

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

USIC LOCATING SERVICES, INC.,

Employer-Respondent

And

Case No. 6-CA-37328

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 13000, AFL-CIO, CLC,

Union-Charging Party.

**EXCEPTIONS OF CHARGING PARTY, COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 13000, AFL-CIO, CLC TO DECISION OF ADMINISTRATIVE
LAW JUDGE**

The Charging Party, Communications Workers of America, Local 13000, AFL-CIO, CLC (“Union”, “CWA”, or “Local 13000”), by and through its attorneys, Markowitz and Richman, pursuant to Section 102.46(a) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), hereby excepts to the January 10, 2012 submits this brief to the January 10, 2012 Decision and Order (“Decision”) of Administrative Law Judge (“ALJ”) David Goldman as follows:

1. The Union excepts to the decision by the ALJ at page 8, lines 42-43, to recommend dismissal of the Complaint;
2. The Union excepts to the conclusion of law of the ALJ at page 9, line 4, that the Respondent did not violate the Act as alleged in the Complaint.

3. The Union excepts to the recommended Order of the ALJ at page 9, line 12 to dismiss the Complaint.

4. The Union excepts to the failure of the ALJ to conclude as a matter of law that the Respondent's failure and refusal to honor dues check off authorizations submitted by bargaining unit employees from December 4, 2009 up to and including the six months prior to the filing of charges in this case, i.e., June 6, 2011, violated §8(a) (1) of the Act.

5. The Union excepts to the failure of the ALJ to conclude as a matter of law that the Respondent's failure and refusal to honor dues check off authorizations submitted by bargaining unit employees from December 4, 2009 up to and including the six months prior to the filing of charges in this case, i.e., June 6, 2011, violated §8(a)(5) of the Act.

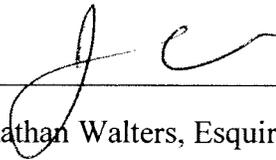
6. The Union excepts to the failure of the ALJ to order that the Respondent honor all dues check off authorizations submitted by bargaining unit employees from December 4, 2009 up to and including the six months prior to the filing of charges in this case, i.e., June 6, 2011/

7. The Union excepts to the failure of the ALJ to order that the Respondent bargain to impasse before ceasing to honor dues check off authorizations submitted by bargaining unit employees.

8. The Union excepts to the failure of the ALJ to order that the Respondent make the Union hall for all dues lost arising out the refusal of the Respondent to honor dues check off authorizations submitted by bargaining unit employees.

Respectfully submitted,

MARKOWITZ & RICHMAN

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ATTORNEYS FOR CHARGING PARTY,

CWA Local 13000

Dated: February 22, 2012

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

USIC LOCATING SERVICES, INC.,

Employer-Respondent

And

Case No. 6-CA-37328

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 13000, AFL-CIO, CLC,

Union-Charging Party.

**BRIEF OF CHARGING PARTY, COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 13000, AFL-CIO, CLC IN SUPPORT OF EXCEPTIONS TO JANUARY 10, 2012
DECISION OF ADMINISTRATIVE LAW JUDGE**

The Charging Party, Communications Workers of America, Local 13000, AFL-CIO, CLC (“Union”, “CWA”, or “Local 13000”), by and through its attorneys, Markowitz and Richman, pursuant to Section 102.46(c) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), submits this Brief in support of the Exceptions it has filed this date to the January 10, 2012 Decision of Administrative Law Judge (“ALJ”) David Goldman in the above matter.

INTRODUCTION

This matter initially arose out of a decision by the General Counsel to raise anew the question of whether an employer may, at any point after the expiration of a collective bargaining agreement, unilaterally terminate that provision of the collective bargaining agreement by which an employer agrees to withhold from the paychecks of union members periodic union dues and fees, assuming these employees have voluntarily executed authorizations permitting such withholding, and transmitting same to the employees' exclusive bargaining representative.

STATEMENT OF FACTS¹

On January 5, 1995, the Communications Workers of America, AFL-CIO, CLC (“International”), a labor organization within the meaning of the Act (Stip. ¶9(a)) was certified to represent certain employees of Central Locating Services, an employer within the meaning of the Act (Stip. ¶8) which was located in Bridgeville, Pennsylvania. (Stip. ¶¶6, 11, 12(a), 14(a)) Central Locating Services was acquired by United States Infrastructure Corporation (“USIC”) on April 1, 2008 and USIC thereupon merged Central Locating Services into a sister company, SM&P Utility Resources, Inc. to create USIC Locating Services (“Employer” or “Respondent”). (Stip ¶14(b)).

