

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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**IN THE MATTER OF:**

**METALCRAFT OF MAYVILLE, INC.**

**Respondent,  
and**

**Case No. 18-CA-178322**

**DISTRICT LODGE NO. 10,  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS OF AMERICA, AFL-CIO.**

**Charging Party.**

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**REPLY BRIEF IN SUPPORT OF  
RESPONDENT'S EXCEPTIONS TO  
THE DECISION AND ORDER ISSUED  
BY JUDGE CHARLES MUHL**

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Submitted this 5th day of May, 2017.

Submitted by:

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METALCRAFT OF MAYVILLE, INC.

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## SUMMARY OF ARGUMENT

The difference between Respondent's position and the Administrative Law Judge (ALJ), Counsel for General Counsel (CGC), and the Union or Charging Party (collectively referred to as "the Three" or "all Three") is whether Wisconsin's Right-to-Work Law (WRTWL) is authorized by §14(b), or is it preempted by § 302. Therefore, if § 302 does not apply and preempt WRTWL, the compelled union membership dues after June 4 are within the reach of § 14(b) and prohibited. Therefore, Respondent's suspension of checkoff until October did not violate the law and it did not commit an Unfair Labor Practice (ULP).

The Three spend most of their effort in discussing the communications, negotiations, and unilateral conduct. However, the real issue is does the WRTWL and § 14(b) authorizing the prohibition of compelled union dues, or does § 302 excuse or preempt the state laws. The linchpin for the Three in support of its legal conclusion relies upon § 302, for without it and the arguments spawned by them, Metalcraft was required to suspend checking off union dues until October under the WRTWL to avoid committing a crime under Wis. Stat. § 111.04 (2015) (*Also see* ALJD page 6). The tension § 302 creates for Respondent's analysis is in the cases cited by the Three. However, these cases are distinguishable because they merely discuss the right and timing of a revocation under § 302, not a new substantive right to prohibit compelled dues in a Right-to-Work State and preemption as argued here. (*See* Respondent's Brief, pages 20-25). Section 302 does not immunize, inoculate, and protect the enforcement of § 25.3 or the continuation of checkoff agreements against § 14(b) and the compelling of the payment of compulsory union dues prohibited by WRTWL.

All Three fail to acknowledge the underlying facts which created the forcible and previously mandatory payment of union dues as a condition of employment prior to June 4

which makes this case unique and distinguishes it from the cases cited by the Three. The dispute here is based on the Three's position that these prior coerced, mandatory, and forced payment of dues paid as a condition of employment can be simply transferred and enforced after June 4, after the effective date of the WRTWL. Respondent disagrees. The Three argue that because of § 302 and the mechanism of checkoff, they can continue to compel and force the employer to collect union membership dues from 100% of Metalcraft employees. That is form over substance, and WRTWL is not preempted to evade the reach of state law as allowed by § 14(b). The common denominator here is that regardless of how you collect the dues, the dues were forced before June 4 and allegedly metastasized after June 4 and continued compelling 100% of Metalcraft employees to pay dues when dues were previously not voluntary, but were obligatory.

The checkoff is a mere mechanism and only a process to collect dues. That is not the issue. The issue is; can you compel and require union dues after June 4 under § 14(b)? Further, you cannot and should not be able to distinguish or separate that moment in time when union dues were compelled and a condition of employment to a period when union dues can only be voluntary. The timing of the signing is important, and this previous coercion to pay union dues is not transferable, by checkoff or otherwise.

## ARGUMENT

### **I. THE THREE FAIL TO GIVE *PENN CORK & CLOSURES, INC.*, 156 NLRB 411 (1965), *ENFORCED* 376 F.2D 52 (2<sup>ND</sup> CIR. 1967), *CERT DENIED* 389 U.S. 843 (1967) (*PENN CORK*) A PROPER ANALYSIS, AND ATTEMPTS TO DISTINGUISH IT ARE NOT RELEVANT TO OUR REVIEW OF PREEMPTION.**

While the Three discuss *Penn Cork*, their analysis does not give a proper reading of either the Board's or the Court's decision. Summarily, all Three contend *Penn Cork*, in light of *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015), has questionable impact. However, *Lincoln*

