

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

DALLAS AIRMOTIVE, INC.,

Respondent

and

Case 16-CA-192780

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, DISTRICT
LODGE 776,**

Charging Party

**CHARGING PARTY'S AMENDED ANSWERING BRIEF TO COUNSEL
FOR THE GENERAL COUNSEL'S CROSS-EXCEPTION NO. 4**

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Table of Contents

I. Statement of the Case 1

II. Statement of Facts 4

III. Argument and Authorities..... 6

A. The Board Should Not Disturb Lincoln Lutheran’s Holding that An Employer’s Dues Deduction Obligation Continues After Expiration of the CBA 6

1. Article 6(A) of the CBA Does Not Constitute a Clear and Unmistakable Waiver... 8

a. “For the Duration of This Agreement” as Used in Article 6(A) of the CBA Does Not Constitute a Clear and Unmistakable Waiver of the Statutory Right to Preserve the Status Quo Post-Expiration 9

b. The General Counsel’s Argument that the Board Should Apply the “Plain Meaning” of Article 6(A) is Inconsistent with Board Law That Requires a Clear and Unmistakable Waiver of Unilateral Changes 10

2. Dues Checkoff Agreements Are Not Uniquely Contractual 13

3. The General Counsel’s Other Arguments as to the Unique Nature of Dues Deductions Are Unavailing..... 15

B. The Board Cannot Consider the General Counsel’s Arguments That Are Beyond The Scope of the Cross-Exceptions 17

IV. Conclusion 18

International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 776 (*IAM* or *Union*), Charging Party files this answering brief to Cross-Exception No. 4 as set forth at page 2 of *Counsel for the General Counsel's Cross Exceptions and Brief in Support to the Administrative Law Judge's Decision (General Counsel's Cross-Exceptions or GC Cross-Exceptions)*, filed with the Board on April 5, 2019.

I. Statement of the Case

This case is pending before the National Labor Relations Board on exceptions and cross-exceptions to Administrative Law Judge Sharon Levinson Steckler's Decision and Order (JD-10-19)¹ issued on January 25, 2019. The Respondent filed exceptions and both the Charging Party and General Counsel have lodged cross-exceptions to the ALJD.

The crux of the case is whether Respondent Dallas Airmotive, Inc. (*Airmotive* or *Company*) unlawfully withdrew recognition of the Union as exclusive representative of a bargaining unit when it relocated its Forest Park operations to its new DFW Center ten miles away. A hearing was held before Judge Steckler on June 11-13, 2018 at Region 16 in Fort Worth, Texas. After reviewing the entire record, Judge Steckler concluded that Airmotive violated the National Labor Relations Act on January 13, 2017 when it unlawfully withdrew recognition of the Union with respect to the Forest Park bargaining unit in connection with its move to DFW Center, and since then has refused to bargain with the Union. JD 30:47-48. However, Judge Steckler also found that Airmotive had not violated the Act with respect to the employer's unilateral changes to many terms and conditions of employment when employees were serially transferred to DFW Center. *See* ALJD 31:3-4. In particular, she found that the Union had waived the application of the parties' 2015 collective

¹ Charging Party uses *ALJD* to refer to Judge Steckler's Decision and *Tr.* to refer to the hearing transcript. Citations to the pages and line numbers of the ALJD are given as, for example, "1:2-3," where the number before the colon is the page number and the numbers after the colon are the line number(s).

bargaining agreement (*CBA*) at DFW Center by entering into a 2015 Facility Closure Agreement and, therefore, the Company's failure to bargain with the Union regarding such changes did not violate the Act. ALJD 28:20-29:29.

The ALJ's remedy for the Company's unlawful withdrawal of recognition requires that the employer cease and desist from withdrawing recognition of, and failing to bargain with, the IAM as exclusive representative of the bargaining unit and from otherwise interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. ALJD 31:29-45. The recommended order also requires the Company to take affirmative action to recognize and on request bargain with the Union in good faith, preserve certain employee records, and to post a *Notice to Employees*, both physically and electronically. ALJD 32:1-39.

