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Metalcraft of Mayville, Inc. and District Lodge No. 10, International Association of Machinists and Aerospace Workers of America, AFL–CIO. Case 18–CA–178322

April 17, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND EMANUEL

On March 10, 2017, Administrative Law Judge Charles J. Muhl issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the Respondent filed a reply brief. In addition, the General Counsel filed a cross-exception and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions only to the extent consistent with this decision and order.

Following Wisconsin’s enactment of a right-to-work law that curtailed dues checkoff, the Respondent ceased deducting union dues from its unit employees’ paychecks and remitting those dues to the Union. The Respondent also communicated with its employees regarding this action, the state right-to-work law, and its understanding of employees’ rights under that law and under the Act. The judge found that by failing to deduct and remit dues to the Union from June to September 2016, the Respondent modified its collective-bargaining agreement with the Union within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act. In addition, the judge found that the Respondent’s related communications to employees undermined the Union in violation of Section 8(a)(1) and constituted direct dealing with employees proscribed by Section 8(a)(5) and (1). We reverse these findings. As explained below, because the Respondent reasonably believed that its employees’ dues-checkoff authorizations did not conform to Wisconsin’s recently enacted right-to-work law, its cessation of dues checkoff was lawful. Its communications to employees about the

¹ The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect.

matter, moreover, were similarly lawful. Accordingly, we shall dismiss the complaint in its entirety.

Facts

The Respondent fabricates metal and manufactures lawn maintenance equipment at its facility in Mayville, Wisconsin. The Union represents the Respondent’s assemblers, maintenance employees, and welders. The Respondent and Union have a decades-long bargaining relationship, and they were parties to a collective-bargaining agreement that was effective from June 2, 2013, to June 4, 2016, and that automatically renewed for another year on June 5, 2016, after neither party gave the contractually required notice to modify, amend, or terminate. Article XXV of the parties’ agreement (hereafter CBA) included union-security and dues-checkoff provisions. Regarding dues checkoff, article XXV stated that “[u]pon receipt of a signed authorization (conforming to applicable law),” the Respondent shall deduct union dues from the employee’s “first payroll check in each month” and remit those dues to the Union by the 15th of the month.

Since 2001, the Union had used a “Membership Application and/or Check-Off Authorization” form. The form states that the signatory employee’s checkoff authorization

shall be irrevocable for one (1) year or until the termination of the collective bargaining agreement between my Employer and the Union, whichever occurs sooner. I agree that this authorization shall be automatically renewed for successive one (1) year periods or until the termination of the collective bargaining agreement, whichever is the lesser, unless I revoke it by giving written notice to my Employer and Union not more than twenty (20) and not less than five (5) days prior to the expiration of the appropriate yearly period or contract term.

By signing the form, an employee authorizes the Respondent to deduct union dues from his or her paycheck and remit that amount to the Union as set forth in article XXV of the CBA. In addition, by signing the form an employee acknowledges that he or she has received and examined the “Notice to Employees Subject to IAM Security Clauses” (Notice) printed on the employee copy of the form. The Notice states: “Employees working under collective bargaining agreements containing union security clauses are required, as a condition

Standard Dry Wall Products, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

of employment, to pay amounts equal to the union's monthly dues and applicable initiation and reinstatement fees."²

On March 9, 2015, Wisconsin enacted a right-to-work law, 2015 Wisconsin Act 1. This law states that "[n]o person may require, as a condition of obtaining or continuing employment, an individual to . . . [b]ecome or remain a member of a labor organization [or p]ay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization." Wis. Stat. Sec. 111.04(3)(a). If a contract provision violates this subsection, the provision is void. *Id.* Sec. 111.04(3)(b). Any person who violates Section 111.04(3)(a) is guilty of a Class A misdemeanor and subject to a fine of up to \$10,000 or imprisonment up to 9 months, or both. Wis. Stat. Sec. 939.51, 947.20. In addition, the statute prohibits dues-checkoff authorizations unless they are revocable by the employee upon 30 days' notice. *Id.* Sec. 111.06(1)(i).

Wisconsin's right-to-work law first applied to the parties' CBA when it renewed on June 5, 2016. See 2015 Wis. Act. 1 Sec. 13. On June 2, 2016,³ the Union sent the Respondent a letter, acknowledging the law's applicability to the parties' agreement and stating the Union's position that, "[a]s dues check-off is governed by federal law, that issue need not be addressed. Your employees have the right to opt out of the Union during the 15 day window period listed on their dues check-off authorization." On June 3, the Respondent notified the Union that it believed article XXV and the checkoff authorization form did not comply with the right-to-work law and that it would no longer enforce them after June 4. Thereafter, the Respondent did not deduct or remit union dues in June, July, August, or September.⁴

On June 6, the Respondent sent unit employees a letter, which stated in part as follows:

[A]fter June 4, the law prohibits requiring employees to pay Union dues. To do so would be a Class A Misdemeanor or a crime under Wisconsin law. If you want to pay Union dues, it is now your decision and it's entirely voluntary.

. . . .

Currently you pay \$59.30 per month or \$711.60 per year in Union dues. All together our employees' payments of Union dues are about \$255,000 per year. Based on the signed authorization for Union dues, we believe it is

a violation of the Right-to-Work law. Therefore, effective after June 4, we will no longer deduct the \$59.30 from your paycheck per month.

The Company informed the proper Union representation on June 3, 2016 about our legal compliance regarding [the Wisconsin right-to-work law] implementation and the legality of the Union dues authorization form.

On June 7, the Respondent sent unit employees another letter, which listed several questions and answers, including the following:

Q: Look at the yearly total we pay the union, where is all that money going?

A: Much of the information about the distribution of union dues is publicly accessible. For example you can Google IAM and find answers to your questions directly from the source or other sources if you want to find out more.

Q: Why should I pay them anything after they screwed up the contract

negotiations?

A: This is a personal choice that every individual has to decide on their own and how they will handle their money.

Q: Do I have to sign a new authorization card? The union has not shown me anything.

A: This is a personal choice that every individual has to decide on their own of whether they will continue to be a paying member of the union or not.

On June 24, the Respondent sent the Union a letter indicating that it would resume deducting and remitting dues if the Union submitted new, legally compliant checkoff authorizations signed by employees after June 5. On June 27, the Respondent sent employees another letter with more questions and answers, including these:

Q: Other people had told me that I should pay union dues myself with a direct deduction from my checking account. Should I do that?

A: Whether to pay union dues, and whether to give the union access to your checking account is up to each

² The record contains all dues-checkoff authorizations maintained by the Respondent that were signed by employees prior to June 4, 2016. Most of the authorizations from 2001 on contain the above-quoted Notice language. Authorizations signed before 2001, as well as a few signed after 2001, refer only to dues checkoff and do not mention union security. They also vary as to the duration of the annual revocation window period, from 14 to 30 days.

³ All dates hereafter are in 2016 unless otherwise specified.

⁴ As stated above, art. XXV required the Respondent to deduct dues from "the first payroll check in each month." Based on the dates the Respondent had deducted dues in prior months, it appears that the first pay date in June was June 9. See *Jt. Exh. 4*.

individual to decide. Such a decision is voluntary and it is your choice. The Company has been as clear as possible with the Union that we acknowledge that we have a legal obligation to collect Union dues from employees as soon as the union presents signed dues checkoff authorization forms that comply with the state law requirement that such decisions are voluntary. The Company intends to honor and follow Article 25 of the contract. The Company does not wish to break the law by collecting dues under the current authorization forms that [] were signed by employees prior to June 5, 2016 when they were told that such a payment was a condition of employment. The Company will not break the law.

....

Q: Do I have to pay union dues and sign a new authorization form to check-off dues to work at Metalcraft?

A: No. The Law in Wisconsin changed and after June 4, 2016, the mandatory payment of union dues is illegal and you cannot be forced to pay union dues.

- The Union wants you to pay \$59.30 per month. You do not have to pay union dues to work at Metalcraft; that's \$711.60 per year or .34 cents for each hour you work.
- The decision is yours and it's purely voluntary!
- You do not have to sign a new authorization card; it is your decision and it is purely voluntary.
- By the IAM giving you a new authorization form, the union now recognizes that the old forms were signed when dues were required and mandatory. That's changed!

On October 3, the Union gave the Respondent new "Membership Application and/or Check-Off Authorization" forms signed by employees. The first page of the new form was identical to that of the old form. However, the new forms in the record do not contain the Notice that was printed on the old forms. The Respondent promptly resumed deducting and remitting dues for employees who signed authorizations on or after June 5.

DISCUSSION

A. The Respondent did not unlawfully modify the CBA when it stopped honoring dues-checkoff authorizations it reasonably believed did not conform to applicable law.

The Board ordinarily will not find a midterm contract modification if the respondent establishes that it had a sound arguable basis for its belief that the contract authorized its action. See *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), *affd. sub nom. Bath Marine Draftsmen's*

Assn. v. NLRB, 475 F.3d 14 (1st Cir. 2007). Where the dispute is solely one of contract interpretation and there is no evidence of animus, bad faith, or intent to undermine the union, the Board does not seek to determine which of two equally plausible contract interpretations is correct. *Phelps Dodge Magnet Wire Corp.*, 346 NLRB 949, 951 (2006); *NCR Corp.*, 271 NLRB 1212, 1213 (1984). Rather, "[a]s the Board has held for many years, with the approval of the courts: ' . . . it will not effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.'" *United Telephone Company of the West*, 112 NLRB 779, 781 (1955) (quoting *Consolidated Aircraft Corp.*, 47 NLRB 694, 706 (1943), *enfd.* 141 F.2d 785 (9th Cir. 1944)). Instead, the parties' recourse is to attempt to settle the question by negotiation and, if there is no settlement, by seeking judicial enforcement of their interpretation of the contract. *Id.* at 781–782.

At the time the Respondent stopped deducting dues, it had a sound arguable basis for its belief that the CBA, viewed in light of Wisconsin's right-to-work law, authorized it to do so. Article XXV of the CBA required the Respondent to deduct union dues "[u]pon receipt of a signed authorization (*conforming to applicable law*)" (emphasis added). The Respondent asserts that the authorizations in its possession did not conform to Wisconsin's right-to-work law because they violated Wis. Stat. Sec. 111.04(3)(a) and Wis. Stat. Sec. 111.06(1)(i). Both assertions are reasonable.

First, Wis. Stat. Sec. 111.04(3)(a) provides that any contract provision that requires the payment of union dues as a condition of employment is void. It is undisputed that Section 111.04(3)(a) rendered the CBA's union-security provision void. Moreover, as the judge found, the Board's decision in *Penn Cork & Closures, Inc.*⁵ can reasonably be interpreted to require cessation of dues checkoff when a union-security agreement is invalidated. In *Penn Cork*, employees voted to deauthorize union security and then sought to revoke their checkoff authorizations. By their terms, those authorizations were irrevocable except during an annual window period (and at contract expiration), and the employees tried to revoke their authorizations outside the window period. The employer continued to honor the checkoff authorizations, and the Board held that by doing so, the employer violated the Act. *Id.* at 415. As the Board there explained, union security is necessarily linked to

⁵ 156 NLRB 411 (1965), *enfd.* 376 F.2d 52 (2d Cir. 1967), *cert. denied* 389 U.S. 843 (1967).

dues checkoff where (as in the instant case) employees signed checkoff authorizations while a union-security agreement was in effect. Under these circumstances, the Board stated, “it would be unreasonable to infer that all employees who authorized the checkoff would have done so apart from the existence of the union-security provision and the necessity of paying union dues, or to infer that these same employees would, as a whole, wish to continue their checkoff authorizations even after the union-security provision was inoperative.” *Penn Cork*, above at 414; see also *Bedford Can Mfg. Corp.*, 162 NLRB 1428, 1431 (1967) (Checkoff authorizations that are executed or permitted to renew during the existence of a union-security agreement “must be viewed as an implementation of the union-security provision. We will not infer in such a situation that, absent the compulsion of the union-security clause, the employees would have acquiesced in the renewal of their checkoff authorizations.”).

Similarly here, the checkoff authorizations the Respondent possessed when it stopped deducting union dues were signed while the CBA’s union-security provision was in effect. Thus, the Respondent’s assertion that the two are linked is reasonable and supported by *Penn Cork*. Additionally, the “Notice to Employees Subject to Union Security Clauses” printed on the checkoff authorization form reminded employees they had to pay union dues as a condition of employment, further cementing the connection between dues checkoff and union security in this case.⁶

Second, the Respondent had a sound arguable basis for believing the authorizations did not conform to Wis. Stat. Sec. 111.06(1)(i), which requires that checkoff authorizations be revocable upon 30 days’ notice. The authorizations, which are irrevocable except during an annual window period or upon contract termination, clearly violate Wis. Stat. Sec. 111.06(1)(i) on its face. Under the circumstances, the Respondent’s assertion that the authorizations

⁶ Although the Board in *Penn Cork* held that the checkoff authorizations in that case became revocable following deauthorization, it was not unreasonable for the Respondent to treat the authorizations in this case as void. It is undisputed that Wis. Stat. Sec. 111.04(3)(a) rendered union-security arrangements void, and a checkoff authorization that cannot be revoked except during a brief annual window period may reasonably be viewed as a form of compulsory unionism. Unit employees who had executed such an authorization only because they could not keep their jobs unless they paid union dues had only one way to stop paying union dues outside the window period: by quitting their jobs. In that sense, the checkoff authorizations in the Respondent’s possession tied employment to the payment of union dues, contrary to Sec. 111.04(3)(a). Moreover, most of those authorizations informed employees that their employment was conditioned on payment of an amount equal to union dues. In light of the fact that Wisconsin’s right-to-work law made violations thereof a crime, punishable by a fine, imprisonment, or both, it was reasonable for the Respondent to take a risk-averse approach by treating the

in its possession did not “conform[] to” the Wisconsin right-to-work law was reasonable and satisfies the “sound arguable basis” standard.

We recognize that the United States Court of Appeals for the Seventh Circuit, in a divided opinion, has held that Sec. 111.06(1)(i) is preempted by federal law. See *International Assn. of Machinists District Ten and Local Lodge 873 v. Allen*, 904 F.3d 490 (7th Cir. 2018), pet. for cert. pending, No. 18-855. However, that decision issued *after* the events at issue in this case, and courts have found the argument that states have authority to regulate checkoff authorizations to be at least colorable. E.g., *SeaPak*, above. Indeed, *Allen* itself implicitly recognized that the argument was at least colorable, inasmuch as the majority opinion’s lengthy and complex preemption analysis was accompanied by a dissenting opinion that reached the opposite conclusion after delving yet further into the intricacies of competing preemption doctrines. If judges on the distinguished Seventh Circuit can reach opposing reasonable conclusions on this difficult question, we have no difficulty in finding that the Respondent’s position satisfies the “sound arguable basis” standard. See *Bath Iron Works*, 345 NLRB at 503 (finding that respondent had a sound arguable basis for its position where its interpretation of the contract was “colorable”).

We further find that the Respondent did not act in bad faith when it stopped deducting union dues unilaterally. Given the CBA requires that only checkoff authorizations “conforming to applicable law” are to be honored and the Respondent’s reasonable position that the authorizations in its possession did not “conform[] to applicable law,” the Respondent had no duty to bargain with the Union before ceasing to honor them. See, e.g., *Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d at 28 (finding that bad faith was not shown by the employer’s taking the position, which was arguable, that the contract permitted it to act unilaterally); see also *NLRB v. Postal Service*, 8 F.3d 832,

authorizations as void rather than revocable. And it was also reasonable for the Respondent to believe that by doing so, it was adhering to the CBA, under which its duty was to honor checkoff authorizations only if they “conform[ed] to applicable law.” In any event, the “sound arguable basis” standard does not require the Respondent’s interpretation of the CBA in light of the right-to-work law to be correct, merely reasonable. As the judge noted, the question of the impact of state right-to-work laws on dues checkoff has been the subject of numerous lawsuits, and the decisions in those cases treat the argument that such laws invalidate checkoff authorizations as reasonable, if ultimately unsuccessful. See, e.g., *SeaPak v. Industrial, Technical and Professional Employees, Division of National Maritime Union, AFL-CIO*, 300 F. Supp. 1197, 1199 (S.D. Ga. 1969) (argument that checkoff authorizations irrevocable for 1 year are sufficiently similar to compulsory unionism to permit states to regulate them had “some force”), affd. 423 F.2d 1229 (5th Cir. 1970), affd. 400 U.S. 985 (1971).

837-838 (D.C. Cir. 1993) (finding employer's failure to bargain with the union over service reductions did not violate the Act where the employer's right to implement service reductions was covered by the parties' contract).⁷ As explained below, we find the Respondent's communications to employees were lawful, and therefore those communications are not evidence of bad faith, either.

Our dissenting colleague believes the sound arguable basis doctrine does not even apply here. For the dissent, the fact that the Seventh Circuit has held that Sec. 111.06(l)(i) is preempted ends the inquiry. Our colleague further contends that the sound arguable basis doctrine is unavailable to the Respondent in any event because in her view, the Respondent was acting in bad faith for the purpose of undermining the Union. We respectfully disagree.

