STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

IN THE MATTER OF WAYNE COUNTY,

Respondent/Public Employer

And

Case No. C16 K-126
Docket No: 16-033168-MERC

AFSCME COUNCIL 25, LOCAL 3317,

Charging Party/Labor Organization

/

AFSCME LOCAL 3317'S SUPPLEMENTAL BRIEF RE CHECK-OFF OF UNION DUES

At the close of the hearing as to MERC Case # C16 K-126, MHAS Docket No. 16-033168-MERC, the ALJ requested that the parties file Briefs as to the appropriateness of having the MERC amend its previous determination, that check-off of Union dues is a permissive subject of collective bargaining and not a mandatory subject of collective bargaining. AFSCME Local 3317 answers this question as follows:

In the State of Michigan there are (2) classes of public employees, the have and the have-nots as it relates to whether the check-off of Union dues is a mandatory subject of bargaining.

A. **Public employees who are covered by the provisions of Act 312 of the P.A. 1969, as amended,**

Pursuant to Section 13 of Act 312, P.A. 1969, as amended, once the Union files for Act 312 Arbitration, all wages, hours and other terms and conditions of employment including the check-off of union dues, must remain in effect until a new CBA is implemented by the parties through an Act 312 Arbitration award.

The Michigan Court of Appeals in the **City of Manistee v Employment Relations Commission**, 168 Mich App 422 (1988) specifically held that once a public safety Union petitions for Act 312 Arbitration, even though the parties have not reached an impasse, that all wages, hours and terms and conditions of employment, shall remain in full force and affect until a new CBA has been awarded by the Act 312 Panel.

Therefore, the Legislature specifically stepped into the issues of what constitutes permissive subjects of bargaining as compared what constitutes mandatory subjects of bargaining, by enacting Section 13 of Act 312, P.A. 1969, as amended, determined that ALL wages, hours and terms and other conditions of employment shall not be changed until such a time as the Act 312 Panel renders its

Decision. It is important to note that pursuant to Article IV, Section 48 of the Michigan Constitution that public employees are granted collective bargaining rights pursuant to enactment of legislation by the State. Therefore, once Section 13 of Act 312 was enacted, the Legislature, pursuant to its constitutional authority, provided public safety officers, covered by Act 312 to have their then existing contract remain in full force and effect until the arbitration process has been completed, this would include articles of the contract which are classified as permissive subjects of bargaining; such as grievance arbitration and check-off of union dues and agency shop provisions.

B. <u>The right to check-off of Union dues for non-Act 312 eligible public employees.</u>

As it relates to all other public employees, those not covered Act 312, 1969, as amended, the Legislature has not stepped into the arena as it relates what constitutes permissive subjects of bargaining and what constitutes mandatory subjects of bargaining. The Legislature left it up to the MERC to develop the common law which relates to permissive and mandatory subjects of bargaining.

The MERC generally follows decisions of the National Labor Relations Board as to what constitutes permissive subjects of bargaining and what constitutes mandatory subjects of bargaining. In 1962, the NLRB in **Bethlehem Steel Co**. (N.Y.), 136 NLRB 1500 (1962), enf'd in pertinent parts, **Bethlehem Steel Co. v NLRB**, 320 F2d 615 (3rd Cir 1963) upheld the Board's holding that check-off of union dues was a permissive subject of bargaining. The Board and the 3rd Circuit held, under Section 8(a)(5) of the MLRA that "dues check-off" provisions pursuant to a Union/Security Agreement, was a permissive subject of bargaining and therefore the right to have dues checked off expired at the expiration of a CBA.

The most recent cases decided by the MERC continued to recognize **Bethlehem Steel** as the law in Michigan relating to public employee unions' right to have the continuation of dues check-off at the expiration of the contract. The Commission, in **Interurban Transit Partnership and Amalgamated Transit Union Local 836,** Case No. C15 H-105, Docket No. 15-047304-MERC, Case No. CU 15 I-025, Docket No. 15-052496-MERC (July 14, 2016) stated this rule as follows:

The Union also alleges that the Employer violated its duty to bargain in good faith by ceasing dues deductions upon the expiration of the parties' interim agreement on August 31, 2015. The law is well settled that under Section 15 of PERA, a public employer may not take unilateral action on mandatory subjects prior to reaching an impasse in negotiations. Detroit Police Officers Ass 'n v Detroit, 391 Mich 44, 54-55. (1974). However, dues deduction is a well-established exception to this rule. The Commission has held that an employer may legally discontinue dues deduction after the expiration of the collective bargaining agreement, whether or not the parties are at impasse. Waldron Area Schs, 1997 MERC Lab Op 256, 261; Gibraltar Sch Dist v Gibraltar MESPA-Transp, 443 Mich 326 (1993). This exception was originally based on the NLRB's holding in Bethlehem Steel, 136 NLRB 1500 (1962). In Lincoln Lutheran of Racine, 362 NLRB No. 188 (2015), and earlier in WKYC-TV, Inc, 359 NLRB No. 30 (2012), the NLRB overruled Bethlehem Steel, finding that a coherent explanation for the rule had never been provided. The NLRB's current position is that dues checkoff arrangements, like other terms and conditions of employment, survive the expiration of the parties' collective bargaining agreement. The Union argues that the Commission should overrule its own precedent and follow Lincoln Lutheran in this case. Federal precedent under the National Labor Relations Act (NLRA) is given weight in interpreting PERA, especially where PERAs language is identical to that of the NLRA. However, the Commission has held that it is not bound to follow "every turn and twist" of NLRB case law. Kent County, 21 MPER 61 (2008); Northpointe Behavioral Healthcare Systems, 1997 MERC Lab Op 530, 537. Until the Commission decides to follow the NLRB in repudiating its previous precedent, I am bound by that precedent. I conclude, therefore, that the Employer did not violate its duty to bargain by ceasing dues deduction after the expiration of the parties' interim successor agreement. **Amalgamated,** at 89-90.

The NLRB, on December 12, 2012, in the matter of **WKYC TV, Inc. and National Ass'n of Broadcast Employees and Technicians,**

Local 42 a/w Communication Workers of America AFL-CIO, Case No. 08-CA-039190 changed the holding in **Bethlehem Steel** and ruled that dues check-off was now a mandatory subject of bargaining and could not be unilaterally revoked by the employer unless impasse has been reached in negotiations. (Exhibit 2 -WKYC TV NRLB Decision).

The question now becomes as to whether or not the MERC should follow the holding in **WKYC-TV** or treat non-Act 312 public employees different than their counter-parts covered by the NLRA.

The earliest decision of the MERC, which AFSCME Local 3317 has been able to find is **Warren Education Ass'n and Warren Consolidated Schools,** MERC Case No. CU73 1-5 (May 21, 1974;) wherein the Commission stated that the rule adopted by the NLRB in **Bethlehem Steel,** from that date forward apply to public employees of the State of Michigan. The holding of the Commission in **Warren Education Association**, is as follows:

> *"When considering the discontinuance of union security and/or check-off of union dues after a contract expires the National Labor Relations Board (NLRB) has long held that these rights of a labor organization expire with the contract. Bethlehem Steel, Co., 136 NLRB 1500, LRRM 1013. This case was reviewed by the United States Third Circuit Court of Appeals in Marine and Ship Building Workers v NLRB, 320 F2d 615,53 LRRM 2878 (CA-3*

1963) cert. den. 375 US 984 55 LRRM 2134 (1964). In that case the Court of Appeals agreed with the NLRB that the expiration of the right of a union to receive union dues coincided with the expiration of the contract. The NLRB reasoning, When considering union security after a contract expires, is that such a contract provision such as union security deals with the relationship between the employer and the union rather than with the relationship between employer and employee and rights stemming from such clauses exist only by virtue of contract.

At the 2013 mid-Winter meeting of the American Bar Association, committee on the development of the law under the NLRB, a paper was presented explaining the history of dues check-off provisions of a CBA which existed before and after **Bethlehem Steel** and how the Board's December 2012 decision in **WKYC-TV** will impact collective bargaining. (Exhibit 2).

The MERC in several decisions has determined that it is not bound by NLRB precedent; in **West Branch/Rose City Ed Ass'n**, 17 MPER 25 (2004), and in **Saginaw Ed Ass'n and Michigan Ed Ass'n**, 29 MPER P21 (2015) the Commission held as follows:

"We note the arguments of Respondents and of ALJ Peltz in his Decision and Recommended Order in Teamsters Local 214 (Case No. CU13 I-037, issued October 3, 2014) against reliance on National Labor Relations Board decisions in this context given the numerous issues that distinguish cases under the National Labor Relations Act from those under PERA. While federal precedent is often given great weight in interpreting

PERA, at least where PERA's language is identical to that of the NLRA, this Commission is not bound to follow its "every turn and twist," Northpointe Behavioral Healthcare Systems, 1997 MERC Lab Op 530, 537; 11 MPER 29002; Marquette Co Health Dep't, 1993 MERC Lab Op 901, 906. Indeed, there are several issues over which PERA and the NLRA differ or where MERC has not followed Board changes in position. The chief example of that is the right of private sector employees to strike, which affects many of the policies adopted by the NLRB, but is not recognized under PERA. Rockwell v Crestwood Sch Dist Bd of Ed, 393 Mich 616 (1975). See also above discussion regarding West Branch-Rose City Ed Assn, 17 MPER 25 (2004). See also Seventeenth Dist Court (Bedford Twp), 19 MPER 88 (2006), which discusses the Commission's continued application of the Midwest Piping/Shea Chemical principle of employer neutrality after the Board expressly overruled Shea Chemical, in RCA Del Caribe, 262 NLRB 963 (1982). However, in the absence of any Michigan case law on issues regarding the withdrawal from union membership where there is a right to refrain from union activity, we are guided on some issues by case law under the NLRA and by the case law of other states."

Clearly, the MERC can rely upon the NLRB decision in **WKYC-TV** (2012) as a legitimate, equitable and well-reasoned precedent for changing the law in the State of Michigan. The Commission knows public employees in the State of Michigan, unlike employees covered under the Federal Act, do not have the right to strike and that the change in the existing rule of law, relating to dues check-off, would not change the employer's right, to bargain to impasse and then implement a no check-off of union due provisions in a new CBA.

CONCLUSION

Wherefore, AFSCME Local 3317 respectfully requests that this Honorable ALJ find that the Commission should adopt the NRLB precedent in **WKYC-TV.**

Dated: February 26, 2018

Respectfully submitted,

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Exhibit #1

WKYC-TV, Inc. *and* National Association of Broadcast Employees and Technicians, Local 42 a/w Communications Workers of America, AFL–CIO. Case 08–CA–039190

December 12, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES, GRIFFIN, AND BLOCK

In this case, we reexamine whether an employer's obligation to check off union dues from employees' wages terminates upon expiration of a collective-bargaining agreement that establishes such an arrangement. Under *Bethlehem Steel*[1] and its progeny, the Board has long held that it does. The Board, however, has never provided a coherent explanation for this rule. This conclusion comes to us not as the product of random reconsideration of our precedent. Rather, the Board and the United States Court of Appeals for the Ninth Circuit have been engaged in a 15-year dialogue about the adequacy of the Board's rationale for excluding dues checkoff from the unilateral change doctrine. Most recently, the Ninth Circuit refused to enforce the Board's decision in *Hacienda Resort Hotel & Casino*, 355 NLRB 742 (2010), a case in which a four-member Board deadlocked on whether to reverse *Bethlehem Steel. Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865 (9th Cir. 2011). On review, the Ninth Circuit observed that the Board "continue[d] to be unable to form a reasoned analysis in support of" the *Bethlehem Steel* rule and, under its own analysis, found the *Bethlehem Steel* rule was unsupportable in the case before it. 657 F.3d at 867.

Although, as a matter of administrative nonacquiescence, we are not bound by the Ninth Circuit's decision in *Local Joint Executive Board of Las Vegas* except as the law of the case,[2] we cannot ignore the concerns raised by the Ninth Circuit and by some Board Members in the underlying decisions in that case. See *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000) (Members Fox and Liebman, dissenting), vacated 309 F.3d 578 (9th Cir. 2002); *Hacienda Resort Hotel & Casino*, 351 NLRB 504 (2007) (Members Liebman and Walsh, dissenting), vacated 540 F.3d 1072 (9th Cir. 2008); *Hacienda Resort Hotel & Casino*, supra, 355 NLRB 742 (Chairman Liebman and Member Pearce, concurring). After careful consideration of those opinions, contrary opinions (including that of our dissenting colleague today), and the positions of the parties in this case, we find compelling statutory and policy reasons to abandon the *Bethlehem Steel* rule. We accordingly hold that, like most other terms and conditions of employment, an employer's obligation to check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement. However, because employers, including the Respondent, have long relied on *Bethlehem Steel* in their dealings with unions, we find that it would be unjust to apply our new holding in pending cases. We shall therefore dismiss the complaint.[3]

I.

The Respondent and the Charging Party (the Union) have been parties to multiple collective-bargaining agreements, the most recent of which was effective from June 1, 2006, through June 1, 2011. The 2006–2011 contract contained a union-security agreement, which required employees to become and remain members of the Union as a condition of employment.[4] The contract also included a provision under which the Respondent, pursuant to signed employee authorizations, agreed to

[1] 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

[2] See, e.g., *Provena St. Joseph Medical Center*, 350 NLRB 808, 814 fn. 29 (2007).

[3] On September 30, 2011, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Acting General Counsel and the Charging Party each filed exceptions and supporting briefs, the Respondent filed an answering brief responding to both sets of exceptions, and the Acting General Counsel filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, and the Acting General Counsel filed an answering brief. Clear Channel Outdoor, Inc., Lee Enterprises, Inc., and Stephens Media, LLC filed an amici brief in support of the Respondent.

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, and conclusions only to the extent consistent with this Decision and Order.

The Respondent and the Charging Party have requested oral argument. This request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[4] Art. I of the contract pertinently states:

> All employees in the bargaining unit who are members of the Union as of the effective date of this Agreement shall, as a condition of employment or continued employment, be members of the Union on the effective date of this Agreement and shall maintain such membership in good standing during the life of this Agreement . . . . As a condition of employment all Employees within the SCOPE OF THE UNIT . . . within thirty (30) days after the date of execution of this Agreement, or in the case of new Employees, thirty (30) days after the date of hiring, become members of the Union and remain members of the Union in good standing during the duration of this Agreement. The Corporation shall, within ten (10) working days after receipt of notice from the Union, discharge any Employee who is not in good standing in the Union by virtue of having failed to tender the uniform membership dues or initiation fees, as required by the Union.

Notwithstanding the contractual language, the Act limits the nature and extent of this obligation.

deduct union dues from employees' wages and remit them to the Union (commonly referred to as "dues checkoff").[5] In addition, the contract included a form whereby employees could authorize dues checkoff.[6]

Pursuant to the contract's reopener provision, the Respondent terminated the contract on June 1, 2009. The parties thus began bargaining over a new contract. The Respondent continued to honor the dues-checkoff arrangement in the terminated contract. On January 4, 2010, the Respondent implemented portions of a final offer, which included the identical union-security agreement and dues-checkoff arrangement established in the terminated contract. The Respondent informed the Union, however, that these provisions were not among the portions of the final offer that it intended to implement. Nevertheless, the Respondent continued to deduct union dues from employees' wages and remit those dues to the Union. On October 5 and 6, 2010, however, the Respondent ceased deducting and remitting union dues. The Respondent did not bargain with the Union over this decision.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act when, following contract expiration, it ceased honoring the dues-checkoff arrangement without first providing the Union notice and an opportunity to bargain over that decision. Applying *Bethlehem Steel*, the judge found that the Respondent was free to unilaterally cease honoring the dues-checkoff arrangement when the contract expired. In their exceptions, the Acting General Counsel and the Union urge the Board to abandon the *Bethlehem Steel* rule and find that an employer's obligation to check off union dues survives contract expiration. The Respondent urges the Board to continue to adhere to *Bethlehem Steel* and its progeny.