Although the remedy is supported by applicable law and the record in many respects, both the Charging Party and the General Counsel have cross-exceptions to its deficiency with respect to the Judge Steckler's failure to order reimbursement of the unpaid dues that the Company had unlawfully refused to deduct and remit to the Union, both before and after expiration of the CBA. *See Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015); GC Cross-Exceptions at p. 2, no. 3; *Charging Party's Cross-Exceptions to Administrative Law Judge's Decision and Recommended Order*, filed with the Board on April 5, 2019, at p. 2, ¶6.

Counsel for the General Counsel submitted a total of four separately numbered cross-exceptions that are set out at page 2 of the General Counsel's Cross-Exceptions. Charging Party agrees with and supports the first three of those exceptions, having itself lodged similar cross-exceptions to those same elements of the ALJD. Specifically, the IAM concurs with the General Counsel that the ALJ erred in (1) finding that the Union waived the right to apply the terms of the parties' 2015 collective bargaining agreement to the employees at DFW Center, (2) finding that

the Company did not violate the Act when it unilaterally changed at least 14 separate terms and conditions of employment, including its abrogation of dues checkoff, and (3) failing to find that the Company was required to deduct and remit dues to the Union both before and after the expiration of the CBA. *See* GC Cross-Exceptions at p. 2, Nos. 1-3. Thus, this answering brief is directed only at General Counsel’s Cross-Exception No. 4, and it is filed contemporaneously with Charging Party’s motion to strike that cross-exception in part.

Counsel for the General Counsel’s Cross-Exception No. 4 does not relate to any portion of the ALJD. Instead, Counsel for the General Counsel urges generally that the Board modify or overturn extant law with regard to dues checkoff and “adopt a new standard giving effect to the plain language of a dues checkoff agreement negotiated by the parties:”

4. Counsel for the General Counsel urges the Board to take this opportunity to adopt a standard for analyzing the terms of a dues checkoff agreement that allows the parties’ plain language limiting the dues checkoff obligation to be respected. The General Counsel requests that the Board apply that standard in analyzing the Complaint allegation and remedial considerations regarding the deduction of dues.

GC Cross-Exceptions at p. 2, No. 4.

In this regard, the ALJ did not mention the issue of dues checkoff in her Decision and Order, except that she noted that dues checkoff was one of many employment terms and conditions that Airmotive unilaterally changed upon the transfer of employees to DFW Center (ALJD:17:9-14), which unilateral changes she concluded the Union waived by reason of the 2015 Facility Closure Agreement. *See* GC Cross-Exceptions at p. 9 (“The Judge generally applied the unilateral change doctrine’s clear and unmistakable waiver standard when evaluating whether Respondent engaged in several unilateral changes but did not address dues check off specifically.”)

The General Counsel asks the Board to find “that the dues-checkoff obligation continues post-contract expiration where the language of the parties’ agreement demonstrates that was their

intent.” GC Cross-Exceptions at pp. 10-11. Accordingly, the General Counsel urges the Board to change extant law as was recently set forth in *Lincoln Lutheran* to cut off an employer’s dues-checkoff obligation at contract expiration by virtue of the language of the collective bargaining agreement in cases such as this, where the 2015 CBA between the Company and the Union obligates the Company to deduct dues and remit them to the Union “[d]uring the life of” the 2015 CBA. Ex. J-28, Art. 6(A). The Board should overrule Cross-Exception No. 4 and reject the General Counsel’s arguments because the language of Article 6(A) of the CBA is not sufficient to effect a *clear and unmistakable waiver* of the Act’s statutory obligation to bargain in good faith.

Neither raised by any party in this case at hearing, nor related to any exception or cross-exception lodged by any party, the General Counsel also asks the Board to “find unlawful any dues checkoff authorization language that restricts the statutory right of employees to revoke their authorizations at expiration of a current contract or during a period in which no collective-bargaining agreement is in effect.” GC Cross-Exceptions at p. 16. Because this request and issue are beyond the scope of the exceptions, the Board should reject and overrule the General Counsel’s arguments in this regard. The Charging Party has contemporaneously filed a motion asking the Board to strike the General Counsel’s request and argument.

