

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VALLEY HEALTH SYSTEM, LLC, d/b/a DESERT
SPRINGS HOSPITAL MEDICAL CENTER, and
VALLEY HOSPITAL MEDICAL CENTER, INC. d/b/a
VALLEY HOSPITAL MEDICAL CENTER,

and

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 1107,

Case Nos.: 28-CA-184993
28-CA-185013
28-CA-189709
28-CA-189730
28-CA-192354
28-CA-193581
28-CA-194185
28-CA-194194
28-CA-194450
28-CA-194471
28-CA-194790
28-CA-195235
28-CA-197426
28-CA-201519

REPLY BRIEF OF CHARGING PARTY
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1107,
TO GENERAL COUNSEL'S ANSWERING BRIEF

JONATHAN COHEN
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, California 91101-3115
Telephone: (626) 796-7555
Facsimile: (626) 577-0124
E-mail: jcohen@rsglabor.com

Attorneys for Service Employees International
Union, Local 1107

I. INTRODUCTION

Charging party Service Employees International Union, Local 1107 (“Union” or “Local 1107”) hereby replies to the General Counsel’s answering brief to Respondents’ exceptions.

As described below, the General Counsel’s answering brief to Respondents’ exceptions raises new arguments that have never been raised before in this proceeding. Such a litigation tactic is plainly prohibited by the Board’s Rules and Regulations, and is obviously unfair. The Board should therefore strike those portions of the General Counsel’s answering brief that raises these new arguments.

That is especially so given that the General Counsel’s new arguments are a 180-degree about-face from the position it has maintained throughout this proceeding. Indeed, although the General Counsel agrees that under current Board law Respondents’ unilateral cessation of dues deductions violated the National Labor Relations Act (“Act”), it simultaneously argues that the Board should adopt a new legal standard under which it contends that Respondents’ conduct would be lawful.

In the event the Board takes the unusual step of addressing the merits of the General Counsel’s arguments, even though they were raised for the first time in an answering brief to exceptions, it should reject its arguments for the reasons described below.

II. ARGUMENT

A. The General Counsel Agrees That the ALJ Correctly Ruled that Respondents’ Unilateral Cessation of Dues Deduction Violated the Act.

The General Counsel agrees that under current Board law, the ALJ correctly ruled that Respondents violated the Act by unilaterally ceasing dues deductions following expiration of the

parties' collective bargaining agreements. General Counsel's Answering Brief to Respondents' Exceptions ("GC Br.") at 40-42. That has been the General Counsel's position throughout this proceeding (until now), and it is the correct one. Indeed, the General Counsel did not file any exceptions to the decision of the ALJ. The Board should therefore sustain the ALJ's ruling that Respondents violated the Act by unilaterally ceasing dues deductions, and decline to reach the contrary arguments raised by the General Counsel.

B. The General Counsel Has Waived Any Exceptions to the ALJ's Decision.

Although the General Counsel agrees that under current law Respondents violated the Act by unilaterally ceasing dues deductions, it urges the Board to adopt two new rules that were never raised at any time until now, and which it believes requires a partial reversal of the ALJ decision. The Board should conclude that these arguments were waived, and strike those portions of the General Counsel's brief that raises these new arguments.

The General Counsel's sudden about-face is prohibited by the Board's rules. Under §102.46(f) of the Board's Rules and Regulations, "[m]atters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding." Because the General Counsel did not file exceptions or cross-exceptions, and failed to raise its current arguments at any time until its answering brief to Respondents' exceptions, it has plainly waived the ability to raise these arguments in this proceeding. *See Oncor Elec. Delivery Co., LLC*, 364 NLRB No. 58, slip op at *1 n.1 (July 29, 2016) ("Because the Respondent failed to raise these arguments in its exceptions or at any earlier point in this proceeding, the arguments are waived."); *1621 Route 22 W. Operating Co., LLC*, 364 NLRB No. 43, slip op. at *1 n.4 (July 13,

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2016) (“The Board’s Rules and Regulations preclude parties from belatedly raising new issues that were not preserved for appeal through the filing of timely exceptions.”).