We agree with the Acting General Counsel and the Union. We find that requiring employers to honor dues-checkoff arrangements postcontract expiration is consistent with the language of the Act, its relevant legislative history, and the general rule against unilateral changes in terms and conditions of employment. In holding to the contrary, the Board in *Bethlehem Steel* failed to take these considerations into account, and engaged instead in reasoning that cannot withstand scrutiny, even on its own terms. We therefore find that *Bethlehem Steel* and its progeny must be overruled.

II.

The declared policy of the Act, as stated in Section 1, is to "encourage[e] the practice and procedure of collective bargaining" and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Because it is critically important that collective bargaining be meaningful, it has long been established 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 prior notice and a meaningful opportunity to bargain about the changes. *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962). Under this rule, an employer's obligation to refrain from unilaterally changing these mandatory subjects of bargaining applies both where a union is newly certified and the parties have yet to reach an initial agreement, as in *Katz*, and where the parties' existing agreement has expired and negotiations have yet to result in a subsequent agreement, as in this case. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). In the latter circumstances, an employer must continue in effect contractually established terms and conditions of employment that are mandatory subjects of bargaining, until the parties either negotiate a new agreement or bargain to a lawful impasse. Id. at 198–199. The Board recently explained the importance of this rule:

> [T]he status quo [upon contract expiration] must be viewed as a collective whole. In the give-and-take of bargaining, a union presumably will make concessions in certain terms and conditions to achieve improvements in others[.] Preserving the status quo facilitates bargaining by ensuring that the tradeoffs made by the

[5] Art. II of the contract explains:

> Upon receipt of a signed authorization of the Employee involved . . . the Corporation shall deduct from the Employee's pay the Union initiation fee and the dues payable by him or her to the Union, during the period provided in the authorization. . . . The Corporation will, on each pay period after such authorization has been received, withhold such dues and/or initiation fees from each Employee's paycheck. Deductions shall be limited to such Employees from whom the Corporation has received written authorization to deduct said dues and/or fees.

[6] The dues-checkoff authorization form states:

> [Employees] submit this authorization and assignment with the understanding that it will be effective and irrevocable for a period of one (1) year from this date [the date an employee signs a check-off authorization form], or up to the termination of the current collective bargaining agreement between WKYC-TV and NABET, whichever occurs sooner . . . . This authorization and assignment shall continue in full force and effect for yearly periods beyond the irrevocable period set forth above and each subsequent yearly period shall be similarly irrevocable unless revoked by me within ten (10) days prior to the expiration of any irrevocable period hereof. Such revocation shall be affected by written notice.

> parties in earlier bargaining remain in place. Just as the employer continues to enjoy prior union concessions after the contract expires, as part of the "status quo," so too the union continues to enjoy its bargained-for improvements, unless . . . the union has clearly and unmistakably agreed to waive them.

Finley Hospital, 359 NLRB 156, 157–158 (2012) (footnote omitted).

An employer's decision to unilaterally cease honoring a dues-checkoff arrangement established in an expired collective-bargaining agreement plainly contravenes these salutary principles. Under settled Board law, widely accepted by reviewing courts,[7] dues checkoff is a matter related to wages, hours, and other terms and conditions of employment within the meaning of the Act and is therefore a mandatory subject of bargaining. See, e.g., *Tribune Publishing Co.*, 351 NLRB 196, 197 (2007), enfd. 564 F.3d 1330 (D.C. Cir. 2009). The status-quo rule, then, should apply to dues checkoff, unless there is some cogent reason for an exception. We see no such reason.

It is certainly true that a select group of contractually established terms and conditions of employment— arbitration provisions, no-strike clauses, and management-rights clauses—do *not* survive contract expiration, even though they are mandatory subjects of bargaining. In agreeing to each of these arrangements, however, parties have waived rights that they otherwise would enjoy in the interest of concluding an agreement, and such waivers are presumed not to survive the contract. For example, in *Hilton-Davis Chemical Co.*, the Board held that parties have no postexpiration duty to honor a contractual agreement to arbitrate, reasoning that such an agreement "is a voluntary surrender of the right of final decision which Congress has reserved to the[ ] parties" because arbitration is, "at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize." 185 NLRB 241, 242 (1970). As the Board later explained, "because an agreement to arbitrate is a product of the parties' mutual consent to relinquish economic weapons, such as strikes or lockouts, otherwise available under the Act to resolve disputes . . . the duty to arbitrate . . . cannot be compared to the terms and conditions of employment routinely perpetuated by the constraints of *Katz*." *Indiana & Michigan Electric Co.*, 284 NLRB 53, 58 (1987).[8] For similar reasons, a contractual no-strike clause normally does not act as a clear and unmistakable waiver of the union's right to strike after the contract expires. *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986) (citations omitted). Accordingly, "in recognition of the statutory right to strike, no-strike clauses are [also] excluded from the unilateral change doctrine." *Litton Financial Printing*, supra, 501 U.S. at 199. The Board has also held that a management-rights clause normally does not survive contract expiration, because "the essence of [a] management-rights clause is the union's waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls." *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003).[9]

The rationale behind these narrowly drawn exceptions to *Katz* does not apply to dues checkoff. Unlike no-strike, arbitration, and management-rights clauses, a dues-checkoff arrangement does not involve the contractual surrender of any statutory or nonstatutory right.[10] Rather, it is simply a matter of administrative convenience to a union and employees whereby an employer agrees that it will establish a system where employees may, if they choose, pay their union dues through automatic payroll deduction.[11] Payments via a dues-checkoff arrangement are thus no different from other voluntary checkoff agreements, such as employee savings accounts

[7] See *Steelworkers v. NLRB*, 390 F.2d 846, 849 (D.C. Cir. 1967), cert. denied 391 U.S. 904 (1968); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 136 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953); *Caroline Farms Division of Textron, Inc. v. NLRB*, 401 F.2d 205, 210 (4th Cir. 1968); *NLRB v. J. P. Stevens & Co.*, 538 F.2d 1152, 1165 (5th Cir. 1976); *Operating Engineers Local 571 v. Hawkins Construction Co.*, 929 F.2d 1346, 1350 (8th Cir. 1991).

[8] In *Litton Financial Printing*, supra, the Supreme Court approved the Board's decision to exempt arbitration agreements from *Katz*, agreeing that the exemption "is grounded in the strong *statutory* principle, found in both the language of the NLRA and its drafting history, of consensual rather than compulsory arbitration." 501 U.S. at 200 (emphasis added).

[9] As we discuss below, union-security clauses also do not survive contract expiration because the proviso to Sec. 8(a)(3) limits such provisions to the term of the contracts containing them. *Bethlehem Steel*, supra.

[10] The dissent argues, incorrectly, that "dues checkoff limits the statutory right to refrain from supporting any labor organization." To the contrary, a dues-checkoff provision limits no one's rights, because checkoff is purely voluntary.

[11] Reviewing courts have recognized that dues-checkoff arrangements serve a unique role as a tool for administrative convenience. See *NLRB v. Atlanta Printing Specialties & Paper Products Union*, 523 F.2d 783, 786 (5th Cir. 1975) (union-security agreements are "governed by a section of the Act totally removed from the section governing dues checkoff, and which have a totally different purpose . . . dues checkoff . . . far from being a union security provision, seems designed as a provision for administrative convenience in the collection of union dues"); *Food & Commercial Workers Local 1 v. NLRB*, 975 F.2d 40, 44 (2d Cir. 1992); *Anheuser-Busch, Inc. v. Teamsters Local 822*, 584 F.2d 41, 43 (4th Cir. 1978); *Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund*, 700 F.2d 1269, 1277 (9th Cir. 1983), cert. denied 464 U.S. 825 (1983).

and charitable contributions, which the Board has recognized also create "administrative convenience" and—notably—survive the contracts that establish them. *Quality House of Graphics*, 336 NLRB 497, 497 fn. 3 (2001).[12] In light of the Board's treatment of these similar checkoff procedures, it is anomalous to hold that they survive contract expiration, but that dues-checkoff arrangements, which directly assist employees in their efforts to support their designated bargaining representatives financially, do not.

Nothing in Federal labor law or policy, meanwhile, suggests that dues-checkoff arrangements should be treated less favorably than other terms and conditions of employment for purposes of the status quo rule. That includes Section 302 of the Taft-Hartley Act, which, at the very least, creates no obstacle to finding that an employer violates the Act by unilaterally discontinuing dues checkoff after contract expiration.[13] Section 302(a) of the Act generally prohibits employer payments to unions, but Section 302(c) exempts certain payments from that prohibition, including dues checkoff. Section 302(c)(4), the exception for dues checkoff, states in pertinent part:

> The provisions of this section shall not be applicable . . . with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment *which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner[.]* [Emphasis added.][14]

The plain terms of this provision indicate that Congress contemplated that a dues-checkoff arrangement would continue beyond the life of the collective-bargaining agreement establishing it. First, Section 302(c)(4) contains no language making dues-checkoff arrangements dependent on the existence of a collective-bargaining agreement. Rather, the only document necessary for a legitimate dues-checkoff arrangement, under the unambiguous language of Section 302(c)(4), is a "written assignment" *from the employee* authorizing deductions.[15] Second, had Congress intended that dues-checkoff arrangements would automatically expire upon contract expiration, there would have been no need to say that employees can revoke their checkoff authorizations at contract expiration. Simply put, if dues checkoff expired with the contract, there would be nothing left thereafter for an employee to revoke.[16] And, of course, it is abundantly clear that, whether during or after the term of a contract, the proviso to Section 302(c)(4) is concerned only with *an individual employee's right* to withdraw his checkoff authorization; nothing therein even remotely suggests that Congress intended to permit employers to unilaterally revoke checkoff arrangements.[17]

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[12] See also *King Radio Corp.*, 166 NLRB 649, 653 (1967), enfd. 398 F.2d 14 (10th Cir. 1968) (employer violated Sec. 8(a)(5) where, following union's election win, it unilaterally canceled its practice of permitting employees to purchase savings bonds through payroll deductions).

[13] Although the Board is not responsible for enforcing Sec. 302, "neither does the statute bar the Board, in the course of determining whether an unfair labor practice has occurred, from considering arguments concerning Section 302 to the extent they support, or raise a defense to, unfair labor practice allegations." *BASF Wyandotte Corp.*, 274 NLRB 978, 978 (1985), enfd. 798 F.2d 849 (5th Cir. 1986). Accord: *NLRB v. Oklahoma Fixture Co.*, 332 F.3d 1284, 1287 (10th Cir. 2003) (en banc) (concluding that the Board's interpretation of Sec. 302 insofar as it affects labor law issues is entitled to "some deference," provided that the Board's interpretation is reasonable and "not in conflict with interpretive norms regarding criminal statutes").

[14] This is the only provision in the Act that regulates dues checkoff.

[15] As discussed in more detail later in this decision, the Act's treatment of dues-checkoff arrangements is in sharp contrast to its treatment of union-security agreements. The Act explicitly conditions the life of a union-security agreement to the term of the collective-bargaining agreement that establishes it.

[16] The District of Columbia Circuit and the Ninth Circuit have agreed with this interpretation of Sec. 302(c)(4). See *Tribune Publishing*, supra, 564 F.3d 1330; *Local Joint Executive Board of Las Vegas*, supra, 657 F.3d 865. In *Local Joint Executive Board*, the Ninth Circuit held that there is "nothing in the NLRA that limits the duration of dues-checkoffs to the duration of a CBA." Id. at 875. The court described Sec. 302(c)(4) as "surplusage" if Congress intended dues checkoff to terminate upon the expiration of a contract. Id. In *Tribune Publishing*, the District of Columbia Circuit reasoned that Sec. 302 "does not require a written collective bargaining agreement" for dues checkoff to be lawful, but merely an employee's "written consent that is revocable after a year." 564 F.3d at 1335.

We are cognizant of conflicting circuit decisions on this issue, cited by the dissent and by the Respondent on brief. See, e.g., *Sullivan Bros. Printers, Inc. v. NLRB*, 99 F.3d 1217, 1232 (1st Cir. 1996); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869–870 (7th Cir. 1993). For the reasons discussed above, we respectfully disagree with those decisions (most of which relied in part on *Bethlehem Steel*). We note in particular that the Supreme Court in *Litton Financial Printing*, supra, cited by the dissent, was not faced with deciding the issue of whether dues checkoff survives contract expiration; the Court merely noted that it was the Board's position that checkoff did not survive. 501 U.S. at 199.

[17] Further support for our interpretation of Sec. 302(c)(4) is found in its legislative history. Sec. 302(c)(4) was enacted in 1947 as part of the Taft-Hartley amendments to the Act. This section of the Taft-Hartley amendments was added as a floor amendment to the Senate bill. Senator Taft, Chairman of the Senate Labor Committee, spoke in support of this amendment and explained its purpose as it related to the then-prevailing industry practice concerning dues checkoff. Clearly, Senator Taft was of the view that Sec. 302(c)(4) permitted dues checkoff to continue indefinitely until revoked by an individual employee:

> If [an employee] once signs such an assignment [authorizing dues checkoff] under the collective-bargaining agreement, *it may continue indefinitely until revoked*, and it may be *irrevocable* during the life of

Congress' treatment of employer payments to employee trust funds further illustrates that Congress contemplated that dues-checkoff arrangements could survive contract expiration. In addition to dues checkoff, Section 302(c) exempts a variety of trust fund payments from the general prohibition against employer payments to unions. Pertinently, Sections 302(c)(5)–(8) provides that this exemption applies only if "the detailed basis on which such payments are made is specified *in a written agreement with the employer* (emphasis added)." Congress' explicit decision to condition the lawfulness of trust fund payments on a "written agreement with the employer"—but the conspicuous absence of this requirement in Section 302(c)(4)— is evidence that Congress did not intend the viability of a dues-checkoff arrangement to depend on the existence of an unexpired collective-bargaining agreement.[18]

Moreover, while Sections 302(c)(5)–(8) conditions the lawfulness of trust fund payments on the existence of a "written agreement," the law is clear that under *Katz*, an employer's obligation to make these payments does not terminate upon expiration of a collective-bargaining agreement that establishes that obligation. See *Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988) (citing, inter alia, *Peerless Roofing Co. v. NLRB*, 641 F.2d 734 (9th Cir. 1981)). To the contrary, the "written agreement" requirement in Sections 302(c)(5)–(8) is satisfied by an *expired* collective-bargaining agreement establishing trust fund payments, together with the underlying trust agreements. Id. at 736; *Made 4 Film, Inc.*, 337 NLRB 1152, 1152 fn. 2 (2002). An employer accordingly has an obligation, pending negotiations, to honor contractually established trust fund payments until the parties have reached a successor agreement or a valid impasse. See *Advanced Lightweight Concrete*, 484 U.S. at 544 fn. 6. Thus, even if Section 302(c)(4) could be read as making dues-checkoff arrangements dependent on the existence of a collective-bargaining agreement, as the Respondent argues, parity of reasoning would require a finding that dues-checkoff arrangements survive the expiration of such an agreement.

III.