II. Statement of Facts

For background as to the dispute between the IAM and Airmotive, Charging Party refers the Board to its comprehensive *Statement of Facts* set forth at pages 7-35 of its *Charging Party’s Answering Brief to Respondent’s Exceptions to the Decision of the Administrative Law Judge (April 5 Answering Brief)* that was filed with the Board on April 5, 2019. Pertinent to General Counsel’s Cross-Exception No. 4, it is undisputed that:

- The Union had represented employees at the Company’s Forest Park facility since 1966, with the parties’ most recent collective bargaining agreement being in effect from March 23, 2015 to March 23, 2018, including during the transition of the bargaining unit to DFW Center. ALJD 3:6-9, 9:35-17:5.
- The 2015 CBA by its terms required the Company to deduct and remit dues to the IAM:

During the life of this Agreement, the Company agrees to deduct from the pay of each Union member and remit to the Union “standard” monthly membership dues uniformly levied in accordance with the Constitution and By-Laws of the Union, provided such member of the Union voluntarily executes the agreed upon form, which is hereinafter included in this Agreement, to be known as “authorization for Check-off of Union Dues,” which shall be prepared and furnished by the Union

Ex. J-28, Art. 6, § A.
- Prior to closure of the Forest Park facility, approximately 85 percent of the unit employees had been dues-paying members of the Union. Tr. 193.
- Without informing or bargaining with the Union, the Company unilaterally ceased withholding and remitting dues as it transferred its Forest Park employees to the new DFW Center, even though neither the IAM nor any of its members had requested that Airmotive cease deducting union dues. ALJD: 9-32; Tr. 94, 131-32, 193-94, 319, 358.
- The Union discovered that Airmotive had ceased making dues deductions when the employer stopped remitting dues payments. ALJD 17:16-17; Tr. 67.
- The Company ceased collecting and remitting dues while the 2015 CBA was in effect, failed to collect and remit any dues after the CBA expired March 23, 2018, and it has continued to repudiate its dues deduction obligations to the present day. ALJD: 9:35-36, 17:9-32.

- In March 2015, the month that the 2015 CBA took effect, Airmotive remitted dues to the IAM in the total amount of \$6,988.68. Ex. CP-4. By January 27, 2017, the Company remitted a total of \$1,068.96 in dues. Ex. CP-5. In and after June 2018, the Company remitted no dues to the Union.

III. Argument and Authorities

As the IAM explains in detail in its briefing in answer to Respondent’s exceptions and in support of its own cross-exceptions filed on April 5, 2019, Judge Steckler correctly determined that Airmotive violated the Act by unlawfully withdrawing recognition of the Union. The Judge erred, however, in finding that the Union had waived application of the 2015 CBA at the DFW Center and concluding that the Company did not violate the Act when it made unilateral changes to the terms and conditions of employment, including the employer’s unilateral repudiation of its dues checkoff obligations under the 2015 CBA.

The General Counsel agrees with the IAM on these points and further agrees that under current law, the Judge erred in failing to order as part of the remedy the reimbursement of the unpaid dues that the employer had unlawfully refused to deduct and remit to the Union, both before and after expiration of the CBA as set forth in *Lincoln Lutheran*. Thus, applying extant Board law, the IAM and the General Counsel’s positions are aligned as to the correctness of the ALJD as well as to its deficiencies. With respect to the General Counsel’s request for modification of Board law under Cross-Exception No. 4, the Board should reject and overrule Cross-Exception No. 4, and reject all of the General Counsel’s supporting arguments, for the reasons set forth below.

