

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

WKYC-TV, INC.

and

CASE NO. 8-CA-039190

**NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES AND TECHNICIANS, LOCAL 42
a/w COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO**

**EXCEPTIONS OF COUNSEL FOR THE ACTING GENERAL COUNSEL
AND BRIEF IN SUPPORT**

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EXCEPTIONS OF COUNSEL FOR THE ACTING GENERAL COUNSEL

On August 18, 2011, the parties in this matter motioned Administrative Law Judge Jeffrey D. Wedekind to decide this case on the basis of a stipulation of facts. On August 19, 2011, Judge Wedekind issued his Order granting this motion. Thereafter, he issued his Decision and Order (JD-60-11) in this matter on September 30, 2011.¹ Counsel for the Acting General Counsel excepts to Judge Wedekind's finding that Respondent did not violate Section 8(a)(1) and (5) by unilaterally ceasing dues deduction after contract expiration.² (ALJD pp.3-4)

The record establishes that the parties' collective bargaining agreement had been expired just over sixteen months when the Respondent unilaterally ceased dues deduction.³ While conceding that the ALJ was bound by Board precedent in making his determination, Counsel for the Acting General Counsel respectfully argues that an employer's unilateral cessation of dues deduction after contract expiration is an unfair labor practice and precedent to the contrary should be overturned.

¹ Hereinafter, ALJD, p. __ will indicate the page in the ALJ's Decision, JD-60-11. "S.R." will be used to reference the Stipulated Record. "Ex." will be used to reference exhibits attached to the Stipulated Record.

² Counsel for the Acting General Counsel does not except to Judge Wedekind's finding that the Respondent did not unilaterally cease dues deduction after reestablishing it as a working condition.

³ S.R. 16, 19, 21, 28, 32, 34.

BRIEF IN SUPPORT OF EXCEPTIONS

Under precedent since Bethlehem Steel,⁴ Judge Wedekind found that the Respondent was privileged to cease dues deduction.⁵ However, it is the Acting General Counsel's position that Bethlehem Steel and its progeny rests on a flawed rationale and should be overturned.

I. Facts

Respondent and the Charging Party Union have a long-standing collective bargaining relationship and have been party to successive collective bargaining agreements, the most recent of which was effective by its terms from June 1, 2006 until June 1, 2009.⁶ This agreement contained provisions for dues checkoff at Article II.⁷

Pursuant to Section 23.2(a) of the collective bargaining agreement, the parties engaged in re-opener negotiations from April 2009 to October 20, 2009.⁸ During the course of these negotiations, the parties did not propose any changes to the dues-checkoff language appearing in their existing collective bargaining agreement.⁹ The Respondent continued to deduct dues throughout these negotiations.¹⁰ On October 20, 2009, the Respondent presented the Union with its final offer, which provided for dues deduction at Article II.¹¹ In fact, Respondent's final offer contained the same dues-checkoff language the parties' collective bargaining agreement had contained.¹² At no time during the negotiations did Respondent propose to cease dues deduction.¹³

⁴ Bethlehem Steel Co. (Shipbuilding Div.), 136 NLRB 1500, 1502 (1962).

⁵ ALJD pp.3-4.

⁶ S.R. 16.

⁷ Ex. I, pp.3-5. The collective bargaining agreement contained a union security provision at pages 2-3.

⁸ S.R. 19-20, Ex. I, p. 39.

⁹ S.R. 21.

¹⁰ S.R. 28.

¹¹ S.R. 22 & 24, Ex. J, p. 3-4.

¹² S.R. 24.

¹³ S.R. 21.

On January 4, 2010, the Respondent implemented portions of its final offer. While most of the implemented terms became effective on January 4, 2010, the changes in wage rates did not become effective until January 10, 2010.¹⁴ The specific portions of the Respondent's offer that were implemented were detailed in a document the Respondent called the "Posted Conditions".¹⁵ These "Posted Conditions" did not reference the dues-checkoff provisions contained in the Respondent's final offer.¹⁶

Respondent continued to deduct dues after implementation.¹⁷ In fact, Respondent deducted Union dues from unit employees' paychecks during the life of the most recent collective bargaining agreement, throughout re-opener negotiations, and after its post-impasse implementation. It was not until October 5, 2010, that the Respondent notified the Union that it was ceasing dues deduction and, immediately thereafter, did so.¹⁸

The Respondent did not propose ceasing dues checkoff during the re-opener negotiations or thereafter, nor did Respondent ever offer to bargain with the Union prior to its cessation of dues deduction.¹⁹

There is no dispute that the parties' collective bargaining agreement had expired when Respondent ceased dues deduction.²⁰ In fact, the collective bargaining agreement had been expired for just over sixteen months.

¹⁴ S.R. 25-26, Ex. M.

¹⁵ Ex. M.