We share our colleague's commitment to upholding the primacy of federal labor policy, consistent with the intent of Congress.⁸ And we accept the Seventh Circuit's conclusion that Sec. 111.06(l)(i) is preempted, as discussed above. But the Respondent's obligation to honor dues checkoff is solely based on the provisions of the parties' CBA, and under the CBA, the checkoff obligation applied only to authorizations "conforming to applicable law." Because the CBA incorporated "applicable law," the question of whether the Respondent acted lawfully when it

suspended dues checkoff is a matter of contractual as well as statutory interpretation, to which the sound arguable basis doctrine clearly applies. See *San Juan Bautista Medical Center*, 356 NLRB 736, 738 (2011) (applying sound arguable basis analysis where, as here, the employer relied on the provisions of applicable law, incorporated in its labor contract, as a basis for its actions).⁹ The dissent's contrary position effectively reads the "conforming to applicable law" provision out of the parties' agreement. Moreover, the dissent focuses on the issue of whether Sec. 111.06(l)(i) is preempted by federal law, and on the Seventh Circuit majority's conclusion that it is. We adhere to the view that a colorable case can be made for the opposite conclusion, as Judge Manion demonstrated in his dissent, but we also reiterate that our rationale does not rely wholly, or even primarily, on Sec. 111.06(l)(i). As explained above, we also rely on Sec. 111.04(3)(a), the validity of which is not in question.

We also reject the dissent's position that the Respondent's cessation of dues checkoff must be presumed to have undermined the Union because "an employer's unilateral cessation of dues-checkoff inevitably tends to undermine the Union's status as collective-bargaining representative."¹⁰ Preliminarily, nothing in the Act compels an employer to agree to dues checkoff. See *H. K. Porter Co. v.*

⁷ Moreover, the Respondent notified the Union of its decision on June 3, 6 days before it stopped deducting dues. While the Respondent's June 3 letter stated the Respondent would no longer check off dues after June 4, the Respondent did not implement this decision until June 9, when it refrained from deducting dues from employees' first payroll check in June. Neither the 6 days' notice nor the letter's use of categorical language shows bad faith. Cf. *Medicenter, Mid-South Hospital*, 221 NLRB 670, 678 (1975) (finding the employer provided the union with adequate notice of a proposed change where the union received notice 2 days before the change was implemented); *Clarkwood Corporation*, 233 NLRB 1172 (1977) (5 days' notice sufficient), *enfd. mem.* 586 F.2d 835 (3d Cir. 1978); *Haddon Craftsmen*, 300 NLRB 789, 790-791 (1990) ("[I]t is not unlawful for an employer to present a proposed change in terms and conditions of employment as a fully developed plan or to use positive language to describe it.") (citations omitted), *rev. denied mem. sub nom. Graphic Communications Workers Local 97B v. NLRB*, 937 F.2d 597 (3d Cir. 1991).

⁸ We reject the dissent's wholly unfounded suggestion that our decision today would in any way allow a hypothetical employer to "escape unfair labor practice liability for discriminating against union members by invoking a state law that makes it a crime to hire them." Unlike here, there could not be any remotely colorable basis for finding that such a law was not preempted. The fanciful scenario the dissent posits has no bearing on the outcome of this case.

⁹ More precisely, the employer in *San Juan Bautista Medical Center* relied on a letter decision of an administrative agency, which was based on applicable law. In arguing that the sound arguable basis standard does not apply here, the dissent relies in part on *San Juan Bautista*, but the Board *applied* sound arguable basis in that case. To be sure, the Board concluded that the employer's interpretation of the contract in light of applicable law was not colorable, but the point is that the Board applied the sound arguable basis standard in reaching that conclusion. Here as there, the issue is whether the employer's interpretation of the contract

was colorable in light of applicable law. That the Board reached the opposite conclusion in *San Juan Bautista* has no bearing on this case, where the Respondent's position was colorable for the reasons stated above.

Shen-Mar Food Products, Inc., 221 NLRB 1329 (1976), *enfd.* 557 F.2d 396 (4th Cir. 1977), cited by the dissent, is not to the contrary. The Board there held that the employer violated Sec. 8(a)(5) by unilaterally ceasing to deduct dues from the pay of employees who had resigned from the union, where the employees' dues-checkoff authorizations were, by their terms, irrevocable at the relevant time. After examining the parties' agreement, the Board concluded that the employer's interpretation of the contract was "clearly in conflict with the intent of the checkoff provisions of the contract," *id.* at 1329, which the Board viewed as incorporating the checkoff authorizations, *id.* at 1330. Thus, the *Shen-Mar* Board based its conclusion on its interpretation of the contract at issue there. We have done likewise here, although we have limited ourselves to determining whether the Respondent's interpretation of the materially different provisions of its contract had a sound arguable basis, consistent with *Bath Iron Works*.

We further observe that *Shen-Mar's* holding that the dues checkoff authorizations in that case remained irrevocable despite the employees' resignation from the union cannot be read in isolation but rather must be viewed together with the Board's subsequent decision in *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 329 (1991), where the Board held that checkoff authorizations *do* become revocable upon resignation from the union absent "[e]xplicit language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership." Thus, the holding of *Shen-Mar* was significantly limited by the subsequent holding of *IBEW Local 2088*.

¹⁰ The cases cited by the dissent in support of this proposition all involved a cessation of dues checkoff that the Board found to be unlawful. See, e.g., *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2018); *Shen-Mar Food Products, Inc.*, *supra*. The premise of those cases has no

NLRB, 397 U.S. 99 (1970) (Board lacks authority to compel party to agree to any specific bargaining proposal, including dues checkoff); *NLRB v. J.P. Stevens Co.*, 538 F.2d 1152, 1165 (5th Cir. 1976).¹¹ And the Board has rejected the view that an employer, having once agreed to dues checkoff, is obligated to continue it forever. *Logemann Bros. Co.*, 298 NLRB 1018, 1020 (1990) (existence of dues checkoff clause in prior contract does not by itself obligate the employer to include it in successive contracts). An employer may lawfully propose the elimination of dues checkoff and, after bargaining to a valid impasse, implement its proposal. *American Thread Co.*, 274 NLRB 1112, 1112 (1985). Thus, an employer may unilaterally discontinue dues checkoff without undermining the union or otherwise violating the Act when, as here, it has a lawful basis for doing so. The dissent's contention that a violation must be found because of the presumed effect on the Union's finances of the cessation of dues checkoff is inconsistent with these principles.

Nor is there any substance to the dissent's position that the Respondent acted in bad faith based on its allegedly unlawful statements disparaging the Union and its alleged direct dealing. Those allegations have no merit for the reasons stated below. We observe, moreover, that in arguing that these violations were established, the dissent relies on her position that the cessation of dues was unlawful.¹² The dissent also relies, in part, on these same purported violations to *find* the cessation of dues unlawful. We are unpersuaded by the dissent's circular reasoning.

Because the Respondent, when it ceased deducting and remitting union dues, acted in good faith pursuant to a sound arguable interpretation of the parties' CBA in light of the Wisconsin right-to-work law, it did not, by doing so, modify the CBA within the meaning of Section 8(d) in violation of Section 8(a)(5). Accordingly, we dismiss this allegation.

application here, where the issue presented is *whether* the cessation of dues checkoff *was* unlawful.

Chairman Ring and Member Emanuel do not pass on whether *Lincoln Lutheran* was correctly decided. They are open to reconsidering its holding in a future appropriate case.

¹¹ In *H. K. Porter*, the underlying court of appeals opinion expressed much the same sentiments the dissent advances here. See *Steel Workers v. NLRB*, 389 F.2d 295, 302 & fn. 15 (D.C. Cir. 1967) (noting that "collection of dues without a checkoff would have presented the union with a substantial problem of communication and transportation," and stating that "the checkoff provision . . . is likely to be of life or death import to the fledgling union, while it is of no consequence whatever to the employer") (footnotes omitted). The Supreme Court rejected the circuit court's views and reversed.

¹² The dissent says that "[t]he Respondent's statement that it would cease deducting union dues . . . was effectively an announcement to employees that it would commit an unfair labor practice . . ."; "[t]he Respondent disparaged the Union as part of its unlawful refusal to deduct and remit union dues"; and "the direct-dealing violation follows from the

B. Because the legality of the cessation of dues checkoff turns on whether the Respondent modified the CBA, a unilateral-change analysis is inapplicable.

We also dismiss the complaint allegation that the Respondent violated Section 8(a)(5) and (1) by unilaterally ceasing dues checkoff without providing the Union notice and an opportunity to bargain. Because dues checkoff is a contractual matter and was covered by the parties' CBA, the issue here is whether the Respondent modified—i.e., failed to adhere to—the CBA when it discontinued dues checkoff, and the applicable standard for determining whether a contract has been modified is that set forth in *Bath Iron Works*. The judge thus erred in analyzing the Respondent's conduct as both a contract modification and a unilateral change, as these theories are mutually exclusive. As the Board explained in *Bath Iron Works*:

The "unilateral change" case and the "contract modification" case are fundamentally different in terms of principle, possible defenses, and remedy. In terms of principle, the "unilateral change" case does not require the General Counsel to show the existence of a contract provision; he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*. The allegation is a *failure to bargain*. In the "contract modification" case, the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract. In terms of defenses, a defense to a unilateral change can be that the union has waived its right to bargain.¹³ A defense to the contract modification can be that the union has consented to the change. In terms of remedy, a remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract.

Respondent's unlawful modification of the contract in failing to honor the dues-checkoff provision."

¹³ We recognize that in unilateral-change cases where the disputed change was made when a collective-bargaining agreement was in effect, several federal courts of appeals have held that the issue to be decided is not whether the union *waived* its right to bargain, but whether the parties, having bargained and reached an agreement, have by the terms of their agreement ceded to the employer the right to take the disputed action unilaterally. In other words, the issue is whether the disputed action is covered by the contract. See, e.g., *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936–937 (7th Cir. 1992); *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007). Notwithstanding these decisions, in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), the Board reaffirmed that the governing standard in all unilateral-change cases remains whether the union clearly and unmistakably waived its right to bargain over the employer's disputed unilateral action. We are open to reconsidering *Provena* and "contract coverage" in an appropriate future case.

Bath Iron Works Corp., 345 NLRB at 501 (emphasis in original).

Here, the Respondent and the Union had already bargained over dues checkoff and entered into a CBA that memorialized their bargain. As a result, there is no continuing duty to bargain with respect to dues checkoff, and a unilateral-change analysis would be meaningless. If the Respondent's cessation of dues checkoff modified the CBA without the Union's consent, its act would have been unlawful even if the Respondent had given the Union notice and an opportunity to bargain. If the Respondent's cessation of dues checkoff did not modify the CBA—and for the reasons set forth above, it did not—its act was lawful even if the Respondent did not give the Union notice and opportunity to bargain. The legality of the Respondent's conduct depends solely on whether it conformed to a colorable interpretation of the parties' CBA in light of Wisconsin's right-to-work law. Therefore, the applicable standard is contract modification, and whether or not the Union was given notice and opportunity to bargain is irrelevant. See, e.g., *NCR Corp.*, above at 1213 (dismissing unilateral change allegation under the “sound arguable basis” standard where the employer acted pursuant to a reasonable interpretation of the parties' contract); *San Juan Bautista Medical Center*, 356 NLRB at 738 & fn. 10 (analyzing employer's failure to pay bonus as an unlawful contract modification, even though complaint alleged unilateral change).

C. The Respondent did not unlawfully undermine the Union in its June 6, 7, and 27 letters to employees.

An employer's statements violate Section 8(a)(1) if they have a reasonable tendency to “interfere with, restrain, or coerce” employees in the exercise of their Section 7 rights. Section 8(c) protects “[t]he expressi[on] of any views, argument, or opinion, or the dissemination thereof, . . . if such expression contains no threat of reprisal or force or promise of benefit.” Accordingly, an employer “may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise

interfere with the Section 7 rights of employees.” *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006).

The judge found the Respondent's letters unlawfully undermined the Union in two ways. First, the judge found that the Respondent incorrectly stated that Wisconsin's right-to-work law prohibited it from continuing to check off dues. As explained above, the Respondent reasonably believed that this statement was correct. And even if it was incorrect, the Board does not “probe into the truth or falsity of any alleged misrepresentation.” *Metropolitan Life Insurance Co.*, 266 NLRB 507, 508 (1983).¹⁴ Moreover, the Respondent unequivocally attributed its decision to cease dues checkoff to the Wisconsin right-to-work law, not to the Union or to any Section 7 activity, and its statements contained no threats or promises. Therefore, these statements were protected under Section 8(c).

Second, the judge found the letters disparaged the Union by listing the amounts employees paid in Union dues and posing questions that raised doubts about the Union's use of those funds and its overall competence. The Respondent's statements implied criticism of the Union, nothing more—and it is perfectly lawful for an employer to criticize a union. To the extent the Respondent implied the Union was incompetent or wasting dues, “[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1).” *Sears, Roebuck & Co.*, 305 NLRB 193, 193 (1991); see also *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 642 (D.C. Cir. 2017) (finding lawful employer's statements that unions were “outdated and ridiculous,” union dues were “ridiculous,” employees “did not need a union,” and the union stole money from its members); *Southern Bakeries, LLC v. NLRB*, 871 F.3d 811, 823 (8th Cir. 2017) (reversing Board's finding that employer unlawfully disparaged union by stating, without supporting evidence, that it had “raised concerns that the [union] was discriminating against Hispanics through targeted grievance allegations”).¹⁵

¹⁴ In *Metropolitan Life Insurance*, the Board held that misrepresentations of law are insufficient even to set aside an election, which involves a more restrictive standard than for finding an unfair labor practice. See *General Shoe*, 77 NLRB 124, 127 (1948), *enfd.* 192 F.2d 504 (6th Cir. 1951), *cert. denied* 343 U.S. 904 (1952).

Contrary to the judge, *Eagle Comtronics, Inc.*, 263 NLRB 515 (1982), does not stand for the proposition that all employer statements that are inconsistent with the law violate the Act. Rather, the Board in *Eagle Comtronics* stated that an employer's statements about job status after a strike violate the Act if they constitute threats that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with the law regarding striker replacement. *Id.* at 515–516. Here, the

Respondent's statements about the Wisconsin right-to-work law would not reasonably be understood as threats.

¹⁵ In *Southern Bakeries*, 364 NLRB No. 64, slip op. at 1–4 (2016), *enfd.* in relevant part 871 F.3d at 823, the Board found the employer's statement that “[t]he union appear[ed] to have plans to take our employees out on strike” as it had at Hostess at the cost of 18,000 lost jobs and 33 closed bakeries unlawfully disparaged the union by threatening that continued unionization would lead to a strike and plant closure. Here, there was no threat of plant closure or any other implication that the Respondent would take action against its employees in retaliation for their membership in the Union.

D. The Respondent did not engage in unlawful direct dealing.

Finally, the judge found that the Respondent engaged in direct dealing by including the following question and answer in its June 7 letter:

Q: Do I have to sign a new authorization card? The Union has not shown me anything.

A: This is a personal choice that every individual has to decide on their own of whether they will continue to be a paying member of the union or not.

We reverse. An employer engages in direct dealing in violation of Section 8(a)(5) where (1) the employer communicates directly with union-represented employees, (2) for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining, and (3) such communication was made to the exclusion of the union. *Southern California Gas Co.*, 316 NLRB 979 (1995). Elements (1) and (3) are met here, but element (2) is not. The Respondent communicated directly with bargaining-unit employees, and it did so to the exclusion of the Union: it sent the June 7 letter directly to unit employees and did not provide a copy to the Union. However, the Respondent was not seeking to establish or change a term or condition of employment or undercut the Union's role in bargaining.

