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## NLRB Overturns 50-Year-Old Precedent in Latest Decision on Dues-Checkoff Provision

By Glenn Smith and David Broderick

In *WKYC-TV*, 359 NLRB No. 30 (Dec. 12, 2012), the National Labor Relations Board effectively overturned 50 years of precedent by holding 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 contains such a provision.

### History

Since its decision in *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), the Board has consistently held that union security provisions (which make union membership mandatory) cannot lawfully continue post-expiration. As a result, dues-checkoff provisions, which implement union security provisions by automatically deducting employee union dues, may be cancelled by employers upon expiration.

In determining that union security provisions cannot survive expiration, the Board in *Bethlehem* relied on the portion of Section 8(a)(3) of the National Labor Relations Act (the "Act") which states, "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." 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" that includes this condition, and can be imposed only "so long as such a contract is in force." Accordingly, under *Bethlehem*, once an agreement expired so too did a union-security provision established therein.

Likewise, the *Bethlehem* Board held that dues-checkoff provisions do not survive contract expiration. The Board reasoned that the dues-checkoff provisions "implemented the union-security provisions" of the collective bargaining agreement, and thus, the union's right to dues-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." These principles remained good law for several decades.

### Evolution of the Law

More recently, the general rule set forth in *Bethlehem* began to be questioned by a trio of cases known as the *Hacienda* decisions.<sup>1</sup> At the heart of the *Hacienda* decisions was the Board's

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<sup>1</sup> See *Hacienda Hotel (Hacienda I)*, 331 NLRB 665 (2000); *Hacienda Hotel (Hacienda II)*, 351 NLRB No. 32 (2007); *Hacienda Hotel, Inc. Gaming Corp. (Hacienda III)*, 355 NLRB No. 154 (2010).

insistence in all three cases that an employer's dues-checkoff obligation did not survive expiration of an agreement, even in a right-to-work state where union security provisions are unlawful.

In the appeal of *Hacienda I*,<sup>2</sup> the U.S. Court of Appeals for the Ninth Circuit overturned the Board, seeking an explanation as to why a dues-checkoff provision could be cancelled upon expiration of an agreement where the underlying agreement did not include a union security provision.

Having not received an adequate explanation on remand, in the appeal of *Hacienda II*<sup>3</sup> the Ninth Circuit again overturned the NLRB, holding that the mere inclusion of a durational clause in the collective bargaining agreement was not a clear and unmistakable waiver by the union of the right to bargain over the employer's decision to cancel dues-checkoff because the durational language said nothing about what would happen upon expiration of the agreement.

Finally, and perhaps frustrated by the Board's inability to respond to the court's inquiry, the Ninth Circuit in *Hacienda III*<sup>4</sup> not only concluded that the Board's decision was arbitrary and capricious for its failure to explain the reasoning of its ruling, but also held that "there is no justification for carving out an exception to the unilateral change doctrine for dues-checkoff in the absence of union security," and that "dues-checkoff is akin to any other term of employment that is a mandatory subject of bargaining." In other words, the Ninth Circuit was stating that an employer in a right-to-work state, unlike employers in states where union security clauses are lawful, may not unilaterally discontinue dues-checkoff after the expiration of a collective bargaining agreement. This logic appears to have been the beginning of the end for the precedent set in the *Bethlehem* decision.

## The Present and Future

Sure enough, the landscape changed dramatically this week when the Board handed down its decision in *WKYC-TV*. In *WKYC-TV*, the Board considered whether, upon the expiration of an agreement that included both union security and dues-checkoff provisions, the employer unlawfully ceased deducting and remitting union dues without prior bargaining with the union. The Board, overruling *Bethlehem* and 50 years of supporting case law, held that "requiring employers to honor dues-checkoff arrangements post-contract 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 making its determination, the Board reviewed each of these areas in depth.

Initially, the Board considered whether an employer's unilateral decision to cease honoring a dues-checkoff provision established in an expired collective bargaining agreement contravenes the well-settled principle that an employer must maintain the status quo post-expiration with respect to wages, hours, and other terms and conditions of employment. In holding that it does, the Board affirmed the well-settled principle that dues-checkoff is a matter related to wages, hours, and other terms and conditions of employment. Thus, the Board held the status quo rule should apply to dues-checkoff, unless there is some cogent reason for an exception.

The Board did, however, acknowledge that there are a select group of contractually established terms and conditions of employment – arbitration provisions, no-strike clauses, and management rights clauses – that do not survive contract expiration. Nevertheless, these provisions are treated differently than dues-checkoff provisions because dues-checkoff "does not involve the contractual surrender of any statutory or nonstatutory rights."

Furthermore, the Board held that nothing in federal labor law or policy, including Section 302(c)(4) of the Taft-Hartley Act (the only statute mentioning dues-checkoff), suggests that dues-checkoff provisions should be treated less favorably than other terms and conditions of employment under the status quo rule. In fact, as the Board points out, the plain terms of Section 302(c)(4) indicate that Congress contemplated that dues-checkoff provisions would continue beyond the life of the collective bargaining agreement. As evidence of this fact, the Board explains that nothing in the text of this statute makes dues-checkoff dependent on the existence of the agreement. The Board further concluded that, if Congress had intended dues-checkoff to expire automatically with the agreement, there would be no need for the statute to allow employees the ability to revoke checkoff authorization upon expiration.