¹⁶ S.R. 26. While the Union challenged the Respondent's implementation of these Posted Conditions through Board charges, the Regional Director determined that the parties had reached a lawful impasse and the implementation of the Posted Conditions did not violate the Act. The Regional Director's dismissal of the Union's charges on this issue was upheld by the Office of Appeals. (S.R. 27).

¹⁷ S.R. 28.

¹⁸ S.R. 28, 30-32.

¹⁹ S.R. 21, 34.

²⁰ S.R. 16, 19.

II. The Board should overrule *Bethlehem Steel* to the extent it holds that dues checkoff does not survive contract expiration

A. Introduction

In *Bethlehem Steel*,²¹ the Board held that union-security and dues-checkoff arrangements, unlike most terms and conditions of employment, do not survive expiration of a collective-bargaining agreement. The Board reasoned that unilateral cessation of union security after contract expiration was not only lawful, but mandatory, because union membership cannot be made a condition of employment except under a “*contract* which conforms to the proviso to Section 8(a)(3).”²² The Board found that “similar considerations” applied to dues-checkoff provisions, because they “implemented the union-security provisions.”²³ In a later decision, the Board also based excepting checkoff from the unilateral change rule on Section 302(c)(4)²⁴, which permits checkoff only if “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[.]”²⁵

The Ninth Circuit twice vacated and remanded Board decisions in *Hacienda Resort Hotel & Casino* (*Hacienda I* and *Hacienda II*) on the ground that the Board had not articulated a clear rationale for excluding dues-checkoff from the unilateral change doctrine in a right-to-work

²¹ *Bethlehem Steel Co. (Shipbuilding Div.)*, 136 NLRB at 1502.

²² Id. (Emphasis added.)

²³ Id. The Board also relied upon a subsidiary rationale for exempting checkoff from the unilateral change doctrine in the absence of an agreement: that the language of the contract (“so long as this Agreement remains in effect”) linked the checkoff obligation with the duration of the contract. Id.

²⁴ See *Hudson Chemical Co.*, 258 NLRB 152, 157 (1981) (adopting ALJ decision without comment). See also *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991) (“[I]t is the Board’s view” that checkoff does not survive contract expiration “because of statutory provisions which permit these obligations only when specified by the express terms of a collective-bargaining agreement,” including Section 302(c)(4)).

²⁵ Labor Management Relations Act, 29 U.S.C. §186(c)(4).

state.²⁶ On remand in Hacienda III,²⁷ the four members of the Board eligible to participate deadlocked, reaching different conclusions reflected by their separate opinions. While Members Schaumber and Hayes recognized that the Board “may have failed to adequately explain” the reasons for excluding dues deduction from the unilateral change doctrine, they argued that “important legal, policy and equitable reasons” existed for upholding the precedent of Bethlehem Steel.²⁸ However, Chairman Liebman and Member Pearce observed that “the Board has never provided an adequate statutory or policy justification for the holding in Bethlehem Steel excluding dues-checkoff from the unilateral change doctrine articulated in NLRB v. Katz.”²⁹ Lacking the three-member majority necessary to overrule precedent, the Board applied prior precedent and upheld the administrative law judge’s recommended Order dismissing the Complaint.³⁰

Thereafter, the Ninth Circuit granted the Union’s petition for review of the decision in Hacienda III and vacated the Board’s decision.³¹ The Ninth Circuit held that, in right to work states, dues checkoff cannot lawfully be unilaterally terminated after contract expiration.³² The Ninth Circuit’s decision did not address the situation before the Board in this matter, where the collective bargaining agreement contained both a dues check off provision and a union security clause.³³ Counsel for the Acting General Counsel argues that there is no principled rationale for

²⁶ Local Joint Executive Bd. of Las Vegas v. NLRB, 309 F.3d 578, 584-85 (9th Cir. 2002), *vacating and remanding* 331 NLRB 665 (2000); Local Joint Executive Bd. of Las Vegas v. NLRB, 540 F.2d 1072, 1082 (9th Cir. 2008), *vacating and remanding* 351 NLRB 504 (2007).

²⁷ Hacienda Hotel, Inc. Gaming Corp. (Hacienda III), 355 NLRB No. 154 (2010).

²⁸ Id., slip op. at 6 (Schaumber & Hayes, concurring).

²⁹ Id., slip op. at 2 (Liebman & Pearce, concurring).

³⁰ Id., slip op. at 2.

³¹ Local Joint Executive Bd. of Las Vegas v. NLRB, --- F.3d---, 2011 WL 4031208 at 1 (Sept. 13, 2011).

³² Id. at 8. (The Ninth Circuit remanded on only the issue of what the appropriate remedy should be given its decision.)