As the foregoing discussion makes clear, the language and policies of the Act strongly support a finding that dues checkoff should be included with the overwhelming majority of terms and conditions of employment that remain in effect even after the contract containing them expires. We now turn to the Board's contrary holding in *Bethlehem Steel*. The principal issues before the Board in *Bethlehem Steel* were whether the employer had violated Section 8(a)(5) by unilaterally ceasing to observe and implement both the union-security and the dues-checkoff provisions of the parties' expired contract. The Board first held—quite correctly—that both union security and dues checkoff involve wages, hours, and terms and conditions of employment that are mandatory subjects of bargaining. 136 NLRB at 1502. Even so, the Board held that the employer acted lawfully in unilaterally ceasing to honor the contractual *union-security* clause. In reaching that conclusion, the Board relied on the proviso to Section 8(a)(3), which states in relevant part that "nothing in this Act . . .shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein[.]"[19] The Board interpreted this language to mean that "the acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso." Id. The Board found that because the proviso explicitly conditions the legitimacy of a union-security agreement on the existence of a contract, parties can impose a union-security agreement only "[s]o long as such a contract is in force." Id. Thus, once a contract expires so, too, does a union-security agreement established in that contract. As the Board explained, when an employer, following contract expiration, refuses to honor a union-security

the particular contract, or for a period of 12 months. That, I think, is substantially in accord with nine-tenths of all check-off agreements, and simply prohibits a check-off made without any consent whatever by the employees.93 Cong.Rec. 4876 (1947), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1311 (1948) (emphasis added).

[18] See *Russello v. U. S.*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[19] Sec. 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The proviso to Sec. 8(a)(3) pertinently states:

> [N]othing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such an agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement[.]

agreement established in that contract, the employer acts "in accordance with the mandate of the Act," and thus does not violate Section 8(a)(5). Id. This finding is not in dispute today.

The *Bethlehem Steel* Board also found, however, that because of "[s]imilar considerations," dues-checkoff arrangements also do not survive contract expiration. Id. In the Board's view, the dues-checkoff arrangement "implemented the union-security provisions" of the parties' contract, and therefore the union's right to checkoff, like its right to impose union security, was "created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force." Id. In essence then, the Board appeared to posit that union-security agreements and dues-checkoff arrangements are so similar or interdependent that they must be treated alike: because the Act explicitly mandates termination of union security agreements following contract expiration, so too must a dues-checkoff arrangement terminate.[20] The Board further found that the language of the checkoff clause—"the Company will, . . . so long as this Agreement shall remain in effect, deduct from the pay of such Employee each month . . . his periodic Union dues for that month"—linked the employer's checkoff obligation with the duration of the contract. Id.

The *Bethlehem Steel* Board's reasoning is flawed in several respects. First, and most obviously, the Board wholly ignored Section 302(c)(4), which is the only provision of the Act that addresses dues checkoff and which, as shown, clearly contemplates that checkoff normally *does* survive the expiration of a collective-bargaining agreement.

Second, the Board found that "[s]imilar considerations"—unspecified—"prevail with respect to [checkoff]." The Board apparently reasoned that because the checkoff provisions in the contract "implemented" the union-security provisions, the proviso to Section 8(a)(3) dictated that dues checkoff, as well as union security, expired upon contract termination. If so, the Board's finding is a non sequitur. Although the contracts in *Bethlehem Steel* contained both union-security and dues-checkoff provisions, that is by no means true of all or even nearly all collective-bargaining agreements. Parties have the option of negotiating either without the other: they may agree to union security, but not to dues checkoff, and vice versa.

The independence of union-security agreements from dues-checkoff provisions is illustrated most clearly in "right-to-work" States.[21] In those jurisdictions, parties are prohibited from including a union-security agreement in a contract, yet parties' contracts in those states may nonetheless include dues-checkoff arrangements. Notably, that was the circumstance in *Tampa Sheet Metal*, 288 NLRB 322 (1988). There, the Board held, without explanation, that a dues-checkoff arrangement did not survive contract expiration, even though union security was prohibited under a State "right-to-work" law. Id. at 326 fn. 15. The facts of *Tampa Sheet Metal* demonstrate the falsity of *Bethlehem Steel's* premise that dues-checkoff "implements" a union-security agreement. Its holding, for which the Board has never provided any rationale, exposes the fundamental infirmity of the *Bethlehem Steel* holding. The undeniable reality is that union-security and dues-checkoff arrangements can, and often do, exist independently of one another. The Board's "[s]imilar considerations" reasoning in *Bethlehem Steel* therefore cannot stand.[22]

Third, the *Bethlehem Steel* Board mistakenly ignored that the proviso to Section 8(a)(3) and Section 302(c)(4)—enacted by the same Congress at the same time—treat union security and dues checkoff quite differently. The language of the 8(a)(3) proviso makes clear that when Congress wanted to make an employment term, such as union security, dependent on the existence of a contract, Congress knew how to do so. Yet Section 8(a)(3) does not mention dues checkoff, let alone limit the effectiveness of a dues-checkoff provision to the life of a collective-bargaining agreement. And, as we have shown, both the language and the legislative history of Section 302(c)(4) unambiguously indicate that Congress contemplated that dues checkoff would survive contract expiration.

Fourth, *Bethlehem Steel* failed to acknowledge another crucial dissimilarity between dues checkoff and union security: the fundamental difference between their compulsory and voluntary natures. Under a union-security agreement, employees are compelled to pay union dues

[20] See *Quality House of Graphics*, supra, 336 NLRB at 511 (adopting, without comment, judge's interpretation of *Bethlehem Steel*'s rationale that "union-security and dues-checkoff arrangements are so interrelated, that to enforce dues checkoff in the absence of a contract would constitute a violation of Section 8(a)(3) which requires a contract for the enforcement of union security, even though Section 8(a)(3) does not explicitly mention dues checkoff").

[21] Notwithstanding Sec. 8(a)(3)'s authorization of union-security agreements, Sec. 14(b) provides that any state or territory may enact laws that prohibit these agreements. States with laws barring union-security agreements are commonly referred to as "right-to-work" States. Ohio, where the Respondent is located, is a not a "right-to-work" State.

[22] Indeed, the Ninth Circuit has held that *Katz* applies in "right-to-work" States, where dues checkoff does not "implement union security." *Local Joint Executive Board of Las Vegas*, supra, 657 F.3d at 876.

or agency fees, or face discharge.[23] By contrast, an employee's participation in dues checkoff is entirely voluntary; "employees cannot be required to authorize dues checkoff as a condition of employment," even where a contract contains a union-security agreement. *Bluegrass Satellite, Inc.*, 349 NLRB 866, 867 (2007).[24] Although an employee who is subject to a union-security agreement may be more likely to choose dues checkoff, participation in dues checkoff still is in no way compelled. An employee has a right under Section 7 to select or reject dues checkoff as the method by which to pay union dues, and may choose to pay dues by another method.[25] Contrary to *Bethlehem Steel* then, as the Board has since acknowledged, union security and dues checkoff are "distinct and separate matters." *American Nurses' Assn.*, 250 NLRB 1324, 1324 fn. 1 (1980).[26] As noted above, the unique administrative nature of a dues-checkoff arrangement further distinguishes it from a union-security agreement.[27]

Last, developments in the Board's case law since *Bethlehem Steel* only cast further doubt on its reasoning. For example, if union security and dues checkoff are governed by "similar considerations," presumably it would be as unlawful for an employer, postcontract expiration, to *continue* to honor a dues-checkoff arrangement as it would be to continue to honor a union-security arrangement. Yet the Board has never prohibited an employer from continuing to check off dues after a contract expires. To the contrary, the Board has long held that an employer "does not violate the Act by voluntarily continuing dues checkoff after a collective-bargaining agreement has expired," and that "after a contract has expired and the employer has terminated dues checkoff, the employer may lawfully agree to resume deducting union dues." *Tribune Publishing*, supra, 351 NLRB at 197 fn. 8.[28] The incompatibility of the two lines of cases demonstrates that the connection between union security and dues checkoff cannot bear the burden the Board assigned to it in *Bethlehem Steel*.

IV.

In support of the *Bethlehem Steel* rule, the dissent makes four basic arguments, none of which persuade us—and none of which has ever been endorsed by the Board in the past. We believe that our view, if not compelled by the Act, is more faithful to its language and policies.

Initially, the dissent suggests that dues checkoff is not really voluntary, and that most employees would not willingly agree to checkoff in the absence of a contractual union-security provision. This view simply cannot be reconciled with the reality that dues-checkoff provisions exist even in the absence of union-security provisions, including in the states with "right-to-work" laws. Nor is it consistent with the fact that employees are free to revoke their checkoff authorizations when the collective-bargaining agreement expires; *that* rule—not allowing employers unilaterally to cease deducting union dues regardless of their employees' wishes—is consistent with "voluntary unionism."

The dissent contends, however, that the right to revoke is not enough, and that employers must be allowed to cease honoring the contractual dues-checkoff provision upon contract expiration in order to effectively protect employees' right not to support unions. In this regard, the dissent relies entirely on speculation and on the im-

[23] The Supreme Court has interpreted Sec. 8(a)(3) as allowing an employee to comply with a union-security agreement by paying only the required dues and initiation fees, without being a union member. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). A nonmember, upon objecting to making other payments to the union, may be charged only those dues and fees that are "germane to collective bargaining, contract administration, and grievance adjustment." *Communications Workers v. Beck*, 487 U.S. 735, 745 (1988).

[24] See also *IBEC Housing Corp.*, 245 NLRB 1282, 1283 (1979) ("[a]n employee has a Section 7 right to refuse to sign a checkoff authorization as a method [of] fulfilling his membership obligation under a lawful union-security agreement"); *Electrical Workers IUE Local 601 (Westinghouse Electric Corp.)*, 180 NLRB 1062, 1062 (1970) (an employee has the "right to select or reject the checkoff system as the method by which to pay his periodic dues to the Union").

[25] The Respondent argues that postexpiration continuance of dues checkoff would undermine employees' Sec. 7 rights because, in essence, employees who otherwise would choose not to continue paying dues might feel compelled to do so. There is no merit to this contention. Employees who do not wish to continue their financial support of the union can exercise their Sec. 7 rights by revoking their dues-checkoff authorizations pursuant to Sec. 302(c)(4).

[26] As previously indicated, a union-security clause effectively waives the right of covered employees to exercise their Sec. 7 right not to join or support a union; a dues-checkoff provision waives no one's rights. This distinction is further reason to find that checkoff survives contract expiration even when union security does not.

[27] As stated above, the *Bethlehem Steel* Board seemingly based its decision in part on the language of the contractual checkoff clause in that case, i.e., that checkoff would continue "so long as this Agreement shall remain in effect[.]" If so, that reasoning is inconsistent with the long-established principle that any waiver of a statutory right must be "clear and unmistakable," *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), and language such as appeared in Bethlehem Steel's contracts has repeatedly been held *not* to constitute a waiver of the union's statutory right to bargain over changes in terms and conditions of employment after contract expiration. See, e.g., *Finley Hospital*, supra, 359 NLRB No. 9, slip op. at 1-4, and cases cited.

[28] See also *Lowell Corrugated Container Corp.*, 177 NLRB 169, 173 (1969), enfd. on other grounds 431 F.2d 1196 (1st Cir. 1970) (employer did not violate Sec. 8(a)(2) and (3) by continuing to honor unrevoked checkoff authorizations after contract expiration); *Frito-Lay*, 243 NLRB 137, 138 (1979).

plicit assumption that employees are not capable of understanding their right to revoke. As we have shown, the language and legislative history of Section 302(c)(4) indicate that Congress had more confidence in employees than that, and so do we. In any event, as the Supreme Court put it in another context, "[t]he Board is . . . entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union. . . . There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996).

The dissent's solicitude for employees' right (contrary to their expressed intention) *not* to support unions is matched— and is clearly driven—by its insistence that employers must retain unilateral cessation of dues checkoff as a bargaining weapon. Any unilateral change that disadvantages employees—and, of course, many employees (if not all) will regard cessation of dues checkoff as detrimental—might be characterized as an economic weapon for employers, but that does not mean it should be permitted. As then-Chairman Liebman and then-Member Pearce observed in their concurring opinion in *Hacienda III*: "the availability of economic weaponry is subject to one crucial qualification—the party utilizing it must at the same time be engaged in lawful bargaining." *Hacienda Resort Hotel & Casino*, supra, 355 NLRB at 744. We agree with that assessment, to which we add only that the antiquity of the *Bethlehem Steel* rule does not change the fact that, as shown, it is difficult to reconcile with the language and policies of the Act. Unlike a good wine, a mistake does not get better with age.[29]

Finally, consistent with his position in *Hacienda III*, our dissenting colleague claims that, like arbitration and no-strike clauses, dues-checkoff arrangements are "uniquely of a contractual nature" and "cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound." By contrast, in our colleague's view, most other terms and conditions of employment "exist from the commencement of a bargaining relationship," and "[t]he obligation to maintain them does not arise with or depend on the existence of a contract." In their concurrence in *Hacienda III*, however, then-Chairman Liebman and then-Member Pearce pointed out, correctly, that "the economic terms of a collective-bargaining agreement, such as wage rates, are no less contractual requirements than is a dues-checkoff obligation. The agreement is the only source of the employer's obligation to provide those particular wages and benefits." Id. at 743.

V.

For all the reasons discussed above, we have determined that *Bethlehem Steel* and its progeny should be overruled to the extent they stand for the proposition that dues checkoff does not survive contract expiration under the status quo doctrine. As shown, the Board's holding to that effect in *Bethlehem Steel* is unsupportable because it is based on questionable reasoning, is inconsistent with established policy generally condemning unilateral changes in terms and conditions of employment, is contradicted by both the plain language and legislative history of the only statutory provision addressing dues checkoff, and finds no justification in the policies of the Act. We recognize, as the Respondent argues, that today's decision represents a change in Board policy that has remained intact for some 50 years. We do not lightly abandon that policy. But we decline to keep following a course that has never been cogently explained—and, in our view, cannot be.[30] Accordingly, we now hold that an employer, following contract expiration, must continue to honor a dues-checkoff arrangement established in that contract until the parties have either reached agreement or a valid impasse permits unilateral action by the employer.[31]

VI.

We must now decide whether to apply our new rule retroactively, i.e., in all pending cases (including this one), or only prospectively. The Board's usual practice is to apply new policies and standards retroactively "to all pending cases in whatever stage," unless retroactive application would work a "manifest injustice." *SNE Enterprises*, 344 NLRB 673, 673 (2005). In determining whether retroactive application would result in "manifest injustice," the Board considers "the reliance of the parties on preexisting law, the effect of retroactivity on accom-

[29] The dissent contends that "the unspoken object of today's decision" is to force employers to collect dues to finance union boycotts and other economic actions against employers. Our reasons for today's decision are those provided here.

[30] See *Goya Foods of Florida*, 356 NLRB 1461, 1463 (2011) (explaining decision to overrule precedent).

[31] Today's holding does not preclude parties from expressly and unequivocally agreeing that, following contract expiration, an employer may unilaterally discontinue honoring a dues-checkoff arrangement established in the expired contract, notwithstanding the employer's statutory duty to maintain the status quo. That is, a union may choose to waive its postexpiration, statutory right to bargain over this mandatory subject of bargaining. Of course, for such a waiver to be valid, it must be "clear and unmistakable." *Metropolitan Edison*, supra, 460 U.S. at 708.

plishment of the purposes of the Act, and any particular injustice arising from retroactive application." Id. at 673.

