

Nos. 18-2013, 18-2105

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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COUNTY CONCRETE CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

LOCAL 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Intervenor

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ON PETITION FOR REVIEW AND  
CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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**JURISDICTIONAL STATEMENT**

This case is before the Court on the petition of County Concrete Corporation (“the Company”) to review an order issued by the National Labor Relations Board

(“the Board”) against the Company, and the Board’s cross-application to enforce that order. The Board’s Decision and Order issued on April 20, 2018, and is reported at 366 NLRB No. 64. (A. 21-31.)<sup>1</sup> The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the Act, 29 U.S.C. 160(a), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board’s Order is final with respect to all parties. The Court has jurisdiction over this appeal under Section 10(e) and (f) of the Act, 29 U.S.C. §160(e) and (f). Venue is proper because the Company transacts business in this Circuit. The petition and application were both timely because the Act imposes no time limits for such filings. The charging party before the Board, Local 863, International Brotherhood of Teamsters (“the Union”), has intervened on the Board’s behalf.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally modifying the effective date of the dues-checkoff provisions contained in agreed-upon collective-bargaining agreements with the Union, and by failing to collect and remit authorized dues to the Union in January and February 2016.

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<sup>1</sup> “A” references are to the Joint Appendix filed by the Company. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

## **STATEMENT OF RELATED CASES**

This case has not been before this Court previously, and the Board is unaware of any related case as defined in L.A.R. 28.1(a)(2).

## **STATEMENT OF THE CASE**

Acting on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unilaterally modifying the effective date for the check-off of union dues from the wages of employees who have authorized such deductions, as required under collective-bargaining agreements entered into by the Company and the Union, and by failing and refusing to remit those dues payments to the Union. (A. 23; 301-07, 311.) After a hearing, an administrative law judge issued a decision and recommended order finding that the Company committed those violations. (A. 23-31.) On review, the Board affirmed the judge's rulings, findings, and conclusions, and adopted the recommended Order, with modifications. (A. 21-31.)

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. Background; in November 2015, the Union and the Company Agree to All Terms of Collective-Bargaining Agreements that Require the Company To Begin Collecting and Remitting Union Dues on January 1, 2016**

County Concrete, a ready-mix concrete sales and transportation company, operates multiple facilities in New Jersey. (A. 23; 142-43, 237, 294, 301-04.) On May 12, 2009, the Company voluntarily recognized the Union as the exclusive collective-bargaining representative for its drivers, mechanics, laborers, and heavy equipment operators employed at its facilities, which currently includes 146 employees. (A. 23; 134-36, 142-43, 237-39, 294, 301-04, 317-20, 768.)

In June 2009, the parties began negotiations for an initial collective-bargaining agreement. The parties agreed that they would use, as a template, a prior bargaining agreement between the Company and the International Brotherhood of Teamsters Local 408, which had previously represented the Company's employees. Bargaining focused on economic issues and the parties eventually agreed that they would have five separate agreements to reflect differences in work performed at the different company facilities, but that most of the provisions set forth in the template would remain the same for each agreement. (A. 23; 137-48, 207-08, 242, 321-508.) The template, incorporated into bargaining proposals, had a dues-checkoff provision that provided, in relevant part, that "during the life of this agreement the employer agrees to deduct once each month

from the employees' wages and remit to the [u]nion monthly dues." (A. 23; 138-41, 324, 340, 357, 371, 389, 408, 427, 446, 465, 483.)

In May 2015, after nearly six years of extensive negotiations, the Company sent the Union a "final offer" that listed a variety of proposed changes to the template, none of which modified the template's dues-checkoff provision. (A. 23-24; 149, 510-15.) On November 8, the union membership ratified the Company's final offer. (A. 24; 141, 149-51, 239-41, 516.)

After the ratification vote, Union Secretary-Treasurer Alphonse Rispoli called company counsel Desmond Massey to inform him of the Union's ratification. During the conversation they agreed that the five bargaining agreements would be effective November 8 and that Massey would draft them. (A. 24; 151-54, 239-40.) Rispoli also spoke with Company President John Crimi, who confirmed that the parties would use November 8 as the effective date for the agreements and that Massey would draft them. Rispoli agreed with Crimi's proposal to start dues deductions on January 1, 2016. Crimi also stated that the Company would distribute authorization cards provided by the Union which employees could sign to permit union dues payments to be deducted from their wages. (A. 24; 154-56, 236, 517-19.)

In a letter to the Company dated December 1, Rispoli confirmed that dues deductions would begin on January 1, 2016. (A. 156-57, 251, 517.)