*Lutheran* is not a § 302 case, and it does not involve a Right-To-Work law. All Three miss the mark. Regardless of the argument of separability in *Lincoln Lutheran*, *Penn Cork* is still good law on subjects affecting our case and preemption. For example, *Penn Cork* without comment by the Three to its holding that § 302 does not immunize checkoff contracts under § 302 (*See Penn Cork*, 376 F.2d 52, 54-56 (2<sup>nd</sup> Cir. 1967)), and the conclusion that based on *Penn Cork*, § 302 would not preempt WRTWL (*See Exceptions and Respondent's Brief to the Board*, Pages 25-28).

Section 302 does not provide a comprehensive and preemptive status regulating checkoff agreements vis-a-vis a RTWL, as here. In *Penn Cork*, the Board and Court restricts the application of § 302 stating,

The union contends that the Board is without authority to brand as an unfair labor practice any checkoff arrangement not illegal under 302. The conclusion does not follow. Congress' determination that only certain checkoff arrangements should give rise to criminal penalties, 302(d), or be enjoined, 302(e), did not immunize all others from scrutiny under 8 by the agency given responsibility for carrying out the declaration of policy in 1.

*NLRB v. Penn Cork & Closures, Inc.*, 376 F.2d 52, 54-56 (2d Cir. 1967). In *Penn Cork*, § 302 has no authority to protect or immunize the union checkoff arrangement, it follows that it has no authority to preempt § 14(b). *Penn Cork* creates a presumption of unenforceability regardless of § 302, and it is seen not as a preemptive right for compelled union dues, but rather the lack of any preemptive effect of checkoff provisions here. The Court held,

[A]dministration of the Act required a general rule, couched if need be in terms of a presumption, which would be available to all employees alike and would avoid the impossible administrative task of exploring the mental processes of thousands of workers.

*Id.* at 56. In *Bedford*, 162 NLRB 1428 (1967) following *Penn Cork* the Board further noted that,

While the facts in *Penn Cork* indicate that the employees resigned from the union, we do not deem such resignation to be a prerequisite to revoking a checkoff authorization.

*Id.* at 1432 n.3. This illustrates that § 302 does not have preemptive authority protecting the checkoff provisions, but does illustrate that checkoff and its status will yield to § 14(b) which is a statutory exception to the federal labor laws, and, as here, gives Wisconsin broad authority to prohibit compelled union dues<sup>1</sup>. Because a checkoff authorization can be barred as a presumption, it follows that § 302 does not apply here and it does not preempt WRTWL.

The U.S. Supreme Court in *Arroyo v. U.S.*, 359 U.S. 419 (1959) held that § 302 was enacted to punish criminal behavior, and when reviewing § 302 the Court stated, “We construe a criminal statute.” (*Id.* at 424-425). Recently, the Court of Appeals for the District of Columbia Circuit on March 23, 2017 in *Stewart v NLRB*, 851 F3d 21 (2017) discussed that § 302(c)(4) is a criminal statute with limited NLRB involvement for only the pivotal timing of an employee’s revocation. Also, Judge Silberman in his concurring opinion stated that the Court owes no deference to the NLRB because § 302(c)(4) is a criminal statute. Judge Silberman further cites *Frito-Lay* 243 NLRB 137, 138 (1979) which he states is citing to *Salant & Salant Inc.*, 88 NLRB 816 (1950) to be interpreted.

## **II. ALL THREE TOTALLY IGNORE *SALANT & SALANT INC.*, (PARIS, TENN) 88 NLRB 816 (1950) (*SALANT*) AND ALL THE NUMEROUS CASES SINCE *SALANT*.**

All Three argue that § 302 preempts WRTWL, and do not even attempt to discuss or distinguish *Salant*’s holding that § 302 has no application here (*See* Exceptions and Respondent’s Brief to the Board, Pages 25-28; Also Brief to ALJ, Pages 75-80).