The judge found that by the above exchange, the Respondent was seeking to alter dues checkoff by suggesting that employees had to submit new checkoff authorization forms, and the dissent agrees with this interpretation. We read the question and answer differently, as referring to the effect of the new right-to-work law. Thus, in response to the question about signing a new authorization card, the answer was, "This is a personal choice that every individual has to decide on their own of *whether they will continue to be a paying member of the union or not*" (emphasis added). The Respondent was not dealing with employees for the purpose of changing *how* they would pay union dues, i.e., through submitting new checkoff authorizations. It was short-circuiting the "how" question altogether and reminding employees that they now had a

"personal choice" to make whether they would continue to pay union dues *at all*. That employees now had this choice was incontrovertibly true, and reminding them of that fact had nothing to do with establishing or changing a term or condition of employment. Union security was off the table; the State of Wisconsin had stepped in and removed it. In the June 7 exchange, the Respondent merely sought to reiterate that fact.¹⁶

Even accepting the judge's and the dissent's interpretation, a suggestion that employees could sign new forms did not add any requirements to or change the CBA's dues-checkoff provision. Rather, it was consistent with the Respondent's reasonable interpretation, in light of Wisconsin's right-to-work law, of the contractual requirement that checkoff authorizations "conform[] to applicable law." Moreover, the Respondent had no duty to bargain with the Union over the validity of the authorizations before ceasing to honor them. Therefore, it did not unlawfully bypass the Union in communicating its decision to employees directly.¹⁷

CONCLUSION

Faced with a new state right-to-work law that imposed criminal penalties for violations, bound to a contract that conditioned dues checkoff on receipt of checkoff authorizations "conforming to applicable law," and possessed of reasonable grounds to believe that existing authorizations did not conform to the new state law, the Respondent acted as any rational employer would have: it notified the Union that it was suspending dues checkoff. But the Respondent also made clear to the Union, and to its employees, that it would resume dues checkoff as soon as the Union submitted forms that complied with state law, specifically affirming its "legal obligation to collect Union dues from employees." The Union disagreed with the Respondent's interpretation of the contract in light of the new state law, but the parties resolved their dispute, with new checkoff authorizations that were consistent with the law, in less than five months—well before subsequent legal developments established that new forms were unnecessary—and the Respondent immediately resumed dues checkoff once the new forms were received. Rather than inject the Board

¹⁶ This is so even though, as the dissent observes, the Respondent's subsequent communication to employees, on June 27, treated the issues of union security and dues checkoff separately. We respectfully disagree that this subsequent communication has any bearing on the meaning of the June 7 letter or on how employees reasonably would have understood it. If it did, then surely the June 27 letter's specific acknowledgement of the Respondent's "legal obligation to collect Union dues from employees" and the statement that "[t]he Company intends to honor and follow Article 25 of the contract" would be relevant as well.

¹⁷ It is worth noting that although the June 7 letter was not presented to the Union, the Respondent and the Union had a decades-long bargaining relationship, the Respondent was contemporaneously dealing with

the Union regarding dues checkoff, and both before and after the June 7 letter, it communicated that it was doing so to the unit employees. Thus, as noted above, the Respondent told employees in a June 6 letter that it had "informed the proper Union representation on June 3, 2016" of its position on dues checkoff. Further, the Respondent informed the Union on June 24 that it would resume dues checkoff if the Union submitted new, compliant checkoff authorizations, and on June 27 it told employees that it "has been as clear as possible with the Union that we acknowledge that we have a legal obligation to collect Union dues from employees as soon as the union presents signed dues checkoff authorization forms that comply with the state law requirement that such decisions are voluntary."

into resolving such contract disputes, as the dissent would do, we believe that employers and unions should be encouraged to resolve such disputes themselves, and if they cannot, to resort to arbitration. Application of the “sound arguable basis” standard does just that by keeping the Board out of the business of interpreting labor contracts, in accordance with federal labor policy.¹⁸

ORDER

The complaint is dismissed.

Dated, Washington, D.C. April 17, 2019

John F. Ring, Chairman

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

The events of this case were precipitated by the State of Wisconsin’s ill-fated attempt in 2015 to regulate union dues-checkoff arrangements as part of a “right to work” law. Seizing on the statutory provision—later struck down by the Seventh Circuit as federally preempted¹—the respondent employer in this case (1) refused to deduct and remit union dues, as authorized by employees and required by the collective-bargaining agreement; (2) undermined the union with its statements to employees about checkoff arrangements; and (3) dealt directly with employees concerning dues-checkoff forms. The administrative law judge correctly found that the Respondent violated the National Labor Relations Act in each of these respects. Despite acknowledging that the predicate for the Respondent’s actions was false—the Wisconsin statute

was invalid, and the existing checkoff arrangements were lawful, as the Respondent should have been well aware at the time—the majority reverses the judge and excuses the Respondent’s conduct entirely. That result cannot be reconciled with long-established Board precedent or basic principles of federalism.

At the time the new Wisconsin law was enacted, it had been established—for many decades—that federal labor law completely preempted state law in this area, notwithstanding Section 14(b) of the Taft-Hartley Act,² which does allow states to prohibit union-security clauses. The Supreme Court held that the states could not regulate dues checkoff in 1971,³ and the Board followed suit in 1976.⁴ It appears that no state or federal court has ever upheld a state law regulating dues-checkoff in the face of a federal preemption challenge.⁵ Simply put, federal supremacy in this area is black-letter law.⁶

It is black-letter law, too, that an employer which has agreed to dues-checkoff in a collective-bargaining agreement violates the National Labor Relations Act by unilaterally ceasing to deduct and remit union dues.⁷ That is precisely what the Respondent did here—and it is inconceivable that this unfair labor practice could somehow be excused by invoking a federally-preempted state law. In that case, federal supremacy would be meaningless, and an employer could just as easily escape unfair labor practice liability for discriminating against union members by invoking a state law that made it a crime to hire them, despite the protections of the National Labor Relations Act.

Here, of course, the Respondent was not caught between a rock and a hard place. Supreme Court precedent made clear that the new Wisconsin provision, like all state regulation of dues checkoff, was federally preempted. The Union reminded the Respondent of that fact in writing. No employee had sought to revoke his checkoff authorization by invoking state law, nor had the state threatened the Respondent with prosecution. The union

¹⁸ “Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.” Labor Management Relations Act Sec. 203(d).

¹ *International Assn. of Machinists Dist. 10 v. Allen*, 904 F.3d 490 (7th Cir. 2018), pet. for cert. pending, No. 18-855.

² 29 U.S.C. §164(b).

³ *Sea Pak v. Industrial, Technical & Professional Employees, Div. of Nat’l Maritime Union*, 400 U.S. 985 (1971) (mem.).

⁴ *Shen-Mar Food Products, Inc.*, 221 NLRB 1329, 1330 (1976), enf. 557 F.2d 396 (4th Cir. 1977).

⁵ For examples of cases finding state laws regulating dues checkoff to be preempted by federal law, see (in chronological order): *State v. Montgomery Ward & Co.*, 120 Utah 294, 233 P.2d 685 (1951); *Int’l Bhd. of Operative Potters*, 295 F. Supp. 961 (S.D. Ind. 1968); *NLRB v. Shen-Mar Food Products, Inc.*, 557 F.2d 396, 399 (4th Cir. 1977); *Local 514,*

Transport Workers v. Keating, 212 F. Supp. 2d 1319 (E.D. Okla. 2002); and *UFCW Local 99 v. Bennett*, 934 F. Supp. 2d 1167 (D. Ariz. 2013).

⁶ E.g., Robert A. Gorman, *Basic Text on Labor Law* 673 (1976) (“Unlike a union shop or an agency shop, the checkoff does not itself ‘require membership’ in the union, so that while the former two kinds of union security may be regulated by state right-to-work laws, the states are not permitted to modify the rules of federal law that apply to the checkoff.”) (emphasis added). See also II American Bar Association, Section of Labor & Employment Law, *The Developing Labor Law* 2269 (6th ed. 2012) (John E. Higgins, Jr., ed.) (“Section 14(b) does not authorize states to enforce their right-to-work laws with respect to contractual dues-checkoff provisions.”). As the leading labor-law treatise observed already in 1971, “[i]n right-to-work states the checkoff assumes even greater significance, for it is the only lawful union security device available.” American Bar Association, Section of Labor Relations Law, *The Developing Labor Law* 716 (1971).

⁷ *Shen-Mar*, supra, 221 NLRB at 1329.

involved in this case brought suit challenging the Wisconsin law in federal district court even before the events of this case arose, and the court permanently enjoined enforcement of the law a few months later.⁸ But instead of continuing to adhere to its collective-bargaining agreement—or even seeking to negotiate with the Union about how to respond to the new Wisconsin law—the Respondent enthusiastically seized on the law as a tool for undermining the Union. In choosing this path, the Respondent violated the National Labor Relations Act in multiple ways, as the judge here correctly found.

Instead of holding the Respondent to account, however, the majority stretches the Board’s “sound arguable basis” doctrine beyond its breaking point. That doctrine was designed to keep the Board out of good-faith contract-interpretation disputes, not to shield an employer’s clear modification of a collective-bargaining agreement, its efforts to undermine a union, and its direct dealing with employees. The “sound arguable basis” doctrine has never been applied to privilege an employer to cease honoring a contractual dues check-off provision, and in light of long-established labor-law principles, no collective-bargaining agreement could ever be plausibly interpreted to make state law trump federal law in this area. That is true of the contractual provision that my colleagues focus on here—which required the Respondent to deduct union dues “upon receipt of a signed authorization (*conforming to applicable law*).”⁹ Before, during, and after the enactment and subsequent invalidation of the Wisconsin statute, *federal* law determined which dues-checkoff arrangements were lawful and which were not. Nothing the state of Wisconsin did could even conceivably alter the “applicable law” governing dues-checkoff arrangements, which is established by federal law. No plausible reading of the parties’ contract could be to the contrary.

In sum, the Respondent acted at is peril in turning a blind eye to the supremacy of federal law, and now it should face the consequences. Nothing in the National Labor Relations Act requires or even permits us to excuse violations of the Act because the state of Wisconsin attempted to regulate in an area where it had no authority. Our task here is enforce federal labor law, which the

Respondent clearly violated. Unfortunately, the Board majority fails in its duty.

I.

The Respondent and the Union were parties to a 2013-2016 collective-bargaining agreement (CBA) that included union-security and dues-checkoff provisions. The agreement required the Respondent to deduct union dues from employee paychecks “[u]pon receipt of a signed authorization [from individual employees] (conforming to applicable law).” The CBA automatically renewed on June 5, 2016. In the interim, Wisconsin adopted a right-to-work law, which prohibited union-security agreements and also prohibited dues-checkoff authorizations unless employees could revoke them on 30 days’ notice. The dues checkoff authorization forms executed by the Respondent’s employees were inconsistent with Wisconsin’s new revocation standard. But as the Seventh Circuit ultimately held, applying long-established Supreme Court precedent, the Wisconsin law in this respect was invalid, preempted by federal labor law.¹⁰

By its terms, the Wisconsin law purportedly became applicable to the parties’ contract when it renewed. On June 2, on the eve of the renewal, the Union explained its view of the new law’s effect, writing the Respondent:

The Wisconsin “right-to-work” law states that when a contract is renewed, it becomes subject to the law. The separability clause on page three of the current [collective-bargaining] agreement will cover this issue. *As dues check-off is governed by federal law, that issue need not be addressed.* Your employees have the right to opt out of the Union during the 15 day window period listed on their dues check-off authorization. [emphasis added]

This letter put the Respondent on notice that the Wisconsin law was invalid—as Supreme Court and Board decisions had made clear for 40 years or more. The Union’s view on dues checkoff was, in short, correct. The Respondent, however, replied that employees’ checkoff authorizations would be void when the Wisconsin law became applicable, and announced that it would no longer deduct and remit union dues for employees whose dues-checkoff forms were executed before June 4.

⁸ *Int’l Ass’n of Machinists Dist. 10 v. Allen*, 2016 WL 7475720 (W.D. Wis. Dec. 28, 2016).

⁹ Emphasis added.

¹⁰ *International Assn. of Machinists Dist. 10 v. Allen*, 904 F.3d 490 (7th Cir. 2018), pet. for cert. pending, No. 18-855. The Seventh Circuit, affirming a December 2016 district court decision, held that the case was controlled by the Supreme Court’s 1971 decision in *Sea Pak v. Industrial, Technical & Professional Employees, Div. of Nat’l Maritime Union*, 400 U.S. 985 (1971) (mem.). 904 F.3d at 495.

The Seventh Circuit observed that its decision was consistent with those of two other Circuits. *Id.* at 497 (citing *UAW Local 3047 v. Hardin*

County, 842 F.3d 407, 410, 421–422 (6th Cir. 2016), and *NLRB v. Shen-Mar Food Products, Inc.*, 557 F.2d 396, 399 (4th Cir. 1977)).

In *Shen-Mar*, *supra*, the Fourth Circuit upheld the Board’s 1976 decision rejecting an employer’s state-law-based defense of its refusal to honor dues-checkoff authorizations, explaining that “matters concerning dues-checkoff authorization and labor agreements implementing such authorizations are exclusively within the domain of Federal law, having been preempted by the National Labor Relations Act.” *Shen-Mar Food Products, Inc.*, 221 NLRB 1329, 1330 (1976).

The Respondent then began a persistent effort to undermine the Union's financial support among employees, proceeding to directly contact employees about their dues-checkoff authorizations—and reiterating its mistaken view about the effect of the new Wisconsin law. In a June 6 letter, the Respondent stated:

[A]fter June 4, the law prohibits requiring employees to pay Union dues. To do so would be a Class A Misdemeanor or a crime under Wisconsin law. If you want to pay Union dues, it is now your decision and it's entirely voluntary.

...

Currently you pay \$59.30 per month or \$711.60 per year in Union dues. All together our employees' payments of Union dues are about \$255,000 per year. *Based on the signed authorization for Union dues, we believe it is a violation of the Right-to-Work law.* Therefore, effective after June 4, we will no longer deduct the \$59.30 from your paycheck per month. [emphasis added]

That letter was followed by another, on June 7, which in question-and-answer format¹¹ disparaged the Union in a not-so-subtle attempt to persuade employees not to re-authorize dues checkoff or support the Union:

Q: Look at the yearly total we pay the union, where is all that money going?

A: Much of the information about the distribution of union dues is publicly accessible. For example you can Google IAM and find answers to your questions directly from the source or other sources if you want to find out more.

Q: Why should I pay them anything after they screwed up the contract negotiations?

A: This is a personal choice that every individual has to decide on their own and how they will handle their money.

Q: *Do I have to sign a new authorization card? The union has not shown me anything.*

A: *This is a personal choice that every individual has to decide on their own of whether they will continue to be a paying member of the union or not.* [emphasis added]

Q: Can I still work here if I don't join the union?

A: Yes. By state law, being a member of the union is no longer a condition of employment.

...

Q: What happens if we decide not to pay union dues?

A: Then you don't pay union dues.

Each letter disregarded the Union's role as employees' bargaining representative. The letters invited employees who had questions about dues-checkoff to contact the Respondent's plant manager or their supervisor – not the Union. Nor did the Respondent provide a copy of these letters to the Union or inform the Union of its communications with employees.

On June 27, the Respondent sent a third letter to employees, again with invented questions and answers, which continued its effort to undermine the Union's status:

Q: Someone told me that if I don't pay union dues my name will be put on a list and posted for everyone to see. What protection will the Company provide to me for this type of harassment?

A: Posting a list to coerce people is harassment and is illegal. The Company does not tolerate illegal conduct. Every employee has a right to make their own decision about whether to pay Union dues. That decision is deeply personal and private. It is illegal for either the Company or the Union to do anything that would be considered a threat to provoke or encourage an individual's decision on union dues.

Q: I was told if I don't pay dues, co-workers who do pay dues will no longer assist or help me with my work or provide me with training. Is that true?

A: No, people are expected to work together and help each other. A job requirement in every job description is to help and assist other employees in conducting their jobs. A refusal or a concerted effort to avoid helping other employees because of an individual's personal decision on paying dues will be handled according to our discipline language.

Q: Do I have to pay union dues and sign a new authorization form to check-off dues to work at Metalcraft?

A: No. The Law in Wisconsin changed and after June 4, 2016, the mandatory payment of union dues is illegal and you cannot be forced to pay union dues.

- The Union wants you to pay \$59.30 per month. You do not have to pay union dues to work at Metalcraft; that's \$711.60 per year or .34 cents for each hour you work.

¹¹ Although this letter, and a second letter on June 27, purported to respond to employee questions, no employees testified to posing any

such questions to the employer, nor did documentary evidence show that the concerns actually originated with employees.

- The decision is yours and it's purely voluntary!
- You do not have to sign a new authorization card; it is your decision and purely voluntary.
- By the IAM giving you a new authorization form, the union now recognizes that the old forms were signed when dues were required and mandatory. That's changed!

Like the prior two letters, this letter also invited employees to take their questions to the Respondent – but made no reference to contacting the Union.

On October 3, 2016, the Union provided the Respondent with newly executed dues-checkoff authorization forms, which conformed with Wisconsin law, for more than 300 employees. Only then did the Respondent resume its deduction and remittance of union dues, having failed to do so for four months: June, July, August, and September 2016.

II.

Reversing the judge, the majority absolves the Respondent entirely, dismissing the complaint. First, the majority concludes that the Respondent did not act unlawfully in failing to deduct and remit union dues – despite the contractual requirement to do so. The majority rejects two theories of the violation, concluding (1) that the Respondent's failure to deduct and remit did not modify the collective-bargaining agreement (within the meaning of Section 8(d) of the Act), because the Respondent reasonably believed that employees' dues-checkoff authorizations were legally invalid; and (2) that the failure cannot be characterized as an unlawful unilateral change in employees' terms and conditions of employment, violating Section 8(a)(5). The majority then turns to the Respondent's June 2016 letters to employees concerning dues-checkoff. It finds that the letters did not unlawfully undermine the Union in violation of Section 8(a)(1) and that the Respondent did not engage in direct dealing with employees, in violation of Section 8(a)(5), by virtue of its June 7 letter. As I will explain, the majority's ultimate conclusions are unsupported by Board precedent, which on this record compels finding that the Respondent violated the Act by failing to deduct and remit dues and by its communications to employees concerning dues-checkoff.