**B. In December 2015, the Company Provides the Union with Draft Copies of the Bargaining Agreements Under Which the Collection and Remittance of Union Dues Begins on January 1, 2016; the Union Signs and Returns the Agreements**

On December 22, Kurt Peters, the Company's in-house counsel, sent Rispoli two "execution copies of each of the [five] collective-bargaining agreements." (A. 24; 165-68, 531-606.) The five agreements were consistent with the terms the parties agreed to in November. Specifically, all of the agreements stated that they were effective November 8, 2015. (A. 24; 165-68, 532, 534, 547, 549, 562, 577, 579, 592, 594). And Article 3 of each agreement, entitled "Dues Check-Off," stated:

[T]his Article 3 is effective January 1, 2016. Thereafter and during the remainder of the life of this Agreement . . . the [Company] agrees to deduct once each month from the employees' wages and remit to the . . . Union monthly dues . . . levied by the . . . Union.

(A. 24; 165-68, 535, 550, 565, 580, 595.) In an accompanying letter, Peters confirmed that the Company "added the effective date of November 8, 2015 (which you have told us is the date the members ratified the [agreements]) and set January 1, 2016 as the start date for dues." (A. 24; 531.) In the letter, Peters also asked Rispoli to "execute both copies [of each agreement] and return them to me so I can have [President] Crimi sign them when he returns from his vacation." (A. 24; 531.) Rispoli signed the agreements sent to him by the Company and returned them by express mail to Peters on January 13, 2016. (A. 24; 168-71, 607-705.)

**C. In January 2016, the Union Submits Signed Dues Authorization Forms to the Company that It Began Collecting in December 2015**

Although the Company initially informed the Union in November 2015 that it would distribute dues-checkoff authorization forms to employees, in December, it informed the Union that it would not distribute the forms. Thereafter, the Union requested a seniority list from the Company that it could use to distribute the forms. (A. 24; 153, 155-59, 520.) After receiving the seniority list, the Union sent two of its business agents to the Company's various facilities to distribute dues-checkoff authorization forms to the union's stewards at each facility. The Union had difficulties obtaining signed authorization forms from some employees because the seniority list, and a subsequent revised list, contained inaccuracies. Nevertheless, during December, the Union collected approximately 100 signed authorizations from employees. (A. 24; 160-65, 171-72, 180, 267-68, 521-30.)

The form distributed by the Union contained two sections. One section, entitled, "Application for Membership," states, "I hereby make application for admission to membership so that the . . . Union may represent me for the purpose of collective bargaining," and "authorize my employer to deduct my dues from my wages and pay them to [the Union]." (A. 25, 518, 707-33.) A second section, entitled "Checkoff Authorization and Assignment," provided authorization for the Company to deduct from the employee's "wages each and every month an amount equal to the monthly dues, initiation fees, and uniform assessments of [the Union],

and direct such amounts so deducted to be turned over each month to the [Union].” (A. 25; 518, 707-33.) That section further stated that the “authorization is voluntary and is not conditioned on my present or future membership in the Union.” (A. 25, 518, 707-33.)

**D. The Company Fails To Deduct or Remit Union Dues in January and February 2016**

In January, Rispoli informed Attorney Peters and Vice-President John Scully that the applicable formula for union dues was 2.5 percent of the employee’s hourly rate plus \$1. They informed Rispoli that the Company wanted to straighten out the seniority list before submitting dues. (A. 26; 172-74.) During a subsequent phone call, President Crimi asked Rispoli to waive the January dues absent the Union having provided a full accounting of dues forms. Rispoli declined. (A. 26; 187-88, 219-21, 273.)

On January 20, the Union emailed copies of 102 signed dues authorization cards to the Company. (A. 21 n.1, 26; 175, 707-33.) The Union continued to collect authorization forms throughout January, and by letter dated February 3, the Company confirmed receipt of dues-checkoff authorizations for 125 employees. (A. 26; 181-82, 768-71.) On February 6, the Union responded with a complete dues-accounting sheet, listing each union member for whom they had an authorization card, with their wage rate, and the dues owed. The Union requested remittance of the dues by February 15. (A. 26; 177-78, 214-18, 231-32, 736-67.)

By mid-February 2016, the Company had not remitted any dues payments to the Union, nor had it provided the Union with signed copies of the collective-bargaining agreements. Rispoli called Attorney Peters and asked when the Union would receive the dues payments and the signed agreements. Peters replied that he was “working on” the agreements. (A. 26; 182-83.)