³³ It is the Acting General Counsel’s position that the Ninth Circuit should have deferred to the Board’s tradition of not overturning precedent in the absence of a three member majority. Brief for the National Labor Relations Board, 2011 WL 860464, Local Joint Executive Bd. of Las Vegas v. NLRB, --- F.3d---, 2011 WL 4031208 (9th Cir. Sept. 13, 2011). This position is based on administrative law principles calling for judicial deference to an agency’s

excluding checkoff from the unilateral change rule regardless of whether the checkoff provision exists alongside a union security clause.

Subsequent to NLRB v. Katz,³⁴ it has become clear that parties are not free to unilaterally change a term or condition of employment at contract expiration without bargaining to impasse unless its inclusion in a bargaining agreement is clearly required by statutory language or it involves the surrender, via collective bargaining, of a statutorily guaranteed right. Checkoff does not satisfy those criteria. Section 8(a)(3) concerns union security, not checkoff, and cases subsequent to Bethlehem Steel contradict its finding that checkoff merely implements union security. Further, Section 302(c)(4) does not preclude checkoff arrangements following contract expiration. Also, the Board's subsidiary rationale in Bethlehem Steel – that contract language linked the checkoff obligation only to the duration of the contract – is inconsistent with more recent Board precedent. Therefore, the Board should overrule Bethlehem Steel to the extent it holds that dues-checkoff arrangements may be unilaterally terminated following contract expiration.

B. The Katz unilateral change doctrine is fundamental to the statutory duty to bargain in good faith.

The duty to bargain collectively is defined by Section 8(d) as the duty to “meet...and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”³⁵ Therefore, once a term or condition of employment has been established, it cannot be unilaterally changed absent waiver or a bargaining impasse. A unilateral change is tantamount to a flat refusal to bargain, and thus violates Section 8(a)(5) without an independent

decision-making procedures and not on any position that the legal precedent of Bethlehem Steel and its progeny should remain Board law.

³⁴ 369 U.S. 736 (1962).

³⁵ National Labor Relations Act, 29 U.S.C. § 158(d).

inquiry into the employer's subjective good faith.³⁶ Indeed, unilateral changes deny employees and their representatives their statutorily-guaranteed right of joint participation in the formulation of terms and conditions of employment, frustrate the ability of the parties to reach agreement on a contract by narrowing the range of possible compromises, and undermine the union by signaling to employees that the union makes no difference.³⁷

Even before the Supreme Court's decision in Katz, the Board and the majority of circuits had recognized that unilateral changes to terms and conditions of employment were a fundamental failure of the duty to bargain in good faith.³⁸ Moreover, although Katz itself involved unilateral changes during bargaining for an initial contract, the unilateral change doctrine also applies to unilateral changes committed after the expiration of a collective-bargaining agreement.³⁹ When the contract expires, the terms and conditions established therein continue by operation of the Act. In other words, they become "terms imposed by law, at least so far as there is no unilateral right to change them."⁴⁰

³⁶ NLRB v. Katz, 369 U.S. at 743, 747 (a unilateral change "is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal").

³⁷ *See id.* at 747 (unilateral changes "must of necessity obstruct bargaining, contrary to congressional policy"); The Little Rock Downtowner, Inc., 168 NLRB 107, 108 (1967) (there is "no clearer or more effective way to erode" a union's ability to bargain than for an employer to make unilateral changes), *enfd.* 414 F.2d 1084 (8th Cir. 1969); NLRB v. Hardesty Co., 308 F.3d 859, 865 (8th Cir. 2002) (unilateral changes send the message to the employees that their union is "ineffectual, impotent, and unable to effectively represent them").

³⁸ *See, e.g.*, Bonham Cotton Mills, Inc., 121 NLRB 1235, 1236, 1259-1260 & fn.38 (1958), *enfd.* 289 F.2d 903 (5th Cir. 1961) (agreeing with trial examiner that unilateral changes independently violated Section 8(a)(5), where the trial examiner described such changes as "patently violative," and referenced a "long decisional line which holds that good-faith bargaining requires that an employer first consult with and give opportunity to the [union] to negotiate changes before altering rates of pay or conditions of employment"); Armstrong-Cork Co. v. NLRB, 211 F.2d 843, 847 (5th Cir. 1954) (finding that employer violated Section 8(a)(5) by unilaterally cancelling planned wage increase and granting merit increases, as this "naturally tended to undermine the [union's] authority," and "[g]ood faith compliance with Section 8(a)(5)... presupposes that an employer will not alter existing 'conditions of employment' without first consulting with the [union]..., and granting it an opportunity to negotiate on any proposed changes"). *See also* Brief for the National Labor Relations Board, 1962 WL 115568 at 33-35, NLRB v. Katz, 369 U.S. 736 (1962).

³⁹ *See* Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 f n.6 (1988).

⁴⁰ Litton Fin. Printing Div. v. NLRB, 501 U.S. at 206-07.