After certification, the International designated Local 13000, also a labor organization within the meaning of the Act (Stip. ¶9(b)), as the representative of these employees. (Stip. ¶12(b)). Accordingly since 1995, the International and Local 13000 represented said employees pursuant to a series of collective bargaining agreements, the most of recent of which covered the

¹ All facts are set forth in the Joint Motion and Stipulation of Facts joined in by the Counsel for General Counsel, the Respondent and the Charging Party. All references to the Stipulation of Facts shall be designated as “Stip ¶” followed by the paragraph number(s) to which the Administrative Law Judge’s attention is directed.

period through November 1, 2006 through October 30, 2009. (Stip. ¶13, Exhibits F-H).. The Employer adopted the collective bargaining agreement (Stip. 14(b), Exhibit F) which was extended by agreement of the Employer and Local 13000 to November 18, 2009 (Stip. ¶13(b), Exhibit G) and then again to December 4, 2009 (Stip. ¶13(b), Exhibit H).

The collective bargaining agreement (Exhibit F) contained a union security clause as well as a dues check off provision pursuant to which the Employer could withhold from wages of those Union members who had voluntarily authorized such withholding in writing periodic union dues and fees and thereafter transmit such dues and fees to Local 13000. (Stip. ¶15, Exhibit F).

On November 18, 2009, the Employer tendered to Local 13000 its last, best and final offer and further advised Local 13000 that it intended to cease honoring dues check off authorizations at the expiration of the contract extension to December 4, 2009. (Stip. ¶16(b)). On February 2, 2010, the Employer advised the Union that upon implementation of the Employer's last, best and final offer on March 1, 2010, it would not implement the dues checkoff authorization provision. (Stip. ¶17). On March 1, 2010, the Employer did in fact implement its last, best and final offer. (*Ib.*). Thereafter, on June 17, 2010, the parties reached an agreement that included the resolution of the dues check off authorization provision and would have resulted in payment of dues back to March 1, 2010, but that agreement was not ratified. (*Ib.*), No bargaining has taken place since then. (*Ib.*).

On May 6, 2011, by letter, Local 13000 requested the Respondent process eleven (11) dues check off authorization forms. (Stip. ¶18(a), Exhibit I). On May 13, 2011, the Respondent through its counsel, Cynthia Springer, Esquire, declined to process those authorizations. (Stip. ¶18(b), Exhibit J).

STATEMENT OF CASE

On June 6, 2011, Local 13000 filed a charge of unfair labor practices, alleging that the refusal of the Employer to process the dues check off authorizations was a violation of Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §158(a)(1) and (5). (Stip. ¶1, Exhibit A). On August 30, 2011, the RD issued a Complaint and Notice of Hearing. (Stip. ¶2, Exhibit B)/ The Respondent filed its Answer to the Complaint on September 9, 2011 (Stip. ¶3, Exhibit C)/ Thereafter, although a hearing was scheduled, on November 15, 2011, the RD issued an Order Postponing hearing Indefinitely (Stip. ¶4, Exhibit E). The parties have agreed to proceed before the ALJ without a hearing, but rather on a stipulated record, and thereafter submitted Briefs.

On January 10, 2012, the ALJ issued his Decision in which he analyzed the arguments advanced by Counsel for the General Counsel and was compelled to concede them to be “substantial.” (Decision at 7, line 37). Indeed, the ALJ questioned the rationale of *Bethlehem Steel*, 136 NLRB 1500 (1962), noting that:

[t]he collapse of the two very different concepts of union security and dues checkoff into one, as articulated by the Board in *Bethlehem Steel*, is not compelling. They are different provisions, different concepts, grounded in different portions of the Act, and with different purposes. If these concepts are to be excepted from the general *Katz* rule, each exception should stand on its own grounds.