The Board and the courts have repeatedly stated that § 302 is not determinative of a § 8

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<sup>1</sup> *Penn Cork* and *Bedford* have not been reversed, and are current law today. Tomorrow, however, the reversal of *Lincoln Lutheran* is probable in light of the change in administration as of 2017. *Lincoln Lutheran* reversed a long standing precedent of over 50 years in *Bethlehem Steel*, 136 NLRB 1500 (1962). Easily, *Lincoln Lutheran*, only a year old, could be reversed making *Lincoln Lutheran* no longer the law.

ULP regarding dues checkoff issues. As early as 1950 (and as recently as *Stewart* in 2017) the Board stated in *Salant & Salant* that,

In our opinion, the limitations on checkoff in Section 302 were intended neither to create a new unfair labor practice, nor even to be considered in determining whether checkoff violates Section 8 of the Act. [...] In our opinion, the intent of Congress was rather to leave undisturbed the application by the Board to checkoff, as well as other conduct not specifically proscribed by amendments to Section 8, its preexisting criteria for determining whether such conduct as is engaged in constitutes a violation of the broad proscriptions of Section 8. The intent was neither to supplement, nor to detract from, such proscription of checkoff as Section 8 imposes completely apart from, and independently of, the restrictions on checkoff in Section 302.

*Id.* at 817-818. Here, therefore, § 302 has no preemptive power in a § 8 or § 14 case as here.

Later, the NLRB in *Baggett Industrial* held,

[S]ince *Salant & Salant, Inc.*, 88 NLRB 816 (1950), the Board has consistently held that failure to comply with the requirements of Section 302 does not constitute an unfair labor practice, and is not “even to be considered in determining whether checkoff violates Section 8 of the Act.” 88 NLRB at 817. *See also, Sweater Bee By Banff, Ltd.*, 197 NLRB 805, 811 (1972). *Julius Resnick, Inc.*, 86 NLRB 38 (1949).

*Baggett Industrial*, 219 NLRB 171 at 172 (1975). Later, the court in *Cameron Iron Works Inc.* held,

[T]he Board cannot redress a mere s 302 violation. Pointing out that enforcement of that section is the responsibility of the Department of Justice, the company cites *Salant & Salant*, 1950, 88 NLRB 816, 817, in which the Board stated that “the limitations on checkoff in Section 302 were intended neither to create a new unfair labor practice, nor even to be considered in determining whether checkoff violates s 8 of the Act.” Since we find that, regardless of whether s 302 vests the Board with authority to act, the company and the union committed no unfair labor practices, we decline to add any gloss to that statute.

*NLRB. v. Cameron Iron Works, Inc.*, 591 F.2d 1, 3 (5th Cir. 1979). Section 302 is a criminal statute, and, as the NLRB has consistently held, does not support any analysis of a finding of an ULP, and here, for preemption of a substantive issue such as the enforceability of the WRTWL, which was newly enacted in Wisconsin. Ignoring this precedent by the Three does not eliminate it, nor does it disappear. Section 302 does not immunize checkoff, and it is not operative, but §

14(b) is.

**III. ALL THREE TOTALLY IGNORE *PLUMBERS, LOCAL 141, 252 NLRB 1299 (1980), ENFORCED 675 F.2D 1257 (D.C. CIR. 1982), CERT DENIED 459 U.S. 1171 (1983). (PLUMBERS)***

The ALJ's conclusion that WRTWL is preempted is an overly simplistic conclusion stating that § 14(b) makes no reference to checkoff, and dues checkoff is only addressed in § 302. Respondent cited and discusses *Plumbers* to the ALJ and in its exceptions and brief to the Board<sup>2</sup>. The decision in *Plumbers* ignored by all Three, however, expresses the NLRB's policy that union dues, or even representation fees, constitute compulsory unionism subject to state regulations under Section 14(b) and are not preempted<sup>3</sup>.