¹² *Hearst Corp. Capital Newspaper*, 343 NLRB 689, 693 (2004) (citations omitted).

¹³ See fn. 3–4 *supra*.

¹⁴ See, e.g., *County Concrete Corp.*, 366 NLRB No. 64, slip op. at 1, fn. 1 (2018), enf'd. No. 18-2013, 2019 WL 1421190 (3d Cir. March 28, 2019).

¹⁵ Accord *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015) (employer's obligation to honor dues-checkoff provision in collective-

A.

“It is well established that an employer violates Section 8(a)(5) [of the National Labor Relations Act] by ceasing to deduct and remit dues in derogation of an existing contract.”¹² Here, the undisputed basis for the Respondent's failure to deduct and remit union dues – as clearly required by the collective-bargaining agreement – was the new Wisconsin right-to-work statute. But that statute was invalid as applied to dues-checkoff arrangements, as the Seventh Circuit has specifically held – and as clearly foreshadowed by Supreme Court and Board precedent, which has long held that state regulation of dues-checkoff arrangements is federally preempted.¹³ In short, there was no *legal* basis for the Respondent's failure to comply with the collective-bargaining agreement. State law did not and could not operate to relieve it of its contractual obligations, as the Respondent should have been well aware. Under the National Labor Relations Act, in turn, the Respondent's failure to deduct and remit union dues as required by the collective-bargaining agreement violated Section 8(a)(5) of the Act, which imposes on employers a duty to bargain in good faith and which prohibits mid-term modifications of a contract without the union's consent.¹⁴ The majority's tortured effort to avoid finding a violation here is, to say the least, unpersuasive.

More than 40 years ago, the Board in *Shen-Mar*, *supra*, explained that an employer's failure to deduct and remit union dues, in line with a collective-bargaining agreement and employees' dues-checkoff authorizations:

by necessity interferes in the relationship of employees and their representative and constitutes an unlawful infringement upon the Section 7 rights of employees protected by law from employer interference. Accordingly, ... by such conduct [the employer] engage[s] in unlawful interference under Section 8(a)(1) of the Act and violate[s] its bargaining duty under Section 8(a)(5)... [W]here an employer ceases to deduct and remit dues in derogation of an existing contract, it is in effect unilaterally changing the terms and conditions of employment of its employees and thus violates Section 8(a)(5) of the Act.

221 NLRB at 1329 (emphasis added; footnote omitted).¹⁵ *Shen-Mar* remains good law, and we should follow that decision here.

bargaining agreement continues after contract expiration, pursuant to statutory duty to maintain status quo with respect to employees' terms and conditions of employment). The *Lincoln Lutheran* Board explained the harm done when an employer stops deducting and remitting union dues, harm both to the union and to employees:

An employer's unilateral cancellation of dues checkoff ... both undermines the union's status as the employees' collective-bargaining representative and creates

Instead, side-stepping *Shen-Mar*, the majority invokes the Board’s “sound arguable basis” doctrine—reaffirmed by the Board in *Bath Iron Works*¹⁶ and applicable in certain cases where a mid-term contract modification is at issue—insisting that the preempted Wisconsin statute here gave the Respondent a “sound arguable basis” for failing to deduct and remit union dues. Coupled with this argument, and relying on *Bath Iron Works*, the majority argues that a unilateral-change analysis is inapplicable here; only contract-modification can apply. The flaws in the majority’s position are easily demonstrated:

1. First, *Shen-Mar* is unequivocal in holding that “where an employer ceases to deduct and remit dues in derogation of an existing contract, it is in effect unilaterally changing the terms and conditions of employment of its employees and thus violates Section 8(a)(5) of the Act.”¹⁷ *Bath Iron Works*—which did not involve dues check-off, but modifications to employee benefit plans—did not address, much less overrule, *Shen-Mar*. And, just last year, the Board quoted and cited the decision’s holding with clear approval.¹⁸ The Board appears never to have applied the “sound arguable basis” doctrine to a dues check-off case; certainly, the majority cites no example.

2. Second, the “sound arguable basis” doctrine has no bearing here because the crucial question in this case is not an issue of contract interpretation—what the collective-bargaining agreement means—but the effect (if any) of the Wisconsin statute on the Respondent’s contractual obligation. No federal labor policy, meanwhile, supports permitting an employer to modify a collective-bargaining agreement because of its mistaken interpretation of the effect of state law on its duty under federal law to honor the contract.

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... [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.

¹⁶ *Bath Iron Works Corp.*, 345 NLRB 499 (2005), *affd.* sub nom. *Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

¹⁷ 221 NLRB at 1329.

¹⁸ *County Concrete Corp.*, supra, 366 NLRB No. 64, slip op. at 1, fn. 1. The majority’s attempt to reconcile *Shen-Mar* with its own application of the “sound arguable basis” doctrine fails. As the majority necessarily acknowledges, *Shen-Mar* was based on the Board’s definitive interpretation of the contract there, not on the “sound arguable basis” doctrine, which permits the Board to dismiss a 8(a)(5) allegation without definitively interpreting the contract—and even if the employer’s interpretation is wrong.

Bath Iron Works explained that the “sound arguable basis” doctrine applies where “the issue of whether the contract has been modified . . . turns on the resolution of two conflicting interpretations of the” contract.¹⁹ Citing and quoting the Board’s 1984 decision in *NCR Corp.*, the *Bath Iron Works* Board observed that “[w]here an employer has a ‘sound arguable basis’ for its interpretation of a contract and is not ‘motivated by union animus or acting in bad faith,’ the Board ordinarily will not find a violation” because “[i]n such cases, there is, at most, a contract breach, rather than a contract modification.”²⁰ As *NCR* observed, the “Board will not enter the dispute to serve the function of arbitrator in determining which party’s interpretation is correct.”²¹ This case does not involve dueling contract interpretations that, as a matter of Board policy, are better left to an arbitrator or some other contractual forum to resolve.

“In interpreting a collective-bargaining agreement to evaluate the basis of an employer’s contractual [“sound arguable basis”] defense, the Board gives controlling weight to the parties’ actual intent underlying the contractual language in question.” *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 3 (2017) (rejecting “sound arguable basis defense,” based on Board’s interpretation of contract language). The parties’ actual intent with respect to the contractual dues-checkoff provision here is immaterial to the effect of the Wisconsin statute.²²

The Respondent has not argued that the Board should defer to arbitration here, nor could it plausibly do so, given the nature of the dispositive issue: the validity of the Wisconsin statute. The Board has held that where a purported contractual issue is actually a dispute over the applicability of a state statutory provision, the Board will not defer

¹⁹ 345 NLRB at 502.

²⁰ Id. (quoting *NCR Corp.*, 271 NLRB 1212, 1213 & fn. 6 (1984)). See, e.g., *American Electric Power*, 362 NLRB 803, 805 (2015) (“[W]here . . . the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, the Board does not seek to determine which of two equally plausible contract interpretations is correct.”).

²¹ 271 NLRB at 1213.

²² The Respondent was contractually required to deduct and remit dues—unless the new law overrode the collective-bargaining agreement. That the agreement referred to employee dues-checkoff authorizations “conforming to applicable law” does not transform the crucial issue into a contractual one, because the interpretation of this contractual phrase is not the crux of the dispute. If the Wisconsin statute had been effective (and thus “applicable”), then the checkoff authorizations indisputably could not have triggered the Respondent’s contractual duty to deduct and remit dues. This would have been true, however, even if the collective-bargaining agreement had *not* referred to authorizations “conforming to applicable law;” the law would have trumped the contract in any event. In short, everything turned not on the parties’ contractual intentions, but on the validity of the Wisconsin statute.

to arbitration—and, in the same case, the Board also held that if the state statute cannot have the effect claimed by the employer, then the “sound arguable basis” standard is not satisfied. *San Juan Bautista Medical Center*, 356 NLRB 736, 737–738 (2011).²³ That is precisely the situation here. Given well-established federal preemption principles—reflected in the Seventh Circuit’s decision, Supreme Court precedent, and the Board’s *Shen-Mar* decision—the Wisconsin statute simply could not serve as a predicate for a “sound arguable basis” defense.

The majority nevertheless argues that the Respondent had a “sound arguable basis” for believing that the checkoff authorizations did not conform to the Wisconsin law and that the Wisconsin law was not preempted. The majority cites no authority for the proposition that an employer may escape liability under Section 8(a)(5) of the Act based on the view—reasonable or not—that a federally-preempted state statute excused its modification of a collective-bargaining agreement. Obviously, no federal labor policy supports that proposition. Congress did not intend for the states to play any role with respect to dues-checkoff arrangements. It did intend, however, to “encourag[e] the practice and procedure of collective bargaining,”²⁴ a policy served by requiring employers to *honor* collective-bargaining agreements, as Section 8(a)(5) and Section 8(d) envision.

3. But even if this case could properly be decided by applying the “sound arguable basis” doctrine, the majority still reaches the wrong result, for two separate reasons: (a) the Respondent clearly *lacked* a “sound arguable basis” for its view that the Wisconsin law privileged its refusal to deduct and remit union dues, as the collective-bargaining agreement required; and (b) in any case, the Respondent sought to undermine the Union and was acting in bad faith, making any “sound arguable basis” for its action immaterial under *Bath Iron Works* and other Board cases in its line.

a. It should be apparent that the Respondent had no “sound arguable basis” for believing that the new

Wisconsin statute relieved it of its contractual obligation to deduct and remit union dues. The Union, of course, immediately put the Respondent on notice that dues checkoff is exclusively a matter of federal—not state—law. Nor, despite the majority’s protestations to the contrary, was there any good reason to believe otherwise. That federal law preempted the Wisconsin statute in this respect was conclusively established by the Supreme Court in a decision, *Sea Pak*, that was more than 40 years old when the Respondent refused to deduct and remit dues. This proposition, of course, is further established by the Seventh Circuit’s decision striking down the Wisconsin statute.

The majority’s effort to cloud the issue is unavailing. That the Seventh Circuit did not rule until after the Respondent had refused to comply with the collective-bargaining agreement makes no difference here, given the rationale of the Circuit’s holding: that the Supreme Court had long since resolved the issue. As explained, the Board, too, had unequivocally held decades before—in the 1976 *Shen-Mar* decision—that dues check-off was a federal matter. The majority’s suggestion that the position rejected by the Supreme Court in *Sea Pak* was “colorable” is also beside the point. That *before Sea Pak* was decided, an employer might have had a “sound arguable basis” for believing that states could regulate dues checkoff cannot mean that the basis still existed *after* the *Sea Pak* decision—to the contrary, *Sea Pak* settled the question, as the Seventh Circuit had emphasized.²⁵

Nor does the Board’s 1965 decision in *Penn Cork*,²⁶ cited by the majority, change the calculation in the least. That decision—which pre-dates both the Supreme Court’s 1971 decision in *Sea Pak* and the Board’s 1976 decision in *Shen-Mar*—had nothing to do with federal preemption of state laws regulating dues check-off. At the time the Respondent here invoked the Wisconsin statute, Board law was clear that state regulation of dues-checkoff was federally preempted (as *Shen-Mar* held) and that, as a general matter, union security and dues checkoff are legally

²³ The majority’s concluding statement here that it is guided by a desire to encourage parties to resolve disputes like this one themselves, or to resort to arbitration, is thus fundamentally misguided, amounting to an abdication of the Board’s proper role. Recall that Sec. 10(a) of the Act expressly provides that the Board’s “power [to prevent unfair labor practices] shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.” 29 U.S.C. §160(a).

²⁴ National Labor Relations Act, Sec. 1, 29 U.S.C. §151.

²⁵ The fact that there was a dissent from the Seventh Circuit decision does not make the federal preemption principles articulated in that decision—which are dictated by the Supreme Court’s decision in *Sea Pak*—any less the law. Much to my chagrin, the existence of a dissent does not undermine the extent to which the position taken by the majority of an adjudicative body is binding law.

²⁶ *Penn Cork & Closures, Inc.*, 156 NLRB 411 (1965), *enfd.* 376 F.2d 52 (2d Cir. 1967), *cert. denied* 389 U.S. 843 (1967). In *Penn Cork*, the Board held that when employees have voted to deauthorize a union-security provision, under Sec 9(e)(1) of the Act, “outstanding checkoff authorizations originally executed while a union-security provision is in effect become *vulnerable to revocation* regardless of their terms.” 156 NLRB at 414 (emphasis added). Notably, even under the *Penn Cork* rule, check-off authorizations do not become *void* (only voidable) when union-security is deauthorized by a majority vote of employees. The employer in *Penn Cork* violated Sec. 8(a)(1) because it refused to honor checkoff *revocations* by individual employees following a deauthorization vote. *Id.* at 415. Nothing in *Penn Cork* suggests that the employer would have been privileged to refuse to deduct and remit dues for all employees, regardless of whether they had revoked their authorizations.

and practically separate matters.²⁷ Here, moreover, the parties' contract specifically included a "separability" provision, ensuring that if the union-security provision became unlawful (as it did), the dues checkoff provision would survive.²⁸ There is no basis in this case, then, for any claim (whether or not predicated on *Penn Cork*) that the Wisconsin law prohibiting union-security provisions could somehow cast into doubt a dues-checkoff provision or dues-checkoff authorizations that were exclusively governed by and entirely valid under federal law and that were shielded by the "separability" provision of the parties' contract.²⁹

b. Finally, even if this were a "sound arguable basis" case, the Respondent would not be entitled to the benefit of that doctrine under the circumstances, because there is evidence that it was seeking to undermine the Union's status as collective-bargaining representative and was acting in bad faith. Only where "there is *no evidence* of animus, bad faith, or an intent to undermine the [u]nion" does the "sound arguable basis" doctrine apply.³⁰

As explained, the Board's decisions establish that an employer's unilateral cessation of dues-checkoff inevitably tends to undermine the Union's status as collective-bargaining representative.³¹ The Supreme Court has made clear, meanwhile, that under the Act, an employer may be presumed to intend the foreseeable consequences of its actions.³² In ceasing to honor employees' dues-checkoff authorizations, then, the Respondent must be held to have intended to undermine the Union.

Here, in any case, the record firmly establishes the Respondent's aim. Not only is there evidence that the

Respondent acted in bad faith and sought to undermine the Union, the evidence is sufficient to establish that, as the judge found (and as I discuss next), the Respondent violated the Act in two relevant respects: it undermined the Union in its disparaging statements to employees, and it acted in bad faith by dealing directly with employees concerning dues-checkoff. These unfair labor practices independently preclude the Respondent from invoking the "sound arguable basis" doctrine in defense of its contract modification.

. . . .

In sum, the "sound arguable basis" doctrine does not authorize dismissing the allegation that the Respondent violated Section 8(a)(5) of the Act by ceasing to deduct and remit union dues. That doctrine does not apply in dues check-off cases, nor is it properly applied here: where the parties' dispute is not over an issue of contract interpretation, but over the effect of a federally-preempted state statute; where the Respondent had no "sound arguable basis" for its legal position in light of Supreme Court, Seventh Circuit, and Board precedent; and where the Respondent sought to undermine the Union and acted in bad faith. The majority's contrary conclusion is gravely mistaken.

B.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7"³³ of the Act, which protects the "right . . . to form, join, or assist labor organizations."³⁴ The Board's cases establish that employers violate Section 8(a)(1)

²⁷ See, e.g., *Lincoln Lutheran*, supra, 362 NLRB at 1660. As the *Lincoln Lutheran* Board explained:

The independence of union-security agreements from dues-checkoff provisions is illustrated most clearly in "right-to-work" States, which, pursuant to Sec. 14(b) [of the Act], bar union-security agreements. Dues-checkoff arrangements exist in these States, even though union-security clauses are prohibited.

Id. at 1660 fn. 21.

²⁸ The provision recites that:

Should any portion of this Agreement conflict with federal or state laws or directions, such portions of the Agreement shall be inoperative to the extent and for the period necessary to conform to the law or directions without prejudice to any other portion of the Agreement.

(emphasis added).

²⁹ The majority's claim that its analysis relies not only on the Wisconsin right-to-work law's restriction of dues checkoff authorizations, but also on its proscription of union-security agreements, necessarily and improperly conflates the concepts of dues checkoff and union security, a flaw underlying much of today's decision. The two concepts are separate, as the Board has noted many times, most recently in *Country Concrete Corp.*, supra, 366 NLRB No. 64, slip op. at 1, fn. 1.

³⁰ *American Electric Power*, supra, 362 NLRB at 805 (emphasis added) (citing *Phelps Dodge Magnet Wire Corp.*, 346 NLRB 949, 951 (2006)). See, e.g., *NCR*, supra, 271 NLRB at 1213 & fn. 5 (applying

"sound arguable basis" doctrine and noting absence of evidence that employer "was motivated by union animus, was acting in bad faith, or in any way sought to undermine the [u]nion's status as collective-bargaining representative"). The *NCR* Board cited *Jos. Schlitz Brewing Co.*, 175 NLRB 141, 142 (1969), where the Board had similarly observed that the "unilateral action taken [was] not designed to undermine the [u]nion."

