769, affiliated with International Brotherhood of Teamsters (the Union).

WE WILL NOT coercively question you regarding your union membership or support.

WE WILL NOT encourage you to circulate a petition to decertify the Union as your bargaining representative.

WE WILL NOT solicit you to withdraw your membership in the Union.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT interfere with the Union's contractual right of access to our facility.

WE WILL NOT withdraw recognition from the Union or refuse to bargain with it as the exclusive collective-bargaining representative of our employees in the following unit:

> All full-time and regular part-time Bus Drivers, Cashiers, Custodians, Damage Clerks, Greeters, Inventory Clerks, Lead Bus Drivers, Lead Service Agents, Lost & Found Clerks, Parts Clerks, Phone Operators, Rental Agents, Return Agents, Service Agents, and Technicians A, B and C, employed by the Employer at its facility at 3355 NW 22nd Street, Miami, Florida; excluding: all other employees, including office clerical employees, confidential employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the Union regarding grievances.

WE WILL NOT fail and refuse to deduct and remit dues to the Union pursuant to the dues-checkoff provision during the term of any collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL restore your short-term disability benefits that were in effect prior to January 1, 2010, and WE WILL make you whole for any losses suffered as a result of our unlawful elimination of those benefits.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, upon request, process the grievance filed by the Union over the discharge of employee Paul Garcia.

WE WILL reimburse the Union for all dues that, following our unlawful withdrawal of recognition, we failed to deduct and remit pursuant to the dues-checkoff provision of the collective-bargaining agreement before it expired on March 31, 2010.

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[16] The manner of the recoupment is best left for the parties to negotiate during compliance proceedings. I otherwise agree with the provisions in the Order (aside from paragraphs 1(a) and 1(c) ordering the Respondent to cease and desist from conduct I would find lawful), including adding the make-whole remedy for the elimination of short-term disability benefits and adding language consistent with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

WE WILL, upon request, rescind the wage increase that was implemented on October 29, 2010, and the benefits improvements that were implemented January 1, 2011.

ENTERPRISE LEASING COMPANY OF FLORIDA, LLC D/B/A ALAMO RENT-A-CAR

The Board's decision can be found at http://www.nlrb.gov/case/12-CA-026588 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.