The District of Columbia Circuit's enforcement of the order and the Supreme Court's subsequent denial of certiorari extends the reach of § 14(b) to WRTWL to include that the enforcement of compelled union dues under § 25.3 of the CBA, and the "old" checkoff contracts are not enforceable and not preempted. The reasoning of *Plumbers* takes us to our case, that enforcing § 25.3, a provision of the CBA and the "old" check-off contracts signed when dues were a condition of employment and transferred after June 4 are the same as in *Plumbers* for the insistence on seeking to negotiate an enforceable provision of the CBA for representation fees in a RTWL state. If you cannot compel the dues in *Plumbers*, you cannot continue the transfer of compelling of dues in Wisconsin that were transferred after June 4, when before June 4 they were paid as a condition of employment. Whether you are enforcing a contract like § 25.3 and "old" check-off contracts or seeking to compel union dues through negotiating a provision for

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<sup>3</sup> Respondent's Brief to ALJ discussing *Plumbers*, Pages 59-61 and 96-100; Respondent's Exceptions, Page 13 lines 10-11, 13-21 and Brief in Support of Respondent's Exceptions, Pages 3, 5, 16, 17, 18, 32-35.

dues, both are unlawful and both are not mandatory subjects of bargaining.

There is no legal significance to enforcing § 25.3 and the “old” checkoff contracts to override the reasoning in *Plumbers*, nor are the facts in both situations distinct. The reality is both are parallel and compel union dues in a RTWL state. In *Plumbers*, it is the making of the contract provision, and here the transfer and enforcing of an illegal contract. The legal rule in both have the same result, compelled union dues, and both are illegal under the RTWL<sup>4</sup>. The simplistic analysis that § 25.3 and checkoff in and of itself have some preemptive effect, and are somehow protected from the reach of § 14(b) would create a subterfuge and be contrary to the Supreme Court Trilogy that union dues cannot be mandatory, and states can reach and prohibit them. The Three fail to discuss *Plumbers* because it is contrary to their overly simplistic and flawed analysis.

**IV. ALL THREE’S ARGUMENTS OVERLOOK THE U.S. SUPREME COURT HAS PROVIDED STATES THE POWER UNDER SECTION 14(b) TO PROHIBIT ARRANGEMENT AND AGREEMENT FOR DUES DEDUCTION, AND THAT STATES WILL HAVE “THE FINAL SAY AND MAY OUTLAW IT [...]”, BUT SECTION 14(b) GIVES THE STATES POWER TO OUTLAW EVEN A UNION SECURITY AGREEMENT [AGENCY SHOP] THAT PASSES MUSTER BY FEDERAL STANDARDS.” *RETAIL CLERKS INT’L ASS’N, LOCAL 1625, AFL-CIO V. SCHERMERHORN*, 375 U.S. 96, 100, 84 S. CT. 219, 221, 11 L. ED. 2D 179 (1963).**

The Three argue the enforcement of union membership dues is not a union security

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<sup>4</sup> The dissent in *Plumbers*, Judge Mikva’s extensive writings, while citing *SeaPak* limits his discussion of preemption under § 302 to merely the period of revocation. Judge Mikva’s dissent is just that, it is his dissent; that is not the law. Judge Mikva discusses the “free rider” and the “duty of fair representation” when only “representation fees” are charged to find these union fees are lawful and not controlled by § 14(b). Section 302 does not apply here, and *Plumbers* is current Board law with court affirmance. It should be noted that the Union, the IAM, here is seeking full union dues, not just representation fees. Therefore, even Judge Mikva would have found the union’s dues here illegal because they were not representation fees. Judge Mikva would therefore have had to join the majority if it were not a representation fee, and hold that the IAM’s union dues are unlawful.

arrangement or an agreement under § 14(b). However, the enforcement of § 25.3 and the “old” checkoff contracts are union security agreements and arrangements, and are covered by § 14(b) for it is literally in the context of our case “the execution or application of agreements requiring membership in a labor organization”. (See § 14(b)). Core membership and the compelled paying of membership dues is “compelled unionism” under the Trinity<sup>5</sup> as outlined in Respondent’s brief to the Board. (See pages 6-20). “Membership” as used in § 8(a)(3) does not mean actual membership in the union, but rather just the enforcement of § 25.3 for “the payment of initiation fee and monthly dues.” *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). After June 4, the enforcement of the CBA, § 25.3, and the “old” checkoff contracts both without a union security clause transforms them into union security arrangement and agreements under § 14(b). While they may be revocable, they cannot be revoked for at least one year<sup>6</sup>.