³¹ See *Lincoln Lutheran*, supra, 362 NLRB at 1657; *Shen-Mar*, supra, 221 NLRB at 1329.

Contrary to the majority, that an employer may lawfully refuse to agree to a dues-checkoff arrangement—or bargain for such an arrangement's termination—does nothing to undermine the *Shen-Mar* Board's well-reasoned conclusion that an employer's failure to deduct and remit union dues, in line with a collective-bargaining agreement and employees' dues-checkoff authorizations, "by necessity interferes in the relationship of employees and their representative." See *Shen-Mar*, supra, 221 NLRB at 1329. There is an obvious difference between an employer's legitimate decision whether or not to accept or continue a dues-checkoff agreement and the Respondent's patently unlawful modification of the parties' contract here to undermine dues checkoff, thereby interfering in employees' relationship with the Union.

³² *Radio Officers' Union v. NLRB*, 347 U.S. 17, 45 (1954).

³³ 29 U.S.C. §158(a)(1).

³⁴ 29 U.S.C. §157.

when they make statements to employees that undermine the status of the union that employees have chosen to support.³⁵ Here, as the judge correctly found, the Respondent's statements reasonably tended to undermine the Union's status in the eyes of employees.

The Respondent wrote to employees on June 6 that, as a result of the new Wisconsin law, it was required to cease deducting union dues, despite their checkoff authorizations. That statement, as explained, was not only false (the Wisconsin law was federally preempted), but it also lacked even an arguable legal basis. In light of the Board's decisions in *Shen-Mar* and *Lincoln Lutheran*, supra, observing that an employer's unilateral cessation of dues checkoff undermines the union, an employer's baseless statement to employees that it is legally required to cease checkoff violates Section 8(a)(1), as well.

But the Respondent did more than tell employees that it would no longer honor their checkoff authorizations and the contract's checkoff provision. It also persistently disparaged the Union—insinuating that the Union was ineffective and wasting employees' dues money—in an effort to persuade employees to withhold providing *new* authorizations for checkoff (after having ceased to honor the existing, lawful authorizations). Thus, on June 7, the Respondent's question-and-answer letter to employees asked “[W]here is all that money going?” and “Why should I pay them anything after they screwed up the contract negotiations?” The Respondent's June 27 question-and-answer letter to employees, in turn, asked baseless questions suggesting that the Union and its supporters would harass or refuse to help employees who did not pay dues, while promising that the Respondent would protect such employees.

The majority's attempt to defend the Respondent's statements is unpersuasive. First, the majority invokes Section 8(c) of the Act, which provides that “expressing . . . any views, argument, or opinion, or the dissemination thereof . . . shall not constitute . . . an unfair labor practice if such expression contains no threat or reprisal or force or promise of benefit.”³⁶ The Respondent's statement that it

would cease deducting union dues, based on the new (but preempted) Wisconsin law, was effectively an announcement to employees that it would commit an unfair labor practice in violation of Section 8(a)(1) and Section 8(a)(5). Section 8(c) of the Act does not privilege such statements. They are not merely misrepresentations of the law (as the majority says); rather, they are statements of intent to violate the law – and such statements interfere with, restrain, or coerce employees in the exercise of Section 7 rights.³⁷

Second, the majority asserts that the “Respondent's statements implied criticism of the Union, nothing more—and it is perfectly lawful for an employer to criticize a union.” But, in sharp contrast to the decision cited by the majority, the Board is dealing here with more than “[w]ords of disparagement alone.”³⁸ The Respondent disparaged the Union as part of its unlawful refusal to deduct and remit union dues. The *Shen-Mar* Board correctly observed that this step “by necessity interfere[d] in the relationship of employees and their representative.”³⁹ Understood in proper context, the Respondent's disparaging words were another instrument of interference in the relationship between employees and the Union. If federal law had not clearly preempted the Wisconsin statute, and if the Respondent had merely communicated to employees the (mistaken) view that Wisconsin law compelled it to cease honoring dues-checkoff, this might be a closer case. But the Respondent stepped far over any conceivably permissible line when it seized on the new Wisconsin statute to attack the Union as it did.⁴⁰

C.

The judge also correctly found that the Respondent engaged in direct dealing, in violation of Section 8(a)(5) and (1), when it falsely suggested to employees that they had to execute new dues-checkoff forms in the wake of the preempted Wisconsin law.⁴¹ Under Board law, a direct-dealing violation is established if (1) an employer communicates directly with union-represented employees; (2) the communication was for the purpose of establishing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) the

³⁵ See *Southern Bakeries, LLC*, 364 NLRB No. 64, slip op. at 1–4 (2016) (employer's memo to employees unlawfully suggested that union would recklessly place jobs in jeopardy and that continued representation would lead to strikes and plant closure), *enfd.* in relevant part 871 F.3d 811, 823 (8th Cir. 2017); *Faro Screen Process, Inc.*, 362 NLRB No. 84, slip op. at 1–2 (2015) (employer's letter unlawfully misrepresented the union's position regarding unit employees' wages).

³⁶ 29 U.S.C. §158(c) (emphasis added).

³⁷ See, e.g., *Sheridan Manor Nursing Home*, 329 NLRB 476, 477 (1999), *enfd.* 225 F.3d 248 (2d Cir. 2000).

³⁸ *Sears, Roebuck & Co.*, 305 NLRB 193, 193 (1991).

³⁹ 221 NLRB at 1329.

⁴⁰ Contrary to the majority, there is nothing “circular” about examining the relationships among the Respondent's distinct violations of the Act in this case. Indeed, the majority itself treats the issues here as interrelated, while mistakenly concluding that all of the Respondent's actions were lawful.

⁴¹ The Respondent's June 7 letter to employees included this exchange:

Q: Do I have to sign a new authorization card? The Union has not shown me anything.

A: This is a personal choice that every individual has to decide on their own of whether they will continue to be a paying member of the union or not.

communication was made to the exclusion of the union.⁴² The majority concedes, as it must, that the first and third elements of a violation are established, but it insists that the second element was not. The record here compels a different answer. The Respondent's communication was, indeed, for the purpose of establishing terms and conditions of employment, as well as undercutting the Union's role in bargaining.

"Under settled Board law, widely accepted by reviewing courts, dues checkoff is a matter related to wages, hours, and other terms and conditions of employment within the meaning of Section 8(a)(5) and (d) of the Act and is therefore a mandatory subject of bargaining."⁴³ Here, employees' existing checkoff authorization forms were valid, because the preempted Wisconsin law did not affect them; the Respondent was required, by the contract and by the Act, to honor them—as the Union had advised the Respondent. By clearly implying that *new* authorizations were required if employees wished to have dues deducted, the Respondent's June 7 letter to employees plainly sought to establish a new term and condition of employment (that only authorization forms that conformed to the Wisconsin statute would be honored) and to undercut the Union's role in bargaining on the subject of dues checkoff. Put somewhat differently, the direct-dealing violation follows from the Respondent's unlawful modification of the contract in failing to honor the dues-checkoff provision, followed by its conduct in bypassing the Union.

The majority distorts the language in the June 7 letter, claiming that the Respondent was merely reminding employees that they now had a choice regarding whether to pay dues "at all," rather than "dealing with employees for the purpose of changing *how* they would pay union dues." (emphasis in original). This claim ignores the letter's gratuitous statement, after the question about signing a new checkoff authorization, that "[t]he Union has not shown me anything." This statement makes clear that the Respondent was dealing directly with employees regarding new dues checkoff authorizations to undercut the Union's role in bargaining. Butressing this conclusion is the Respondent's manufactured question from its subsequent June 27 letter, asking "Do I have to pay union dues and sign a new authorization form to check-off dues to work at Metalcraft?" This question deals with what my colleagues describe as the obligation to pay union dues "at all" separately from the question of whether employees must sign a new checkoff authorization form. Indeed, the letter answers this question in part by stating that

employees "do not have to sign a new [dues checkoff] authorization" and that, by distributing new checkoff authorization forms, the Union "now recognizes that the old forms" were invalidated.

Further, the majority asserts that the Respondent's communication to employees was "consistent with [its] reasonable interpretation, in light of Wisconsin's right-to-work law, of the contractual requirement that checkoff authorizations 'conform[] to applicable law.'" But the "sound arguable basis" standard was not satisfied here, as already demonstrated. And even if it were satisfied, no Board decision has ever applied the underlying doctrine to excuse a direct-dealing violation. An employer is not free to deal directly with employees on a mandatory subject of bargaining, covered by the collective-bargaining agreement, because the employer believes (reasonably or not) that the agreement in that respect is invalid. Under Section 8(a)(5), the employer is still required to deal exclusively with the employees' collective-bargaining representative, the union. The majority tellingly cites no authority for its contrary view, which makes no statutory sense at all.

III.

Today the majority transforms the "sound arguable basis" doctrine from a shield into a sword for employers. Under the traditional understanding of that doctrine, the Board abstains from resolving a good-faith dispute about the interpretation of a collective-bargaining agreement. Here, in contrast, the majority deploys the doctrine to enable an employer's baseless interference with the relationship between a union and the employees it represents. That result serves no goal of the National Labor Relations Act, and it has no support in judicial or Board precedent. Accordingly, I dissent.

Dated, Washington, D.C. April 17, 2019

Lauren McFerran,

Member

NATIONAL LABOR RELATIONS BOARD

Renée M. Medved, Esq., for the General Counsel.

Thomas P. Krukowski, Esq. and *Christopher C. Rundell II, Esq.* (*Mallery & Zimmerman, S.C.*), of Milwaukee, Wisconsin, for the Respondent.

Jill M. Hartley, Esq. (*The Previant Law Firm, S.C.*), of Milwaukee, Wisconsin, for the Charging Party.

⁴² See, e.g., *Permanente Medical Group, Inc.*, 332 NLRB 1143, 1144 (2000) (citing *Southern California Gas Co.*, 316 NLRB 979 (1995)).

⁴³ *Lincoln Lutheran*, supra, 362 NLRB at 1656 (footnote collecting cases omitted).

DECISION

CHARLES J. MUHL, Administrative Law Judge. In March 2015, the State of Wisconsin enacted a right-to-work law prohibiting union-security agreements, including requiring an individual, as a condition of employment, to become or remain a union member or to pay dues to a union. The State law also prohibited employers from deducting union dues from employees' paychecks, unless an employee signed an authorization terminable upon at least 30 days' written notice. Both of these prohibitions applied "to the extent permitted under federal law." On June 5, 2016, the collective-bargaining agreement between the Respondent, Metalcraft of Mayville, Inc., and the Union, International Association of Machinists, renewed for 1 year. As a result of the renewal, the contract became subject to the Wisconsin right-to-work law for the first time. Two days prior to that occurring, the Respondent notified the Union that it would no longer enforce either the union-security or the dues-checkoff provisions in their agreement. The Respondent then ceased checking off and remitting dues to the Union. The General Counsel's complaint in this case principally alleges that the Respondent's unilateral cessation of dues checkoff violated Section 8(a)(5) of the National Labor Relations Act (the Act). The Respondent answers, in part, that the Wisconsin right-to-work law rendered its action lawful. As explained fully herein, I conclude that the Act gave the State of Wisconsin the authority to enact prohibitions on union security, but preempts the state's attempt to regulate dues checkoff. I further find that the Respondent's cessation of dues checkoff was unlawful.

STATEMENT OF THE CASE

On June 14, 2016, District Lodge No. 10, International Association of Machinists and Aerospace Workers of America (IAM), AFL-CIO (the Union or Charging Party) filed a charge against Metalcraft of Mayville, Inc. (the Respondent or the Company).¹ On August 11, the Union filed an amended charge and, on September 21, it filed a second amended charge. On September 29, the General Counsel issued a complaint against the Respondent. The complaint alleges the Respondent violated Section 8(a)(5) of the Act since about June 4, by unilaterally ceasing to check off dues for bargaining unit employees and to remit those dues to the Union. The complaint also alleges this action constituted an unlawful modification of the parties' collective-bargaining agreement within the meaning of Section 8(d) of the Act. The complaint further alleges that, through letters dated June 6, 7, and 27, the Respondent undermined the Union by communicating with employees regarding the appropriateness of their current union dues-checkoff authorization forms, thereby violating Section 8(a)(5). Finally, the complaint claims that the Respondent bypassed the Union and dealt directly with employees by soliciting revised union dues-checkoff authorization forms in the letters, also in violation of Section 8(a)(5). The

¹ All dates hereinafter are in 2016, unless otherwise noted. Although IAM District Lodge 10 filed the charge in this case, IAM Rock River Lodge No. 2053 is the signatory for the Union on its collective-bargaining agreement with the Respondent. References to "the Union" are to both entities collectively.

Respondent filed a timely answer to the complaint on October 12, in which it denied the allegations and asserted numerous affirmative defenses.² I conducted a trial on the complaint on December 5, in Milwaukee, Wisconsin.

On the entire record, including my observation of the demeanor of witnesses and after considering the briefs filed by the General Counsel, the Respondent, and the Union, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in metal fabrication and the manufacture of lawn maintenance equipment from a facility in Mayville, Wisconsin. During the calendar year ending December 31, 2015, the Respondent, in conducting its business operations described above, sold and shipped, from its Mayville facility, goods valued in excess of \$50,000 directly to points outside the State of Wisconsin. The Respondent admits, and I find, that, at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction. The Respondent also admits, and I find, that IAM District 10 and Rock River Lodge No. 2053 both are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At the Mayville facility, the Respondent and the Union have a longstanding collective-bargaining relationship going back decades. The Union represents assemblers, maintenance employees, and welders. Currently, the unit consists of approximately 350 employees. Ronald Lock has been the plant manager for 22 years. The Union's business representatives at times material to this case were Scott Parr and David Grapentine.

A. Union Security, Dues Checkoff, and Checkoff Authorization Language

The last negotiated collective-bargaining agreement between the Respondent and the Union initially ran from June 2, 2013, to June 4, 2016.³ Article 25 of the contract addressed union shop and dues checkoff:

25.1 The Company agrees as a condition of employment that all eligible employees shall become members of the Union (as that term is defined by applicable law) on or before 90 calendar days following the beginning of their employment or the effective date of this Agreement, whichever is later. All employees who become members of the Union shall remain members of the Union during the term of this Agreement.

25.2 The Company, within three (3) days after receipt of written notice from the Union, will discharge any employee subject hereto who is not in good standing in the Union as required by the preceding paragraph. The Union shall indemnify and save

² The transcript inadvertently omits pages 14 and 15 from the Respondent's answer. (GC Exh. 1(i).) The transcript is corrected to include those pages.

³ Jt. Exh. 2. The parties' collective-bargaining agreement for this period does not contain the correct dates in art. 24 addressing duration. The correct term of the agreement is listed on the cover page.

the Company harmless against all forms of liability that shall arise out of or by reason of the application of this Article.

25.3 Upon receipt of a signed authorization (conforming to applicable law) voluntarily submitted and executed in writing by an employee covered by this Agreement, the Company shall deduct from the first payroll check in each month appropriate monthly dues and any initiation fees for each employee who has signed an authorization. Union shall notify the Company the amount (sic) of monthly dues and initiation fees.

The contract also contains a separability clause directing that portions of the agreement in conflict with Federal or State law would be inoperative, without affecting any other parts of the contract.

During the term of the contract and going back to 2001, the Union utilized a "Membership Application and/or Check-Off Authorization" form pursuant to article 25. That form stated in relevant part:

Membership Application. Check here: To the Officers and Members of Lodge No. _____ (the "Lodge" or "Union"), I hereby tender my application for membership in the International Association of Machinists and Aerospace Workers (IAM). I understand that while I may be required to tender monthly fees to the Union, I am not required to apply for membership or be a member as a condition of employment and that this application for membership is voluntary...

Check-Off Authorization. Check here: I authorize my Employer to deduct from my wages and forward to the Union: (1) monthly membership dues or an equivalent service fee; and (2) any required initiation or reinstatement fee as set forth in the collective bargaining agreement between the Employer and the Union and the by-laws of the Lodge. This authorization shall be irrevocable for one (1) year or until the termination of the collective bargaining agreement between my Employer and the Union, whichever occurs sooner. I agree that this authorization

shall be automatically renewed for successive one (1) year periods or until the termination of the collective bargaining agreement, whichever is the lesser, unless I revoke it by giving written notice to my Employer and Union not more than twenty (20) and not less than five (5) days prior to the expiration of the appropriate yearly period or contract term. I expressly agree that this authorization is independent of, and not a quid pro quo, for union membership, but recognizes the value of the services provided to me by the Union. It shall continue in full force and effect even if I resign my Union membership, except if properly revoked in the manner prescribed above.

Important Notice. I have examined and acknowledge receipt of the attached "Notice to Employees Subject to Union Security Clauses"...

The referenced notice is contained on the back of the employee copy of the checkoff authorization form. The notice states in relevant part:

Employees working under collective bargaining agreements containing union security clauses are required, as a condition of employment, to pay amounts equal to the union's monthly dues and applicable initiation and reinstatement fees...