C. No statutory basis exists for excluding dues check off from the unilateral change rule following contract expiration.

There is no statutory basis for the Board's holding in Bethlehem Steel that a checkoff arrangement does not survive contract expiration. Neither the Section 8(a)(3) proviso nor Section 302(c)(4) supports excepting dues-checkoff from the unilateral change rule.⁴¹

1. The Section 8(a)(3) proviso does not warrant excepting checkoff from the unilateral change rule.

The Board's primary rationale in Bethlehem Steel for exempting checkoff from the unilateral change rule after contract expiration was that checkoff merely implements a union security agreement. Therefore, the Board reasoned, the Section 8(a)(3) proviso's "agreement" requirement for union security applies with equal force to checkoff. However, the plain language and legislative history of Section 8(a)(3), as well as subsequent case law indicating that union security and checkoff are not mutually dependent, demonstrate that the Board's primary rationale in Bethlehem Steel is flawed.

Initially, the Section 8(a)(3) proviso does not reference dues-checkoff or any other means by which dues owed pursuant to a union security requirement may be transmitted to a union. It references only agreements between employers and labor organizations that "require as a condition of employment membership therein,"⁴² i.e. union security. Nor did the legislative history of the Section 8(a)(3) proviso relate to checkoff; the debate focused on the merits of outlawing the "closed shop." Indeed, the original House Bill would have made a checkoff that

⁴¹ See generally Joseph R. Weeks, "Continuing Liability Under Expired Collective Bargaining Agreements: Part 1," 15 OKLA. CITY U. L. REV. 1, 38-39 & n.108 (1990) (no "coherent rationale" for excluding dues-checkoff arrangements from the unilateral change rule after contract expiration).

⁴² 29 U.S.C. §158(a)(3).

did not meet certain requirements an unfair labor practice under Section 8(a)(2), although that provision was eliminated in conference and from the Bill as finally enacted.⁴³

In addition, contrary to the Bethlehem Steel rationale, checkoff does not merely implement union security. In subsequent decades, the Board and courts have indicated that although union security and checkoff often go hand-in-hand, they are markedly different kinds of obligations that should not necessarily be treated as legally inseparable.⁴⁴ Unlike union security agreements, for example, a checkoff authorization gives rise to an independent wage assignment contract between the employee and employer: the employee assigns to the union a designated part of future wages to be received from the employer.⁴⁵ The Board has held that such wage assignments survive the expiration of the collective-bargaining agreement when the employee's authorization so intends.⁴⁶ And while the purpose of union security is to stabilize the collective-bargaining relationship by securing the union's ability to fund its representational activities, the

⁴³ Frito-Lay, 243 NLRB 137, 138 (1979), quoting Salant & Salant, Inc., 88 NLRB 816, 817-18 (1950).

⁴⁴ See, e.g., Shen-Mar Food Products, 221 NLRB 1329, 1330 (1976), *enfd. as modified* 557 F.2d 396 (4th Cir. 1977) (check off authorizations could not properly be viewed as union security devices, which the state was permitted to prohibit under Section 14(b), because they did not “impose membership or support as a condition required for continued employment”); NLRB v. Atlanta Printing Specialties & Paper Prod. Union 527 (Mead Corp.), 523 F.2d 783, 786 (5th Cir. 1975) (union security clauses are “governed by a section of the Act totally removed from the section governing dues checkoff, and which have a totally different purpose and rationale”); American Nurses' Assn., 250 NLRB 1324, 1324 n.1 (1980) (resignation from union ordinarily does not revoke checkoff authorization; “union security and dues checkoff are distinct and separate matters”).

⁴⁵ Electrical Workers IBEW Local 2088 (Lockheed Space Operations), 302 NLRB 322, 327 (1991) (referencing Restatement (Second) of Contracts §§ 317, 321, and 326 (1981)). See also Frito-Lay, 243 NLRB at 137. Of course, an individual employee's checkoff authorization is separate and legally distinct from a checkoff clause, which is a provision in a contract between a union and an employer setting forth the employer's agreement to honor checkoff authorizations executed by employees. Contrary to the Ninth Circuit's analysis in Local Joint Executive Bd. of Las Vegas v. NLRB, dues check-off is not “forced upon all employees” in circumstances where a checkoff provision exists alongside union security. 2011 WL 4031208 at 7. If a contract contains a union security provision and a checkoff clause, but an employee does not authorize checkoff, the employee simply must make other arrangements to satisfy his or her dues obligation. Thus, whether the dues check off arrangement arises in a right to work state or alongside a union security clause is not a crucial distinction in analyzing whether the cessation of dues deduction is a unilateral change.