**E. In March 2016, the Union Receives Signed Agreements in Which the Company Unilaterally Changed the Agreed-Upon Date to Start Dues Collection from January to March 2016; in April 2016, the Company Remits March and April Dues**

In a February 26 letter, Attorney Peters informed Rispoli that “the date dues will be initially collected . . . must be changed in all of the [agreements] to March 1, 2016.” (A. 27; 798-99.) After receiving the letter, Rispoli called Peters. Peters reiterated that the Company would change the effective date for dues deduction from January 1 to March 1. Rispoli replied that their agreement back in November, was for dues to be deduced and remitted as of January 1, and stated that the Union would not agree to any change in the date. (A. 27; 187-88.) Rispoli then called President Crimi, who expressed surprise that the Union had not yet received the agreements because he had signed them. (A. 27; 189.)

In a letter dated March 4 from Vice-President Scully to Rispoli, the Company enclosed collective-bargaining agreements signed by President Crimi. (A. 27; 801-901.) In Article 3 of each agreement, entitled “Dues Check-Off,” Crimi crossed out “January 1, 2016,” as the effective date for the clause to take

effect, and hand wrote in the words “effective March 1, 2016.” (A. 27; 805, 825, 845, 865, 885.) In the accompanying cover letter Scully wrote, “[a] small change has been made. . . . [President] Crimi has changed the dues check off date from January 1, 2016 to March 1, 2016 to reflect the date of the initial execution of the [agreements] by both parties.” (A. 27; 229, 801.) In the letter, Scully also asked the Union to initial the changes in its set of the agreements and forward an updated copy.” (A. 27; 801.) Rispoli returned the agreements to the Company with the word “January” written back in as the effective month for Article 3. (A. 27; 195-96, 922-1002.)

On March 9, the Union emailed the Company its dues-accounting sheet outlining dues payments owed for March.<sup>2</sup> On April 12, the Company remitted March dues to the Union. On April 19, the Company remitted April dues payments. (A. 27; 196-97, 224-28, 231-36, 1003-06.)

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<sup>2</sup> The accounting sheet contained separate ledgers for those employees who selected financial-core status and those employees who selected full-membership status. As explained below (p. 27 n.5), an employee who selects financial-core membership does not pay full union dues. Rather, the employee pays dues that reflect only a union’s costs germane to representing the unit employees. Here, about 35 employees selected financial-core status, and thus paid anywhere between \$37 and \$42 per month in dues, whereas full members paid between \$46 and \$52 per month. (A. 27; 277-88.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On April 20, 2018, the Board (Members Pearce, Kaplan, and Emanuel) issued its Decision and Order finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by modifying the effective date of the dues-checkoff authorization provisions in the collective-bargaining agreements. (A. 21-23.) The Board further found, in agreement with the judge, that the Company violated Section 8(a)(5) and (1) by failing and refusing to collect authorized dues from January 1 through March 1, 2016, and remit them to the Union. (A. 21-23.)

The Board's Order requires the Center to cease and desist from the unfair labor practices found, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. (A. 22.) Affirmatively, the Board's Order directs the Company to reimburse the Union for losses resulting from the Company's failure to deduct and remit union dues in January and February 2016. (A. 22.) The Order also requires the Company to post a remedial notice. (A. 22.)

## STANDARD OF REVIEW

The scope of the Court’s inquiry in reviewing a Board order is quite limited. The Board’s findings of fact are conclusive if supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act, 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 606 (3d Cir. 2016). The Board’s factual findings, and the reasonable inferences drawn from those findings, are not to be disturbed, even if the Court would have made a contrary determination had the matter been before it de novo. *Universal Camera*, 340 U.S. at 488; *Citizens Publ’g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001). Further, the Court “defers to the Board’s credibility determinations and will reverse them only if they are incredible or patently unreasonable.” *Advanced Disposal*, 820 F.3d at 606 (citations and internal quotation marks omitted). Finally, the Board’s legal conclusions must be upheld if based on a “reasonably defensible” construction of the Act. *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

## **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by modifying the effective date of the dues-checkoff provisions in the collective-bargaining agreements with the Union, and by failing and refusing to deduct and remit authorized dues in January and February 2016. The undisputed record evidence establishes that the Union ratified the Company's final collective-bargaining proposal on November 8, 2015, which the parties thereafter agreed was the effective date of their agreements and that deductions for dues for employees who authorized checkoffs would begin January 1, 2016. Consistent with the Union's ratification and the parties' agreement regarding the start date for dues-checkoff, the Company drafted the five bargaining agreements that set forth January 1, 2016, as the effective date for it to begin remitting dues. Despite timely receiving 125 dues authorization forms by the end of January, the Company failed to deduct and remit any dues to the Union in January and February 2016. Instead, the Company unilaterally modified the five agreements to begin collecting dues on March 1, 2016. In these circumstances the Board was fully warranted in finding that the Company unlawfully evaded its contractual obligations by failing to remit dues in January and February, and further acted unlawfully by modifying the agreements to begin dues collection in

March, thereby overriding the parties' agreed-upon terms without the Union's consent.