A. The Board Should Not Disturb Lincoln Lutheran’s Holding that An Employer’s Dues Deduction Obligation Continues After Expiration of the CBA

In its 2015 decision in *Lincoln Lutheran*, the Board held that “an employer has an obligation to continue dues checkoff after the expiration of a collective-bargaining agreement

establishing that arrangement.” 362 NLRB at 1655-56. It explained the nature of the harm that is done to both the union and its members when an employer unilaterally stops deducting and remitting union dues upon the expiration of the collective bargaining agreement:

An employer's unilateral cancellation of dues checkoff ... both undermines the union's status as the employees' collective-bargaining representative and creates administrative hurdles that can undermine employee participation in the collective-bargaining process. Cancellation of dues checkoff eliminates the employees' existing, voluntarily-chosen mechanism for providing financial support to the union. By definition, it creates a new obstacle to employees who wish to maintain their union membership in good standing... Such a change also interferes with the union's ability to focus on bargaining, by forcing it to expend time and resources creating and implementing an alternate mechanism for due collection during a critical bargaining period. [A]n employer that unilaterally cancels dues checkoff sends a powerful message to employees: namely, that the employer is free to interfere with the financial lifeline between employees and the union they have chosen to represent them.

Id. at 1657. The Board concluded that “[b]ecause unilateral changes to dues checkoff undermine collective bargaining no less than other unilateral changes, the status quo rule should apply, unless there is some overriding ground for an exception.” *Id.*

Despite the Board's compelling rationale for its holding in *Lincoln Lutheran*, the General Counsel argues that the Board should adopt a contractual interpretation standard for dues checkoff obligations, and that the *clear and unmistakable waiver* standard is not appropriate in this context in light of the “unique aspects of dues checkoff.” GC Cross-Exceptions at p. 11. The General Counsel argues that the Board should limit *Lincoln Lutheran's* rule that the employer's dues checkoff obligations continue beyond contract expiration to only those situations where the “plain language” of the collective bargaining agreement evinces the parties' intent that dues checkoff should continue after contract expiration. GC Cross-Exceptions at pp. 10-11.

For instance, with regard to this case, the General Counsel incorrectly argues that in light of the “plain meaning” of the six-word phrase at the beginning of the dues deduction provision of the 2015 CBA, “[d]uring the life of this Agreement” (Ex. J-28, Art. 6(A)), the IAM absolved

Airmotive of the obligation to continue dues deductions upon contract termination, and that by these six words the IAM negotiated away the right established in *Lincoln Lutheran* for dues deduction to continue after the expiration of the 2015 CBA. GC Cross-Exceptions at pp. 16-17.

The Board should reject the General Counsel's arguments, overrule General Counsel's Cross Exception No. 4, and continue to apply the holding of *Lincoln Lutheran* in all cases where the employer unilaterally terminates dues deductions at contract expiration, without adopting the General Counsel's proposed contract interpretation standard that would severely limit the right of unions to maintenance of the status quo after contact expiration.

1. Article 6(A) of the CBA Does Not Constitute a Clear and Unmistakable Waiver

Unilateral changes to mandatory subjects of bargaining violate the Act's statutory duty to bargain in good faith. *NLRB v. Katz*, 369 U.S. 736 (1962). Moreover, under *Katz*, "an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *Id.* at 743. *Katz*'s holding "has been extended to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988)). *See also Air Convey Indus.*, 292 NLRB 25, 25-26 (1988) ("It is well established that Section 8(a)(5) and (1) of the Act prohibits an employer who is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union."). The language of a collective bargaining agreement may waive this statutory obligation to bargain in good faith if that language amounts to a "clear and unmistakable" waiver of the right. *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1984).