⁴⁶ See Lowell Corrugated Container Corp., 177 NLRB 169, 172-73 (1969), *enfd.* 431 F.2d 1196 (1st Cir. 1970) (employer did not violate Section 8(a)(2) and (3) by continuing to honor unrevoked checkoffs after expiration of the collective-bargaining agreement).

purpose of dues check off is “administrative convenience in the collection of union dues.”⁴⁷

Finally, checkoff provisions have often appeared in collective-bargaining agreements that have no union security provision.⁴⁸

2. Section 302(c)(4) does not warrant excluding checkoff from the unilateral change rule.

Section 302(c)(4)⁴⁹ does not limit checkoff to situations where a contract is in effect.

Section 302 generally “makes it a crime for an employer to willfully ‘pay, lend, or deliver’ money to a labor organization or for a labor organization to ‘request, demand, receive, or accept’ such payments, except in certain limited circumstances” that further legitimate ends.⁵⁰ One of those exceptions, Section 302(c)(4), permits dues-checkoff payments so long as the affected employee makes 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.”⁵¹ In other words, checkoff is lawful if the employee has the option to revoke the check off authorization at least once per year and at contract expiration. Significantly, the fact that a checkoff authorization must be *revocable* by the employee when the contract terminates indicates that it is *not* automatically revoked. Thus, Section 302(c)(4) clearly contemplates dues

⁴⁷ NLRB v. Atlanta Printing Specialties & Paper Prod. Union 527 (Mead Corp.), 523 F.2d at 786.

⁴⁸ In a 1995 review of collective-bargaining agreements, 95 percent were found to contain dues-checkoff provisions while 82 percent contained union-security provisions. BNA, BASIC PATTERNS IN UNION CONTRACTS 97 (14th ed. 1995) (Attachment 1). A 1981-82 study of collective-bargaining agreements covering 1,000 or more employees found that 86 percent contained dues-checkoff provisions while 83 percent contained union-security provisions. U.S. DEPAR’T OF LABOR BUREAU OF LABOR STATISTICS, MAJOR COLLECTIVE BARGAINING AGREEMENTS: UNION SECURITY AND DUES CHECK OFF PROVISIONS 3, 23 (Bulletin 1425-21, May 1982) (available at http://books.google.com/books?id=mX4vq9HszusC&dq=%22OCLC8634936%22&as_brr=3&pg=PR6#v=onepage&q&f=false). And a 1961 review of collective-bargaining agreements found that 82 percent contained dues-checkoff provisions while 76 percent contained union-security provisions. BNA, BASIC PATTERNS IN UNION CONTRACTS 87:5 (5th ed. 1961) (Attachment 2).

⁴⁹ 29 U.S.C. §186(c)(4).

⁵⁰ Frito-Lay, 243 NLRB at 138. Section 302’s general proscription was intended to deal with labor racketeering. Id.

⁵¹ 29 U.S.C. §186(c)(4).

checkoff continuing after contract expiration.⁵² Indeed, Senator Taft, speaking in favor of enacting the Section 302(c)(4) checkoff exception, stated that checkoff authorizations under that provision “may continue indefinitely until revoked” by the employee.⁵³

This interpretation of Section 302(c)(4) is bolstered by Section 302(c)(5)’s exception for employer contributions to union trust funds. Section 302(c)(5) permits such contributions only if the “detailed basis on which such payments are to be made is specified in a written *agreement* with the employer....”⁵⁴ Thus, Congress included language requiring an “agreement” in Section 302(c)(5) but made no mention of such a requirement in Section 302(c)(4). Moreover, notwithstanding the explicit “written agreement” requirement, the Board and courts have found that an employer’s obligation to make payments into union benefit funds survives contract expiration.⁵⁵ Accordingly, finding that Section 302(c)(4) precludes dues-checkoff after contract expiration would be anomalous, considering that it contains no “agreement” requirement, whereas the next subsection specifically requires a “written agreement” for employers to contribute to union trust funds, yet there is no question that such payments survive contract expiration.

A few courts have misconstrued Section 302(c)(4) to prohibit checkoff in the absence of a current agreement between an employer and union.⁵⁶ But those decisions do not provide any

⁵² Tribune Publ’g Co. v. NLRB, 564 F.3d 1330, 1335 (D.C. Cir. 2009) (“Section 302 does not require a written collective bargaining agreement. In order for payroll deduction of union dues to be lawful, Section 302 requires merely that employees give written consent that is revocable after a year”).

⁵³ NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947, Vol. II 1311 (1985).

⁵⁴ 29 U.S.C. §186(c)(5) (Emphasis added).

⁵⁵ Concord Metal, 298 NLRB 1096, 1096 (1990) (expired contract is sufficient to satisfy the “written agreement” requirement of Section 302(c)(5)); Hinson v. NLRB, 428 F.2d 133, 138-39 (8th Cir. 1970) (trust fund agreements satisfy “written agreement” requirement); Peerless Roofing Co. v. NLRB, 641 F.2d 734, 736 (9th Cir. 1981) (trust fund agreements and expired contract satisfy “written agreement” requirement).