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2 *Culinary Workers v. NLRB*, 309 F.3d 578 (9th Cir. 2002).

3 *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008).

4 *Local Joint Executive Board of Las Vegas v. NLRB*, No. 10-72981 (9th Cir. Sept. 13, 2011).

With respect to *Bethlehem*, the Board's discussion initially focuses on and reaffirms the Board's reasoning on union security provisions. In this regard, it remains the law that an employer's refusal to honor a union-security provision post-expiration does not violate Section 8(a)(5) of the Act.

However, the Board takes a different view with respect to dues-checkoff. The Board discusses and takes issue with four main deficiencies in the *Bethlehem* case. First, according to the Board, the *Bethlehem* Board failed to consider "Section 302(c)(4) (of Taft-Hartley), which is the only provision of the Act that addresses dues-checkoff and which, [] clearly contemplates that check-off normally does survive the expiration of a collective-bargaining agreement."

Second, the Board challenges the *Bethlehem* Board's reasoning that dues-checkoff and union security are dependent on each other. In doing so, the Board points out that "[t]he independence of union-security agreements from dues-checkoff provisions is illustrated most clearly in 'right-to-work' States" where it is frequently the case that the agreement contains a dues-checkoff provision, even though there can be no union security provisions in such states.

Third, the Board finds that *Bethlehem* mistakenly ignores the legislative history of Section 8(a)(3), which does not mention dues-checkoff, let alone limit the effectiveness of a dues-checkoff provision to the life of an agreement. The Board then again refers to Section 302(c)(4), which it says unambiguously indicates that Congress contemplated that dues-checkoff would survive contract expiration.

Fourth, according to the Board, *Bethlehem* failed to acknowledge the fundamental difference between the compulsory and voluntary natures of dues-checkoff and union security provisions. Under a union-security agreement, employees are compelled to pay union dues or agency fees, or face discharge. By contrast, an employee's participation in dues-checkoff is entirely voluntary, as case law states that "employees cannot be required to authorize dues-checkoff as a condition of employment."

Finally, the Board considered whether to apply its new rule retroactively, in all pending cases, or only prospectively. In holding that this new rule will only be applied prospectively, the Board recognized that *Bethlehem* was long-standing precedent and determined that any other application of the ruling would work a manifest injustice.

Given all this, the Obama Board's view is that *Bethlehem* 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.

The result is a new rule that states, "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."

**However, there exists one clear exception to this new rule, as set forth in footnote 31 of the opinion. This clear exception provides that the decision does not foreclose an employer's ability to bargain for the right to discontinue honoring a dues-checkoff post-expiration, so long as the waiver is "clear and unmistakable."**

## What this Decision Means

As is clear from its unabashed willingness to overturn 50 years of precedent, the Board, as presently constituted, is not shying away from its reputation as being union-friendly. It goes without saying that this decision marks a new era in dues-checkoff jurisprudence and attempts to limit employer bargaining leverage post-CBA expiration. As a result, it is now the case that, unless a CBA clearly provides otherwise, the only way that unions will cease receiving dues from employees after contract expiration is if the employees resign from the union, if employees revoke the checkoff authorizations themselves, or if there are no wages from which dues can be withheld due to a strike or lockout.

The practical implications of this decision will impact other strategies in labor-management relationships, for example:

- First contract hard bargaining – This decision potentially serves to make more legitimate an employer's position that bargaining hard to avoid union security and dues-checkoff are not as unreasonable as some critics have said. Certainly, it will give bargaining parties more to discuss on this often routine bargaining subject.

- Under existing contracts, employers should consider whether to propose language specifically disabling dues-checkoff at contract termination.
- Employers should also consider whether it makes sense to propose language that would automatically disable dues-checkoff for the remainder of the CBA if the union strikes during the term of the agreement.
- Since the Board is willing to place greater restrictions on an employer's ability to take unilateral action post-expiration, employers should consider other provisions that they do not wish to extend or desire to extend beyond the agreement term and work those provisions into their next phase of bargaining proposals. For instance:
  - Extending a management rights provision;
  - Extending or expanding subcontracting rights, including permanent subcontracting rights;
  - Making sure that wage increases are not recurring (think of the onerous CBA requirement that the New York City schools have whereby the city must continue giving increases to teachers even though the CBA is long expired);
  - Establishing an end date on wage progression increases and suspending them at contract termination;
  - Addressing employee benefit contributions and coverage at the end of a CBA's term;
  - Terminating successorship provisions at expiration – at present the law is unsettled as to whether they survive expiration; and
  - Reviewing fully every provision in an employer's CBA and addressing with certainty what will occur at the end of your contract.

Finally, employers who have a currently-expired CBA and have disabled dues-checkoff should consult with experienced labor counsel regarding reinstating checkoff, communicating with the union and employees on the issue, and reconsidering their bargaining strategy in light of this development.

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