The General Counsel contends in this case that the IAM waived the employer's continued deduction of dues upon expiration of the 2015 CBA by agreeing to language in Article 6(A) that states that the dues deduction obligation continued "[d]uring the life of this Agreement," thus agreeing to link Airmotive's obligation to deduct and remit union dues to the term of the 2015 CBA. *See* GC Cross-Exceptions at pp. 16-17. This contention lacks merit. First, language such as that used in Article 6(A) has previously been held not to constitute a waiver such as would permit an employer to automatically terminate payroll deductions for purposes other than dues. Second, the General Counsel's strained arguments for a strictly contractual standard for dues checkoff agreements are also flawed because, as developed below, a waiver of statutory rights must meet the *clear and unmistakable waiver* standard of *Metropolitan Edison*. Dues checkoff agreements are not unique in any way that would make them an exception to this rule.

a. "For the Duration of This Agreement" as Used in Article 6(A) of the CBA Does Not Constitute a Clear and Unmistakable Waiver of the Statutory Right to Preserve the Status Quo Post-Expiration

Metropolitan Edison's "clear and unmistakable" standard for waiver of a statutory right is not met in this case because the Board has held consistently that contract language similar to the language of Article 6(A) does not permit an employer to take unilateral action. For example, in *Finley Hospital*, 362 NLRB 915 (2015), *enf'd in part and denied in part*, 827 F.3d 720 (8th Cir. 2016), a case concerning annual wage increases following expiration of a labor agreement, the Board recognized the difference between a contractual obligation and the statutory obligation to maintain the status quo post-expiration. Contract language such as that found in Article 6(A) may limit the scope of the *contractual obligation*, but it is nevertheless insufficient to waive the *statutory obligation to maintain the status quo* because it does not amount to a clear and convincing waiver. 362 NLRB at 917.

This is so because language like that found in Article 6(A) and *Finley Hospital* does not satisfy the *clear and unmistakable* threshold for waiver of a statutory right under *Metropolitan Edison* in that it fails “to ‘unequivocally and specifically express [the parties’] mutual intention to permit unilateral employer action with respect to [the annual wage increases].” *Finley Hospital* at 917 (quoting *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007)). Similarly, in *StaffCo of Brooklyn, LLC*, 364 NLRB No. 102 (2016), *enfd.* 888 F.3d 1297 (D.C. Cir. 2018), a case concerning pension benefits post expiration, the Board likewise found no clear and unmistakable waiver of statutory rights because the contractual term at issue “contains no express authorization of unilateral action by the Respondent.” *StaffCo*, 364 NLRB 102, Slip op. at 3.

Like the contractual language at issue in *Finley Hospital* and *StaffCo*, Article 6(A) of the 2015 CBA does not expressly sanction unilateral action on the part of Airmotive post contract expiration and it does not expressly provide that the Company can unilaterally terminate dues deduction upon contract expiration. The absence of language authorizing the employer to take unilateral action demonstrates that the language of Article 6(A) did not effect a waiver of the IAM’s statutory right to maintain the status quo upon expiration of the 2015 CBA.

b. The General Counsel’s Argument that the Board Should Apply the “Plain Meaning” of Article 6(A) is Inconsistent with Board Law That Requires a Clear and Unmistakable Waiver of Unilateral Changes

The General Counsel concedes that under current Board law, the language of Article 6(A) does not amount to a clear and unmistakable waiver, and Airmotive had a continuing obligation to deduct and remit dues to the IAM both before and after expiration of the 2015 CBA under *Lincoln Lutheran*. See GC Cross-Exceptions at p. 10, § B. Nevertheless, the General Counsel urges the Board to adopt a new standard that would relieve Airmotive of its obligation to deduct and remit dues following contract expiration. The General Counsel argues that the Board should adopt a

contractual analysis standard that does not require a clear and unmistakable waiver, but instead gives effect to the “plain meaning” of contractual language indicating that the employer’s dues checkoff obligation will only be in effect during the term of the collective bargaining agreement. GC Cross-Exceptions at pp. 10-13. The General Counsel implies that such a “plain meaning” contractual standard would be less exacting than the “clear and unmistakable waiver” standard of *Metropolitan Edison*, and should be adopted because “disputes involving dues checkoff provisions and authorizations essentially involve contract interpretation.” GC Cross-Exceptions at p. 12, citing *Kroger Co.*, 334 NLRB 847, 849 (2001)).