⁵⁶ See 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 (7th Cir. 1993); Microimage Display Div. of Xidex Corp. v. NLRB, 924 F.2d 245, 254-55 (D.C. Cir. 1991); Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d 1111, 1114 (D.C. Cir. 1986).

reasoned explanation for that interpretation. Moreover, the two D.C. Circuit decisions cited are inconsistent with that court's subsequent finding in Tribune Publishing Co. v. NLRB,⁵⁷ that Section 302(c)(4) "does not require a written collective bargaining agreement." Counsel for the General Counsel also notes that the Supreme Court has merely observed that it is the "Board's view" that Section 302(c)(4) precludes checkoff absent a collective-bargaining agreement, but the Court has never explicitly endorsed that view.⁵⁸

D. All exceptions to the unilateral change rule other than checkoff are creatures of contract due to a statutory mandate or the contractual surrender of a statutory right.

Considering the unilateral change rule's essential role in giving effect to the *statutory* bargaining obligation following contract expiration, any exceptions to that rule should have a statutory basis. Indeed, as shown below, all of the recognized exceptions to the unilateral change rule – other than dues-checkoff – are "statutorily dependent upon an existing collective-bargaining agreement" or stem from the surrender, in a collective-bargaining agreement, of a "statutorily guaranteed right."⁵⁹

1. Union security: statute requires an "agreement."

Union security requirements do not survive contract expiration because Section 8(a)(3) permits an employer to discriminate against employees who fail to pay union dues only if it has a union security "agreement" with the union.⁶⁰ Indeed, an employer that continues to enforce a union security requirement after contract expiration would violate Section 8(a)(3). Therefore,

⁵⁷ 564 F.3d at 1335.

⁵⁸ Litton Fin. Printing Div. v. NLRB, 501 U.S. at 199.

⁵⁹ Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d at 1113-14 (rejecting employer's contention that the reason some terms and conditions of employment do not survive contract expiration is that they concern the institutional "employer-union" relationship in addition to the "employer-employee" relationship, and finding that hiring hall provision survives expiration of contract). *See also* Local Joint Executive Bd. of Las Vegas v. NLRB, 309 F.3d at 584-85 (reviewing potential statutory bases for excluding dues-checkoff from the unilateral change doctrine in concluding that the Board has not articulated a cogent rationale).

⁶⁰ Bethlehem Steel Co. (Shipbuilding Div.), 136 NLRB at 1502. *See also* Litton Fin. Printing Div. v. NLRB, 501 U.S. at 199-200.

union security requirements are exempted from the unilateral change rule after contract expiration because they are statutorily dependent upon an existing agreement between the union and the employer.

2. Arbitration: surrender of parties' statutory right to make final determination regarding terms and conditions of employment and to use economic weaponry.

Final and binding arbitration constitutes a surrender of the statutory right of parties to make their own final determination as to which terms and conditions of employment they will accept, and how to interpret already agreed-upon terms.⁶¹ As the Board observed in Indiana & Michigan Electric Co.,⁶² Congress ultimately rejected a version of Section 8(d) that would have included in the definition of “to bargain collectively” language requiring compulsory arbitration over the interpretation or application of the contract. Under Section 8(d) as finally enacted, each party to the bargaining relationship is the “final arbiter of its own best interest,” absent mutual consent to the contrary.⁶³ An arbitration agreement also typically represents “the parties’ mutual consent to relinquish economic weapons, such as strikes and lockouts, otherwise available under the Act to resolve disputes.”⁶⁴ Therefore, arbitration is a creature of contract, and parties can unilaterally refuse to arbitrate a dispute arising after the expiration of a contract containing an arbitration provision.⁶⁵

⁶¹ Indiana & Michigan Elec. Co., 284 NLRB 53, 57-58 (1987). *See also* 29 U.S.C. § 158 (d) (Section 8(d)) (duty to bargain “does not compel either party to agree to a proposal or require the making of a concession”).

⁶² 284 NLRB at 57.

⁶³ Hilton-Davis Chemical Co., 185 NLRB 241, 242 (1970). *See also* Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 374 (1974).

⁶⁴ Indiana & Michigan Elec. Co., 284 NLRB at 58.

⁶⁵ Litton Fin. Printing Div. v. NLRB, 501 U.S. at 206.