[Decision 8, lines 25-29]

However, he concluded that Board precedent was binding upon him, citing *Waco, Inc.*, 273 NLRB 746, 749, fn. 14 (1984). (Decision at 8, n. 5). Accordingly, he was obliged to find that an employer does *not* violate the Act in unilaterally terminating dues checkoff after the expiration of a collective bargaining agreement, compelled a finding that the Act had not been violated. Accordingly, he recommended and dismissal of the Complaint. (Decision at 8).

ISSUES: 1. WHETHER THE BOARD SHOULD OVERRULE ITS HOLDING IN *BETHLEHEM STEEL* THAT AN EMPLOYER DOES NOT VIOLATE §§ 8(a)(1) AND (5) OF THE ACT BY UNILATERALLY REFUSING TO HONOR DUES AUTHORIZATIONS SUBMITTED BY BARGAINING UNIT EMPLOYEES?

2. WHETHER THE RESPONDENT IN THIS MATTER VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT SINCE MAY 13, 2011 BY REFUSING THE LOCAL UNION'S REQUEST TO PROCESS DUES AUTHORIZATION CARDS AS DESCRIBED IN PARAGRAPH 18(a) OF THE JOINT STIPULATION OF FACTS?

ARGUMENT:

A. THE BOARD SHOULD RE-EXAMINE ITS HOLDING IN *BETHLEHEM STEEL*, GIVEN THE FACT THAT UNION SECURITY AND DUES CHECK OFF AUTHORIZATION CLAUSES ARE GROUNDED IN DIFFERENT STATUTORY PROVISIONS.

On September 30, 2010, the Board issued its decision, upon remand from the United States Court of Appeals for the Ninth Circuit in *Local Joint Board of Las Vegas, Culinary Union Local 226 v. NLRB*, 540 F.3d 1072 (9 Cir. 2008), as to this question.. *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154 (2010) [*"Hacienda III"*]². Because Member Becker recused himself, the Board was divided 2-2 with respect to whether such employer conduct violates the Act and, accordingly, affirmed dismissal of the Complaint.

Given that the decision in *Hacienda III* was mandated by a deadlock a deadlock affirmance is hardly definitive for any parties other than those whose case was before the Board.³ A number of significant legal issues were raised in *Hacienda III* that were not considered initially considered in *Hacienda I*, included the question of whether the termination of a dues check arrangement absent impasse as to that issue is an appropriate Employer weapon. Accordingly, in the Union's view, complete consideration of all issues raised by *Hacienda III* by

² The Board initially decided that dues check off termination was *not* a violation of the Act. *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000), That decision [*"Hacienda I"*] was vacated by the U. S. Court of Appeals for the 9th Circuit and remanded to the Board for further consideration. *Local Joint Executive Board, Las Vegas Culinary Workers Union Local 226*, 309 F.3d 578 (9 Cir. 2002). In September, 2007, the Board once more declined to find a violation of the Act. 351 NLRB 504 (2007) [*"Hacienda II"*], a decision that was once more vacated and remanded by the 9th Circuit.. *Local Joint Executive Board, Las Vegas Culinary Workers Union Local 226* 540 F.3d 1072 (9 Cir. 2008)

³ The Court of Appeals, considering *Hacienda III*, rejected the Board's reasoning in that decision, concluded in light of the history of the case that remand to the Board would serve no further purpose, and decided as a matter of law that in the case before it, the Act was violated . *Local Joint Executive Board, Las Vegas Culinary Workers Union Local 226 v. NLRB*, 657 F.3d 865 (9 Cir. 2011).

the full complement of Board whose members are *all* able to deliberate is warranted, a position that General Counsel has clearly asserted by issuance of the Complaint herein

Thus, the Board should resolve once and for all the question of whether an employer, notwithstanding the Supreme Court's holding in *Katz*, may without bargaining in the absence of a contract provision authorizing dues check off terminate such an arrangement, even those states or territories which have not availed themselves of the authority set forth in §14(b) of the Act to outlaw union security clauses.

B. THE BOARD SHOULD OVERRULE *BETHLEHEM STEEL*, FIND THAT, IN THE ABSENCE OF A *BONA FIDE* IMPASSE, AN EMPLOYER VIOLATES THE ACT BY TERMINATING THE DUES CHECK PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND, ACCORDINGLY, THE EMPLOYER HERE VIOLATED THE ACT BY REFUSING TO PROCESS DUES CHECK OFF AUTHORIZATIONS.