The General Counsel’s argument for the application of a “plain meaning” contractual standard to analyze the issue of whether an employer’s post-expiration dues checkoff has been waived fails for two reasons. First, the issue of an employer’s post-contract expiration absolution from the obligation to deduct and remit dues arises not merely from the contract, but also in the context of the statutory duty to maintain the status quo upon contract expiration. For this reason, it is a statutory, rather than merely a contractual question. As such, under *Finley Hospital and StaffCo*, the language of Article 6(A) is not sufficient to waive the IAM’s statutory right to preserve the status quo upon the expiration of its 2015 CBA.

Further, the Board in *Kroger* did not apply a *plain meaning* standard to the contract at issue in that case; rather, it applied a *clear and unmistakable* waiver standard. *Kroger*, 334 NLRB at 849, citing *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 328 (1991). The standard the Board applied in *Lockheed* was in fact derived from *Metropolitan Edison. Lockheed*, 302 NLRB at 322 n. 24 (“We will require clear and unmistakable language waiving the right to refrain from assisting a union, just as we require such evidence of waiver with regard to other statutory rights.”

The General Counsel points out that the Board in *Lincoln Lutheran* recognized in a footnote that its holding does not preclude parties from agreeing that an employer may discontinue dues checkoff after contract expiration, notwithstanding the employer's statutory duty to maintain the status quo. 362 NLRB 1655, 1663 n. 28. However, in that footnote the Board made clear that any such agreement must be not only be made "expressly" and "unequivocally," but in order to be enforceable as a waiver of the statutory right to bargain, it must meet the *Metropolitan Edison clear and unmistakable* standard. *Id.*

As previously noted, the *Kroger* and *Lockheed* cases on which the General Counsel relies for the proposition that a plain language standard would be consistent with "the Board's view that disputes involving dues checkoff provisions and authorizations essentially involve contract interpretation" actually require a *clear and unmistakable waiver* in accordance with *Finley Hospital and StaffCo.* Indeed, the Board's analysis in all four cases is derived from *Metropolitan Edison.*

Kroger's foundation in *Metropolitan Edison* is also crucial because it undermines the General Counsel's contention that matters concerning dues deduction are contractual rather than statutory. *Lockheed* explicitly states that it is a statutory matter and, pursuant to *Metropolitan Edison*, required that any waiver of the right under the Act be clear and unmistakable. The General Counsel has presented no authority to support a radical departure from this standard in regard to application of Article 6(A) in this case because no such authority exists. General Counsel's Cross-Exception No. 4 should be overruled because the language of Article 6(A) does not embody a clear and unmistakable waiver of the Union's statutory rights.

2. Dues Checkoff Agreements Are Not Uniquely Contractual

The General Counsel argues that the nature of dues deductions is uniquely contractual and therefore should be assessed under a standard different from that of other mandatory subjects of bargaining. GC Cross-Exceptions at pp. 13-15. This argument fails because it disregards the sole standard for assessing whether a unilateral change of a mandatory subject of bargaining is permitted – whether there was a clear and unmistakable waiver of the right to maintain the status quo upon contract expiration. The assertion that dues deductions exist only as creatures of labor agreements and dues authorization cards cannot alter the fact that dues deductions are a mandatory subject of bargaining that may only be unilaterally changed where there has been a clear and unmistakable waiver.

In *Lincoln Lutheran*, the Board distinguished dues checkoff provisions from certain other clauses that are widely thought to be “uniquely of a contractual nature” including no-strike, arbitration, and management rights provisions, reasoning that unlike those other provisions, a dues checkoff clause does not involve the contractual surrender of any statutory or non-statutory rights. Instead it has long been recognized that a dues checkoff provision reflects the employer’s agreement to establish a system for employees who elect to pay their dues through payroll deduction as a matter of administrative convenience. 362 NLRB at 1369. Such voluntary payments are similar to other voluntary employment payment arrangements such as employee savings accounts and charitable contributions, and the Board did not see any reason why dues checkoff agreements should be treated any less favorably for purposes of the status quo doctrine than those other terms and conditions of employment. *Id.*