We find that retroactive application of today's holding would work a manifest injustice. Mistaken or not, *Bethlehem Steel* has been the law for 50 years. Employers, like the Respondent, have relied upon it when considering whether to cease honoring dues-checkoff arrangements following contract expiration.[32] Although the validity of *Bethlehem Steel* had been called into question on several recent occasions, the Respondent and other similarly situated employers did not have adequate warning that the Board was about to change the law at the time of the events in any currently pending cases. Moreover, today's ruling represents a change in longstanding substantive Board law governing parties' conduct, rather than a mere change to a remedial matter. See *SNE Enterprises*, supra, 344 NLRB at 673; cf. *Kentucky River Medical Center*, 356 NLRB 6, 10 (2010). We therefore shall decide all pending cases involving unilateral cessation of contractually established dues-checkoff arrangements, following contract expiration, under *Bethlehem Steel*.

Because we shall apply today's holding only prospectively, the Respondent was privileged to cease honoring the dues-checkoff arrangement under *Bethlehem Steel*. Accordingly, the Respondent did not violate Section 8(a)(5) and (1) as alleged in the complaint.[33]

ORDER

The complaint is dismissed.

[32] See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 729 (2001) (50-year Board precedent allowing employers to withdraw recognition from incumbent unions based on good-faith uncertainty as to union's majority support, overruled only prospectively because of employers' reliance on former precedent).

[33] The Charging Party excepts to the judge's rejection of the Acting General Counsel's alternative argument that the Board's holding in *Tribune Publishing*, supra, compels finding an 8(a)(5) violation. There, the Board found that an employer violated Sec. 8(a)(5) where the employer ceased dues checkoff following contract expiration, later agreed that employees could continue having their dues deducted and credited to the union under the employer's direct deposit system, but then subsequently reneged on that agreement. 351 NLRB at 198. As the judge found, the facts here are distinguishable. The Respondent did not terminate dues checkoff, agree to re-establish them, and then terminate them again. Rather, the Respondent, after contract expiration, continued deductions without interruption and then ceased dues checkoff only once, in October 2010. We thus adopt the judge's determination that an 8(a)(5) violation is not warranted under *Tribune Publishing*.

MEMBER HAYES, concurring and dissenting.

Following the expiration of a collective-bargaining agreement containing union-security and dues-checkoff clauses, the Respondent unilaterally ceased deducting and remitting union dues. Under long-settled precedent, it was entitled to do so. For 50 years, the Board has held that an employer is privileged to take this step, as an employer's obligation to check off union dues does not survive the expiration of the collective-bargaining agreement that created it.[1] Today, the majority abandons that precedent and instead requires that dues checkoff, once instituted, continue ad infinitum until the parties either agree to discontinue it or reach a valid impasse. I am not persuaded that this disruption of settled law, and of the settled expectations and negotiating practices of those who rely on it, is adequately justified by the majority. I dissent from the change in our precedent.[2]

In *Bethlehem Steel*, as here, expired collective-bargaining agreements contained both union-security and dues-checkoff clauses. The Board held that the union security clause became "inoperative" upon contract expiration as a matter of law, such that it was not an unfair labor practice for the employer to cease applying it.[3] "Similar considerations prevail with respect to the Respondent's refusal to continue to checkoff dues after the end of the contracts," the Board ruled. "The Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force." Id. Both the District of Columbia and Seventh Circuits have endorsed this view.[4] The Ninth Circuit has stated that the dues-checkoff obligation survives contract expiration in right-to-work States, "where dues checkoff does not exist

[1] *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

[2] Because I would adhere to *Bethlehem Steel*, and because the Respondent's conduct was undisputedly lawful under that precedent, I concur in the majority's conclusion that the complaint should be dismissed.

[3] 136 NLRB at 1502. The majority says that this holding is not in dispute "today." I do not believe it could validly be called into question at any time.

[4] See *Office & Professional Employees Local 95 v. Wood County Telephone Co.*, 408 F.3d 314 (7th Cir. 2005); *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1030 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869–870 (7th Cir. 1993); *Microimage Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245, 254–255 (D.C. Cir. 1991); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986). The Supreme Court has likewise acknowledged the special status of dues-checkoff provisions as an exception to the rule regarding unilateral changes established in *NLRB v. Katz*, 369 U.S. 736 (1962). See *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991).

to implement union security." But that court has also stated (without deciding the issue) that it "can see why the Board would treat dues-checkoff in the same manner as union security when both are present."[5]

The *Bethlehem Steel* holding is consistent with the Board's longstanding, commonsense recognition that a union-security clause operates as a powerful inducement for employees to authorize dues checkoff, and that it is unreasonable to think that employees generally would wish to continue having dues deducted from their pay once their employment no longer depends on it:.

Checkoff is optional, of course, but on the facts before us we cannot agree that the exercise of this option by employees is in all circumstances independent of the impact of union security. Here, the Respondent and the Union had agreed to a contract containing both union-security and checkoff provisions. The contract not only required the employees to be union members but offered them the convenience of paying membership dues effortlessly through wage deductions which the Employer agreed to make. When executing these checkoff authorizations, the employees can hardly have been unmindful of the fact that they had to pay union dues. In these circumstances 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.[6]

For these reasons, checkoff authorizations become revocable at will, regardless of any otherwise lawful limits on revocation provided by their terms, when the union-security obligation is removed following a deauthorization election. Id.; see also *Bedford Can Mfg. Co.*, 162 NLRB 1428, 1431 (1967) (dues checkoff was "an implementation" of the contract's union-security clause).[7] Exempting dues-checkoff clauses from automatic post-expiration continuation under the *Katz* rule is consistent with these cases and with the principle of "voluntary unionism" established by the Act.[8] The majority's decision today is not.

It is no answer to say, as my colleagues do, that employees' Section 7 right to refrain from union activity is adequately protected because they may revoke their checkoff authorizations if they no longer wish to support the Union. It is unlikely that employees will recall the revocation language in their authorizations, and less likely still that they will understand that their obligation to pay dues as a condition of employment terminated as a matter of law once the contract expired. Even if they do remember and understand, checkoff authorizations typically permit revocation only during brief annual window periods, and the wording of the revocation language may be difficult to understand. Take, for example, the revocation provision in the checkoff authorizations at issue in a recent case:

> This authorization and assignment shall be irrevocable for a period of one (1) year from the date of execution or until the termination date of the agreement between the Employer and Local 99, whichever occurs sooner, and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and Union written notice of revocation bearing my signature thereto.[9]

This language provides 15-day window periods during which the assignment may be revoked "prior to the end of any *subsequent* yearly period," but what about at the end of the initial period? The authorization provides that it ceases to be irrevocable at the earlier of the 1-year anniversary of execution or the date the collective-bargaining agreement expires, but it does not say how long the revocation window remains open at those times.

Moreover, if an employee's 1-year anniversary of executing his authorization occurs before the collective-bargaining agreement expires, the authorization may be understood to say that he may *not* revoke the authoriza-

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[5] *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865 (9th Cir. 2011), denying enf. *Hacienda Resort Hotel & Casino*, 355 NLRB 742 (2010) (*Hacienda*). My colleagues cite this case as a significant factor in their decision to overrule precedent, while neglecting to acknowledge the portion of the opinion quoted above. They state that the Ninth Circuit "found the *Bethlehem Steel* rule was unsupportable in the case before it," without mentioning that the case concerned the application of *Bethlehem Steel* in the absence of union security. Thus, the majority's reliance on that decision to justify overruling *Bethlehem Steel* rings hollow.

For the reasons stated in my joint concurrence with former Member Schaumber in *Hacienda*, I respectfully disagree with the view of the Ninth Circuit that dues checkoff survives contract expiration in cases where there is no union-security clause.

[6] *Penn Cork & Closures, Inc.*, 156 NLRB 411 (1965), enfd. 376 F.2d 52 (2d Cir. 1967), cert. denied 389 U.S. 843 (1967).

[7] As the Board explained in *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 326 fn. 12 (1991), unions and employers find it mutually advantageous to agree to dues checkoff where a union-security obligation is in place to reduce the administrative burden of collecting dues and avoid the burden of discharging employees who become delinquent in their dues payments.

[8] *Lockheed*, supra, 302 NLRB at 327.

[9] *Fry's Food Stores*, 358 NLRB 704, 706 (2012).

tion when the contract expires: it is revocable at the 1-year anniversary *or* at contract expiration, whichever occurs sooner. As a matter of law, it is revocable when the contract expires in any event,[10] but how is the employee supposed to know that? Based on his reading of the authorization itself, an employee may well believe that he must continue having his dues deducted from his paycheck until the next annual 15-day window period, even though his obligation to remain a member of the union has ceased. The union is not likely to tell him otherwise, and the employer is probably barred from doing so unless specifically asked. Thus, I am not persuaded to abandon *Bethlehem Steel* by the majority's assurances that the revocability of checkoff authorizations sufficiently protects employees' Section 7 rights.[11]

The majority acknowledges that the *Bethlehem Steel* rule concerning dues checkoff is not the sole exception to the *Katz* rule, and that other contractually established terms concerning mandatory subjects of bargaining also lapse at contract expiration. The majority argues that those exceptions all share a common feature that dues checkoff lacks. Their argument fails to persuade, however, because it ignores the fact that some of the exceptions they would group together rest on fundamentally different rationales. Management-rights provisions are excepted from the *Katz* rule because of the Act's *extent*. The Act creates and protects the right to bargain collectively. A management-rights provision represents a waiver of that statutory right, and the Board will not infer an intent to continue that waiver postcontract expiration absent clear and unmistakable evidence to the contrary.[12] Arbitration provisions, by contrast, are excepted from *Katz* because of the Act's *limits*. The duty to bargain under Section 8(d) is limited to a duty to meet and confer in good faith concerning mandatory subjects of bargaining; it "does not compel either party to agree to a proposal or require the making of a concession." Both parties retain the right to impose their will through economic force. Contractual arbitration provisions represent the parties' mutual relinquishment of that right. When the contract expires, that extra-statutory right is resumed.[13]

Another and more persuasive rationale links dues checkoff with other exceptions to the *Katz* rule. As I explained in *Hacienda*, dues checkoff, no-strike/no-lockout, and arbitration provisions are all "uniquely of a contractual nature": they "cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound." 355 NLRB at 745. By contrast, a whole range of other terms and conditions of employment subject to the mandatory bargaining duty "exist from the commencement of a bargaining relationship," and "[t]he obligation to maintain them does not arise with or depend on the existence of a contract." Id. Accordingly, dues checkoff and other uniquely contractual terms are "sui generis" and "cannot be compared to the terms and conditions of employment routinely perpetuated by the constraints of *Katz*."[14]

But even under the majority's rationale for justifying the several exceptions to the *Katz* rule, continuing to except dues checkoff is similarly justified. Those other exceptions, say my colleagues, all "involve the contractual surrender of [a] statutory or nonstatutory right." Likewise, dues checkoff limits the statutory right to refrain from supporting any labor organization.[15] And as I have already explained, that right is insufficiently protected by the revocability of checkoff authorizations.

The majority also contends that their decision to overrule *Bethlehem Steel* finds support in the text of Section 302(c)(4). I disagree. My colleagues are quite correct that Section 302(c)(4) allows employers to deduct union dues from employees' pay and forward it to the union if the employee has executed 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 bargaining agreement, whichever occurs sooner." This provision plainly limits the postexpiration durability of the written *assignment*. Even if it suggests that such assignments, while revocable, may continue beyond the life of the collective-bargaining agreement without violating Section 302, it does not mandate that the dues-checkoff *clause* in the expired collective-bargaining

[10] *Atlanta Printing Specialties*, 215 NLRB 237 (1974).

[11] The majority terms these concerns "speculation," but they are well grounded in the Board's long standing experience in the administration of the Act. See, e.g., *Penn Cork & Closures, Inc.*, supra.

[12] *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). Although I recognize that the "clear and unmistakable waiver" standard is Board law, I would adopt the "contract coverage" standard, as I recently stated in my partial dissent in *Centurylink*, 358 NLRB No. 134, slip op. at 4 (2012).

[13] See, e.g., *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970).

[14] *Indiana & Michigan Electric Co.*, 284 NLRB 53, 58 (1987) (reaffirming *Bethlehem Steel*).

[15] Both union-security clauses and dues-checkoff arrangements place limits on the general right of employees to refrain from supporting a labor organization and would violate the Act absent specific statutory authorization. Thus, Sec. 8(a)(3) authorizes union-security clauses subject to numerous safeguards as part of a compromise between the competing interests of insuring employee free choice in the exercise of Sec. 7 rights and safeguarding the legitimate role of the union as the exclusive representative of all unit employees. Likewise, deduction of union dues and fees violates the Act absent a valid authorization from the employee. *Industrial Towel & Uniform Service*, 195 NLRB 1121 (1977), enf. denied on other grounds 473 F.2d 1258 (6th Cir. 1973). That is not the case with deductions from pay for other purposes, contrary to my colleagues' attempt to lump those deductions together with dues checkoff.

agreement likewise continue.[16] Moreover, to the extent the majority argues that Section 302(c)(4) evidences congressional intent to continue dues-checkoff postcontract expiration, *Bethlehem Steel* has been the law for 50 years, and Congress has never legislatively overruled it.

Citing *Finley Hospital*,[17] the majority posits that compulsory continuation of dues checkoff following contract expiration is necessary to protect the bargaining process. An employer's status quo obligation "must be viewed as a collective whole" that includes dues checkoff (the reasoning goes) because the employer may have agreed to it in return for a union concession on some other term that continues as part of the status quo. But this argument ignores the fact that for 50 years, it has been settled law that dues checkoff, if agreed to, will not survive the contract. Both sides know the rules. If a union deems dues checkoff sufficiently important that it is willing to secure it through a concession on a term subject to the *Katz* rule, it understands the deal it is striking—just as an employer understands the deal it is striking if it makes a concession on a term subject to *Katz* in exchange for desired language in a management-rights provision. In both situations, both sides know that they are conceding on a term that will continue postcontract in exchange for one that will end with the contract. The bargaining process is better protected by preserving the settled rules with respect to both management rights *and* dues checkoff. It hardly advances collective bargaining to require that some portions of negotiated agreements—i.e., those favorable to the union—survive contract expiration, while others—those favorable to the employer—do not.[18]

Further, under the majority's new rule, dues checkoff, once agreed to, will continue indefinitely unless the union agrees to end it (a highly unlikely possibility) or the parties reach lawful impasse on its elimination. An employer will not find it easy to establish such an impasse to my colleagues' satisfaction.[19] But in any event, no employer can even reach that threshold without including the elimination of dues checkoff in its final proposal to the union. Creating an incentive for employers to inject that issue into collective bargaining does little to advance the collective-bargaining process, in my view.

On the other hand, my colleagues know well that an employer's ability to cease dues checkoff upon contract expiration has long been recognized as a legitimate economic weapon in bargaining for a successor agreement. The ability of parties to wield such weapons is an integral part of the system of collective bargaining that the Wagner and Taft-Hartley Acts envisioned for the peaceful resolution of industrial disputes. To strip employers of that opportunity would significantly alter the playing field that labor and management have come to know and rely on. Indeed, even in times of union boycott and other economic actions in opposition to an employer's legitimate bargaining position, the employer will be forced to act as the collection agent for dues to finance this opposition. This is the unspoken object of today's decision, and it contravenes the well-established doctrine that the Board may not function "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."[20] In sum, dues-checkoff clauses, like arbitration clauses, are "sui generis" and do not fit neatly into the *Katz* scheme regarding employers' status quo obligations. On its best days, the Board has recognized in other settings that the complex situations that arise under the Act cannot always be forced into neat categories, and has responded flexibly in an effort to implement to the fullest possible extent the Federal labor policy Congress has established.[21] For the

[16] The majority endeavors to elide this critical difference by lumping together the contractual dues-checkoff clause and the written assignment pursuant to it under the umbrella term "dues checkoff arrangements."