The remainder of the notice provides information on how employees could object to their funding of union expenditures that are not germane to the collective-bargaining process.⁴

Prior to June 4, the Respondent provided the Union's membership application and/or dues-checkoff authorization form to new hires for signature during employee orientation.⁵ For employees who signed the forms, the Respondent regularly deducted dues payments from employees' paychecks no later than the 15th of the month.

B. The Wisconsin Right-to-Work Law

On March 9, 2015, with the parties' contract mid-term, the State of Wisconsin enacted a right-to-work law. It implemented the law on March 11, 2015. With respect to union security, the

⁴ The parties entered into evidence all of the dues-checkoff authorization forms maintained by the Respondent and signed by employees prior to June 4, 2016. (Jt. Exh. 1.) The exhibit contains nearly 300 such forms going as far back as 1978. Almost all of the forms from 2001 forward use the language cited above. However, at least a handful of these forms from post-2001 contain only dues-checkoff language and nothing concerning union security. The forms pre-2001 similarly contain only language regarding dues checkoff. The checkoff language in the post-2001 forms differs in two respects from the pre-2001 forms. First, the last two sentences containing the "quid pro quo" language was new ("I expressly agree that this authorization is independent of, and not a quid pro quo, for union membership, but recognizes the value of the services provided to me by the Union. It shall continue in full force and effect even if I resign my Union membership, except if properly revoked in the manner prescribed above."). Second, the time period during which employees could request revocation of the authorization was different. The pre-2001 forms contained a 30-day window period. Most of the post-2001 forms contained a 15-day window period between 5 and 20 days prior to the yearly deadline. However, the post-2001 forms with only checkoff language contained a 14-day window period instead.

⁵ The Respondent contends that, before June 4, it required employees to agree to both union membership and dues checkoff on the form in order to remain employed. However, the record evidence does not

establish this. Plant Manager Lock testified on direct that the Company's procedure was to provide employees with the collective-bargaining agreement, as well as the membership application and dues-checkoff authorization form, at orientation. (Tr. 132-133.) He stated the Respondent had employees "sign it and give us back a copy of it." He then confirmed, in response to a leading question, that he had told an unspecified number of employees that "they would be terminated without signing it..." I find this generalized testimony insufficient to demonstrate that the Respondent required employees to agree to dues checkoff, as opposed to simply becoming union members, after they were hired. Lock did not say the Respondent required employees to check the box agreeing to dues checkoff, when the Respondent provided the form. Lock also conceded on cross examination that employees did not have to pay their union dues solely by checkoff. (Tr. 156-157.) The Respondent's own exhibit demonstrates that, although most of the Respondent's employees chose the convenience of checkoff, not all did. (R. Exh. 16.) I also do not credit Union Business Representative Parr's inconsistent testimony concerning whether dues checkoff was mandatory or voluntary. (Tr. 82-84, 104-105.) Parr stated on the one hand that dues checkoff was mandatory, but then testified that employees could pay their dues in manners other than through checkoff. Thus, he appeared to confuse union security with dues checkoff. For all these reasons, I conclude that dues checkoff was voluntary for the Respondent's employees prior to June 5.

law states:

No person may require, as a condition of obtaining or continuing employment, an individual to do any of the following:

Become or remain a member of a labor organization.

Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization.

This subsection applies to the extent permitted under federal law. If a provision of a contract violates this subsection, that provision is void.

WIS. STAT. 111.04(3)(a)(2), (3)(a)(3), and (3)(b) (2015). Anyone who violates this provision is guilty of a class A misdemeanor and subject to a fine not to exceed \$10,000 or imprisonment not to exceed 9 months, or both. WIS. STAT. 947.20 and 939.51 (2015). The Wisconsin right-to-work law also makes it an unfair labor practice for an employer:

To deduct labor organization dues or assessments from an employee's earnings, unless the employer has been presented with an individual order therefor, signed by the employee personally, and terminable by the employee giving to the employer at least 30 days' written notice of the termination. This paragraph applies to the extent permitted under federal law.

WIS. STAT. 111.06(1)(i) (2015). The law first applied "to a collective bargaining agreement containing provisions inconsistent with this act upon the renewal, modification, or extension of the agreement occurring on or after the effective date of this subsection."⁶

C. *The Respondent's Cessation of Dues Checkoff in June 2016*

As previously noted, the parties' collective-bargaining agreement was set to expire on June 4. The contract required any party that wished to modify, amend, or terminate the agreement to provide written notice of that desire at least 60 days prior to the expiration date.⁷ In the event no party provided notice, the agreement automatically renewed for a period of 1 year.

It is undisputed that the Union did not provide the Respondent with timely notice of a desire to reopen the contract by April 5. As a result, the parties' contract renewed for 1 year beginning June 5.

From April 12 to June 2, the Respondent and the Union communicated multiple times regarding the Wisconsin right-to-work law. On April 12, Plant Manager Lock sent Union Business Representative Grapentine a letter stating that the renewal of the contract "puts into effect" the Wisconsin right-to-work law.⁸ On April 29, Lock and Grapentine had a phone conversation, during which Lock said that the two needed to talk about the impact of the right-to-work law. Grapentine responded that it was not necessary. Lock's email to Grapentine dated May 3 stated his contention that several provisions of the contract would be unlawful once the law applied.⁹ He further said that they should discuss the impact of the law on the agreement and directed Grapentine

to contact the Respondent's attorney in that regard. In a follow-up email on May 4, Lock stated again to Grapentine that "the legality of the Union security clause should be dealt with..."¹⁰ In mid-May, the Union replaced Grapentine with Parr as the business representative to deal with the Respondent. On June 2, Parr sent a letter to Lock via email.¹¹ Parr stated:

As the contract was not opened up by the Union, it has been renewed for a period of one year. The Wisconsin "right-to-work" law states that when a contract is renewed, it becomes subject to the law. The separability clause on page three of the current agreement will cover this issue. As dues check-off is governed by federal law, that issue need not be addressed. Your employees have the right to opt out of the Union during the 15 day window period listed on their dues check-off authorization.

On June 3, Lock responded via letter to Parr's contentions.¹² Lock stated:

Under the state law, Article XXV, the Union Shop and Check-Off of Union Dues, is unlawful effective June 4. The dues check-off provision under Article XXV and the authorization form also becomes illegal because both are inseparable the basis (sic) for the authorization and the language of the authorization itself is premised on the unlawful union security provision. Both compel the employees to pay Union dues as a condition of employment. The language of the written authorization form requires that employees who may resign from the union must pay "agency fees," which is also not currently permitted under Wisconsin law. The language of the Collective Bargaining Agreement, specifically Article XXV, Section 25.3, provides "Upon receipt of a signed authorization (conforming to applicable law) ..." Your authorization form does not comply with the state law because it specifically compels the payment of Union dues and therefore it does not conform to Wisconsin Law. Your form in part provides, "Employees working under collective-bargaining agreements containing union security clauses are required, as a condition of employment, to pay amounts equal to the Union's monthly dues..." Under the law, specifically Section 111.04(3)a, "No person may be required, as a condition of obtaining or continuing employment, an individual to do any of the following...: 3. Pay any dues, fees, assessment, or other charges or expenses of any kind or amount..."

Therefore, the company believes that Article XXV of the contract and the authorization form do not comply with Wisconsin Law and neither will be enforced after June 4, 2016.

The Respondent did not check off dues and remit payment to the Union beginning in June 2016. Other than the written communication described above, the parties did not meet or bargain prior to the Company taking this action. Moreover, no employee had attempted to revoke a dues-checkoff authorization prior to the cessation.

⁶ R. Exh. 13, Sec. 13.

⁷ Jt. Exh. 2, Art. 24.1.

⁸ R. Exh. 2.

⁹ R. Exh. 3.

¹⁰ Jt. Exh. 5.

¹¹ Jt. Exh. 6.

¹² Jt. Exh. 7.

D. The Respondent's Subsequent Communications with Unit Employees

On June 6, 7, and 27, Lock provided letters to employees with answers to purported questions that employees asked about the contract renewal and the new right-to-work law.¹³ He did not consult with the Union before doing so, nor did he provide the Union with copies of the letters.

In the first letter on June 6, Lock communicated the Respondent's position on the impact of the new law.¹⁴ This included:

Simply stated, after June 4, the law prohibits requiring employees to pay Union dues. To do so would be a Class A Misdemeanor or a crime under Wisconsin law. If you want to pay Union dues, it is now your decision and it's entirely voluntary...

Currently you pay \$59.30 per month or \$711.60 per year in Union dues. All together our employees' payments of Union dues are about \$255,000 per year. Based on the signed authorization for Union dues, we believe it is a violation of the Right-to-Work law. Therefore, effective after June 4, we will no longer deduct the \$59.30 from your paycheck per month.

The Company informed the proper Union representation on June 3, 2016 about our legal compliance regarding [the right-to-work law] implementation...

Lock's June 7 letter listed questions and answers.¹⁵ With respect to employees' dues-checkoff forms, Lock wrote:

Q: Do I have to sign a new authorization card? The union has not shown me anything.

A: This is a personal choice that every individual has to decide on their own of whether they will continue to be a paying member of the union or not.

The remainder of the letter stated, in part:

Q: Look at the yearly total we pay the union, where is all that money going?

A: Much of the information about the distribution of union dues is publicly accessible. For example you can Google IAM and find answers to your questions directly from the source or other sources if you want to find out more.

Q: Why should I pay them anything after they screwed up the contact negotiations?

A: This is a personal choice that every individual has to decide on their own and how they will handle their money.

Q: Can I still work here if I don't join the union?

A: Yes. By state law, being a member of the union is no longer a condition of employment.

Q: What happens if we decide not to pay union dues?

A: Then you don't pay union dues.

Q: Who do we send our payment to for union dues and how

much?

A: Individuals need to get payment direction and specifics from the union.

Q: Would we have to pay partial dues and a fee if I need Union representation?

A: No, not true at all.

Q: Does the Union have to represent me in a grievance if I don't pay dues?

A: Yes, this is required as part of the National Labor Relations Act.

Q: If employees drop the union, is the company going to let people go and find replacements for less money?

A: No. We have a good workforce and have every intention to keep it in place. We maintain a very competitive compensation package which allows us to retain our people and recruit the skills necessary to run our operations well. The changes made this week comply with state laws and are in no way an effort to impact our employees financially or save money. We believe our people really do make a difference.

Lock's final letter to employees was dated June 27.¹⁶ This letter included:

Q: Someone told me that if I don't pay union dues my name will be put on a list and posted for everyone to see. What protection will the Company provide to me for this type of harassment?

A: Posting a list to coerce people is harassment and is illegal. The Company does not tolerate illegal conduct. Every employee has a right to make their own decision about whether to pay Union dues. That decision is deeply personal and private. It is illegal for either the Company or the Union to do anything that would be considered a threat to provoke or encourage an individual's decision on union dues.

Q: I was told if I don't pay dues, co-workers who do pay dues will no longer assist or help me with my work or provide me with training. Is that true?

A: No, people are expected to work together and help each other. A job requirement in every job description is to help and assist other employees in conducting their jobs. A refusal or a concerted effort to avoid helping other employees because of an individual's personal decision on paying dues will be handled according to our discipline language.

Q: Other people had told me that I should pay union dues myself with a direct deduction from my checking account. Should I do that?

A: Whether to pay union dues, and whether to give the union access to your checking account is up to each individual to decide. Such a decision is voluntary and it is your choice. The Company has been as clear as possible with the Union that we acknowledge that we have a legal obligation to collect Union

¹³ Lock testified generally that the automatic renewal of the contract and the Respondent's cessation of dues checkoff generated questions from employees. (Tr. 124, 127.) However, no employee testified as to asking Lock questions and no documentary evidence regarding questions being asked was entered into evidence to support Lock's testimony.

¹⁴ Jt. Exh. 8.

¹⁵ Jt. Exh. 9.

¹⁶ Jt. Exh. 14.

dues from employees as soon as the union presents signed dues checkoff authorization forms that comply with the state law requirement that such decisions are voluntary. The Company intends to honor and follow Article 25 of the contract. The Company does not wish to break the law by collecting dues under the current authorization forms that have been signed (sic) by employees prior to June 5, 2016 when they were told that such a payment was a condition of employment. The Company will not break the law.

Q: Do I have to pay union dues and sign a new authorization form to check-off dues to work at Metalcraft?

A: No. The Law in Wisconsin changed and after June 4, 2016, the mandatory payment of union dues is illegal and you cannot be forced to pay union dues.

- The Union wants you to pay \$59.30 per month. You do not have to pay union dues to work at Metalcraft; that's \$711.60 per year or .34 cents for each hour you work.
- The decision is yours and it's purely voluntary!
- You do not have to sign a new authorization card; it is your decision and it is purely voluntary.
- By the IAM giving you a new authorization form, the union now recognizes that the old forms were signed when dues were required and mandatory. That's changed!

Q: Can I be forced, pressured or coerced into signing an authorization form or paying union dues?

A: No. That is illegal! If this happens, appropriate action will be taken to protect employee rights.

At the end of each of these letters, Lock invited employees to ask him or their supervisors any questions they had. Lock stated in two of the letters that the Respondent would do everything possible to get employees the "most direct and correct answer quickly."

E. The Union's Grievance Over the Respondent's Cessation of Dues Checkoff

On June 10, the Union filed a grievance to contest the Respondent's dues-checkoff cessation.¹⁷ In the grievance, the Union only alleged a violation of article 25.3 of the contract dealing with dues checkoff. The parties held a meeting on June 16, but were unable to resolve the grievance. Lock then sent the Union a written denial of the grievance dated June 24.¹⁸ In that letter, Lock stated for the first time that the Respondent would resume dues checkoff, if and when the Union provided new authorization forms compliant with Wisconsin law. He also stated:

To be clear, we are not contending that Section 25.3 is

unlawful. Among other legal objections to your grievance, the authorizations that you are using to accomplish the check off provision in Section 25.3 are unlawful. By seeking to use and continue those unlawful authorizations you are attempting to force us to engage in an unlawful act.

We take the position that your authorizations are unlawful because on page two [the "Notice"] it provides in part "Employees working under collective-bargaining agreements containing union security clauses are required, as a condition of employment, to pay amounts equal to the Union's monthly dues..." [Emphasis added in the original.]

Prior to June 5th the language of your authorization form was permissible. After that date, however, the renewal of the CBA mandated that Wis. Stats. § 111.04 (3)(a)(3) became applicable. Section 25.3 requires an "authorization (conforming to applicable law)." After June 5, 2016 your authorization no longer conforms to Wisconsin law.

Parr responded via letter dated June 27 and denied that the Union's existing authorizations were unlawful.¹⁹ The Union also requested, and the Respondent ultimately provided, all of the existing authorizations the company had on file. At a subsequent meeting on August 1, the Union asked the Respondent to reinstitute dues checkoff based on the existing authorization forms. The Respondent rejected this request in writing dated August 4.²⁰ In late August, the parties agreed to hold the grievance in abeyance pending the outcome of this case.

F. The Respondent's Resumption of Dues Checkoff in October 2016

On October 3, the Union acceded to the Respondent's demand and provided more than 300 new "Membership Application and/or Check-Off Authorization" forms signed by employees.²¹ Parr did this because he wanted to show the Respondent that an overwhelming majority of bargaining unit employees still wanted the Union there. Parr likewise wanted to restart the Union's revenue stream, which was needed to fund its representational activities.²² For forms that were signed and dated on June 5 or later and had the boxed checked next to "Check-Off Authorization," the Respondent resumed making dues deductions and remitting payment to the Union that month.²³ The language on the first page of the new form was identical to the old form. However, the new form does not appear to contain the "Notice" from the prior form.²⁴ As a result of the resumption of dues checkoff in October, the period during which the Respondent did not deduct and remit dues to the Union included the months of June, July, August, and September 2016.²⁵

forms, despite believing that the prior forms remained valid. (Tr. 63, 65–66, 90–93.) His testimony was consistent on both direct and cross examination. That the Union would need 4 months to obtain employees' signatures on new forms in a unit of over 300 employees is understandable. That same time period renders it logical that the Union was beginning to feel the strain of the lack of dues payments.

¹⁷ Jt. Exh. 10.

¹⁸ Jt. Exh. 12.

¹⁹ Jt. Exh. 13. As noted above, June 27 also was the date that Lock sent his third letter to employees. In that letter, Lock claimed the Union had provided new authorization forms to employees, because the Union recognized the old forms were invalid.

²⁰ Jt. Exh. 16.

²¹ Jt. Exhs. 17 and 18; R. Exh. 16.

²² I found Parr credible when testifying concerning the reasons why the Union ultimately decided to submit the new checkoff authorization

²³ Jt. Exh. 19.

²⁴ Compare Jt. Exh. 3 with Jt. Exh. 18.

²⁵ Jt. Exh. 4.

ANALYSIS

I. WAS THE RESPONDENT'S CESSATION OF DUES CHECKOFF A UNILATERAL CHANGE IN WORKING CONDITIONS THAT VIOLATED SECTION 8(A)(5)?