The Board reasonably found no merit to the Company's affirmative defenses and rejected them. Thus, contrary to the Company's contention, it was obligated by the agreed-upon terms of the collective-bargaining agreements to remit dues on January 1, 2016, even though the parties' process of executing the agreements had not yet been completed. Further, the Board reasonably rejected the Company's reliance on cases involving union-security clauses, which simply have no application here. And in fairness, the Company is in no position to rely on its own dilatory tactics in signing the very agreements that it prepared and which contained the effective date for dues check-off to which the parties had agreed back in November. Likewise, the Board did not err by requiring the Company to remit dues prior to the Union fully informing the employees of their rights regarding union membership and dues. As the Board found, whether the employees timely received such information may affect the amount of dues that they owe, which can be adjusted, but does not relieve the Company of its contractual obligations to adhere to the agreed-upon terms of its collective-bargaining agreements.

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY MODIFYING THE EFFECTIVE DATE OF THE DUES-CHECKOFF PROVISIONS, AND BY FAILING AND REFUSING TO COLLECT AND REMIT AUTHORIZED DUES IN JANUARY AND FEBRUARY 2016**

#### **A. Where Parties Have Agreed on a Term and Condition of Employment Through Collective Bargaining, the Employer Cannot Alter the Term Without the Union’s Consent**

Section 8(d) of the Act, 29 U.S.C. § 158(d), provides that an employer has a statutory obligation to bargain in good faith with the representative of its employees over mandatory terms and conditions of their employment, and a dues-checkoff arrangement is subject to the good-faith bargaining requirement. *Tribune Publishing*, 351 NLRB 196, 197 (2007), *enforced*, 564 F.3d 1330 (D.C. Cir. 2009). Accordingly, in turn, an employer violates Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing or refusing to fulfill that statutory bargaining obligation.<sup>3</sup>

Further, under that statutory scheme, parties have a duty to honor their collectively bargained agreements. As Section 8(d) of the Act provides, no party to such an agreement is required “to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period.” 29 U.S.C. §

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<sup>3</sup> A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *Citizens Publ’g & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3d Cir. 2001).

158(d); *see also Chesapeake Plywood, Inc.*, 294 NLRB 201, 212 (1989) (“A party is not required to rebargain that which has already been secured to him by binding past agreement”), *enforced in relevant part*, 917 F.2d 22 (4th Cir. 1990).

Accordingly, it is an unfair labor practice in violation of Section 8(a)(5) for a party to modify the terms of a collective-bargaining agreement unilaterally. *NLRB v. Ford Bros., Inc.*, 786 F.2d 232, 233 (6th Cir. 1986); *Chesapeake Plywood*, 294 NLRB at 201, 211-12; *Safelite Glass*, 283 NLRB 929, 939 (1987). The prohibition on non-consensual midterm modifications reflects Congress’ intent to “stabilize collective-bargaining agreements.” *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 186 (1971); *see also NLRB v. Keystone Steel & Wire*, 653 F.2d 304, 307 (7th Cir. 1981) (“Industrial stability depends, in part, upon the binding nature of collective bargaining agreements.”).

The Board has defined “modification” for Section 8(d) purposes to include “a change that has a continuing effect on a basic contractual term or condition.” *St. Vincent Hosp.*, 320 NLRB 42, 44 (1995); *see also C & S Indus., Inc.*, 158 NLRB 454, 458 (1966) (same). Such modifications include both express changes to contractual terms, *St. Vincent Hosp.*, 320 NLRB at 42, and failures to implement such terms so as to “effectively terminat[e]” them, *Link Corp.*, 288 NLRB No. 132, 1988 WL 213934, at \*2 (1988), *enforced mem.*, 869 F.2d 1492 (6th Cir. 1989).

Even a temporary suspension of contractual employment terms can constitute a midterm modification. *E.G. & G. Rocky Flats, Inc.*, 314 NLRB 489, 497 (1994).

To determine if parties have reached an agreement, the Board looks to whether their actions and communications reflect an intent to be bound. *United Bhd. of Carpenters & Joiners, Local 405*, 328 NLRB 788, 793 (1999). Acting to implement agreed-upon terms is evidence of such intent. *Id.* The Board's standard is an objective one, based on what a reasonable party would understand under the circumstances; the parties' unexpressed, subjective intentions are not relevant. *TTS Terminals, Inc.*, 351 NLRB 1098, 1101 (2007).