The majority's reliance on Secs. 302(c)(5)–(8) is likewise unavailing. Those provisions authorize employer payments to union-sponsored pension and welfare benefit funds under certain circumstances and, as the majority notes, the obligation to continue such payments survives contract expiration under *Katz*. Unlike Sec. 302(c)(4), however, Secs. 302(c)(5)–(8) do not posit the existence of an "applicable collective agreement" or revocation upon termination thereof. In addition to this critical difference in the statutory text, the nature of the payments is different as well. The payments to the pension and benefit plans are the means by which the employer provides the relevant fringe benefits and thus are part of the *Katz* status quo obligation to the same extent as if those benefits were provided by some other method, such as an employer-sponsored plan. Those payments are "for the sole and exclusive benefit of the employees," 29 U.S.C. § 302(c)(5), unlike payments to the union by employees through dues checkoff, which are for the direct benefit of the union.

[17] 359 NLRB 156 (2012). I relevantly dissented in that case.

[18] See, e.g., *Omaha World Herald*, 357 NLRB 1870 (2011) (employer not privileged to make unilateral changes in 401(k) plan that applies equally to unit and nonunit employees after collective-bargaining agreement expired despite "reservation of rights" clause in plan documents authorizing such changes). I relevantly dissented in that case.

[19] See, e.g., *Erie Brush*, 357 NLRB 363 (2011), enf. denied 700 F.3d 17 (D.C. Cir. 2012). I relevantly dissented in that case.

[20] *NLRB v. Insurance Agents*, 361 U.S. 477, 497 (1970). My colleagues say that one who deploys economic weaponry "must at the same time be engaged in lawful bargaining." I agree—and until today, postcontract cessation of dues checkoff was long accepted by the Board, with the approval of reviewing courts, as fully consistent with lawful bargaining.

[21] See, e.g., *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988) (union recognition extended under Sec. 8(f) confers limited 9(a) status on union for purpose of enforcing contract during its term); *Servicenet, Inc.*, 340 NLRB 1245 (2003) (duration clause normally mandatory

past 50 years, the Board has done so in the area of dues checkoff as well. My colleagues point to no evidence that this approach has impeded collective bargaining or the peaceful resolution of labor disputes, but today they abandon it all the same. For my part, I respectfully dissent.

Kelly Freeman, Esq., for the General Counsel.
William A. Behan, Esq., for the Respondent.
Charles M. DeGross, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case alleges that WKYC-TV (the Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Board (the Act) by unilaterally ceasing dues checkoff in October 2010, some 16 months after the parties' contract terminated in June 2009.[1]

A hearing on the complaint allegations was originally scheduled in August 2011. However, on August 19, the parties filed a joint motion requesting a decision without a hearing based solely on a stipulated record. Consistent with Section 102.35(a)(9) of the Board's Rules, the motion included the parties' stipulation of facts with attached exhibits, statement of the issues, and short statements of position.

By order dated August 19, I granted the joint motion and approved the stipulation of facts. The General Counsel, the Charging Party, and the Respondent subsequently filed briefs. Based on the briefs and the entire stipulated record,[2] for the reasons set forth below, I find that the Respondent did not violate the Act under extant law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation that operates a television broadcasting station in Cleveland, Ohio. The Respondent admits, and I find, that its annual gross revenues and out-of-State purchases exceed $100,000 and $5000, respectively, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

NABET Local 42 is the designated exclusive bargaining representative of the Respondent's employees who install, operate, control, repair, and maintain the television broadcast equipment at the station. The Respondent admits, and I find, that NABET Local 42 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent and Local 42 have been party to successive collective-bargaining agreements, the most recent of which became effective June 1, 2006, and contained both a union-security clause and a dues-checkoff provision. The union-security clause (art. I) required all unit employees to become and remain union members or pay initiation fees and weekly dues. The dues-checkoff provision (art. II) required the Respondent, upon receipt of an employee's signed authorization, to deduct fees and dues from the employee's paycheck and remit them to NABET and Local 42 until such time as the authorization is timely and properly revoked by the employee.

By its terms, the 2006 contract was effective through June 1, 2011. However, pursuant to the reopener provisions of the agreement, the contract was terminated by the Respondent effective June 1, 2009. Accordingly, the parties began bargaining over new terms and conditions in April 2009, shortly after the Respondent provided notice of the termination.

Eventually, on October 20, 2009, the Respondent gave Local 42 its final offer. However, the offer was unanimously rejected by the unit membership. Thereafter, on January 4, 2010, the Respondent implemented portions of the final offer unilaterally.[3]

At no time prior to implementing portions of its final offer on January 4 did the Respondent cease deducting and remitting union dues. Nor did the Respondent ever propose any changes to the dues-checkoff provisions of the terminated agreement; the Respondent's final offer included the identical language.

The Respondent also continued to deduct and remit dues after it implemented portions of its final offer on January 4. It continued to do so even though the dues-checkoff provisions in its final offer were not among the terms it advised Local 42 and the employees that it would be implementing unilaterally on January 4.

However, in late September 2010, the Respondent's general manager (Spectorsky) became aware of the situation and instructed that dues checkoff cease.[4] Accordingly, on October 5 and 6, the Respondent notified Local 42 and the affected employees, respectively, that dues checkoff would cease "effective immediately." The Respondent has not deducted fees and dues from unit employees' paychecks since that time.

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subject, but clause of indefinite duration was exception because it required parties to forgo right to take economic action in support of bargaining positions for successor agreement).

[1] The underlying charge was filed by the unit employees' designated representative (NABET Local 42) on October 18, 2010, and amended on March 28, 2011. The complaint issued on March 30, 2011, and was subsequently amended on April 5, 2011.

[2] No consideration has been given to any facts set forth in the briefs that are not supported by the stipulated record.

[3] Local 42 filed unfair labor practice charges on January 5 and March 30 relating to the implementation. However, the Regional Director dismissed the charges on the ground that the parties had reached a lawful impasse, and the dismissal was upheld by the Office of Appeals. Thus, for purposes of this case, I have assumed that the January 4 implementation was lawful.

[4] The parties stipulated that, at various times during the course of the negotiations and period of impasse, and continuing to date, the Union has engaged in activity directed at the general public, the viewing audience, and the station's advertisers, designed to influence the station's position on contract issues. However, the parties did not stipulate how General Manager Spectorsky became aware that the station was still deducting and remitting union dues or why Spectorsky directed that the station cease doing so.

B. Analysis

The General Counsel makes two alternative arguments why the Respondent's unilateral cessation of dues checkoff in October 2010 was unlawful. The General Counsel first argues that, as a matter of policy, employers should be required to continue dues checkoff after contract expiration to the same extent they are required to maintain wages, benefits, and other mandatory terms and conditions of employment until a new agreement or good-faith impasse. As the General Counsel concedes, however, this argument is contrary to longstanding Board precedent, specifically *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), and its progeny. Although the General Counsel offers various reasons why the precedent is unsound, the Board's most recent decision addressing the subject, on second remand from the Ninth Circuit, effectively reaffirmed the precedent in the absence of a three-member majority to overrule it. See *Hacienda Resort Hotel & Casino (Hacienda III)*, 355 NLRB 742 (2010).

Like *Hacienda I* and *II*, *Hacienda III* was reviewed by the Ninth Circuit at the request of the union. And this time, instead of remanding the case yet again for a rational explanation of the precedent, the court rejected the precedent outright. However, the court did so only as applied to dues-checkoff provisions that "exist as a free-standing, independent convenience to willingly participating employees." *Local Joint Executive Board of Las Vegas, Culinary Workers Local 226 v. NLRB*, 657 F.3d 865 (9th Cir. 2011). The court expressed no opinion with respect to situations, such as that here, where the expired contract also contained a union-security clause that compelled employees to join or pay dues to the union as a condition of employment. In any event, I am bound by Board precedent unless and until it has been reversed by the Supreme Court. *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004).

The General Counsel alternatively argues that, even if the Respondent had a right under *Bethlehem Steel* to cease dues checkoff upon contract expiration, it forfeited the right by continuing to deduct and remit dues for 16 months thereafter and failing to propose eliminating dues checkoff in negotiations prior to making the change.[5] However, the employer in *Hacienda* likewise did not cease dues checkoff until over a year after the contract expired. Nor is there any indication that the employer had previously proposed eliminating dues checkoff during the parties' unsuccessful negotiations. See *Hacienda Resort Hotel & Casino* (*Hacienda I*), 331 NLRB 665, 665, 673 (2000). See also *West Co.*, 333 NLRB 1314, 1315 fn. 6 and 1319–1320 (2001) (employer lawfully ceased dues checkoff 3 months after the contract expired and the employer unilaterally implemented its final offer, even though the final offer included the same dues checkoff provision); and *87-10 51st Ave. Owners Corp.*, 320 NLRB 993 (1996) (employer lawfully ceased dues checkoff 7 months after the contract expired, even though no bargaining whatsoever had occurred up to that time).

Further, the case cited by the General Counsel—*Tribune Publishing Co.*, 351 NLRB 196 (2007), enfd. 564 F.3d 1330 (D.C. Cir. 2009)—is clearly distinguishable. In that case, the Board found that the employer violated Section 8(a)(5) by discontinuing direct deposit of union dues after previously agreeing, during the hiatus between collective-bargaining agreements, to permit direct deposit of union dues. Although the General Counsel argues that the distinction is "immaterial," the Board emphasized the distinction in its decision:

> [T]he issue before us is not whether the Respondent had the right to unilaterally cease dues checkoff after the collective-bargaining agreement expired. Rather, the issue is whether the Respondent, after unilaterally ceasing dues checkoff but later reaching a new agreement with the Union to allow employees to use direct deposit for the deduction of their union dues, could unilaterally terminated the use of direct deposit for that purpose. [351 NLRB at 197.]

In sum, the General Counsel's second argument is just as contrary to Board precedent as the first. Accordingly, in agreement with the Respondent, I find that its unilateral decision to cease dues checkoff in October 2010 did not violate the Act.[6]

CONCLUSION OF LAW

The Respondent's unilateral cessation of dues checkoff in October 2010, following termination of the parties' collective-bargaining agreement in June 2009, did not violate Section 8(a)(5) and (1) of the Act.

On the foregoing findings of fact and conclusions of law and on the entire stipulated record, I issue the following recommended[7]

ORDER

The complaint is dismissed.

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[5] As a general rule, an employer's post-impasse changes in wages, benefits, and other mandatory terms of employment cannot be substantially different from the terms of its prior offers during negotiations. See *Church Square Supermarket*, 356 NLRB 1357, 1362 (2011), and cases cited there.

[6] Given this finding, it is unnecessary to address the Respondent's affirmative defense that the complaint is barred by Sec. 10(b) because Local 42 failed to file the underlying charge within 6 months after it learned that the Respondent was unilaterally implementing other portions of its final offer on January 4, 2010.

[7] 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.

Exhibit #2

AMERICAN BAR ASSOCIATION
COMMITTEE ON THE DEVELOPMENT OF THE LAW
UNDER THE NATIONAL LABOR RELATIONS ACT
2013 MIDWINTER MEETING

California Dreamin' (On Such A Mid-Winter's Day)

Topic: **All the Leaves are Brown and the Sky is Gray... Because My Dues Check-Off Agreement Went Away**

Dues Check-Off Dreams Do Come True, They Do, They Do
By Brian A. Powers & Andrew Kelser

Summary: This paper explores an employer's duty to honor a dues check-off provision after the expiration of a collective bargaining agreement. Since the Board's decision in *Bethlehem Steel* (1962), the Board and Federal Courts adhered to the principle that dues check-off provisions terminate when the collective bargaining agreement expires. However, the Ninth Circuit's 2011 decision in *Local Joint Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III)* called into question the Board's longstanding commitment to the rule originally articulated in *Bethlehem Steel* and developed in subsequent cases by the Board. Fourteen months later, the Board abrogated its adherence to *Bethlehem Steel* when it decided *WKYC-TV* (2012). Significantly, in *WKYC-TV* the Board emphasized that an employer's obligation to check-off union dues continues after the collective bargaining expires. The purpose of this paper is to 1) examine the development of the Board's treatment of dues-check off provisions after the collective bargaining agreement expires, and 2) explore the effects of the Board's decision in *WKYC-TV* on not only dues check-off provisions, but also other mandatory subjects of bargaining excepted from the *Katz* rule. In addition, this paper provides practice pointers on wording dues check-off authorizations in light of the Board's decision in *WKYC-TV*.

Dues Check-Off Dreams Do Come True, They Do, They Do
By Brian A. Powers

Introduction

For the past fifty years, the National Labor Relations Board ("Board") has consistently ruled that an employer's obligation to check off union dues from employees' wages ceased upon expiration of the collective bargaining agreement. Unlike other mandatory subjects of bargaining, the Board determined that dues check-off provisions did not survive the expiration of the collective bargaining agreement.[1] Thus, employers could cease to check off union dues from employees' wages after a collective bargaining agreement expired without violating the National Labor Relations Act ("Act").

Employers that terminated dues check-off provisions post-contract expiration relied on the Board's 1962 decision in *Bethlehem Steel.*[2] In *Bethlehem Steel,* the Board concluded that the Act does not impose an obligation on an employer to continue to check-off dues after a collective bargaining agreement expires.[3] Specifically, the Board held that an employer does not violate Section 8(a)(5) of the Act when it unilaterally ceases to abide by a dues check-off provision pursuant to a union-security agreement.[4] Accordingly, absent contrary language in the agreement, the employer could unilaterally stop deducting union dues from an employee's wages once the collective bargaining agreement expired.

In 2002, the Ninth Circuit first challenged the Board's long-standing precedent established in *Bethlehem Steel Co.* Over the course of the next twelve years, the Ninth Circuit would unabashedly criticize the Board's decision and reasoning in *Bethlehem Steel Co.* in a trio of cases known as *Hacienda I, II,* and *III.*[5] The *Hacienda* saga

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[1] *See NLRB v. Katz,* 369 U.S. 736, 742-743 (1962) (explaining that the National Labor Relations Act prohibits an employer from unilaterally changing mandatory subjects of bargaining post-contract expiration). For ease of reference, this paper refers to the obligation to honor terms and conditions of employment post-contract expiration as the *Katz* rule.

[2] *Bethlehem Steel Co. (New York, N.Y.),* 136 NLRB 1500, 1501 (1962), *enf'd in pertinent part, Bethlehem Steel Co. v. NLRB,* 320 F.2d 615 (3d Cir. 1963).