The General Counsel's complaint alleges that the Respondent's cessation of dues checkoff since June 4 constitutes an unlawful unilateral change and a failure and refusal to bargain collectively and in good faith with the Union. (Complaint Pars. 6(a) through 6(d), 8.)

A. The Respondent Made a Unilateral Change to Working Conditions When It Ceased Dues Checkoff in June 2016.

The law is well settled that an employer violates Section 8(a)(5) when it unilaterally changes represented employees' wages, hours, and other terms and conditions of employment, without providing their bargaining representative with prior notice and a meaningful opportunity to bargain over the changes. *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at 2 (2015), citing to *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962). Dues checkoff likewise long has been considered a matter related to working conditions within the meaning of Section 8(a)(5) and 8(d) of the Act, and thus a mandatory subject of bargaining. *Ibid.*; see also *Tribune Publishing Co.*, 351 NLRB 196, 197 (2007), *enfd.* 564 F.3d 1330 (D.C. Cir 2009); *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962).

No dispute exists that the Respondent ceased checking off dues for employees in June and did not resume it until October. The Company did so despite the parties' contract, including article 25.3 requiring checkoff, automatically renewing for 1 year on June 5. When an employer ceases to deduct and remit dues in derogation of an existing contract, it has unilaterally changed the terms and conditions of employment of its employees and violates Section 8(a)(5) of the Act. *Shen-Mar Food Products, Inc.*, 221 NLRB 1329 (1976), *enfd.* as modified, 557 F.2d 396 (4th Cir. 1977).

Before ceasing dues deduction, the Respondent did not provide the Union with adequate notice of its intended change to permit meaningful bargaining to occur. The date the Respondent provided actual notice of its planned change was June 3. On that date, Lock stated, for the first time, his view that article 25 in its entirety, as well as the Union's membership application and dues-checkoff authorization form, were unlawful under the right-to-work law. He also advised the Union for the first time that the Respondent would not enforce either article 25 or the authorization form after June 4. Lock even confirmed that the Respondent provided notice to the Union on June 3, by stating such in his June 6 letter announcing the change to employees.

The Respondent argues that it provided notice of the change to the Union on April 12, when Lock wrote to Grapentine that the contract would renew after June 4 and that the renewal put the Wisconsin right-to-work law into effect. I find no merit to this contention. In its communications to the Union from April 12 to May 4, the Respondent generally stated its view that, upon contract renewal, the Wisconsin right-to-work law would apply

to and impact the parties' collective-bargaining agreement by rendering "several provisions" unlawful. But the only specific provision that Lock ever identified was the union security clause. Similarly, the Union's communications in that time period only mentioned the Respondent's desire to negotiate over union security. At no time prior to June 3 did the Respondent even mention dues checkoff, let alone indicate it planned on ceasing checkoff upon renewal of the parties' contract. Thus, the Respondent's statements were not sufficiently specific to advise the Union that the Company would stop checking off dues. See, e.g., *Coastal Cargo Co.*, 353 NLRB 819, 821 (2009), *reaffd.* 355 NLRB 704 (2010) (letter from employer to union stating "it may be necessary to pay in excess of the wage rate" due to labor shortage did not put union on notice of subsequently implemented wage increase); *Pan American Grain Co., Inc.*, 343 NLRB 318 (2004), *enfd.* in relevant part 432 F.3d 69 (1st Cir. 2005) (general statement by employer that it anticipated layoffs in the future not adequate notice for a specific layoff later implemented); *Oklahoma Fixture Co.*, 314 NLRB 958, 960–961 (1994) ("inchoate and imprecise" announcement of future plans does not constitute adequate notice and trigger a union's obligation to request bargaining).

This sequence of events establishes that the Union had no meaningful opportunity to bargain over the change before it was made. To satisfy its bargaining obligation, an employer "must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments and proposals." *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001), quoting *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964). Here, the Respondent provided notice of the dues-checkoff cessation to the Union 2 days prior to the contract renewal. It stated therein that "neither [article 25 nor the authorization form] will be enforced." Then, 1 day after renewal, the Company informed its employees that it "will no longer deduct" dues payments from their paychecks, effective June 4. In its June 7 letter to employees, the Respondent stated repeatedly that it made this change in order to comply with State law and avoid criminal prosecution. These communications cast the Respondent's decision as final and already implemented. Lock gave no indication therein that the decision was subject to bargaining with the Union. Under these circumstances, the Respondent's June 3 notice to the Union of the change was a fait accompli. See, e.g., *American Medical Response of Connecticut, Inc.*, 359 NLRB 1301, 1302–1303 (2013), *reaffd.* 361 NLRB No. 53 (2014) (communication to union on same day change to procedures was implemented was a fait accompli); *Burrows Paper Corp.*, 332 NLRB 82, 83 (2000) (notice of wage increase to union 1 day before increase was announced to employees did not afford union the opportunity to bargain). Cf. *Sutter Tracy Community Hospital*, 362 NLRB No. 199, slip op. at 3 (2015) (no fait accompli when employer notified union of proposed changes to health benefits, told the union it would delay notification to employees to allow time for bargaining, and advised employees that benefits would be finalized only after the union had a full opportunity to bargain over proposals.)²⁶

²⁶ Article 25.4 of the parties' contract required the Respondent to remit the dues deductions to the Union no later than the 15th of the month. (Jt.

Exh. 2.) As a result, the Respondent's dues payment to the Union technically would not have been past due until June 16. In theory, then, the

Accordingly, the Respondent's unilateral cessation of dues checkoff in June 2016, without providing the Union notice and an opportunity to bargain, violates Section 8(a)(5), absent a valid affirmative defense.

B. The Wisconsin Right-to-Work Law's Provisions on Dues Checkoff Are Preempted by the National Labor Relations Act and Do Not Provide a Basis for the Respondent's Cessation of Dues Checkoff.

The Respondent asserts two affirmative defenses in its answer, both of which argue the Wisconsin right-to-work law rendered illegal all dues-checkoff authorization forms signed prior to June 5. The Respondent contends that Section 14(b) of the Act authorized the State law. In turn, the State law made it illegal to require union membership, dues payments, and dues checkoff as conditions of employment. These contentions raise the question of whether the Act preempts the Wisconsin right-to-work law's provisions on dues checkoff.

Addressing this question begins with an assessment of the relevant statutory language at the Federal and State levels. At the Federal level, Section 8(a)(3) of the Act addresses union security. That section renders lawful an agreement between an employer and union that requires employee membership in a union, or the payment of an agency fee for the cost of representation, as a condition of employment. However, Section 14(b) of the statute permits states to opt out and pass a law prohibiting such union-security agreements. Section 14(b) makes no mention of dues checkoff.

Instead, dues checkoff is addressed in the Act solely in Section 302. That provision generally makes it unlawful for an employer to pay any money to a labor organization which represents its employees. One of the exceptions to this ban is payments from an employer to a labor organization "with respect to money deducted from the wages of employees in payment of membership dues in a labor organization." Dues payments only can be made when:

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 date of the applicable collective agreement, whichever occurs sooner.

As discussed above, the Wisconsin right-to-work law requires dues authorization forms to be terminable by an employee upon 30 days' notice. Thus, the State law is contrary to Federal law in this regard.

Some 40 years ago, the Board squarely addressed the impact that state right-to-work laws have on dues checkoff. In *Shen-Mar Food Products*, 221 NLRB at 1329–1330, an employer ceased deducting and remitting the union dues of 9 employees, after they resigned from the union and submitted letters to the employer requesting the cancellation of their voluntary checkoff authorizations. The requests were untimely under terms of those authorizations, which followed Federal law. The Board

parties could have negotiated over the dues-checkoff cessation from June 5 to 15, before the Respondent's lack of payment would have been in dereliction of its contractual obligation. However, because the Company's communications rendered its decision a *fait accompli*, this

concluded that the employer's action in those circumstances was an unlawful Section 8(a)(5) unilateral change. In so holding, the Board rejected the employer's argument that the State of Virginia's right-to-work law permitted it to cease dues checkoff. That state law prohibited employers from deducting dues after an employee terminated membership in the union by resignation. In that regard, the Board stated:

...[W]e agree with the Administrative Law Judge that the dues checkoff herein does not, in and of itself, impose union membership or support as a condition required for continued employment, and that matters concerning dues-checkoff authorization and labor agreements implementing such authorizations are exclusively within the domain of Federal law, having been preempted by the National Labor Relations Act and removed from the provisions of Section 14(b) by the operation of Section 302.

Id. at 1330. In enforcing the Board's order, the Fourth Circuit Court of Appeals found "well supported" the Board's holding that a contractual dues-checkoff provision is not a union-security device subject to State law under Section 14(b). *NLRB v. Shen-Mar Food Products, Inc.*, 557 F.2d at 399.

Six years prior to *Shen-Mar*, the U.S. Supreme Court summarily affirmed a district court decision with the same holding. In *SeaPak v. Indus., Tech. & Prof'l Emp., Div. of Nat'l Mar. Union, AFL-CIO*, 300 F. Supp. 1197, 1200 (S.D. Ga. 1969), *affd.* sub nom. 423 F.2d 1229 (5th Cir. 1970), *affd.* sub nom. 400 U.S. 985 (1971), the State of Georgia enacted a right-to-work law, which gave employees the ability to revoke their dues-checkoff authorizations at will. The district court found this provision was preempted by the Act. The court held that the area of dues checkoff was federally occupied to such an extent that no room remained for state regulation. The district court also rejected the state's argument that Section 14(b) of the Act permitted it to regulate dues checkoff.

Since then, numerous Federal courts have relied upon *SeaPak* to reach the same conclusion that State laws on dues checkoff are preempted by the Act. In particular, after the close of the hearing in this case, a Federal district court in the Western District of Wisconsin held that the portion of Wisconsin's right-to-work law addressing checkoff was preempted and therefore unconstitutional. *International Association of Machinists District 10 v. Allen*, No. 16-cv-77-wmc (W.D. Wis., Dec. 28, 2016). See also *UAW Local 3047 v. Hardin County, Kentucky*, 842 F.3d 407, 420–422 (6th Cir. 2016) (county dues-checkoff ordinance preempted); *Georgia State AFL-CIO v. Olens*, 194 F. Supp. 3d 1322, 1329–1331 (N.D. Ga. 2016) (Georgia right-to-work law provision on dues checkoff preempted); *General Cable Industries v. Teamsters Local 135*, No. 15-cv-81 (N.D. Ind., June 17, 2016) (same as to Indiana right-to-work law); *UFCW Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1180–1182 (D. Az. 2013) (same as to Arizona right-to-work law); *Local 514, TWA v. Keating*, 212 F. Supp. 2d 1319, 1326–1328 (E.D. Ok. 2002) (same as

theoretical opportunity does not constitute a meaningful opportunity to bargain. *Dixie Electric Membership Corp.*, 358 NLRB 1089, 1092 (2012), *reaffd.* 361 NLRB No. 107 (2014).

to Oklahoma right-to-work law).

The *SeaPak* and *Shen-Mar* decisions control the outcome in this case on the question of federal preemption of dues checkoff. Pursuant to Section 14(b) of the Act, the State of Wisconsin was free to enact a law prohibiting union-security agreements. However, that section does not permit the state to regulate dues checkoff. While Wisconsin law allows revocation of a dues-checkoff authorization upon 30-days' notice, Federal law permits dues-checkoff agreements that are irrevocable for 1 year. The two provisions are directly at odds with one another. I conclude that the provisions of Wisconsin's law addressing that topic are preempted.

The Respondent attempts to avoid this outcome by arguing that union security and dues checkoff are "inseparably linked" to such an extent that states also are permitted to regulate dues checkoff under Section 14(b), just as they are permitted to regulate union security. However, in *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at 6-7, the Board specifically rejected the notion that union-security and dues-checkoff arrangements are so similar or interdependent that they must be treated alike. Although *Lincoln Lutheran* addressed the question of whether an employer's obligation to check off union dues terminated upon the expiration of a collective-bargaining agreement, the Board's finding that the two concepts are not intertwined is equally applicable here.

The Respondent also relies heavily upon the Board's decision in *Penn Cork & Closures, Inc.*, 156 NLRB 411 (1965), enf'd. 376 F.2d 52 (2d Cir. 1967), cert. denied 389 U.S. 843 (1967). In that case, employees voted in a deauthorization election to withdraw the authority of the employer and union to agree to require union membership as a condition of employment. Thereafter, a number of employees submitted their resignations from union membership, as well as a request to cease dues checkoff. The employer accepted the membership resignations, but continued checking off dues. The company did so, because the signed authorization forms did not permit revocation at the time the employees submitted the requests. Under the specific factual circumstances of that case, the Board found the employer's refusal to cease dues checkoff violated the Act. The Board rejected the union's argument that the right to discontinue union membership did not extend to dues checkoff, because the two concepts were distinct. The Board concluded "on the facts before us we cannot agree that the exercise of [dues checkoff] is in all circumstances independent of the impact of union security." Id at 414.

To the extent that *Penn Cork* suggests that, in some cases, union security and dues checkoff are linked, it supports the Respondent's argument. Nonetheless, I do not find the decision controlling here. The *Penn Cork* Board was careful to make clear it was deciding the issue based upon the specific facts presented in that case. In this case, the Wisconsin right-to-work law, not a deauthorization election, caused the elimination of the union-security agreement in the parties' contract. Moreover, none of the Respondent's employees sought to revoke their checkoff authorizations after that elimination occurred. These

distinguishing facts take this case outside the realm of *Penn Cork*. In addition, the Board decided *Shen-Mar*, a case directly on point, some 12 years after *Penn Cork* and presumably was aware of its prior *Penn Cork* holding when doing so. In any event, the viability of the *Penn Cork* decision has been called into question by the Board's decision in *Lincoln Lutheran*, as noted by the dissent in that case.

The remaining question here is whether the dues-checkoff authorization forms executed by employees prior to June 4 imposed dues checkoff as a condition of employment. As previously noted, I have rejected the Respondent's contention that it forced employees to agree to dues checkoff after they were hired. That leaves the language contained in the authorization form itself. On the one hand, the form contains both union-security and dues-checkoff provisions. On the other, the checkoff language specifically states that employees were agreeing that "this authorization is independent of, and not a quid pro quo, for union membership." The language further noted that dues checkoff "shall continue in full force and effect even if I resign my Union membership, except if properly revoked" in the manner prescribed therein. Even the title of the form and its use of "and/or" between union membership and dues checkoff signals that the two provisions are independent of one another. No basis exists for a finding that dues checkoff was a condition of employment. The credited testimony and the form language establish that dues checkoff was voluntary.²⁷

Because union security and dues checkoff are distinct concepts, the Respondent's reliance on the union-security language in the notice attached to the pre-June 5 authorization forms likewise is misplaced. That notice is the one required by the U.S. Supreme Court's decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988), and the Board's subsequent decision in *California Saw and Knife Works*, 320 NLRB 224 (1995). It does not address dues checkoff in any fashion, let alone require it as a condition of employment. To the extent the Respondent may be contending that the entire form was rendered illegal when union security became illegal, the state law and the party's contract contradict that argument. Both provide for the separability of provisions that remain lawful. That means the union-security provisions in the parties' contract and in the authorization form are void, but not the entire agreement or form.

For all these reasons, I conclude that the Wisconsin right-to-work law eliminated the union-security requirement in the parties' collective-bargaining agreement in article 25.1 and 25.2, but had no impact on the dues-checkoff agreement in article 25.3. I also find that the authorization forms signed by employees prior to June 5 remained valid, because the "applicable law" to which they had to conform was federal, not state, law. I reject the Respondent's claim that the state law rendered employees' dues-checkoff authorizations illegal and permitted the Company to unilaterally cease dues checkoff.

²⁷ In any event, the Respondent did not cease dues checkoff only for those employees who signed authorizations containing union-security language. The Company stopped all deductions, including for

employees who had signed forms after 2001 which contained only dues-checkoff language.

C. The Union Did Not Waive Its Right to Bargain Over Dues Checkoff.

The Respondent's last affirmative defense as to the Section 8(a)(5) unilateral change allegation is that the Union clearly and unmistakably waived its right to bargain over or bring an unfair labor practice claim involving the dues-checkoff cessation.²⁸

Waiver of a statutory right must be clear and unmistakable. *Amoco Chemical Co.*, 328 NLRB 1220, 1221–1222 (1999); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708–710 (1983). Establishing waiver is a heavy burden, not to be lightly inferred. *Georgia Power Co.*, 325 NLRB 420, 420–421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999). A union's waiver of the right to negotiate over dues checkoff will not be inferred "in the absence of unambiguous contract language to that effect or a history of negotiations demonstrating that fact." *Shen-Mar*, 221 NLRB at 1330. In interpreting contractual language, the Board looks to the plain meaning of the language itself and to any relevant extrinsic evidence. *Mining Specialist, Inc.*, 314 NLRB 268, 268–269 (1994).