In conducting that analysis, "the Board is not bound by technical questions of traditional contract interpretation." *NLRB v. World Evangelism, Inc.*, 656 F.2d 1349, 1355 (9th Cir. 1981); accord *Wyandanch Engine Rebuilders, Inc.*, 328 NLRB 866, 875-76 (1999). The relationship between an employer and a union is governed by the Act and its underlying principles of encouraging agreement and promoting stable, ongoing industrial relations. *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89 (8th Cir. 1981); *Lozano Enters. v. NLRB*, 327 F.2d 814, 818 (9th Cir. 1964). Unlike parties negotiating an arms-length commercial contract, an employer and a union have a statutory duty to bargain throughout the course of their relationship—and to do so in good faith and exclusively with each other.

*Presto Casting Co. v. NLRB*, 708 F.2d 495, 497-98 (9th Cir. 1983); *Pepsi-Cola Bottling*, 659 F.2d at 89.

The parties' ongoing statutory obligation, rather than the formalities of the common law of contracts, is what guides the process of negotiation and agreement in this context. As a result, "[t]he Board is free to use general contract principles adapted to the collective bargaining context to determine whether the two sides have reached an agreement." *World Evangelism, Inc.*, 656 F.2d at 1355; *see also Presto Casting*, 708 F.2d at 497-98 (explaining that the "policies of the Act dictate that this process not be encumbered by undue formalities"). Thus, for purposes of the Board's Section 8(a)(5) analysis, the "crucial inquiry is whether the two sides have reached an 'agreement,' even though that 'agreement' might fall short of the technical requirements of an accepted contract." *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138, 141 (9th Cir. 1976). Accordingly, when the parties have been found to have agreed to the substantial terms and conditions of a contract, they can be held to the terms of that agreement even though it may not been reduced to writing. *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514, 524-26 (1941); *NLRB v. New-York-Keansburg-Long Branch Bus Co., Inc.*, 578 F.2d 472, 476-77 (3d Cir. 1978).

**B. The Board Reasonably Found that the Company Modified Its Agreements with the Union Regarding Dues Checkoff Without the Union's Consent**

Ample undisputed evidence supports the Board's finding that "the [Company] and the Union reached an agreement in November 2015 that deductions of dues for employees who authorized checkoffs would begin January 1, 2016." (A. 21 n.1.) Thus, the record establishes that during lengthy negotiations, the parties never altered language used in a template from a prior bargaining agreement between a different union and the Company that required the Company to remit union dues. Thereafter, on November 8, 2015, the union membership ratified the Company's final offer that made certain modifications to the template, but no modification to the Company's requirement to deduct and remit union dues.

Critically, the Company does not dispute the Board's finding that after the Union's ratification, it then orally agreed to draft each of the five specific bargaining agreements "with an effective date of November 8, 2015 and a date for dues deductions and remittances to commence on January 1, 2016." (A. 29.) Indeed, both Company Counsel Massey and Company President Crimi confirmed in conversations with Union Secretary-Treasurer Rispoli that the agreements would be effective November 8, 2015, the date of the Union's ratification of the Company's final offer. In addition, Crimi further confirmed with Rispoli that dues

collection would begin January 1, 2016. In sum, as the Board found, “the parties reached a meeting of the minds on all substantive issues and material terms in November 2015,” including the Company’s obligation to begin collecting and remitting union dues on January 1, 2016. (A. 21 n.1.)

Moreover, the Company demonstrated an intent to be bound by the January effective date to begin collecting and remitting union dues. Thus, in December, consistent with the parties’ oral agreement, company in-house counsel Peters provided the Union with copies of five bargaining agreements that were effective November 8, 2015, and that, by their terms, required the Company to begin remitting dues payments on January 1, 2016. In an accompanying cover letter, Peters specifically highlighted the effective dates of November 8, 2015, for the agreements, and January 1, 2016, for the checkoff of union dues.

The undisputed facts further establish that the Company did not collect and remit dues in January or February. Thus, the Company does not dispute, as the Board found, that “[b]y the end of January, the [Company] had received 125 signed dues-checkoff authorizations.” (A. 21 n.1.) Nor is there any dispute, as the Board further found, that “upon receipt of these authorizations . . . [the Company] refused to deduct dues for any employee for the months of January and February.” (A. 21 n.1.) Rather than beginning to collect and remit union dues in January, the Company instead unilaterally modified the agreements to begin dues collection and

remittance in March, and refused to collect and remit dues to the Union in January and February.