3. No-strike provisions: surrender of the statutory right to strike.

Because a no-strike provision represents the surrender of the statutory right to strike,⁶⁶ parties to a bargaining relationship are not required to abandon that right when there is no agreement to waive it in effect. As mentioned above, the Supreme Court of the United States has observed that no-strike provisions are generally coterminous with an obligation to arbitrate.⁶⁷

4. Waiver: mutual renunciation of union's statutory right to bargain.

Similarly, a waiver by a union of its statutory right to bargain over mandatory subjects does not survive contract expiration.⁶⁸ The rule that a contractual waiver must be “clear and unmistakable” to be effective is based on the proposition that the bargaining obligation continues even when a contract is in effect.⁶⁹ A contractual waiver reflects the “mutual intention” of the parties “to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.”⁷⁰ Because a contractual waiver represents the parties’ agreement that the union will relinquish its statutory bargaining rights regarding a particular subject, the waiver does not survive contract expiration absent evidence of the parties’ intent to the contrary.⁷¹

5. Checkoff: no contractual surrender of a statutorily guaranteed right.

Checkoff is not a “creature of contract” because an individual checkoff authorization is a private agreement. Unlike arbitration, no-strike commitments, and contractual waivers, checkoff arrangements do not involve the surrender by a *party to the bargaining relationship* of any

⁶⁶ 29 U.S.C. § 158 (d), §163 (Section 8(d); Section 13). *See also* Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d at 1114; Litton Fin. Printing Div. v. NLRB, 501 U.S. at 199.

⁶⁷ Gateway Co. v. United Mine Workers, 414 U.S. at 382.

⁶⁸ Ironton Publications, 321 NLRB 1048, 1048 (1996) (provision granting employer sole discretion to award merit increases did not survive contract expiration).

⁶⁹ Provena St. Joseph Med. Ctr., 350 NLRB 808, 811 (2007).

⁷⁰ Id.

⁷¹ Ironton Publications, 321 NLRB at 1048.

statutorily guaranteed right. A checkoff arrangement in a collective-bargaining agreement simply reflects the parties' agreement to honor checkoff authorizations voluntarily executed by individual employees. The fact that an employee's checkoff assignment is a "contract" with his or her employer has no bearing on whether the separate and legally distinct checkoff arrangement between the union and employer is subject to the statutory bargaining obligation after the contract has expired. Furthermore, to the extent that the periodic irrevocability of dues-checkoff implicates the Section 7 right to "refrain from" assisting a union, Section 302(c)(4) already ensures employees' right to revoke checkoff authorizations after contract expiration.

E. The subsidiary, contract-language rationale in Bethlehem Steel should also be overruled.

The Board's subsidiary rationale in Bethlehem Steel – that contract language linked the checkoff obligation only to the duration of the contract – is inconsistent with more recent Board precedent. Thus, regardless of such limiting terminology in an agreement, an employer ordinarily has a statutory duty to bargain with the employees' collective-bargaining representative before making changes in terms and conditions of employment. All terms and conditions of employment set forth in a collective-bargaining agreement are linked to the agreement's term by virtue of the duration clause; nonetheless, these terms survive the contract's expiration.⁷² Moreover, the language of the Bethlehem Steel checkoff provision ("so long as this Agreement remains in effect") would not satisfy the Board's current "clear and unmistakable" standard for finding a contractual waiver of the right to bargain over a mandatory subject following contract expiration.⁷³ If a union and employer want to negotiate a contract that

⁷² Honeywell Int'l, Inc. v. NLRB, 253 F.3d 125, 131-33 (D.C. Cir. 2001) (general durational clause, without more, does not defeat unilateral change doctrine).

⁷³ See Natico, Inc., 302 NLRB 668, 684-85 (1991) (language stating that pension fund provision will "remain in effect for the term of this agreement" not clear and unmistakable waiver); Schmidt-Tiago Constr. Co., 286 NLRB 342, 366 (1987) (language requiring that employer contributions to pension fund be "in accordance with" a pension

provides for checkoff to cease after contract expiration, the Board's post-Bethlehem Steel precedent provides ample guidance.⁷⁴ The Board should therefore confirm that its current contract-waiver standards apply to checkoff.

The checkoff provision in the terminated contract between the Respondent and the Union in this case states that checkoff shall occur "during the period provided in the authorization."⁷⁵ The authorization states that it will be "effective and irrevocable" for a period of one year or "up to the termination date" of the collective-bargaining agreement.⁷⁶ Like the language of the Bethlehem Steel checkoff provision, the checkoff provision in the terminated contract clearly does not evince a clear and unmistakable waiver under Cauthorne Trucking. Of course, the Board will consider evidence in addition to contract language, if available, in determining whether a clear and unmistakable waiver has occurred.⁷⁷ No such evidence has been presented in the instant case.

F. Summary

The Katz unilateral change rule, which precludes parties to a bargaining relationship from unilaterally changing terms and conditions of employment without first bargaining to impasse, is fundamental to implementing the statutory duty to bargain in good faith. All exceptions to the unilateral change rule following the expiration of a collective-bargaining agreement, other than dues-checkoff arrangements, are statutorily dependent upon an existing collective-bargaining agreement or stem from the surrender, in a collective-bargaining agreement, of a statutorily

agreement did not specifically state that employer's obligation to contribute to pension fund ended at contract expiration); KMBS, Inc., 278 NLRB 826, 849 (1986) (language requiring contributions to be made "as long as a Producer is so obligated pursuant to said collective bargaining agreements" insufficient because language did not "deal with the *termination* of the employer's obligation to contribute to the funds").