[3] *Id.*

[4] *Id.*

[5] *Hacienda I,* 331 NLRB 665 (2000), *vacated, Local Joint Executive Bd. of Las Vegas, Culinary Workers Union Local 226 v. N.L.R.B.,* 309 F.3d 578 (9th Cir. 2002); *Hacienda II,* 351 NLRB 504 (2007), *vacated, Local Joint Executive Bd. of Las Vegas v. N.L.R.B.,* 540 F.3d 1072, (9th Cir. 2008); *Hacienda III,* 355 NLRB No. 154 (2010), *vacated, Local Joint Executive Bd. of Las Vegas v. N.L.R.B.,* 657 F.3d 865 (9th Cir. 2011).

originated in 2000 when the Board affirmed an Administrative Law Judge's ("ALJ") decision to dismiss a union's allegation that the employer violated Section 8(a)(5) and 8(a)(1) of the Act by unilaterally terminating the dues check-off provision from an expired collective bargaining agreement before bargaining a new agreement or bargaining to impasse.[6] In 2002, the Ninth Circuit granted the union's petition for review, vacated the Board's decision, and remanded with instructions to the Board to explain its rationale, or adopt and explain a different rule.[7]

Subsequently, the Board and the Ninth Circuit danced to the same tune in *Hacienda II* as in *Hacienda I*.[8] On remand, the Board rejected the bright-line rule it relied on in *Hacienda I*.[9] Instead, the Board examined the collective bargaining agreements and determined that the union waived its right to claim dues check-off in the agreements.[10] Accordingly, the Board dismissed the Union's complaint.[11] On petition for review by the union, the Ninth Circuit again disagreed with the Board's determination.[12] The court explained that the Board's decision improperly applied the rule from *Metro. Edison Co. v. NLRB*, 460 U.S. 692 (1983) that required the union to waive its right "clearly and unmistakably."[13] Consequently, the Ninth Circuit vacated the Board's decision and remanded once again with instructions to explain its rationale for the rule adopted in *Hacienda I*, or adopt and explain a different rule.[14]

To the Ninth Circuit's dismay, the Board again affirmed the ALJ's decision to dismiss the union's complaint by a split 2-2 vote.[15] Not surprisingly, the Ninth Circuit vacated the Board's ruling a third and final time on September 13, 2011.[16] Specifically, the court held that an employers' unilateral termination of dues check-off in a right-to-

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[6] *Hacienda I*, 331 NLRB 665 (2000), *vacated, Local Joint Executive Bd. of Las Vegas, Culinary Workers Union Local 226 v. N.L.R.B.*, 309 F.3d 578 (9th Cir. 2002).
[7] *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union Local 226 v. N.L.R.B.*, 309 F.3d 578 (9th Cir. 2002).
[8] *Hacienda II*, 351 NLRB 504 (2007), *vacated, Local Joint Executive Bd. of Las Vegas v. N.L.R.B.*, 540 F.3d 1072, 9th Cir., Aug. 27, 2008.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Local Joint Executive Bd. of Las Vegas v. N.L.R.B.*, 540 F.3d 1072, 9th Cir., Aug. 27, 2008.
[13] *Id.*
[14] *Id.*
[15] *Hacienda III*, 355 NLRB No. 154 (2010), *vacated, Local Joint Executive Bd. of Las Vegas v. N.L.R.B.*, 657 F.3d 865 (9th Cir. 2011).
[16] Local Joint Executive Bd. of Las Vegas v. N.L.R.B., 657 F.3d 865 (9th Cir. 2011).

work state constituted a violation of Section 8(a)(5) for refusal to bargain.[17] The Ninth Circuit refused to provide the Board with a third open remand to craft its own rule.[18] Rather, the Ninth Circuit remanded to the Board to determine the appropriate relief in light of its decision.[19]

Fourteen months after the Ninth Circuit's decision in *Local Joint Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III),* the Board abandoned the *Bethlehem Steel* rule entirely.[20] Exactly fifty years after the Board's decision in *Bethlehem Steel,* the Board held that an employer's obligation to check-off union dues continues after the collective bargaining agreement expires.[21] As explained *infra*, in overruling *Bethlehem Steel,* the Board repudiated not only the conclusion, but also the reasoning relied on by the earlier Board's decision. Consequently, the Board's decision leaves many labor practitioners speculating potential concerning collateral effects of *WKYC-TV.*

The purpose of this paper is to explore the history of the *Bethlehem Steel* rule and potential effects of the Board's decision *WKYC-TV.* This paper is divided into four sections: 1) an explanation of dues check-off authorizations, 2) the development of the *Bethlehem Steel* rule from 1962-2013, 3) *WKYC-TV's* effect on dues check-off provisions after a collective bargaining agreement expires, and 4) potential secondary effects of the Board's decision *WKYC-TV, Inc.,* on other mandatory subjects of bargaining excepted from *Katz.* In Section 2, this paper also contains practice pointers on how to word dues check-off authorization provisions in collective bargaining agreements after the Board's decision in *WKYC-TV.*

Section 1. Understanding Dues Check-Off Authorization.

A common misconception about dues check-off authorization has misled many employers, unions, labor law practitioners, and occasionally, even Board members. Despite assertions to the contrary, dues check-off authorization is *not* fundamentally linked to a union-security clause. Rather, dues check-off authorization is an independent, contractual clause in a collective bargaining agreement that allows

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[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *WKYC-TV, Inc. & Nat'l Ass'n of Broad. Employees & Technicians, Local 42 a/w Communications Workers of Am., AFL-CIO,* 359 NLRB No. 30 (2012).
[21] *Id.*

employees to elect to deduct monies from their paycheck to cover the cost of union dues. This is a matter of administrative convenience for unions and employees alike. In addition, it removes the inefficiency inherent in shop stewards collecting union dues on company property or even on company time. Dues check-off authorization is also 1) voluntary, 2) irrevocable, and 3) preempted by state law.

The Act requires that parties that agree to dues check-off authorization ensure that it is completely voluntary.[22] Specifically, the Act prohibits a union from requiring an employee to authorize dues check-off as an employment condition.[23] Section 7 of the Act guarantees employees the right to refuse to sign a dues check-off authorization.[24] Accordingly, a union violates Section 8(b)(1)(A) of the Act by requiring an employee to sign a dues check-off authorization.[25]

Significantly, once an employee voluntarily authorizes dues check-off, his or her authorization may be irrevocable for a maximum of one year assuming the contractual language is unambiguous. The Labor Management Relations Act ("LMRA") Section 302(c)(4) permits parties to make dues check-off authorization irrevocable for one year from the execution date or until contact expiration, whichever period is shorter.[26] After the one-year period or contract expires, authorization is revocable during an "escape period," which is usually a ten to twenty day window immediately after the irrevocability period expires.[27] Unless a party revokes their dues check-off authorization, dues deduction automatically continues for another one-year period or until the contract expires, whichever occurs first, and the renewal period will commence once a successor contract is negotiated.[28]

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[22] *Local 74, Serv. Employees Int'l Union (Parkside Lodge of Connecticut, Inc.)*, 323 NLRB 289, 293 (1997) ("[I]t is well settled that the dues-checkoff authorization must be voluntarily made and that an employee has a right under Section 7 to refuse to sign a checkoff authorization.")
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Int'l Broth. of Elec. Workers, Local No. 2008*, 302 NLRB 322, 325 (1991).
[27] *Machinists Monroe Lodge 770 v. Litton Bus. Sys.*, 334 F. Supp. 310 (W.D. Va.), aff'd, 80 LRRM 2379 (4th Cir. 1971); Williams *v. N.L.R.B.*, 105 F.3d 787, 792 (2d Cir. 1996)
[28] *Machinists Monroe Lodge 770, supra* note 27.

Notably, the irrevocability period applies to members, non-members, and members that authorize dues deduction but resign during the applicable time period.[29] In *Electrical Workers IBEW Local 2088 (Lockheed Space Operations),* the Board emphasized that dues "may properly continue to be deducted from the employee's earnings and turned over to the union during the entire agreed-upon period of irrevocability, even if the employee states he or she has had a change of heart and wants to revoke the authorization."[30] The check-off authorization must contain explicit language obligating an employee to pay dues even in the absence of union membership.[31] Thus, where an authorization contains language clearly authorizing dues deduction irrespective of union membership, dues check-off is irrevocable for the period described in LMRA Section 302(c)(4).[32]

In addition, the LMRA exclusively governs dues check-off authorization and preempts state law prohibiting dues check-off.[33] LMRA Section 302(c)(4) explicitly authorizes dues check–off provisions. As noted *supra,* dues check-off provisions are entirely independent of union-security provisions, which are governed by NLRA Section 8(a)(3) and LMRA Section 14(b). LMRA Section 14(b) only permits States to prohibit "agreements requiring membership in a labor organization as a condition of employment." Unlike union-security provisions, dues check-off provisions are entirely voluntary and cannot be required as an employment condition. Thus, LMRA Section 14(b) does not apply to dues check off-provisions. Consequently, LMRA Section 302(c)(4) preempts state law attempts to prescribe dues check-off authorization through "right to work" laws.

Ultimately, it's essential to appreciate the voluntary nature of dues check-off authorization to understand how it fundamentally differs from union-security provisions. In contrast to union-security provisions, employees must voluntarily agree to dues check-off authorization. Employees that voluntarily authorize dues check-off elect to

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[29] *N.L.R.B. v. U.S. Postal Serv., 833 F.2d 1195, 1197* (6th Cir. 1987), *decision supplemented,* 837 F.2d 476 (6th Cir. 1988)
[30] *Id.* at 328.
[31] *Id.*
[32] *United Steelworkers of Am., Local 4671 & Calvin Eugene Dugger,* 302 NLRB 367 (1991).
[33] *See Shen-Mar Food Products, Inc.,* 221 NLRB 1329 (1976) (explaining that dues check-off authorization are exclusively a matter of federal law); *See also Seapak v. Industrial, Technical and Professional Emp., Division of National Maritime Union, AFL-CIO,* 300 F. Supp. 1197 (N.D. Ga. 1969), *aff'd, 423 F.2d 1229 (5th Cir. 1970).*

deduct monies from their paycheck to cover the cost of union dues. Once an employee authorizes dues check-off pursuant to a clearly-articulated authorization form, it may become irrevocable for up to one year. Additionally, unlike union-security provisions, federal law preempts state law attempting to govern dues check-off authorization. As explained *infra,* confounding dues check-off authorization with union-security provisions can lead to unnecessary confusion, and, seemingly fifty years of reliance on flawed precedent.

Section 2. The Development of the Bethlehem Steel Rule from 1962-2013.

In the beginning, the Board created the heavens, the earth, and *Bethlehem Steel.* In 1962, the Board emphasized that an employer does not violate the Act when it ceases to honor a dues check-off provision after the collective bargaining agreement expires.[34] Following expiration of the collective bargaining agreement between Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO ("Union") and Bethlehem Steel Company (Shipbuilding Division) and Bethlehem-Sparrows Point Shipyard, Inc. ("Employer") in the summer of 1959, the parties began negotiating a new contract.[35] During negotiations, the Employer refused to honor the prior agreement's union-security clause, the dues check-off provision, super-seniority provision, and the grievance procedure provision.[36] In addition, the Employer implemented multiple changes in the employees' work conditions, including seniority rules, work assignments, and special employee benefits.[37] Subsequently, the Unionized employees went on strike to protest the Employer's unilateral changes to their employment terms and conditions.[38]

The Union also filed a complaint with the Board, alleging that the Employer failed to bargain in good faith.[39] Thereafter, the General Counsel issued an unfair labor practice complaint asserting that the Employer violated Section 8(a)(5) and 8(a)(1) by

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[34] *Bethlehem Steel Co. (New York, N.Y.), supra* note 2.
[35] *Bethlehem Steel Co. (New York, N.Y.),* 133 NLRB 1347, 1349 (1961).
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*

refusing to bargain in good faith with the Union.[40] The General Counsel contended that the totality of the Employer's conduct indicated that it failed to bargain in good faith.[41] Specifically, the General Counsel pointed to the Employer's unilateral decisions 1) to terminate the union-security clause, dues check-off provision, super-seniority provision, and the grievance procedure provision; and 2) to change the unionized members' working conditions.[42]

Ultimately, the Board determined that the Employer violated Section 8(a)(5) of the Act by failing to bargain in good faith.[43] The Board agreed that the Employer violated the Act "when it deprived union representatives of certain seniority rights and declined to process grievances as before."[44] However, the Board reached the opposite conclusion with respect to the Employer's termination of the union-security agreement and dues check-off provision.[45] The Board noted that dues check-off, similar to preferential seniority and union-security clauses, relates to "wages, hours, and other terms and conditions of employment."[46] Correctly, the Board determined that dues-check off is a mandatory subject of collective bargaining.[47] Nevertheless, the Board reasoned that the employer's obligation to check-off dues expired with the collective bargaining agreement.[48] The Board explained that the union obtained the right to check-off dues through its contractual agreement with the employer.[49] Under the Board's analysis, it follows that the contractual right to dues check-off ceases to exist when the contract expires.[50]

Consistent with the Board's decision in *Bethlehem Steel,* for fifty years the Board and United States' Federal Courts subscribed to the idea that dues-check off provisions when linked to union-security clauses left such clauses vulnerable to lawful, unilateral

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[40] *Id.* at 1347; all references hereafter to Section 8(a)(5) and Section 8(a)(1) refer to NLRA Sections 8(a)(5) and 8(a)(1).
[41] *Id.* at 1349.
[42] *Id.*
[43] *Bethlehem Steel Co. (New York, N.Y.), supra* note 2, at 1500.
[44] *Id.* at 1501.
[45] *Id.*
[46] *Id.* at 1502.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*

termination by an employer when a contract expires.[51] For instance, the D.C. Circuit Court explained that "the well established exceptions for union-shop and dues-checkoff provisions are rooted in § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), and § 302(c)(4) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(4), which are understood to prohibit such practices unless they are codified in an existing collective-bargaining agreement."[52] In addition, the Supreme Court acknowledged that "dues check-off provisions are excluded from the unilateral change doctrine because of statutory provisions which permit these obligations only when specified by the express terms of a collective-bargaining agreement."[53]

The Board also clarified that its decision in *Bethlehem Steel* is not limited to dues check-off provisions linked to union-security agreements. In *Tampa Sheet Metal,* the Board concluded that the *Bethlehem Steel* rule also applies in right-to-work states.[54] In right-to-work states, state law prohibits collective bargaining agreements that contain union-security clauses.[55] Thus, the Board had to determine if its decision in *Bethlehem Steel* applied to an isolated dues check-off provision in a collective bargaining agreement that was not associated with a union security clause. The Board concluded, "An employer's duty to check off union dues is extinguished upon the expiration of the collective-bargaining agreement."[56]

Given the Board's continued devotion to the *Bethlehem Steel* rule, it came as no surprise when the Board agreed to dismiss a union's complaint in 2000 that alleged the

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[51] See *Teamsters Local 70 (Sea-Land of California),* 197 NLRB 125, 128 (1972), *enf'd. per curiam* 490 F.2d 87 (9th Cir. 1973); *Peerless Roofing Co.,* 247 NLRB 500, 505 (1980), *enf'd.* 641 F.2d 734 (9th Cir. 1981); *Ortiz Funeral Home Corp.,* 250 NLRB 730, 731 fn. 6 (1980), *enf'd. on other grounds* 651 F.2d 136 (2d Cir. 1981), *cert. denied* 455 U.S. 946 (1982); *Robbins Door & Sash Co.,* 260 NLRB 659, 659 (1982); *Petroleum Maintenance Co.,* 290 NLRB 462, 463 fn. 4 (1988); *R.E.C. Corp.,* 296 NLRB 1293, 1293 (1989); *Xidex Corp.,* 297 NLRB 110, 118 (1989), *enf'd.* 924 F.2d 245, 254-255 (D.C. Cir. 1991); *AMBAC,* 299 NLRB 505, 507 fn. 8 (1990); *U.S. Can Co.,* 305 NLRB 1127, 1127 (1992), *enf'd.* 984 F.2d 864, 869 (7th Cir. 1993); *J. R. Simplot Co.,* 311 NLRB 572, 572 (1993), *enf'd. mem.* 33 F.3d 58 (1994), *cert. denied* 513 U.S. 1147 (1995); *Sonya Trucking, Inc.,* 312 NLRB 1159. 1160 (1993); *Katz's Deli,* 316 NLRB 318, 334 fn. 23 (1995), *enf'd. on other grounds* 80 F.3d 755 (2d Cir. 1996); *Sullivan Bros. Printers,* 317 NLRB 561, 566 fn. 15 (1995), *enf'd.* 99 F.3d 1217, 1231 (1st Cir. 1996); *Spentonbush/Red Star Cos., Cos.,* 319 NLRB 988, 990 (1995), *enf. denied on other grounds* 106 F.3d 484 (2d Cir. 1997); 87-10 51st Ave. *Ownership Corp.,* 320 NLRB 993 (1996); *Talaco Communications, Inc.,* 321 NLRB 762, 763 (1996); *Able Aluminum Co.,* 321 NLRB 1071, 1072 (1996); and *Valley Stream Aluminum, Inc.,* 321 NLRB 1076, 1077 (1996).