Historically, an employer which unilaterally changes terms and conditions of employment that are mandatory subjects of bargaining violates Sections 8(a)(1) and (5) of the Act. *NLRB v. Katz*, 369 U. S. 736 (1962). Bargaining to impasse is required before an employer may impose such changes. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991) However, in the same year that the Supreme Court decided *Katz*, *supra.*, the Board held that the termination of dues check off is an exception to the rule established in *Katz*.

Bethlehem Steel Co., 136 NLRB 1500 (1962), *remanded on other grounds sub nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 621 (3d Cir. 1963)..

There is no doubt that payroll deductions have long been held to be – and continue to be viewed by the Board as - a mandatory subject of bargaining in the sense that an employer cannot simply refuse to discuss the topic. *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1952), *cert. denied*, 346 U. S. 887 (1953); *Quality House of Graphics*, 336 NLRB 497 (2001); *H. K. Porter Company, Inc.*, 153 NLRB 1370 (1965). An employer which refuses to bargain over such a provision violates the Act. *Stevenson Brick and Bake Company*, 160 NLRB 198, 210 (1966). In order to avoid the obvious implication of such findings, the Board initially reasoned that dues check off provisions were intertwined with the union security provisions of a contract, since the dues check off provisions were designed to implement statutorily regulated union security clauses. *Bethlehem Steel Co.*, *supra.*, at 1502. Over one quarter century later, the Board attempted to decouple the dues check off provision from the union security portion of collective bargaining agreements when, in *Tampa Sheet Metal*, 288 NLRB 322 (1988), the Board concluded that the exception it carved out from *Katz* in *Bethlehem Steel Co.*, *supra.*, was applicable even in right-to-work states.

The Board examined the issue anew in the *Hacienda* series of cases, and, as has been noted earlier (see p. 2, n. 1, *supra.*), On September 30, 2010, in *Hacienda III*, the Board in a deadlocked decision in which two members of the Board continued to adhere to the view that a dues check off provision can be unilaterally abrogated once a contract expires and the other two members of the Board would have found a violation, once more affirmed its earlier view as to whether a violation of the Act takes place. This latest decision was, in essence, overturned by the U. S. Court of Appeals for the 9th Circuit but in so doing, the Court focused solely on the

abrogation of a dues check off in a "right-to work" state, i.e, a state where union security clauses have been outlawed pursuant to §14(b) of the Act and expressly declined to comment on the continued vitality of *Bethlehem Steel. Local Joint Executive Board of Las Vegas*, 657 F.3d, *supra.*, at 875.

Analysis of the language of §8(a)(3) of the Act makes clear that the existence of a union security clause is conditioned utterly and completely upon the existence of a collective bargaining agreement between an employer and the labor organization serving as the exclusive bargaining representative of those employees:.

It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: **Provided**, That *nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization* (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) *to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later*, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: **Provided further** that no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

§8(a)(3) of the Act; 29 U.S.C. §158(a)(3) [Emphasis added]

The application of a union security clause, of course, only requires, as implied by the second proviso in the above-cited language payment. of dues and fees. Indeed, this section of the Act has been so construed. *NLRB v. General Motors Corp.*, 373 U. S.. 734, 742 (1963). There is, then, clearly a distinction to be drawn between the obligation to pay dues and fees, on the one hand, and the method that dues will be collected. Nothing in the language of §8(a)(3) references dues check off.

Dues check agreements are *not* a form of union security; rather they are purely a collection device. Indeed, they are designed to avoid the problems that would otherwise be created by §302 of the Labor-Management Relations Act of 1947, (“LMRA”) as amended; 29 U.S.C. 8186. Section 302(a) of the LMRA, 29 U.S.C. §186(a) makes it a criminal violation for an employer to pay to a labor organization money or any other things of value, but §302(c)(4) of the LMRA, 29 U.S.C. §186(c)(4) establishes an exception for this prohibition that permits a union to accept the following:

The provisions of this section shall not applicable...(4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account, such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination of the applicable collective bargaining agreement, whichever occurs sooner...