Moreover, the oft-proffered *uniquely contractual* rationale for distinguishing between different types of contract clauses does not hold up on closer scrutiny and it is not consistent with

the Act. Even those types of unilateral changes that the Board allows prior to impasse that are quintessentially identified as being “uniquely contractual” in nature and that terminate on contract termination, such as no-strike, arbitration, and union security clauses, in fact have an explicit statutory basis for their automatic termination upon contract expiration. For example, the termination of the obligation to arbitrate has been held to be grounded in the strong statutory principle found in both the language of the NLRA and its drafting history of consensual, rather than compulsory arbitration. *Litton*, 501 U.S. at 200-201. Moreover, in labor relations, the duty to arbitrate has long been tied to no-strike clauses, which terminate with the contract because of the union’s statutory right to strike. *NLRB v Lion Oil Co.*, 352 U.S. 282, 293 (1957); 29 U.S.C. §§ 158(d)(4), 163. Termination of union security arrangements when the collective bargaining agreement expires is expressly mandated by statute. *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), *enf’d. in part*, 320 F.2d 615 (3d Cir. 1963), *overruled on other grounds*, *WKYC-TV, Inc.*, 359 NLRB 286 (2012); 29 U.S.C. § 158(a)(3).

Even in such cases, the waiver of statutory rights, such as the right to strike, must be clear and unmistakable. *Metropolitan Edison Co.*, 460 U.S. at 7098. *See Gary-Hobart Water Corp.*, 210 NLRB 742, 744-745 (1974) (waiver of the statutory right to strike can arise only by contract and not by operation of law). There is an exception to the automatic expiration of the no-strike clause when a collective bargaining agreement expires; if the employer’s duty to arbitrate a matter continues after expiration under *Nolde Brothers, Inc. v. Local Union No. 358, Bakery and Confectionary Workers Union*, 430 U.S. 243 (1977), then to the same extent the no-strike obligation continues. *Goya Foods, Inc.*, 238 NLRB 1465 (1978). Both of these exceptions – post-expiration arbitration and post-expiration labor peace – are rooted in “the strong national policy

favoring arbitration of labor disputes” expressed in the statute and a construction of the no-strike promise that it is intended to be exchanged for arbitration. *Id.* at 1467.

Thus, even the oft-noted exceptions to the unilateral-change rule are not “uniquely contractual,” but in fact are compelled by statute. They were not arrived at as a means of matching union and employer bargaining power or even because they encouraged the process of collective bargaining. Dues check-off is entirely different although it has for years been put in this category. The Board has recognized for many years that dues checkoff authorizations are individual wage assignment contracts between the workers and the employer that survive expiration of the collective bargaining agreement. *Quality House of Graphics*, 336 NLRB 497, 512-513 (2001); *IBEW, Local 2088*, 302 NLRB 322 (1991); *Associated Press*, 199 NLRB 1110 (1972), *pet. for review denied* 492 F.2d 662 (D.C. Cir. 1974); *Lowell Corrugated Container*, 177 NLRB 169 (1969), *enf'd* 431 F.2d 1196 (1st Cir. 1970). So, for example, an employer does not violate the Act by continuing to honor unrevoked check-off authorizations after the expiration of the agreement. *Lowell Corrugated Container*, 177 NLRB at 173. *See also Tribune Publishing Co.*, 351 NLRB No. 22 (2007), *enf'd* 564 F.3d 1330 (D.C. Cir. 2009) (holding that when an employer stops dues check-off after contract expiration but then starts it again during the contract hiatus, it may not thereafter be stopped unilaterally). Similarly, a union does not violate the Act when it demands that dues be deducted after expiration of a CBA pursuant to unrevoked authorizations. *Chemical Workers Local 143*, 188 NLRB 705 (1971).

