

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

TROPICAL WELLNESS CENTER, LLC

and

Cases 12-CA-167884
12-CA-171371

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

**COUNSEL FOR THE GENERAL COUNSEL’S SUPPLEMENTAL BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

Counsel for the General Counsel (“General Counsel”) respectfully submits this supplemental brief in response to Administrative Law Judge Elizabeth M. Tafe’s June 25, 2020 Order Inviting Parties to File Supplemental Briefs on Limited Issue, in light of the Board’s adoption of the “contract coverage” standard in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019). As will be discussed below, under the Board’s “contract coverage” standard for analyzing whether an employer’s unilateral action is permitted by a collective-bargaining agreement, Tropical Wellness Center, LLC’s (“Respondent”) failure and refusal to deduct and remit union dues, make monthly pension fund contributions, and process grievances, remain unlawful as alleged.

I. Introduction

This case involves Respondent’s failure to continue in effect all of the terms of the collective-bargaining agreement with the International Association of Machinists and Aerospace Workers, District Lodge 166, AFL-CIO, Local Lodge 971 (the Union), by failing and refusing to deduct and remit Union dues and failing and refusing to make monthly pension fund contributions to the Union’s pension fund, in violation of Section 8(a)(1) and (5) of the Act; by failing and refusing to process

grievances over its failure and refusal to deduct and remit Union dues and its failure to make monthly pension fund contributions, in violation of Section 8(a)(1) and (5) of the Act; by failing and refusing to provide the Union with requested information, in violation of Section 8(a)(1) and (5) of the Act; by laying off the bargaining unit employees, in violation of Section 8(a)(1), (3), (4), and (5) of the Act.¹ This matter was heard on July 10, 2017 and August 27, 2018. Respondent failed to appear on either of those dates. On January 11, 2019, the General Counsel filed her Brief to the Administrative Law Judge. On June 25, 2020, Administrative Law Judge Tafe invited the parties to file supplemental posthearing briefs addressing the limited issue of how, if at all, the Board’s “contract coverage” standard set forth in *MV Transportation* should affect her analysis of this case.

II. The “Contract Coverage” Standard

Section 8(a)(5) and 8(d) establish an employer’s obligation to bargain in good faith with respect to “wages, hours, and other terms and conditions of employment.” Section 8(d) of the Act imposes an additional requirement when a collective bargaining agreement is in effect and an employer seeks to “modify” terms and conditions of employment “contained in” the agreement. In that instance, the employer must obtain the union’s consent before implementing the change. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), *enfd.*, 505 F.2d 1302 (5th Cir. 1974), *cert. denied* 423 U.S. 826 (1975).

On September 10, 2019, the Board issued its decision in *MV Transportation*, which overruled *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), and adopted the “contract coverage” standard when determining whether a collective bargaining agreement grants the employer the right to take certain actions unilaterally. The Board decided to abandon the “clear and unmistakable waiver” standard adhered to in *Provena St. Joseph*, noting that it is not the standard applied by the courts or arbitrators when interpreting collective-bargaining agreements; it results in the Board impermissibly

¹ On July 15, 2020, the General Counsel filed a Motion to Withdraw Complaint Allegations requesting to withdraw the allegation that Respondent laid off the bargaining unit employees in violation of Section 8(a)(5) of the Act.

sitting in judgment upon contract terms; it undermines contractual stability; it alters the parties' deal reached in collective bargaining; it results in conflicting interpretations between the Board and the courts; it undermines grievance arbitration; and it has become indefensible and unenforceable. *MV Transportation, Inc.*, slip op. at 1-8. Under the "clear and unmistakable waiver" standard, an employer violated the Act unless a provision of the collective-bargaining agreement specifically referred to the type of employer decision at issue or mentioned the kind of factual situation the case presented. *Id.* citing *Wilkes-Barre Hospital Co. LLC v. NLRB*, 857 F.3d 364, 373 (D.C. Cir. 2017) (quoting *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015)). The Board concluded that the "contract coverage" standard is more consistent with the purposes of the Act than the "clear and unmistakable standard." *MV Transportation*, slip op at 1.

Under the "contract coverage" standard, the Board will examine the plain language of the collective-bargaining agreement to determine whether the action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. If the agreement does not cover the employer's disputed act, and that act has materially, substantially, and significantly changed a term and condition of employment constituting a mandatory subject of bargaining, the employer will have violated Section 8(a)(5) and (1) unless it demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason. *MV Transportation*, slip op at 2.

III. Respondent does not have the right to act unilaterally by failing and refusing to make monthly deductions of union dues from the wages of employees in the bargaining unit who have signed dues check-off authorizations and failing and refusing to remit union dues to the Union

As previously briefed and set forth in the record, on January 9, 2014, the parties executed a collective-bargaining agreement that contains a dues check-off provision. [GC Ex. 4; Tr. 26:2-19; Tr. 31:9-12; GCX 4, pg. 2). The dues check-off provision states, in part, that Respondent "shall deduct

from the employee's wages an amount equal to monthly union dues which shall be deducted in a fixed amount each pay period and remitted to the Union.” From January 2015 through July 15, 2015, Respondent deducted and remitted dues, as required by Article 3 Section 1 of the parties’ collective-bargaining agreement and pursuant to dues authorization check off cards completed by employees. [Tr. 31:17-32:13; 55:19-23; 26:2-3; 57:7-18; 69:1-10, 21-24; 70:24-7:14; 72:21-73:11; 90:9-12; 93:7-11, 17-25; 94:1-2; 95:2-16; 96:19-97:1]. Respondent did not remit dues to the Union after July 15, 2015. [Tr. 31:17-32:13; GCX 7].