[52] *Sw. Steel & Supply, Inc. v. N.L.R.B.,* 806 F.2d 1111, 1114 (D.C. Cir. 1986).

[53] *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.,* 501 U.S. 190, 199, (1991).

[54] *Tampa Sheet Metal,* 288 NLRB 322 (1988).

[55] *Id.*

[56] *Id.* at fn 15.

employer violated Section 8(a)(5) and 8(a)(1) by ceasing to deduct union dues.[57] The Hacienda Resort Hotel and Sahara Hotel ("Employer") and Culinary Workers Local 226 and Bartenders Local 165, Hotel and Restaurant Employees ("Union") were parties to collective bargaining agreements that expired on May 31, 1994.[58] After the parties unsuccessfully negotiated for a successor agreement from May 31, 1994 through June 1995, the Employer notified the union that it planned to cease honoring the dues check-off provision in the expired agreements.[59] Subsequently, the Union filed a Complaint with the Board against the Employer alleging Section 8(a)(5) and 8(a)(1) violations. Following a hearing, the ALJ dismissed the Union's Complaint based solely on the collective bargaining agreements' language.[60]

The Board affirmed the ALJ's decision to dismiss the Union's Complaint, however, it based its decision on the *Bethlehem Steel* rule.[61] Specifically, the Board based its decision on "well-established precedent that an employer's obligation to continue a dues-checkoff arrangement expires with the contract that created the obligation."[62] The Board acknowledged that the Supreme Court's decision in *NLRB v. Katz* prohibits a party from unilaterally changing most mandatory subjects of bargaining after a contract expires.[63] However, the Board stressed that the NLRA excepts various contractually-established employment terms and conditions from the general prohibition established in *Katz,* including dues-checkoff arrangements.[64] Accordingly, the Court applied the 38 year old "bright-line rule" from *Bethlehem Steel* and dismissed the Union's Complaint.[65]

Notably, Board members Fox and Liebman dissented from the 3-2 majority opinion.[66] In contrast to the majority, Fox and Liebman asserted that the Employer

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[57] *Hacienda I, supra* note 5.
[58] *Id.* at 665.
[59] *Id.*
[60] *Id.* at 666.
[61] *Id*
[62] *Id.*
[63] *Id.; NLRB v. Katz,* 369 U.S. 736 (1962).
[64] *Id.; Citing Southwestern Steel & Supply v. NLRB,* 806 F.2d 111, 114 (D.C. Cir. 1986), *enfg 276 NLRB 1569* (1985) ; *See also Indiana & Michigan Electric Co.,* 284 NLRB 52, 54-55, 58-59 (1987).
[65] *Id.* at 667.
[66] *Id.*

violated 8(a)(5) and (1) when it unilaterally ceased to check off dues after the collective bargaining agreement expired.[67] Fox and Liebman explained:

> In our view, there is no statutory or policy justification for excepting dues checkoff from the general rule that following the expiration of a collective-bargaining agreement, an employer is obliged to maintain the status quo with regard to employees' terms and conditions of employment until the parties agree on changes or bargain to impasse.[68]

Fox & Liebman were prepared to overrule 38 years of Board policy established in *Bethlehem Steel.* Fox & Liebman also disagreed with the ALJ's determination that the language in the collective bargaining agreement permitted the Employer to terminate the dues check-off system after the contract expired.[69] They underscored that Section 8(d) and Section 8(a)(5) impose a statutory obligation to continue to check-off dues after a contract expires *until the parties bargain to impasse or agree on changes.*[70] Thus, the contractual language confining the employer's obligation to check-off dues "to the term of the agreement" was inoperable.[71] Consequently, Fox & Liebman would have held that the Employer violated Section 8(a)(5), 8(a)(1), and 8(d).[72]

Fox & Liebman's dissent in *Hacienda I* would end up carrying the day roughly a decade later. As discussed *infra,* the Ninth Circuit ultimately reached the same conclusion as Fox & Liebman in 2011 in *Local Joint Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III).*

In 2001, the Union petitioned the Ninth Circuit for review of the Board's order in *Hacienda I.*[73] After oral argument and briefing, the Ninth Circuit granted the petition for review, vacated the Board's decision, and remanded to the Board to convey an explanation for its rule, or adopt and explain a separate rule.[74] In reaching its conclusion, the court emphasized that it was "unable to discern the Board's rationale for excluding dues-checkoff from the unilateral change doctrine in the absence of union

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[67] *Id.*
[68] *Id.*
[69] *Id.* at 671.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 672.
[73] *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union Local 226 v. N.L.R.B.*, 309 F.3d 578 (9th Cir. 2002)
[74] *Id.* at 580.

security."[75] Specifically, the court highlighted the Third Circuit's explanation in enforcing *Bethlehem Steel:*

> The right to require union membership as a condition of employment is dependent upon a contract which meets the standards prescribed in §8(a)(3). The checkoff is merely a means of implementing union security. Since there was no contract in existence when the company discontinued these practices, its action was in conformity with the law.[76]

The court stressed that the collective bargaining agreements at issue did not contain a union security clause.[77] Therefore, the court concluded that the Board's decision and reasoning in *Bethlehem Steel* failed to support the rule the Board adopted in *Hacienda I.*

Five years later, the Board "accepted the remand of the U.S. Court of Appeals for Ninth Circuit" and affirmed its initial decision.[78] Pursuant to the Ninth Circuit's Order, the Board adopted a separate rule in reaching its conclusion.[79] Coincidentally, the Board adopted the ALJ's initial reason for dismissing the Union's Complaint – that the "dues-checkoff clauses in the parties' collective-bargaining agreements contained explicit language limiting the Respondents' dues-checkoff obligation to the duration of the agreements."[80] The Board noted that the language in the agreement "clearly" linked dues check-off to the agreements' duration.[81] Thus, the Union waived its right to dues check-off as an employment term and condition after the contract expired.[82] Member Liebman again dissented, this time joined by Member Walsh.[83] The dissenting opinion underlined the same flaws in the majority's decision as in *Hacienda I,* including the inexplicable exclusion of dues check-off from the *Katz* doctrine.[84] Accordingly, Member Liebman reiterated her earlier opinion that the Employer violated Section 8(a)(5) and 8(a)(1).

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[75] *Id.*
[76] *Id. citing Industrial Union of Marine & Shipbuilding Workers v. NLRB,* 320 F.2d 615, 619 (3d Cir. 1963).
[77] *Id.*
[78] *Hacienda II,* 351 NLRB 504 (2007), *vacated, Local Joint Executive Bd. of Las Vegas v. N.L.R.B.,* 540 F.3d 1072, (9th Cir. 2008).
[79] *Id.*
[80] *Id.*
[81] *Id.* at 505.
[82] *Id.*
[83] *Id.* at 507.
[84] *Id.*

On petition to the Ninth Circuit, the court again vacated the Board's decision and remanded with instructions to the Board.[85] The court examined the Board's argument that the contractual language implied that the Union waived its right to dues check-off after expiration of the agreement.[86] Recognizing the standard articulated by the Supreme Court in *Metro. Edison Co. v. N.L.R.B.*, the court explained that the employer bears the burden of proving that waiver of a statutory right - such as dues check-off - must be "clear and unmistakable."[87] Moreover, where the Board relies solely on language in a collective bargaining agreement in determining a party clearly and unmistakably waived a statutory right, Board precedent requires the agreement to explicitly state the provision will *terminate*.[88] Notably, in the agreement at issue, the provision merely stated that it applied *during the term of the Agreement.*[89] Accordingly, the court held that the Union did not "clearly and unmistakably" waive its right to protection from the Employer's unilateral change to dues check-off.[90] The court remanded with "instruct[ions to] the Board to explain the rule it adopted in *Hacienda I,* or abandon *Hacienda I* to adopt a different rule and present a reasoned explanation to support it."[91]

For the second time, the Board accepted the Ninth Circuit's remand.[92] In *Hacienda III,* with a decisive fifth vote impossible after Member Becker recused himself, Chairman Liebman and Members Schaumber, Pierce, and Hayes deadlocked.[93] Members Schaumber and Hayes voted to uphold the ALJ's decision and dismiss the Union's complaints, while Chairman Liebman and Member Pierce unsurprisingly voted to overturn the Board's rule in *Bethlehem Steel.* Significantly, the Board's established precedent prohibited an equally divided four-member board from offering a new

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[85] *Local Joint Executive Bd. of Las Vegas v. N.L.R.B.*, 540 F.3d 1072, 9th Cir., Aug. 27, 2008.
[86] *Id.*
[87] *Id.* at 1079; *citing Metro. Edison Co. v. N.L.R.B., 460 U.S. 693 (1983).*
[88] *Id.* at 1080.
[89] *Id.* at 1076.
[90] *Id.* at 1082.
[91] *Id.*
[92] *Hacienda III,* 355 NLRB No. 154 (2010), *vacated, Local Joint Executive Bd. of Las Vegas v. N.L.R.B.*, 657 F.3d 865 (9th Cir. 2011).
[93] *Id.*

explanation for its existing rule or overruling precedent.[94] Thus, the Board decided to follow its existing precedent and affirm the ALJ's dismissal of the Union's Complaint.[95]

Less than two months after the Board's decision in *Hacienda III*, the Ninth Circuit predictably granted the Union's petition for review a third and final time.[96] The court was clearly out of patience with the Board, explaining in the introduction to its opinion that:

> [T]he Board's decision in *Hacienda III* is arbitrary and capricious because the Board provides no explanation for the rule it follows in dismissing the Union's complaint. We further conclude that, although we must show deference to the Board in its promulgation of labor policy, a third open remand is inappropriate in this case because the Board, after more than fifteen years, has reached a deadlock on the merits and continues to be unable to form a reasoned analysis in support of its ruling.[97]

Furthermore, the court determined, "upon consideration of the merits," that the employers' unilateral termination of dues check-off prior to bargaining to impasse violated Section 8(a)(5).[98] Accordingly, the Ninth Circuit remanded to the Board to determine the appropriate relief in light of its decision.[99]

The court's decision in *Local Joint Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III)* rested substantially on its conclusion that the Board lacked justification "for carving out an exception to the unilateral change doctrine for dues-checkoff in the absence of union security."[100] The court's based its conclusion on the "crucial distinction" between the Board's seemingly defensible reasoning in *Bethlehem Steel* and ostensibly flawed reasoning in *Hacienda III.*[101] In *Bethlehem Steel,* the court pointed out, the collective bargaining agreement required dues check-off pursuant to the union security agreement.[102] Conversely, in *Hacienda III,* the agreement lacked a

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[94] *Id.* (explaining "It is the tradition of the Board that the power to overrule precedent will be exercised only by a three-member majority of the Board.1 In the absence of a three-member Board majority to overrule established precedent, we reluctantly join our colleagues in affirming the judge's dismissal of the complaint allegations. In an appropriate case, we would consider overruling Bethlehem Steel and its progeny, including Tampa Sheet Metal, 288 NLRB 322, 326 fn. 15 (1988)").
[95] *Id.*
[96] Local Joint Executive Bd. of Las Vegas v. N.L.R.B., 657 F.3d 865 (9th Cir. 2011).
[97] *Id.* at 867.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 875.
[101] *Id.*
[102] *Id.*

union-security provision and each employee signed a request permitting the Employer to deduct union dues from their paycheck.[103] The court emphasized the consequence of this pivotal difference:

> [U]nlike in *Bethlehem Steel,* where the unilateral cessation of dues-checkoff merely terminated a contractual arrangement that individual employees and employers alike were compelled to accept, the unilateral cessation of check-off by the Employers in this case stripped employees of a contractual right that they had expressly exercised by requesting dues-checkoff.[104]

In light of this difference, the court underscored that dues check-off authorization – unrelated to a union security clause - was a mandatory subject of bargaining; thus, it survived the expiration of the collective bargaining agreement.[105] More broadly, the court held that an employer cannot unilaterally eliminate a dues check-off provision after the collective bargaining agreement expires in right to work states which prohibit union security agreements.[106]

Despite the Ninth Circuit's decision in *Hacienda III,* over the next fourteen months the Board refused to overturn its long-standing precedent established in *Bethlehem Steel.*[107] In *Hargrove Electric Co., Inc.,* the Board affirmed an ALJ's findings that, *inter alia,* the employers did not violate Section 8(a)(5) and 8(a)(1) by ceasing to deduct union dues when the contract expired.[108] The employers notified the union prior to contract expiration that it intended to terminate the agreement.[109] Eleven days after the contract expired and ten days after the employer sent a ten-day termination notification, the employers terminated the agreement and unilaterally implemented changes to the employees working conditions and terms.[110] Amongst other changes, the employers

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[103] *Id.*
[104] *Id.*
[105] *Id.* at 876.
[106] *Id.*
[107] *See Hargrove Electric Co., Inc.*, 358 NLRB No. 147 (2012); *See also C & G Distrib. Co., Inc. & Gen. Truck Drivers, Warehousemen, Helpers, Sales & Serv. & Casino Employees, Teamsters Local Union No. 957, Affiliated with the Int'l Bhd. of Teamsters,* 2012 WL 5494946 (N.L.R.B. Div. of Judges Oct. 17, 2012); *Windsor Skyline Care Ctr. & SEIU United Healthcare Workers - W. Windsor Monterey Care Ctr. & SEIU United Healthcare Workers - W. Windsor Country Drive Care Ctr. & SEIU United Healthcare Workers - W. Windsor the Ridge Rehab. Ctr. & SEIU United Healthcare Workers - W.*, 2012 WL 5941223 (N.L.R.B. Div. of Judges Nov. 26, 2012).
[108] *Id.*
[109] *Id.* at **11.
[110] *Id.*

stopped deducting union dues from employees' paychecks.[111] In the ALJ's decision, she acknowledged 1) the Ninth Circuit's holding in *Local Joint Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III),* and 2) that Texas is a right-to-work state.[112] However, the ALJ explained that the Ninth Circuit's decision did not require her to overrule fifty years of Board precedent. Rather, the ALJ found, and the Board agreed, that the Board's decision in *Hacienda III* remained "the outstanding current Board law with respect to the lawfulness of an employer's cessation of dues deductions after the expiration of a contract."[113]

Yet, less than three months after the Board's decision in *Hargrove Electric Co., Inc.,* the Board renounced its commitment to *Bethlehem Steel* and determined that an employer must continue to check-off union dues after a contract expires unless the parties reach an agreement or bargain to impasse.[114] In *WKYC-TV,* the union filed a complaint alleging the employer violated Sections 8(a)(5) and 8(a)(1) after the employer ceased honoring the dues-checkoff arrangement without providing notice to the Union.[115] The ALJ appropriately applied the Board's longstanding rule from *Bethlehem Steel,* finding that the Employer's conduct did not violate the Act. However, the Union and General Counsel excepted to the ALJ's findings and asked the Board to reject the ALJ's determination - and, in the process, abandon fifty years of Board precedent.[116] Remarkably, the Board agreed with the Union and General Counsel, holding that "requiring employers to honor dues-checkoff arrangements postcontract expiration is consistent with the language of the Act, its relevant legislative history, and the general rule against unilateral changes in terms and conditions of employment." As discussed *infra,* the Board's decision in *WKYC-TV* resulted in several foreseeable, immediate effects.