What’s more, the Board’s rules specifically bar the General Counsel’s attempt to raise these new issues in its answering brief to Respondents’ exceptions. Under § 102.46(b)(2) of the Board’s Rules and Regulations, “[t]he answering brief to the exceptions must be limited to the questions raised in the exceptions and in the brief in support.” Because neither of the new positions addressed by the General Counsel’s answering brief was raised in Respondents’ exceptions, the General Counsel is clearly barred from raising the new positions in its answering brief. *See Indianapolis Mack Sales and Srvce., Inc.*, 288 NLRB 1123 n.3 (1988) (striking General Counsel’s answering brief where the “brief fails to address Respondent’s limited cross exceptions).

Last, basic fairness bars the General Counsel from raising new arguments for the first time in an answering brief to exceptions. This proceeding has been ongoing for more than two years, during which time the General Counsel has consistently taken the position that Respondents’ unilateral cessation of dues deductions violated the Act. Allowing the General Counsel to suddenly and drastically reverse positions at the final stage of the case, after all evidence has been submitted and the record is closed, after exceptions have been filed, and after briefing has been nearly finally completed, would prevent the parties from addressing its arguments in any meaningful fashion other than in their ten-page reply briefs. That is patently unfair, and undermines the basic procedural rights of the parties.

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In short, the General Counsel has clearly waived the argument that Respondents lawfully ceased dues deductions. As a result, the Board should strike the portion of its brief – pages 44 through 50 – which raises these new arguments.

C. The Board Should Reject the General Counsel’s Proposed Changes to Existing Law.

If the Board reaches the General Counsel’s arguments, it should nevertheless reject the General Counsel’s proposed changes to existing precedent for several reasons.

1. The Board Should Adhere to Its Ruling in *Lincoln Lutheran of Racine*.

In *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (Aug. 27, 2015), the Board held that “an employer’s obligation to check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement.” *Id.*, slip op. at *1. It reached that conclusion based, in part, on “settled Board law, widely accepted by reviewing courts, [that] dues checkoff is a matter related to wages, hours, and other terms and conditions of employment within the meaning of Section 8(a)(5) and (d) of the Act and is therefore a mandatory subject of bargaining.” *Id.*, slip op. at *3.

However, the Board acknowledged that its holding did “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 the employer’s statutory duty to maintain the status quo.” *Id.*, slip op at *10 n.28. The Board emphasized that a union’s agreement to waive its “statutory right to bargain over this mandatory subject of bargaining” must be “clear and unmistakable.” *Id.* (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)).

The General Counsel agrees that dues checkoff is a mandatory subject of bargaining. *See* GC Br. at 40. Even so, it urges the Board to partially reverse *Lincoln Lutheran of Racine* and hold that a union’s agreement that an employer may unilaterally cease deducting dues after contract expiration does *not* need to be clear and unmistakable. GC Br. at 43. Based on the more relaxed standard it asks the Board to adopt, the General Counsel argues that under the expired CBAs the parties agreed that Respondents could cease dues deduction following contract expiration.¹ GC Br. at 49-50.

The simplest response to this argument is that *not even Respondents*, the parties to the CBA, have taken that position. As is undisputed from the record, Respondents relied solely and exclusively on the language of employees’ dues checkoff authorizations in unilaterally ceasing dues deductions. *See* Resp. Ex. 22, 24; GC Ex. 16. Respondents have never once argued that the parties agreed in their CBAs that Respondents’ dues checkoff obligation would cease upon expiration of the CBA. Thus, the Board should reject the General Counsel’s newly-minted argument without reaching the continued validity of *Lincoln Lutheran of Racine*.