In these circumstances, the Board was fully warranted in finding that the Company “violated Sec[ti]on 8(a)(5) and (1) of the Act by modifying the dues-checkoff provisions of its collective-bargaining agreements with the Union and by refusing to deduct and remit dues to the Union in January and February 2016 in accordance with those agreements.” (A. 21 n.1.) *See Shen-Mar Food Prods., Inc.*, 221 NLRB 1329, 1329 (1976) (finding that, where an employer fails to deduct and remit dues in derogation of an existing contract, it is in effect “unilaterally changing the terms and conditions of employment . . . and thus violates Section 8(a)(5) of the Act”), *enforced in relevant part*, 557 F.2d 396 (4th Cir. 1977); *Hearst Corp. Capital Newspaper*, 343 NLRB 689, 693 (2004) (“An employer violates Section 8(a)(5) by ceasing to deduct and remit dues in derogation of an existing contract”).

**C. The Company’s Contentions Are Without Merit**

**1. The Board did not err by requiring the Company to remit dues prior to when it signed the collective-bargaining agreements**

The Company incorrectly contends (Br. 18-25) that the Board acted contrary to Board precedent by requiring it to collect and remit dues after it received dues-authorization forms from unit employees, but prior to it signing the collective-

bargaining agreements in late February 2016. As the Board noted, the Company supports its argument by relying “on cases pertaining to union-security clauses” (A. 21 n.1), which are clauses in collective-bargaining agreements that require union membership, and are legally distinct from questions of dues checkoff. In that context, the Board has held that “a union-security clause may not be applied retroactively,” and that “the date of execution, not the effective date of a collective-bargaining agreement, governs the validity of such a clause.” *Local 32B-32J, SEIU*, 266 NLRB 137, 138 (1983); *see also, Peoria Newspaper Guild, Local 86*, 248 NLRB 88, 91 (1980) (“[T]he Act does not sanction the retroactive application of a union-security clause and . . . the date of a contract’s execution, . . . not its retroactive ‘effective’ date, must govern the validity of such a clause.”)

Here, in contrast, as the Board explained “this case involves employees’ voluntary decision to authorize dues checkoff, not the enforcement of a mandatory union-security provision.” (A. 21 n.1.) In the context of the deduction and remittance of union dues, Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, which generally prohibits payments from employers to a union, includes an express exception for the payment of union membership dues. Specifically, Section 302(c)(4) permits an employer to deduct union membership dues from employees’ wages and remit those moneys to their exclusive collective-bargaining representative. 29 U.S.C. § 186(c)(4). Accordingly, employees and

their employer can enter into individual written agreements (dues-checkoff authorizations), which instruct the employer, for a period, to deduct union dues from employees' wages and remit those dues to the union that represents them. *See IBEW, Local 2088 (Lockheed Space Operations Co.)*, 302 NLRB 322, 325, 328-39 (1991).

The Board has long held, as it noted here, “that an employee’s decision to authorize the deduction of moneys to be remitted to a union is separate and distinct from the issue of union membership.” (A. 21 n.1.) Indeed, as the Board has explained, dues checkoff “does not, in and of itself, impose union membership or support as a condition required for continued employment.” *Shen-Mar Food Prods.*, 221 NLRB at 1330; *see also IBEW Local 2088*, 302 NLRB at 328 (“recogniz[ing] that paying dues and remaining a union member can be two distinct actions.”) As shown above, the Company and the Union reached an agreement in November 2015 for the Company to begin deducting and remitting union dues on January 1, 2016, from the wages of those employees who subsequently authorized such deductions. Thereafter, the Company failed to comply with that effective date, despite having received 125 dues authorizations forms executed by employees.

Moreover, even putting aside that union membership and authorizing dues checkoff are two distinct matters that can operate independently from each other,

the cases relied on by the Company would not require a different result. In *Local 32B-J, SEIU*, 266 NLRB 137 (1983) (cited at Br. 18-20, 24), the employer and the union negotiated an agreement that was “finalized in a letter of acceptance on March 27, 1981,” and made retroactive to July 1, 1980. *Id.* at 138. During the months of March and April, most of the employees in the bargaining unit signed dual purpose cards for the union, under which they agreed to become union members and authorized dues payments. The employer maintained that pursuant to an agreement with the union, dues deductions were to commence on March 1, 1981; however, the union alleged that dues were to commence retroactively to July 1, 1980. *Id.* at 138. In finding that the union committed an unfair labor practice, the Board noted that while “an employee may voluntarily pay dues for a period prior to the execution of a collective-bargaining agreement, that freedom of choice has not been afforded to the employees in the instant case” because the employees were not given “the choice to refrain or not from paying retroactive dues.” *Id.* at 139. The Board further explained, “[i]nasmuch as any dues obligation under the union-security clause herein could only have started to accrue from the date of the contract’s execution March 27, 1981, and not the date to which the contract was made retroactive July 1, 1980,” no obligation to pay or remit dues existed prior to March of 1981. *Id.*

Thus, on the facts of that case, the employer could not collect and remit union dues prior to the parties executing the contract through a “letter of acceptance” absent the employees providing such permission. Here, the Union’s ratification of the Company’s final offer and it thereafter informing the Company of the ratification is akin to the “letter of acceptance” in *Local 32 B-J* that made the bargaining agreement effective. Moreover, the Board is not ordering the Company to retroactively collect dues. Rather, the Board’s order simply requires the Company to collect dues starting in January 2016, an action that is fully consistent with the agreement the parties reached in November 2015 to start the collection and remittance of authorized dues on January 1, 2016.