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[111] *Id.* at **12.
[112] *Id.* at **18.
[113] *Id.*
[114] *WKYC-TV, Inc. & Nat'l Ass'n of Broad. Employees & Technicians, Local 42 a/w Communications Workers of Am., AFL-CIO, supra* note 20.
[115] *Id.* at **2.
[116] *Id.*

Section 3. WKYC-TV's immediate effects on dues check-off provisions after a collective bargaining agreement expires.

To understand the immediate effects of the Board's decision in *WKYC-TV,* labor practitioners need only read several key paragraphs littered in Parts IV, V, and VI in the majority's opinion. Specifically, readers should focus on where the Board discusses 1) the independent relationship between union-security agreements and dues check-off provisions, and 2) the prospective effect of its decision.

Significantly, the Board's decision in *WKYC-TV* went a step further in protecting a union's right to receive post-contract dues than the Ninth Circuit's decision in *Local Joint Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III).* Unlike the Ninth Circuit, the Board did not limit its decision to collective bargaining agreements between parties in right-to-work states.[117] The union and employer's collective bargaining agreement in *WKYC-TV* covered work in Ohio, a non-right-to-work state, and the collective bargaining agreement contained a union-security agreement.[118] Throughout its opinion, the Board stressed a fundamental flaw in the *Bethlehem Steel* Board's reasoning; namely, the dues check-off provision terminated with the union-security provision because "the dues-checkoff arrangement 'implemented the union-security provisions.'"[119] In contrast to the *Bethlehem Steel* Board, the Board in *WKYC-TV* decreed that dues check-off provisions are fundamentally different from union-security agreements because employees must voluntarily elect to allow dues check-off, even where the contract contains a union-security clause.[120] The Board also noted that precedent established subsequent to *Bethlehem Steel* confirms its assertion. Specifically, the Board referenced its decision in *American Nurses' Assn.* that union security and dues checkoff are "distinct and separate matters."[121] Thus, where a state permits union-security clauses and the collective bargaining agreement in fact contains a union-security clause, unilateral termination of a dues check-off provision after contract expiration still

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[117] *Id.* at *7-8.
[118] *Id.* at fn 21, fn 5.
[119] *Id.* at *7.
[120] *Id.*; *citing Bluegrass Satellite, Inc.*, 349 NLRB 866, 867 (2007) ("By contrast, an employee's participation in dues checkoff is entirely voluntary; "employees cannot be required to authorize dues checkoff as a condition of employment," even where a contract contains a union-security agreement").
[121] *Id.* at *7; *American Nurses' Assn.*, 250 NLRB 1324, 1324 fn. 1 (1980).

violates the Act so long as the dues check-off provision is independent of the union-security clause.

The Board's decision in *WKYC-TV* underscores the importance of correctly wording dues check-off authorization provisions to survive contract expiration. Most importantly, the language in the collective bargaining agreement should make it clear that the dues check-off provision is independent of the union-security agreement. The dues check-off provision should not reference the union security clause or the obligation to maintain membership in the union for it to have effect. In addition, language emphasizing the voluntary nature of dues deduction is useful and consistent with the Board's decision in *WKYC-TV.*[122] Thus, the dues check-off provision should state that deductions are limited to employees who authorize it. In essence, drafters are well advised to take care to use appropriate language to separate the dues check-off provision from the union-security agreement.

Drafters will also benefit by using language that indicates dues-deduction serves an independent purpose. For instance, the collective bargaining agreement could include language stating, "the employer will check-off dues from employees' paychecks in order to encourage administrative convenience." Alternatively, the agreement could state that "dues check-off is necessary to limit the solicitation of dues payment during working hours or on company property." To be sure, drafters can get creative in adopting any language that emphasizes an independent reason for dues-deduction. Ultimately, the goal should be to draft a collective bargaining agreement with an explicitly independent dues check-off provision. Where the dues check-off provision achieves an independent purpose and is clearly unconnected to the union-security clause, it's less likely an opposing party will successfully argue that a dues check-off provision implements the union-security clause.

In addition, the Board underlined that its decision in *WKYC-TV* had prospective effect only.[123] The Board explained that its general policy is to apply its decisions retroactively "'to all pending cases in whatever stage,' unless retroactive application

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[122] *WKYC-TV, supra* note 20, at fn 5 ("Deductions shall be limited to such Employees from whom the Corporation has received written authorization to deduct said dues and/or fees").
[123] *Id.* at *2.

would work a 'manifest injustice.'"[124] Here, where the Employer relied on fifty-years of Board precedent, the Board found that retroactive application would certainly result in manifest injustice.[125] Accordingly, the Board found that the Employer did not violate Sections 8(a)(5) and (1) under *Bethlehem Steel* and its progeny.[126]

Indeed, in several cases decided the same week and subsequent to *WKYC-TV*, the Board reaffirmed the decision's prospective effect.[127] In *Nebraskaland, Inc.*, a case decided immediately after *WKYC-TV*, the Board applied *Bethlehem Steel* in finding that an employer did not violate the Act by discontinuing a dues check-off provision.[128] The court acknowledged that in *WKYC-TV* it held that "an employer, following contract expiration, must continue to honor a dues-checkoff arrangement established in the contract until the parties have either reached agreement or a valid impasse permits unilateral action by the employer."[129] However, the Board also emphasized that it decided to apply the rule adopted in *WKYC-TV* prospectively.[130] As a result, the Board affirmed the ALJ's finding that the employer's conduct did not violate Sections 8(a)(5) and 8(a)(1).

The Board's decision in *Nebraskaland, Inc.*, underscores one of the two major effects of the Board's decision in *WKYC-TV*. Specifically, that the Board will only hold an employer liable for violating Sections 8(a)(5) and 8(a)(1) if it refuses to honor a dues check-off provision *after* its decision in *WKYC-TV*. The other major impact, as noted *supra*, is the Board's holding that employers in non-right-to-work states violate Sections 8(a)(5) and 8(a)(1) when they discontinue dues check-off post-contract expiration. Ultimately, the Board adopted the Ninth Circuit's decision in *Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III)* and expanded it to apply to states that permit union-security agreements. Clearly, the Board's decision in *WKYC-TV* had an immediate effect on the Board's treatment of dues check-off provisions after a collective bargaining agreement expires. However, as discussed *infra*, the Board's about-face in *WKYC-TV* on

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[124] *Id.* at *10; *citing SNE Enterprises*, 344 NLRB 673, 673 (2005).
[125] *Id.* at *11.
[126] *Id.*
[127] *See Nebraskaland, Inc*, 359 NLRB No. 25 (2012); *Excelsior Golden Living Center*, 359 NLRB No. 47 (2012); *and USIC Locating Services, Inc.*, 359 NLRB No. 33 (2012).
[128] *Nebraskaland, Inc., supra* note 124.
[129] *Id.*
[130] *Id.*

December 12, 2012, may affect more than just an employer's duty to honor a dues check-off provision after contract expiration.

Section 4. Potential Secondary Effects of the Board's Decision WKYC-TV, Inc.

The Board's decision in *WKYC-TV* could affect more than the Board's treatment of dues check-off provisions post-contract expiration. For instance, the Board has continuously held that no-strike clauses, arbitration clauses, and management-rights clauses also do not survive contract expiration. However, in light of the Board's decision in *WKYC-TV*, could one of these collectively-bargained for clauses be next to experience the newfound, post-contract longevity of dues check-off provisions? Naturally, labor practitioners are left to wonder, what is the next shoe to drop?

Notably, the Board in *WKYC-TV* distinguished dues check-off provisions from no-strike, arbitration, and management-rights clauses.[131] The Board explained that no-strike, arbitration, and management-rights clauses, similar to dues check-off provisions, are mandatory subjects of bargaining.[132] Also like dues check-off provisions prior to *WKYC-TV*, earlier Board decisions demonstrate that no-strike, arbitration, and management-rights clauses do not survive contract expiration.[133] However, the Board in *WKYC-TV* noted a crucial difference between dues check-off provisions and no-strike, arbitration, and management-rights clauses. Specifically, the Board stressed that, "In agreeing to [no-strike, arbitration, and management-rights] arrangements... parties have waived rights that they otherwise would enjoy in the interest of concluding an agreement, and such waivers are presumed not to survive the contract."[134] In other words, once the contract expires, the parties' waiver of rights they are otherwise entitled

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[131] *Id.* at *3, *10.
[132] *Id.* at *3.
[133] *Id.*
[134] *Id.; Citing Sterling Drug, Inc., Hilton-Davis Chem. Co. Div.*, 185 NLRB 241, 242 (1970) ("the Board held that parties have no postexpiration duty to honor a contractual agreement to arbitrate, reasoning that such an agreement 'is a voluntary surrender of the right of final decision which Congress has reserved to the [ ] parties' because arbitration is, 'at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize'"); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986) ("For similar reasons, a contractual no-strike clause normally does not act as a clear and unmistakable waiver of the union's right to strike after the contract expires"); *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001) ("The Board has also held that a management-rights clause normally does not survive contract expiration, because 'the essence of [a] management-rights clause is the union's waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls'").

to exercise also expire. Consequently, the duty to refrain from unilaterally changing employment terms and conditions post-contract expiration does not apply to no-strike, arbitration, and management-rights clauses.

In contrast, dues check-off provisions do not require the union to waive any statutory or non-statutory right.[135] As the Board indicated in *WKYC-TV,* dues check-off is "simply a matter of administrative convenience to a union and employees whereby an employer agrees that it will establish a system where employees may, if they choose, pay their union dues through automatic payroll deduction."[136] Unlike no-strike, arbitration, and management-rights clauses, the employer does not fundamentally receive the surrender of any rights from the union in exchange for a dues check-off agreement. Thus, a plain reading of the Board's decision in *WKYC-TV* strongly suggests that the Board will not change course on no-strike clauses, arbitration clauses, and management-rights clauses.

With regard to arbitration clauses, it's worth highlighting that the Board relied on its holding in *Bethlehem Steel* in explaining why arbitration clauses do not survive contract expiration.[137] Specifically, the Board explained:

> "Our view in this regard is not unprecedented. We have also declined to apply Katz to unilateral abandonment of union-security and dues-checkoff provisions following contract expiration because they, like arbitration, are purely creatures of contract. *See Bethlehem Steel Co.,* 136 NLRB 1500, 1502 (1962)."[138]

Notably, the Board's decision in *WKYC-TV* rejects the notion that dues check-off provisions are subject to termination at contract expiration because they are "purely creatures of contract." Instead, as noted *supra,* the legal justification for excepting arbitration provisions from the *Katz* rule corresponds to the union's waiver of rights.

Arguably, labor practitioners could creatively draft free-standing arbitration clauses similar to dues check-off provisions described *supra.* For instance, there may be situations where arbitration provisions do not involve the waiver of some other statutory or non-statutory right, such as a no-strike clause. Under those circumstances,

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[135] *Id.*
[136] *Id.*
[137] *Indiana & Michigan Elec. Co.,* 284 NLRB 53, 77 (1987)
[138] *Id.*

a labor practitioner could draft an arbitration clause highlighting its independent status. Where there is no waiver of any specific right in exchange for inclusion of an arbitration provision, the Board's discussion in *WKYC-TV* loses its force. Theoretically, the creative arbitration-clause drafter could reasonably argue the arbitration provision is no different from a stand-alone dues check-off provision. How this argument plays out before the current board, or subsequent boards, is impossible to predict. Indeed, the secondary effects of the Board's decision in *WKYC-TV* will only become clear in years to come.

Conclusion. Have we come to the end of the road with dues check-off provisions?

From 1962 until December, 2012, the NLRB majority steadfastly and consistently ruled that an employer's obligation to deduct union dues expired with the contract. Employers could lawfully unilaterally cease honoring dues check-off provisions without violating Sections 8(a)(5) and 8(a)(1). After a "fifteen year dialogue" with the Ninth Circuit in the *Hacienda* trilogy, as characterized by the Board in *WKYC-TV* in 2012, the Board overturned fifty years of precedent and held that an employer's obligation to check-off union dues continues after the collective bargaining agreement expires.

Naturally, the Board's decision in *WKYC-TV* had immediate consequences for labor law practitioners. Specifically, the Board's decision underlined the importance of separating dues check-off provisions from union-security clauses in collective bargaining agreements. The Board explained that where dues check-off provisions are unrelated to a union-security clause, they presumptively survive contract expiration. However, the Board also emphasized that the decision only applied prospectively. Accordingly, unions seeking to challenge employer's unilateral termination of dues check-off provisions prior to December 12, 2012, are left without a remedy. Nevertheless, in the future, failure to continue deducting dues after a contract expires will violate Section 8(a)(5) and 8(a)(1) of the Act.

The Board's decision also left many unanswered questions for potential impact on other exceptions to the *Katz* doctrine. As a practical matter, the Board's decision in *WKYC-TV* seems to undercut the possibility of this current Board extending post-contract survival rights to arbitration provisions, as well as management-rights and no-

strike clauses. As noted *supra*, the Board's discussion in *WKYC-TV* suggests that the waiver of statutory rights associated with the above-referenced clauses precludes the Board from likening them to dues check-off provisions. However, as also explained above, creative contract drafting could open the door for the Board to reverse its course on arbitration provisions as well.

In the dynamic world of labor-relations, only time will tell the long-term effects of the Board's decision in *WKYC-TV*. Ultimately, the Board's decision in *WKYC-TV* proves one thing: there are areas of Board law, including fifty-years of Board precedent, which labor practitioners can successfully challenge through diligence, creative argument, and a little help from the Circuit Courts.

Samples Dues Check-Off Authorization

Modified version of the authorization in Kroger Co., *334 NLRB 847 (2001)*[139]

You are hereby authorized and directed to deduct from my wages, commencing with the next payroll period, an amount equivalent to dues and initiation fees as shall be certified by [the Union], and remit same to [the Union].

This authorization and assignment is voluntarily made in consideration for the cost of representation and collective bargaining and is not contingent upon my present or future members in [the Union]. This authorization and assignment shall be irrevocable for a period of one (1) year from the date of execution or until the termination date of the agreement between the Employer and [the Union], whichever occurs sooner, and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and [the Union] written notice of revocation bearing my signature thereto.

[The Union] is authorized to deposit this authorization with any Employer under contract with it and is further authorized to transfer this authorization to any other Employer under contract with it in the event that I should change employment.

This authorization will remain in effect in the event that I am laid off, leave work on a leave of absence or separated from employment with my present Employer. I authorize deductions to resume upon the resumption of employment. If I have not requested an Honorable Withdrawal Card while on leave or layoff status with the Company, then upon my recall from leave or layoff, the Company will also deduct in addition to current dues (1) all delinquent monthly dues that are owed during the leave or layoff period, but not to exceed three months past dues, and (2) any past due initiation fee arising from employment with the Company.

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[139] Henry M. Willis, Schwartz, Steinsapir, Dohrmann & Sommers LLP, modified this sample language.