The U.S. Supreme Court in *C.W.A. v. Beck*, 487 U.S. 735 (1988) refers to § 8(a)(3) as “conditions regarding the union shop and checkoff” (*Id.* at 750) in comparing the NLRA to the RLA. Further, the Court also in discussing the use of union dues provided “The Board made entirely clear, however, that it was the purpose of the fee, not the manner which it was collected, that control [...]” (*Id.* at footnote 7)

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<sup>5</sup> See *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), *Retail Clerks International Association Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963) (*Retail Clerks I*), and *Retail Clerks International Association Local 1625 v. Schermerhorn*, 375 U.S. 96 (1963) (*Retail Clerks II*) (hereinafter collectively referred to as the “Trilogy”)

<sup>6</sup> Therefore, the compelled payment of union membership dues continues after at least one year. The reality is employees as a condition of employment signed the “old” authorizations and the employees do not know how to revoke their checkoff authorizations. The only employee to testify, Nicole Becker, a Metalcraft Union Representative for seven years, didn’t know how. (Trans. at 113-115). The union does not educate the employees how to revoke, and all Three seek to have the employees never revoke their authorizations and they just continue and continue and continue to automatically deduct dues. That is the reality here!

The transfer of the compelled union dues by a checkoff and the inability to revoke for at least one year makes them unlawful “agency fees” after the passage of WRTWL, and not preempted on the analysis of the Trilogy.

The Supreme Court in *Retail Clerks II* held,

In light of the wording of s 14(b) and this legislative history, we conclude that Congress in 1947 did not deprive the states of any and all power to enforce their laws restricting the execution and enforcement of union security agreements. Since it is plain that Congress left the States free to legislate in that field, we can only assume that it intended to leave unaffected the power to enforce those laws. [...]

Yet even if the union security agreement clears all federal hurdles, the States by reason of s 14(b) have the final say and may outlaw it. [. . .] But s 14(b) gives the states power to outlaw even a union security agreement that passes muster by federal standards.

*Id.* at 102–03. In concluding, the Court stated that Section 14(b) allowed states extensive power to regulate both the execution and *application* of Section 8(a)(3) membership agreements,

Congress, in other words, chose to abandon any search for uniformity in dealing with the problems of state laws barring the execution and application of agreements authorized by s 14(b) and decided to suffer a medley of attitudes and philosophies on the subject.

*Id.* at 104–05. All Three provide that checkoff is a mandatory subject of bargaining. The Three argue that the Act protects the right to require the payment of union dues and checkoff under the Act, 29 U.S.C. § 158(a)(3) and (5). Because the law protects this right under the Act, it also gives states under § 14(b) the right to bar these union dues and the checkoff mechanism to collect these mandatory union dues for the continuation and transfer of an agreement when they were a condition of employment. (*Retail Clerks I*, 373 U.S. 746, 751-52). The Trilogy confirms this right for each state. (*See* Respondent’s Brief to the Board, Pages 3, 6-20).

**VI. ALL OTHER ARGUMENTS IN OUR EXCEPTIONS AND EARLIER BRIEF WILL SUPPORT A REPLY TO THE CGC AND UNION.**

Respondent's position on presumption, specifically § 302 and § 14(b) should dispose of many of CGC's and Union's response to Respondent. The other arguments, many of which CGC or Union never responded to, should be upheld by the Board. They include; the Union was given the chance to negotiate; the Union waived this right to sue Respondent with the exclusionary language. Also, § 8(c) gave Respondent the right to communicate, particularly when the ALJ found Respondent's position to be sound and reasonable. (ALJD p. 23, lines 1-15).

**CONCLUSION**

For the foregoing reasons, Respondent respectfully requests that the Board overturn Judge Muhl's decision, enter an order finding that Respondent did not violate the Act, and dismiss the Complaint herein.

Dated at Milwaukee, Wisconsin, this 5th day of May, 2017.

/s/Thomas P. Krukowski

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