The Company’s reliance on *Peoria Newspaper Guild, Local 86*, 248 NLRB 88 (1980) (cited at Br. 18, 24), is equally misplaced. In that case, the Board found that the union unlawfully sought the discharge of an employee who had resigned his membership in the union at a time when a contract binding him to continued membership was not in force. Specifically, the employee resigned from union membership prior to both the union’s ratification of a contract and prior to the parties’ execution of the contract. The Board examined the language of the union-security clause in question and found that it did not support the union’s contention that the contract’s retroactive date, rather than the date it became “an effective contract binding on [the employer],” was controlling. *Id.* at 91. The Board further

found that the contract became binding either upon “its execution by the parties . . . or arguably [earlier] . . . when it was ratified by the [union’s] membership.” *Id.*

Thus, fully consistent with this case, the Board in *Peoria Newspaper* recognized that a bargaining agreement could be effective based on a union’s ratification. Moreover, as the Board explained here, “there is no evidence to support the conclusion that [the Company] could properly rely upon the contract’s execution date (which was in its exclusive control), rather than its agreed-to effective date to give the clause effect.” (A. 30.) To the contrary, the language at issue in the union-security clause of each agreement here refers to membership during the “terms of this Agreement” (A. 610, 629, 649, 669, 689), and it is apparent that the parties had a meeting of the minds in November regarding all terms and conditions of employment, including the effective date for dues checkoff on January 1, 2016.

In sum, the Company’s attempt to avoid its contractual obligations, based on terms and conditions proposed by the Company, ratified by the Union, and set forth in the very agreements that it drafted and forwarded to the Union, rings hollow. Indeed, the Company, as it acknowledges (Br. 23-24), would have acted unlawfully had it simply declined to sign the agreements and failed to implement its terms. Here, it was equally unlawful for the Company to sign the agreements

previously agreed to, but only after unilaterally changing the agreed-upon start date for deducting and remitting union dues.<sup>4</sup>

**2. The Board did not err by requiring the Company to remit dues prior to the Union fully informing employees of their rights regarding union membership and dues**

The Company next contends (Br. 25-29) that the Board erred by requiring it to collect and remit dues prior to the Union fully informing employees of their rights regarding membership and the payment of union dues. The Board reasonably rejected the Company's contention. In doing so, the Board noted that the Union did not timely provide notices known as "*General Motors*" and "*Beck*" notices when it distributed the dues authorizations forms to the unit employees. (A. 21 n.1.) Such notices provide unit employees with notice of their rights to be a nonmember or to become a financial-core member, who only pays dues for a union's collective-bargaining responsibilities.<sup>5</sup> The Board reasonably found,

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<sup>4</sup> The complaint did not allege that the Company's delay in signing the agreements constituted a separate unfair labor practice. The Board did, however, reject the Company's attempt to justify its unilateral change by relying on its own "dilatatory tactics" in signing the very agreements that it drafted. (A. 30.)

<sup>5</sup> A union is required to inform employees, when it first seeks to obligate them to pay dues and fees under a union-security clause, of their rights under *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), to be and remain nonmembers of the union. At the same time, it must inform them of their corresponding rights, as nonmembers under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to paying for union activities that are not germane to the union's duties as collective-bargaining representative, and to obtain a reduction-in-dues for such

however, that the Union’s conduct did not excuse the Company’s failure to collect and remit union dues. (A. 21 n.1.) As the Board explained, “[a]lthough the Union’s failure to provide employees with a *General Motors* and *Beck* notice may affect the amounts it was entitled to receive . . . it does not justify the [Company’s] failure to comply with the agreed-upon contract term to deduct dues.” (A. 21 n.1.) Yet here, as the Board found, “[t]he [Company] made no attempt to honor its contractual obligation.” (A. 21 n.1.)