Under the “contract coverage” standard adopted in *MV Transportation*, Respondent does not have the right to unilaterally stop making monthly deductions of union dues and remitting those dues to the Union absent the Union’s consent, unless the action “was within the compass or scope of contractual language granting the employer the right to act unilaterally” or the Union clearly and unmistakably waived its right to bargain. 368 NLRB No. 66, slip op at 2. Article 3 Section 1 of the parties’ collective-bargaining agreement plainly states that Respondent **shall** deduct and remit monthly union dues from employees who executed written authorization forms. Thus, under the terms of the collective-bargaining agreement Respondent must, without exception, remit dues to the Union and nothing in Article 3 Section 1 or elsewhere in the agreement suggests that Respondent had a unilateral right to cease remitting those dues. Accordingly, the “contract coverage” standard is not applicable to this violation.

It is well established that an employer violates Section 8(a)(5) of the Act by ceasing to deduct and remit dues in derogation of an existing contract. *Shen-Mar Food Products*, 221 NLRB 1329 (1976); *MBC Headwear, Inc.*, 315 NLRB 424, 428 (1994). By failing and refusing to deduct and remit union dues as required by the terms of the collective agreement, in the absence of a clear and

unmistakable waiver and without the Union's consent, Respondent has been failing and refusing to bargain collectively and in good faith with the Union, in violation of Section 8(a)(1) and (5) of the Act.

IV. Respondent does not have the right to act unilaterally by failing and refusing to make monthly pension fund contributions

The parties' collective-bargaining agreement contains a pension fund provision requiring that Respondent make pension contributions to the IAM Labor Management Pension Fund (the Pension Fund). [GCX 4 pgs. 8-9]. On January 9, 2014, Respondent and the Union also executed a separate agreement that sets forth Standard Contract Language with respect to Respondent's hourly contributions for 2014, 2015, and 2016. [Tr. 26:2-19; GCX 5].

Article 15 of the parties' collective-bargaining agreement clearly sets forth Respondent's obligation to make contributions to the Pension Fund. The parties also negotiated and executed a separate agreement setting forth Respondent's hourly contributions to the Pension Fund for 2014, 2015, and 2016. Nothing in Article 15 or the separate agreement grant Respondent the right to act unilaterally with regard to pension fund contributions and, therefore, the "contract coverage" standard does not apply.

An employer violates Section 8(a)(5) of the Act when it fails and refuses to make contractual pension fund contributions. See e.g. *Alvin Greeson d/b/a Greeson Masonry*, 298 NLRB. No. 163 (1990); *Island Transportation Company, Inc.*, 307 NLRB No. 187 (1992). Respondent never made the contractually required monthly pension contributions. As stated above, the "contract coverage" standard does not apply, and the Union did not clearly and unmistakably waive its right to bargain over changes to pension plan contributions. Thus, Respondent's failure and refusal to make monthly pension fund contributions violated Section 8(a)(5) of the Act.

IV. Respondent does not have the right to act unilaterally by failing and refusing to process grievances

Sometime in early 2015, the Union submitted an oral grievance over Respondent's failure and refusal to deduct and remit Union dues and make monthly pension fund contributions. The Union also submitted the grievance in writing. (Tr. 34:4-35:4; GCX 8]. In early November 2015, the Union filed a grievance over Respondent's failure to make monthly pension fund contributions. Respondent did not respond to the grievances. [Tr. 38:10; 39:5-7; 105:5-16, 19-20].

The "contract coverage" standard also does not apply to Respondent's failure and refusal to process grievances. Article 14 of the parties' collective-bargaining agreement plainly sets forth the grievance procedure. It includes Respondent's obligation to meet with the Union to attempt to resolve disputes. The Board has found that in the context of grievance-arbitration proceedings pursuant to a provision in the collective-bargaining agreement, a refusal to attend and conduct grievance meetings to be unlawful. *Trailmobile Trailer, LLC*, 443 NLRB 95, 96-97 (2004). The Union filed grievances pursuant to that procedure and Respondent failed to meet and discuss those grievances. Respondent does not have the right to fail and refuse to meet and bargain regarding grievances. Therefore, Respondent violated Section 8(a)(5) of the Act when it failed and refused to meet and bargain regarding grievances over Respondent's failure and refusal to remit union dues and make pension fund contribution.

V. Conclusion

The parties' collective-bargaining agreement plainly sets forth Respondent's continuing obligation to deduct and remit union dues, make monthly pension fund contributions, and process grievances and nothing in the contract suggests that Respondent can unilaterally modify those obligations. Thus, the "contract coverage" standard is not applicable to the foregoing changes and the Board will conduct a waiver analysis. A review of the collective-bargaining agreement reveals that the Union did not clearly and unmistakably waive its right to bargain over the remittance of union dues,

pension fund contributions, or the grievance procedure. Accordingly, Respondent may not make mid-term changes to those terms and conditions of employment without the Union's consent. For the reasons set forth above, the General Counsel's previously filed Brief, and the record as a whole, Counsel for the General Counsel requests that the Administrative Law Judge find that Respondent violated Section 8(a)(5) of the Act by failing and refusing to deduct and remit union dues, make monthly pension fund contributions, and process grievances.

DATED at Miami, Florida, this 9th day of July 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Supplemental Brief to the Administrative Law Judge in Cases 12-CA-167884 and 12-CA-171371 was served as follows on July 9, 2020.

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