Furthermore, the “special concerns” identified by the General Counsel do not warrant the change in law the General Counsel seeks. It asserts that dues checkoff should be treated

¹ The sole evidence the General Counsel points to in support of its argument is the language of the parties’ collective bargaining agreements providing that the employer would checkoff dues “[d]uring the life of this Agreement” GC Br. at 49; *see* GC Ex. 12 (Art. 13, § A); GC Ex. 13 (Art. 4, § A); GC Ex. 14 (Art. 4, § A). Notably, as the General Counsel recognizes, GC Br. at 44 n.11, the Board has rejected the argument that such language clearly and unmistakably waives a union’s statutory right to maintain the status quo following contract expiration. *See Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at *8 n. 23; *see also Finley Hosp.*, 362 NLRB No. 102, slip op. at *3-6 (June 3, 2015), *enforcement denied* 827 F.3d 720 (8th Cir. 2016). In any event, because this argument was never raised before, there is no evidence other than the CBAs regarding the parties’ intent concerning post-contract expiration dues checkoff.

differently than other terms and conditions of employment that continue post contract expiration because dues checkoff is “exclusively a product of contract.” GC Br. at 46. In *Lincoln Lutheran of Racine*, the Board specifically rejected the argument that this distinction, if it is a distinction at all, warranted treating dues checkoff differently from other mandatory subjects of bargaining: “[T]he purported distinction between checkoff and other terms and conditions of employment ignores the fact that virtually all, if not all, of employees’ terms and conditions of employment are the result of collective bargaining between their union and employer.” 362 NLRB No. 188, slip op. at *9. As the Board observed, the “economic terms of a collective-bargaining agreement, such as wage rates, are no less contractual requirements than is a dues checkoff obligation. The agreement is the only source of the employer’s obligation to provide those particular wages and benefits.” *Id.* (quoting *Hacienda Resort Hotel & Casino*, 355 NLRB 742, 742 (2010) (concurring opinion of Chairman Liebman and Member Pearce)). In short, an employer’s obligation to refrain from making unilateral changes to mandatory subjects of bargaining has never depended on whether the terms and conditions at issue existed separate and apart from a collective bargaining agreement.

The General Counsel also contends that dues checkoff implicates Section 7 rights, and is therefore different from other types of employer checkoff arrangements such as savings accounts or health insurance. GC Br. at 47. According to the General Counsel, Section 7 rights are implicated because an employee may have agreed to a period of irrevocability in a dues checkoff authorization, and thereby waived his or her right to refrain from supporting a union. *Id.* Again, the Board rejected these same arguments in *Lincoln Lutheran of Racine*. The Board likened dues checkoff to the various types of trust fund payments also permitted by Section 302(c) of the

Labor Management Relations Act, 29 U.S.C. 186(c), which an employer must continue to make following contract expiration. *See Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op at *5-6. Since dues checkoff, like trust fund payments, is permitted by Section 302(c), “parity of reasoning would require a finding that dues-checkoff arrangements can survive the expiration of such an agreement.” *Id.* at *6; *see also id.* at *4 (“Payments via a dues-checkoff arrangement are similar to other voluntary checkoff arrangements, such as employee savings accounts and charitable contributions, which the Board has recognized . . . survive the contracts that establish them.”).

Moreover, the Board rejected the argument that dues checkoff is a waiver of the Section 7 right to refrain from supporting a union. Quite the opposite, the Board observed as follows:

Properly understood, an employee’s voluntary execution of a dues-checkoff authorization is an exercise of Sec. 7 rights, not a waiver of such rights. When an employee authorizes other types of checkoff provided for by a collective-bargaining agreement, he is exercising a right under the agreement--and thus engaging in protected, concerted activity. Exercising that right does not mean waiving the corresponding right to refrain from engaging in protected concerted activity, not least because Sec. 302(c)(4) guarantees that an employee may revoke dues-checkoff authorization when the contract expires.

Id. at *4 n.12. The General Counsel makes no effort to address these points, let alone explain why the Board should reverse course so soon after deciding *Lincoln Lutheran of Racine*.

The General Counsel also contends that dues checkoff is unique among mandatory subjects of bargaining because it implements employees’ free choice to support a union. GC Br. at 47. Other than identifying the distinction, the General Counsel fails to explain why that should mean that an employer deserves greater reign to make changes to dues checkoff post expiration. Indeed, the Board addressed this same contention in *Lincoln Lutheran of Racine*, and concluded

that “there is no reason to suppose that employees who voluntarily support their unions cease to do so simply because a collective-bargaining agreement has expired.” 362 NLRB No. 188, slip op. at *10. If anything, the General Counsel’s argument *undermines* employee free choice by undercutting an employee’s voluntary decision to financially support his or her union. *See id.* (“[T]here is no reason why employees who wish to support their union financially should be denied the administrative convenience of voluntary dues checkoff, simply because the collective-bargaining agreement has expired.”).