The Respondent argues that the Union waived its right to challenge the dues-checkoff cessation by agreeing to the indemnification language contained in article 25.2 of the parties' collective-bargaining agreement. To reiterate, that section addressed union security and stated:

The Company, within three (3) days after receipt of written notice from the Union, will discharge any employee subject hereto who is not in good standing in the Union as required by the preceding paragraph. *The Union shall indemnify and save the Company harmless against all forms of liability that shall arise out of or by reason of the application of this Article.* [Emphasis added.]

The Respondent presented no extrinsic evidence concerning the parties' negotiations or discussions over this provision, leaving only the language itself.

The question presented here is whether the indemnification language, specifically the reference to "this Article," applies only to article 25.2 or to the entirety of article 25.²⁹ If it applies only to article 25.2, then the Union agreed to indemnify the Respondent against any liability arising from it discharging employees for not being in good standing with the Union. If it applies to the entire article, then the Union also indemnified the Respondent against any liability arising out of article 25.3

²⁸ The Respondent's clear and unmistakable waiver defense applies only to the General Counsel's allegation of a unilateral change in working conditions. See *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005). Although the General Counsel also alleged an 8(d) contract modification, the Respondent did not assert in an affirmative defense or in its brief that the Union consented to a change in the contractual dues-checkoff provision.

²⁹ In both its answer and brief, the Respondent states that the indemnification provision is contained in art. 25.3 addressing dues checkoff, which simply is incorrect.

³⁰ In its answer to the complaint, the Respondent also asserted that this case should be deferred to the parties' grievance and arbitration procedure in the collective-bargaining agreement, pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). However, in its brief, the Respondent stated it was no longer willing to arbitrate the pending grievance and

requiring it to check off dues. By its placement in this specific provision, I conclude that it only applies to article 25.2. An indemnification clause intended to apply to all of article 25 logically would have been placed in a separate, stand-alone provision at the end of that article. In any event, to the extent the placement of "this Article" results in ambiguity over the portion of article 25 to which it applies, that ambiguity prevents a finding of clear and unmistakable waiver by the Union. Therefore, I reject the Respondent's reliance on the indemnification language to support its waiver argument.

The Respondent next argues that the Union waived its right to negotiate by failing to request bargaining after receiving notice of the Company's intent to cease dues checkoff. As noted above, I have concluded that the Respondent did not provide actual notice until June 3 and that the change was presented as a fait accompli. In those circumstances, the lack of a request to bargain does not constitute a waiver. *Tri-Tech Services*, 340 NLRB 894, 903 (2003) (if a union is presented with a fait accompli, it need not engage in a meaningless effort to turn back the clock and rescind the change). Moreover, the Union's submission of new authorization forms in October likewise does not support the Respondent's waiver argument. The Union's motivation for doing so at that point principally was to resume receiving needed compensation for its representational duties related to the bargaining unit. The Union was forced into the position of complying with the Respondent's demand, only because the Company had unlawfully ceased dues checkoff.

As the Respondent has not established any valid affirmative defense, its cessation of dues checkoff on June 5 violated Section 8(a)(5).³⁰

II. DID THE RESPONDENT UNDERMINE THE UNION AND ENGAGE IN DIRECT DEALING THROUGH ITS WRITTEN COMMUNICATIONS WITH EMPLOYEES?

The General Counsel alleges that the Respondent undermined the Union by communicating with employees regarding the appropriateness of their current authorization forms, in violation of Section 8(a)(1).³¹ The complaint also claims that the Respondent bypassed the Union and dealt directly with employees by soliciting revised authorization forms in violation of Section 8(a)(5). These allegations are premised on Lock's June 6, 7, and 27 letters to employees. (Complaint Pars. 7 and 8.)

otherwise did not address the issue. (R. Br. p. 3.) As a result, I find it has waived this defense. *SBC Midwest*, 346 NLRB 62, 64 fn. 8 (2005).

³¹ The General Counsel's complaint alleged that the Respondent's communications to employees violated Sec. 8(a)(5) and (1) by undermining the Union. The complaint did not allege this as an independent 8(a)(1) violation, but counsel for the General Counsel argues for such a finding in her brief. Irrespective of the statute provision relied upon, the complaint did challenge the legality of the Respondent's communications. In addition, the Respondent had the opportunity at the hearing to fully litigate the nature and extent of its communications to employees. I conclude that the independent 8(a)(1) violation is related to the allegations in the complaint; the matter was fully and fairly litigated; and the Respondent has not been prejudiced. Accordingly, I find it proper for me to consider this allegation. *Facet Enterprises*, 290 NLRB at 153.

A. The Respondent Undermined the Union in its June 2016 Letters to Employees, Thereby Violating Section 8(a)(1).

Employer communications that reasonably tend to undermine employees' confidence in and support for their union are coercive and violate Section 8(a)(1). See, e.g., *RTP Co.*, 334 NLRB 466, 479 (2001), enfd. 315 F.3d 951 (8th Cir. 2003); *Facet Enterprises, Inc.*, 290 NLRB 152, 153 (1988), enfd. in relevant part 907 F.2d 963 (10th Cir. 1990). However, Section 8(c) of the Act permits an employer to lawfully express views, argument, or opinion, including by written dissemination, to employees, if the communication does not express any threat of reprisal or force or promise of benefit.

No question exists that the Respondent, in its letters to employees, repeatedly asserted its position that the Wisconsin right-to-work law prohibited it from continuing to check off union dues. That assertion was a misstatement of the law under *SeaPak* and *Shen-Mar*. Such misstatements have been found to violate Section 8(a)(1), albeit in different factual circumstances. *Eagle Comtronics, Inc.*, 263 NLRB 515, 515 (1982) (employer statements to employees on their job status following a strike violate the Act, where they are inconsistent with the law); *The May Department Stores Co.*, 191 NLRB 928, 937–938 (1971) (employer violated Section 8(a)(1) by circulating memorandum to employees announcing it would refuse to bargain with union in order to test the Board's certification); see also *RTP Co.*, 334 NLRB at 467, 479 (misstatement of fact in employer's letter to employees, which would reasonably tend to undermine employees' confidence and support for their union, violated Section 8(a)(1)). The Respondent asserts it was making a prediction to employees about the impact of the right-to-work law and is allowed to express its viewpoint under Section 8(c), even if it ultimately ended up being wrong. But the Respondent cites to no case law supporting that position. In any event, the Respondent's statements to employees concerning that impact were framed as a certainty, not a prediction. The Respondent also made no mention to employees of the Union disagreeing with the Company's position.

The Respondent also disparaged the Union in multiple statements that went beyond merely expressing its position as to the impact of the Wisconsin right-to-work law. Lock included extraneous information, such as the total yearly dues payment for each employee and for all employees in sum. He also listed purported questions in the communications that raised doubt as to the competency of the Union's representation. These included, "[l]ook at the yearly total we pay the union, where is all that money going?" and "[w]hy should I pay them anything after they screwed up the contract negotiations."³²

In contrast to this dim view of the Union, the Respondent repeatedly reassured employees that they would suffer no harm if they ceased paying union dues and portrayed itself as their guardian. Lock said the Respondent would protect employees who chose not to pay union dues from any repercussions from the Union or coworkers. He noted the Union would continue to have to represent them, even if they did not pay dues. He even

offered that employees would be fine if they dropped the Union entirely. What is notably missing from all these communications is any reassurance to employees who wished to continue paying dues through payroll deductions.

Finally, the Respondent sent these letters to employees after unlawfully ceasing dues deductions in June 2016. That the communications resulted from the Respondent's unfair labor practice lends further credence to the finding that they are unlawful.

Accordingly, I conclude Lock's June 2016 letters to employees violate Section 8(a)(1) by undermining employee confidence in and support of their Union.

B. The Respondent Dealt Directly with Employees by Soliciting New Authorization Forms in Violation of Section 8(a)(5).

Direct dealing in violation of Section 8(a)(5) and (1) is shown where an employer communicates with represented employees to the exclusion of their union for the purpose of establishing working conditions or making changes regarding a mandatory subject of bargaining. *Permanente Medical Group*, 332 NLRB 1143, 1144–1145 (2000); *Southern California Gas Co.*, 316 NLRB 979, 982 (1995). The established criteria for finding that an employer has engaged in unlawful direct dealing are (1) that the [employer] was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. *El Paso Electric Co.*, 355 NLRB 544, 545 (2010) (citations omitted).

The General Counsel's direct dealing allegation is premised on the following language in Lock's June 7 letter, restated here in full:

Q: Do I have to sign a new authorization card? The Union has not shown me anything.

A: This is a personal choice that every individual has to decide on their own of whether they will continue to be a paying member of the union or not.

Taken in context, I find the language sufficient to demonstrate unlawful direct dealing in violation of Section 8(a)(5). No dispute exists that the Respondent submitted the June 7 letter directly to employees and did not provide it to the Union. The issue here, then, is whether the cited language is sufficient to demonstrate that the Respondent was seeking to change working conditions or to undercut the Union. To be sure, this question and answer does not contain any direct instruction to employees to submit new authorization forms. Nonetheless, the Respondent certainly suggested that employees had to do so, if they wished to continue being dues-paying members of the Union. That suggestion was inaccurate, since the existing authorization forms remained valid and, in any event, employees could remain members and pay dues without using checkoff. It is another instance of the Respondent incorrectly intertwining the concepts of union security and dues checkoff. By suggesting new forms were

they asked any of the questions contained in the three letters. Even if they were asked, the Respondent chose on its own to list questions that contained disparaging statements about the Union, rather than revising the wording to make it noncoercive.

³² The Respondent suggests that a violation cannot be premised upon its recitation of questions that employees asked after the Company announced it was ceasing dues deductions. I disagree. The Respondent did not present any employee testimony at the hearing to corroborate that

needed, the Respondent was seeking to alter the requirements of dues checkoff, a mandatory subject of bargaining. Finally, the unnecessary inclusion of “[t]he Union has not shown me anything” is further evidence of the Company attempting to undercut the Union. For all these reasons, I find merit to the General Counsel’s complaint allegation.

III. DID THE RESPONDENT MODIFY THE PARTIES’ COLLECTIVE BARGAINING AGREEMENT WITHOUT THE CONSENT OF THE UNION?

Finally, the General Counsel’s complaint alleges that, by ceasing dues checkoff since June 4, the Respondent unlawfully modified articles 25.3 and 25.4 of the parties’ contract, within the meaning of Section 8(d) and in violation of Section 8(a)(5) of the Act. (Complaint Pars. 6(e) and 9.)

Section 8(d) provides that “where there is in effect a collective-bargaining contract...no party to such contract shall terminate or modify such contract.” Where the General Counsel alleges an unlawful contract modification, the determination to be made is whether the employer altered the terms of a contract without the consent of the union. *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), *affd. sub nom. Bath Marine Draftsmen Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). Where an employer has a “sound arguable basis” for its interpretation of a contract and is not motivated by union animus, was not acting in bad faith, or did not in any way seek to undermine the union’s status as collective-bargaining representative, the Board ordinarily will not find a violation. *Id.* at 502 (citations omitted). The issue here is the Respondent’s interpretation of a law, as opposed to a contract provision. Nonetheless, the Board has applied the contract modification standard in similar circumstances. See *San Juan Bautista Medical Ctr.*, 356 NLRB 736, 738 (2011) (employer defending denial of contractually-required bonus, on the basis of an exemption it received from the government of Puerto Rico allegedly permitting nonpayment).

Applying this standard to the facts here, I conclude that the Respondent had a sound arguable basis for contending that the Wisconsin right-to-work law prohibited continued dues checkoff. The Respondent’s interpretation was based, at least in part, on the Board’s decision in *Penn Cork*. That decision can be reasonably interpreted as linking union security and dues checkoff in certain circumstances, and thereby requiring the cessation of dues checkoff when a contractual union-security provision is invalidated. Moreover, and as noted above, the question of the impact of state right-to-work laws on dues-checkoff provisions has spawned countless lawsuits over the years. The decisions in those cases do not suggest that the parties contesting federal preemption of states’ attempts to regulate dues checkoff were being unreasonable.

However, and as described above, the record evidence demonstrates that the Respondent, in arriving at and implementing its decision, was seeking to undermine the Union’s status as collective-bargaining representative. The Company ceased checking off dues without notifying or bargaining with the Union. It almost immediately thereafter communicated directly with employees, in a manner which sought to weaken their support for the Union. Therefore, the Respondent cannot be said to have acted in good faith.

As a result, I find that the Respondent also unlawfully

modified the parties’ contract without the Union’s consent, in violation of Section 8(a)(5).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District 10 and Rock River Lodge No. 2053, International Association of Machinists and Aerospace Workers of America, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by ceasing dues checkoff for bargaining unit employees and ceasing monthly remittance of dues to the Union after June 4, 2016, without prior notice to the Union and without affording the Union the opportunity to bargain with respect to the conduct and/or effects of the conduct.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by modifying articles 25.3 and 25.4 of its collective-bargaining agreement with the Union, when it ceased checking off and remitting dues to the Union after June 4, 2016, without the Union’s consent.

5. The Respondent violated Section 8(a)(1) of the Act by undermining the Union through its communications to employees on June 6, 7, and 27, 2016.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with employees to obtain new dues-checkoff authorization forms on June 7, 2016.

7. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In particular, I shall order the Respondent to rescind its unilateral cessation of dues checkoff, upon the request of the Union, and return to the status quo ante. I also shall order the Respondent to continue in effect all the terms and conditions contained in the collective-bargaining agreement between it and the Union, including articles 25.3 and 25.4 addressing dues checkoff. The Respondent must make the Union whole by reimbursing any dues the Union would have received, but for the Respondent’s unlawful unilateral cessation of dues checkoff, with interest. *Hacienda Resort Hotel & Casino*, 363 NLRB No. 7, slip op. at 3 (2015); *Creutz Plating Corp.*, 172 NLRB 1 (1968). I reject the Respondent’s contention, unsupported in Board law, that a proper remedy would allow it to deduct from employee paychecks the necessary dues to reimburse the Union. Rather, in conformance with the above-cited cases spanning nearly 50 years, the Respondent must directly reimburse the Union for its losses as part of the make-whole remedy. Interest is to be paid at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³³

ORDER

The Respondent, Metalcraft of Mayville, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time and regular part-time maintenance and production employees; excluding engineering department employees, supervisory employees, watchmen, quality control employees, and clerical workers.

(b) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain, including by unilaterally ceasing to check off union dues pursuant to valid checkoff authorization forms and to remit the same to the Union.

(c) Failing to continue in effect all the terms and conditions of employment contained in the collective-bargaining agreement covering its employees in the unit described above, including checking off union dues and remitting the same to the Union pursuant to articles 25.3 and 25.4 of the agreement.

(d) Undermining the Union in communications with bargaining unit employees.

(e) Bypassing the Union and dealing directly with bargaining unit employees concerning their terms and conditions of employment.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the unit described above.

(b) Upon request of the Union, rescind the unilateral cessation of dues checkoff and resume checking off and remitting dues to the Union pursuant to the valid dues-checkoff authorizations filed with the Respondent prior to June 5, 2016, using the procedure set forth in the parties' collective-bargaining agreement.

(c) Continue in effect all the terms and conditions of employment contained in the collective-bargaining agreement covering employees in the unit described above, including articles 25.3 and 25.4.

(d) Make the Union whole for any dues the Respondent should have checked off and remitted to the Union following its unlawful, unilateral cessation of dues checkoff, in the manner set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Mayville, Wisconsin, copies of the attached notice marked "Appendix."³⁴ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 5, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., March 10, 2017.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with the International Association of Machinists, Local Lodge No. 2053 (the Union) as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time maintenance and production employees; excluding engineering department employees,

³³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

supervisory employees, watchmen, quality control employees, and clerical workers.

WE WILL NOT change your wages, hours, or other working conditions without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT unilaterally cease to check off and remit dues to the Union pursuant to the dues-checkoff arrangement in the parties' collective-bargaining agreement, for those employees who have executed and have in effect a valid dues-checkoff authorization form.

WE WILL NOT change the terms of our collective-bargaining agreement with the Union without the Union's consent.

WE WILL NOT undermine the Union in our communications to you, including by communicating misstatements of the law to you regarding dues checkoff or denigrating the Union's representation of you.

WE WILL NOT bypass the Union and deal directly with you regarding your working conditions, including by suggesting you need to sign a new dues-checkoff authorization form to continue paying Union dues.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in bargaining unit described above.

WE WILL, upon request of the Union, rescind our unilateral cessation of dues checkoff and resume checking off and

remitting dues to the Union, pursuant to the valid dues-checkoff authorization forms filed with us prior to June 5, 2016, using the procedure set forth in the parties' collective-bargaining agreement.

WE WILL restore and maintain all the terms and conditions of employment contained in the collective-bargaining agreement covering employees in the unit described above, including articles 25.3 and 25.4 addressing dues checkoff.

WE WILL at our expense and not that of employees, make the Union whole, with interest, for any dues it should have received since June 4, 2016, but for our unlawful, unilateral cessation of dues checkoff.

METALCRAFT OF MAYVILLE, INC.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/18-CA-178322 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