An employee need not authorize dues be withheld from his or her wages; the execution of a dues check off authorization is a purely voluntary act and cannot be compelled by threat of discharge. *Air La Carte*, 284 NLRB 471 (1987); *Food & Commercial Workers Local 115 (California Meat Co.)*, 277 NLRB 676 (1985).⁴ Pursuant to the terms of §302(c)(4), a dues check off authorization can be revoked after one (1) year *or* upon the expiration of the contract,

⁴ Indeed, the Seaman’s Wage Act, 46 U.S.C. §§10314-10316 limit what can be withheld from the wages of a seaman. Union dues cannot, under the language of this statute, be withheld.

whichever is first. The language does not by its terms render the dues check off authorization inoperable. Indeed, as acknowledged in *Hacienda I* and its progeny, an employer violates no law by honoring dues check off authorizations even after a collective bargaining agreement expired. *Hacienda III, supra.*, pp. 2-3s 2 and 3. See also, *Newspaper Guild/CWA of Albany v. Hearst Corporation*, 645 F.3d 527 (2d Cir. 2011); *The Providence Journal Company v. Providence Newspaper Guild*, 308 F.3d 129 (1 Cir. 2002).

The Board's previously-expressed view (as in *Bethlehem Steel Co., supra.*, and its progeny) then that there is some sort of link between dues check off clause and union security clauses is simply incorrect and fails to comprehend the distinction between the two provisions.. The latter involves compulsion, i.e., an employee must join the union, and, as such, it is subject to strict regulation as to when the compulsion may be imposed, to wit, when there is a collective bargaining agreement in force. The former involves purely a voluntary act on the part of an employee. *Air La Carte*, 284 NLRB 471 (1987); *Food & Commercial Workers Local 115 (California Meat Co.)*, 277 NLRB 676 (1985). It is required for purpose of legitimating the transfer of dues for purpose of establishing an exception to the bar created by §302(a).

Indeed, as noted by Chairperson Liebman and Member Pearce in *Hacienda III*, the exception set forth in §302(c) with respect to dues check off withholding and transmittal is part of an entire series of exceptions to the bar established by §302(a). Thus, §302(c)(5) of the LMRA; 29 U.S.C. §186(c)(5) authorizes contributions made by employers to pension and welfare benefit funds, subject to certain conditions.⁵ The obligation to continue contributions after contract expiration, absent impasse, is not at all disputed. In *Laborers Health & Welfare*

⁵ The conditions are set forth in subparts (A) through (C) of §302(c) (5) and include but are not limited to that the contributions be made to a trust that is jointly administered

Trust Funds for Northern California v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544, fn. 6 (1988), the Supreme Court held that while there may not be a basis for a claim by such a benefit fund for post-contract expiration contributions pursuant to either §301 of the LMRA, 29 U.S.C. §185 of §502 of the Employment Income Security Act of 1974, as amended (“ERISA”), 29 U. S.C. §1132, the termination of such contributions can be viewed through the prism of *Katz*.

One is therefore compelled to inquire as to what rationale could be offered for the long held Board position that an employer which must bargain to impasse on a whole host of mandatory subjects of bargaining before implementation⁶ is somehow not subject to such stricture with regard to dues check off authorization. The only other rationale appears to be contained the opinion in *Hacienda III*, authored by members Schomber and Hayes, to wit, that the ability of an employer to terminate dues check off authorization is a recognized economic weapon and that somehow the declaration that such conduct is illegal would “strip employers of that [weapon] would significantly alter the playing field that labor and management have come to know and expect.” *Hacienda III*, at p. 5. But that justification puts the horse before the cart; the Board must decide whether parties met their lawful obligations in the bargaining process, as mandated by Board law and statute, not to engage in an analysis as to which weapons of economic warfare one party or the other might employ. *Cf. NLRB v. Katz*, 369 U.S., *supra.*, at