Last, the General Counsel contends that discontinuing dues checkoff is a “legitimate economic weapon” for an employer. GC Br. at 47. The Board emphatically rejected the identical argument in *Lincoln Lutheran of Racine*, concluding that “‘unilateral action is not a lawful economic weapon.’” 362 NLRB No. 188, slip op. at *4 n.7 (quoting *Daily News of Los Angeles*, 315 NLRB 1236, 1242 (1994)). The Board further emphasized that “‘[t]o condone such a proposition,’ in the words of the District of Columbia Circuit, ‘would make a mockery of the bargaining process.’” *Id.* (quoting *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 414 (D.C. Cir. 1996)). Again, the General Counsel fails to explain why the Board should reverse course and adopt the very argument it clearly rejected only a few years ago.

2. The General Counsel’s Attempt to Change Existing Law Concerning Revocation of Dues Checkoff Authorization is Not Warranted Based on the Present Record.

Despite admitting that it is “not specifically at issue in this case,” the General Counsel also seeks a change in law regarding employee revocation of a dues checkoff authorization after contract expiration. GC Br. at 48. Specifically, the General Counsel urges the Board to find “unlawful any dues checkoff authorization language that restricts the statutory right of employees

to revoke their authorization at expiration of a current contract or during a period in which no collective bargaining agreement is in effect.” GC Br. at 48.

Just like the other change in law the General Counsel seeks, it never once raised this argument prior to its answering brief to Respondents’ exceptions. Thus, for the same reasons described above, the Board’s Rules and Regulations, not to mention basic procedural fairness, prevent the General Counsel from raising a significant new issue in this case at this very late stage. *See* Board Rules and Regulations, §§ 102.46(b)(2), (f).

Furthermore, adopting such a rule in this case is entirely unnecessary to resolve whether Respondents violated the Act. Neither Respondents nor the General Counsel presented any evidence that an employee had ever tried to revoke his or her dues checkoff authorization after contract expiration, let alone that the Union denied an employee the ability to revoke his or her authorization after contract expiration. Nor did Respondents or the General Counsel present evidence that the Union had ever construed the dues checkoff authorizations as restricting revocation after contract expiration, or that such revocations were limited to a “window period.”

As a result, adopting the General Counsel’s proposed new rule in this case would not affect the outcome at all, which likely explains why the General Counsel admits that its proposed rule is “not specifically at issue in this case” GC Br. at 58. Hence, the Board should refrain from deciding an issue that is not presented by this case, was not addressed by the ALJ, has not been litigated by any of the parties.

III. Conclusion

The Union respectfully requests that the Board reject the General Counsel’s proposed changes to existing precedent. Furthermore, for the reasons identified in the Union’s answering

CERTIFICATE OF SERVICE

The undersigned, hereby certifies that on January 10, 2019, the foregoing **Reply Brief of Charging Party Service Employees International Union, Local 1107 to General Counsel's Answering Brief** was filed electronically with the National Labor Relations Board at www.nlr.gov and duly served electronically upon the following named individuals:

Sara Demirok, Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Email: Sara.demirok@nlrb.gov

Stephen Kopstein, Counsel for the General Counsel
National Labor Relations Board
Las Vegas Resident Office
Foley Federal Building
300 Las Vegas Blvd. S., Suite 2-901
Las Vegas, NV 89101
Email: Stephen.kopstein@nlrb.gov

Thomas H. Keim, Jr.
Ford & Harrison, LLP
100 Dunbar Street, Suite 300
Spartanburg, South Carolina 29306
Email: tkeim@fordharrison.com

Henry F. Warnock
Ford & Harrison, LLP
271 17th Street, NW, Suite 1900
Atlanta, GA 30363
Email: hwarnock@fordharrison.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 10, 2019, in Pasadena, California.



DOROTHY A. MARTINEZ