The Board’s finding is not undermined by the Company’s professed concern (Br. 28) that it risked violating the Act if it collected dues prior to the unit employees receiving *General Motors* and *Beck* notices. The Company has not cited any case where an employer was found to have acted unlawfully by collecting dues where a union has not properly provided those notices to the unit employees. To the contrary, even where a union does not timely provide *General Motors* and *Beck* notices, the Board has held that a union is still entitled to collect

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activities—that is, to become financial-core rather than full members of the union. Such members cannot attend union meetings, hold union office, or vote in union elections. *See generally California Saw & Knife Works*, 320 NLRB 224, 231, 233-35 (1995), *enforced sub nom. Int’l Ass’n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998); *see also Pirlott v. NLRB*, 522 F.3d 423 (D.C. Cir. 2008).

dues for expenses related to representational activities. *District Councils Nos. 8, 16, and 33 of the Int'l Brotherhood of Painters*, 327 NLRB 1010, 1021-22 (1999).

Moreover, the Company does not dispute, as the Board explained, that “even assuming the [Company] was genuinely concerned about deducting dues in these circumstances or was uncertain as to the correct amounts to deduct, it could have addressed such concerns while making a good-faith effort to honor its contractual obligation.” (A. 21 n.1.) For example, as the Board noted, the Company “could have sought the Union’s consent to change the start date for dues checkoff, bargained for indemnification from the Union, or placed the dues in escrow pending resolution of its concerns.” (A. 21 n.1.) *See generally, Nathan’s Famous of Yonkers, Inc.*, 186 NLRB 131, 133 (1970) (no violation, where an employer’s good-faith uncertainty as to which of two unions it was required to remit checked-off dues was demonstrated by placing the dues in escrow). Here, however, the Company, as shown above, simply made no attempt to honor its contractual obligations.

In sum, as the Board explained, the Company’s “unlawful unilateral change is not condoned by the fact that certain employees may not have submitted properly executed dues check off forms by the date the relevant contract term was to have taken effect.” (A. 30.) Rather, “to the extent questions exist about whether certain employees selected financial-core as opposed to full membership, or about

the particular date that certain employees authorized dues checkoff, these questions can be answered in the compliance stage of th[e] proceeding.” (A. 21 n.1.) *See Williams Pipeline Co.*, 315 NLRB 630, 632 and n.8 (1994) (the Board found that the employer violated Section 8(a)(5) of the Act by failing to deduct and remit union dues for those employees who had signed checkoff authorizations, and ordered the Company to remit the dues for employees who signed checkoff authorizations as of that date, while leaving to compliance whether any employees had not signed valid authorization forms).

**3. The Board did not err by finding insufficient evidence to invalidate the checkoff authorization cards that the Company received**

Finally, the Company (Br. 29-33) attempts to defend its actions by asserting that the Union improperly coerced employees in obtaining union membership and dues authorization cards. The Board reasonably found “[t]he evidence regarding this [claim] unavailing.” (A. 29.) Thus, the record establishes that union stewards at each company facility were responsible for obtaining signed authorizations from employees. One employee, Dean Walgren, testified that union steward Vinnie Montefiore, told him that he had to fill out the forms and “[t]hat core members weren’t really member[s].” (A. 29; 263.) Putting aside that core members do indeed have more limited rights than full union members (see above p. 27 n.5), the credited record evidence does not establish that any other unit employee, among

the 146 unit employees, received the same information prior to signing an authorization card. In these circumstances, the Board was fully warranted in finding Walgren's testimony "cannot . . . be sufficient evidence of employee coercion to invalidate the well over 100 dues authorization cards obtained by the union in January 2016." (A. 29.)

Moreover, to the extent the Company suggests (Br. 29-33) that it was simply looking out for its employees' rights, that claim is not persuasive. As the Supreme Court long ago explained, "[t]o allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954). Thus, the Board is "entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) ("There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom.").

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board

November 2018

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

COUNTY CONCRETE CORPORATION	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 18-2013, 18-2105
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
LOCAL 863, INTERNATIONAL	)	
BROTHERHOOD OF TEAMSTERS	)	
	)	
Intervenor	)	

**CERTIFICATE OF BAR MEMBERSHIP**

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel David Seid certifies that he is a member in good standing of the State Bar of Maryland. He is not required to be a member of this Court's bar, as he is representing the federal government in this case.

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Dated at Washington, DC  
this 20th day of November 2018

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and	)	
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LOCAL 863, INTERNATIONAL	)	
BROTHERHOOD OF TEAMSTERS	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 7,113 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that: the electronic version of the Board’s brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC  
this 20th day of November 2018

**UNITED STATES COURT OF APPEALS  
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LOCAL 863, INTERNATIONAL	)	
BROTHERHOOD OF TEAMSTERS	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on November 20, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

Dated at Washington, DC this 20th day of November 2018	<u>/s/Linda Dreeben</u> Linda Dreeben Deputy Associate General Counsel National Labor Relations Board 1015 Half Street, SE Washington, DC 20570
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