3. The General Counsel’s Other Arguments as to the Unique Nature of Dues Deductions Are Unavailing

The General Counsel asserts a number of other ways in which dues checkoff agreements purportedly are unique. For example, the General Counsel argues that dues checkoff affects an employee’s terms and conditions of employment only indirectly (GC Cross-Exceptions at p. 14).

But there are circumstances in which dues checkoff can have a direct effect. For example, although dues deductions do affect wages to the extent they impact the employees' take-home pay, an employer's unilateral termination of an employee's dues deduction effectively increases the employee's take-home pay by an amount equal to what would have been deducted in dues. An employer's ability to take this action would amount to a unilateral increase in the employee's wages, which would violate the Act.

The clear and unmistakable waiver standard applies to both the right to be free of unilateral changes under the Act under *Finley Hospital* and *StaffCo* and the Section 7 rights implicated by dues deduction under *Kroger* and *Lockheed*. As such, the Section 7 interest that the General Counsel alludes to in his brief (GC Cross-Exceptions at pp. 14-15) is already protected by the clear and unmistakable standard of *Metropolitan Edison*, and there is no need under the facts of this case to reexamined and potentially undermine those safeguards.

Finally, the economic weapon argument advanced by the General Counsel as a justification for permitting termination of dues deductions upon contract expiration (GC Cross-Exceptions at p. 15) would not provide employers with a "mild" economic weapon as the General Counsel suggests in its brief, but rather a super-economic weapon. Employers are free at impasse to make unilateral changes consistent with their bargaining proposals. Under the scheme proposed by the General Counsel, employers would be free to terminate the deduction of dues upon contract expiration automatically without having first proposed and then bargained over the termination of dues. This ability would render dues termination a unique super-weapon because an employer would not have to propose and bargain over this type of change prior to implementing it. The implementation of such a super-economic weapon as sought by the General Counsel would frustrate the process of collective bargaining by removing the termination of dues from the ambit

of bargaining and placing over a union the proverbial Sword of Damocles; a unilateral change that could be imposed in the absence of impasse and one that would not be subject to bargaining. This proposed exception to the law of impasse as well as the prohibition against unilateral changes is not justified, and it should be rejected and overruled by the Board.

B. The Board Cannot Consider the General Counsel’s Arguments That Are Beyond the Scope of the Cross-Exceptions

Although it is not the subject of any of the General Counsel’s cross-exceptions and was not an issue raised in the General Counsel’s *Complaint* initiating this case (Ex. GC-1(c)), the General Counsel asks the Board to “reconsider current law regarding employee revocation of checkoff authorization after contract expiration.” GC Cross-Exceptions at p. 16. The General Counsel admits that this request does not relate to any issue in the case. *See* GC Cross-Exceptions at p. 16 (“**Although not specifically at issue in this case**, the Board should also reconsider current law regarding employee revocation of checkoff authorization after contract expiration.”) (Emphasis added.)

Under Rule 102.46(a)(2), (c) of the NLRB’s Rules and Regulations, a brief in support of cross-exceptions may contain only matter that is included within the scope of the cross-exceptions. Thus, the Board cannot consider any matters or argument contained in the General Counsel’s brief pertaining to the issue of termination or revocation of dues checkoff authorizations -- including the first full paragraph on page 11 and Section C(iii) on page 16 -- as these matters are not properly before the Board. This argument should therefore be rejected summarily.

On May 16, 2019, the IAM filed a motion to strike this section of the brief in support of the General Counsel’s Cross-Exceptions.

IV. Conclusion

For the foregoing reasons, the Charging Party requests that the Board reject the arguments of the General Counsel in support of Cross-Exception No. 4 and, accordingly, overrule this cross-exception.

Dated May 17, 2019.

Respectfully submitted,

/s/Rod Tanner
Rod Tanner

Certificate of Service

The undersigned attorney for the Charging Party certifies that on May 17, 2019, he served a copy of the foregoing *Charging Party's Amended Answering Brief to Counsel for the General Counsel's Cross-Exception No. 4* on the attorneys listed below via electronic filing and e-mail:

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