⁶ See, e.g., *Braswell Motor Freight Lines*, 141 NLRB 1154 (1963)[overtime pay]; *Singer Mfg. Co.* 24 NLRB 444, *modified and enforced*, 119 F.2d 131 (7th Cir. 1941) [paid holidays]; *Guard Publishing Co.*, 339 NLRB 333 (2003); *Inland Steel Co.*, 77 NLRB 1, *enforced* 170 F.2d 247 (7 Cir. 1948), *cert. denied*, 336 U.S. 960 (1949)[pensions]; *W.W. Cross & Cp. V. NLRB*, 174 F.2d 875, 878 (1 Cir. 1949) [health insurance]; *Kroger & Co. v. NLRB*, 401 F.2d 682 (6 Cir. 1968)[profit-sharing plans]; *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979)[cafeteria and vending machine prices]; *Gratiot Comty. Hosp.*, 312 NLRB 1075 91993), *enforced In pertinent part*, 51 F.3d 1255 (6 Cir. 1999)[issuance and laundering of uniforms]; *Tuskegee Area Transp. Sys* 308 NLRB 251, *enforced*, 53 F.3d 1499 (11 Cir. 1993)[shift changes]; *Southern California Edison Co.*, 284 NLRB 1205 (1987), *enforced*, 852 F.2d 572 (9 Cir. 1988); *NLRB v. Proof Co.*, 242 F.2d 560 (7 Cir. 1957), *cert. denied*, 355 S. 831 (1957); Indeed, while a union security clause is a creature of contract, during the term of the contract, an employer cannot unilaterally decline to enforce its terms. *The Hearst Corp. Capital Newspaper Division*, 343 NLRB 689 (2004); *St. John's Mercy Health System*, 344 NLRB 341 (2005).

747; *Charles D. Bonanno Linen Service*, 243 NLRB 1093, 1097 (1979);, *enf'd.* 630 F.2d 25 (1 Cir. 1980), *aff'd.* 454 U.S. 404 (1982). Once a determination is made by the Board, then – and only then – can the parties utilize whatever economic weapons may be available to them. Indeed, the rationale proffered by Members Schomber and Hayes in *Hacienda III*, clearly – and impermissibly – allow the Board to put its finger directly on the scale. That weight should be removed and the Board should return to its classic role, administering the Act with respect to ongoing collective bargaining with fealty to the principle that an employer wishing to make unilateral changes in terms and conditions of employment must first bargain to impasse before doing so.

The issues to be decided then are contingent on the continued vitality of *Bethlehem Steel Co, supra.* As has been argued above, there is no statutory or logical foundation for the Board's position that the rules it has applied to the bargaining process somehow should be discarded with respect to agreements between the parties permitting voluntary dues check off authorizations to be honored even after expiration of the collective bargaining agreement in which such a provision is found to exist. *Bethlehem Steel* then should be overruled. Accordingly, given that there is absolutely no evidence that the parties here bargained to impasse with respect to the dues check off authorization provision contained in the existing agreement and the lack of dispute that the Respondent acted unilaterally in refusing to recognize such authorizations, the Respondent's conduct clearly violated §§8(a)(1) and (5) of the Act.

CONCLUSION

In light of the fact that the implementation of voluntary dues check off authorizations is a mandatory subject of bargaining, that unilateral changes with respect to mandatory subjects of bargaining absent impasse violate the Act and that there is a distinction in the statutory underpinnings between contract provisions allowing voluntary dues authorizations and a provision permitting implementation of a union security provision, the Board should overrule its holding in *Bethlehem Steel Co*, 136 NLRB 1500 (1962). Given that there was no bargaining to impasse with regard to voluntary dues check off authorizations before the Employer here unilaterally ceased honoring the provision providing for same, the Respondent did violate §§8(a)(1) and (5) of the Act by refusing since December 7, 2010 to honor dues authorizations submitted by bargaining unit members prior to December 4, 2009 and, further, by refusing to process such dues authorization cards submitted by Local 13000 since May 13, 2011. The Board

should therefore find merit to the Charging Party's Exceptions, hold the Employer here to have violated the Act and order an appropriate remedy and notice.

Respectfully submitted

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ATTORNEYS FOR CHARGING PARTY,

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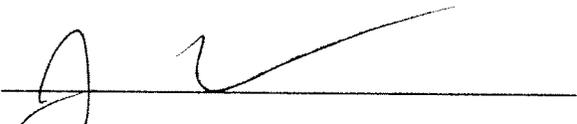
Dated: February 22, 2012

CERTIFICATE OF SERVICE

I, Jonathan Walters, hereby certify the copies of the foregoing Exceptions of the Charging Party to the January 10, 2012 decision of Administrative Law Judge David Grossman and Brief in support of such exceptions were served this date by electronic mail upon:

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JONATHAN WALTERS, ESQUIRE

Dated: February 22, 2012