⁷⁴ See Cauthorne Trucking, 256 NLRB 721, 722 (1981) (contractual language stating that "at the expiration" of the contract the pension trust agreement "shall terminate" constituted a clear and unmistakable waiver of the union's right to bargain regarding an employer's cessation of payments into a pension trust fund after the contract expires).

⁷⁵ Ex. I, p.3

⁷⁶ Ex. I, p. 3

⁷⁷ See, e.g., Provena St. Joseph Med. Ctr., 350 NLRB at 815.

guaranteed right. No statutory basis exists, however, for excluding dues-checkoff. Indeed, neither the proviso to Section 8(a)(3) nor Section 302(c)(4) support excluding dues-checkoff arrangements from the unilateral change rule. Moreover, contract language that merely links a checkoff obligation to the duration of the contract does not waive a union's right to bargain, post-expiration, over changes to the parties' checkoff arrangement. Although checkoff has been excluded from the unilateral change rule for nearly 50 years, the Board has never provided a principled rationale for doing so. Thus, Counsel for the Acting General Counsel respectfully argues that the Bethlehem Steel line of cases should be overturned.

III. Respondent did not bargain to impasse on the issue of dues deduction

The parties in this matter bargained to impasse and the Respondent implemented portions of its last and final offer upon reaching this impasse.⁷⁸ However, a cessation of dues deduction was not part of the Respondent's last and final offer nor was it discussed in bargaining.⁷⁹ In fact, the continuation of dues deduction was provided for in Respondent's last and final offer. The Respondent did not cease dues deduction until nine months after its implementation of its final offer and did so without advance to the Union.⁸⁰ At that time, Respondent did not claim that the earlier impasse in negotiations privileged its action. An employer may implement terms and conditions of employment only if they were "reasonably comprehended" as part of Respondent's proposals before impasse.⁸¹ Thus, Respondent was not at liberty to cease dues deduction based on its implementation of its last and final offer and any argument that the cessation of dues deduction occurred as part of Respondent's implementation of portions of its final offer is groundless.

⁷⁸ S.R. 25, 27.

⁷⁹ S.R. 21, 24.

⁸⁰ S.R. 24, 25, 32.

⁸¹ Taft Broad. Co., WDAF AM-FM TV, 163 NLRB 475, 478 (1967).

IV. Requested Remedy

Counsel for the General Counsel respectfully seeks the standard remedy for an unlawful failure to checkoff dues and requests that the Respondent be ordered to reimburse the union with interest for any loss of dues it experienced due to the Respondent's failure to deduct and remit dues, where employees have individually signed valid checkoff authorizations.⁸²

Retroactive application of this new rule would not impose a manifest injustice in this case. It is the Board's usual practice to apply new rules in all pending cases unless doing so would cause a manifest injustice.⁸³ In considering whether the retroactive application of a Board decision will cause manifest injustice, the Board considers "reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application."⁸⁴ The Board balances the "ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'"⁸⁵

Counsel for the Acting General Counsel recognizes that the precedent of Bethlehem Steel has been the established law for nearly fifty years. However, the Board's decision in Hacienda III signaled that precedent was in question, as the participating members split on the substantive issue of whether the unilateral cessation of dues deduction after contract expiration is unlawful. Hacienda III was decided on August 27, 2010 and the Respondent ceased dues deduction on October 6, 2010.⁸⁶ The Board's decision in Hacienda III put Respondent on notice that it acted

⁸² See, e.g. YWCA of Western Massachusetts, 349 NLRB 762, 764-65 (2007); Plymouth Court, 341 NLRB 363, 363 (2004).

⁸³ Foster Poultry Farms, 352 NLRB 1147, 1151 (2008) (citing Deluxe Metal Furniture Co., 121 NLRB 995, 1006-07 (1958)).

⁸⁴ Wal-mart Stores, Inc. 351 NLRB 130, 134 (2007) (quoting SNE Enterprises, 344 NLRB 673, 673 (2005)).

⁸⁵ SNE Enterprises, 344 NLRB 673, 673 (2005) (quoting SEC v. Chenery Corp. 332 U.S. 194, 203 (1947)).

⁸⁶ S.R. 32.

at its own peril by ceasing dues deduction with providing notice and an opportunity to bargain to the Union.⁸⁷

Further, no particular injustice would result from retroactive application in this case. The Respondent and Union are in an on-going bargaining relationship. The standard remedy in this case requires the Respondent to reinstate the status quo and, thereafter, provide the Union with notice and an opportunity to bargain over the cessation of dues deduction. Rather than result in an injustice, this outcome promotes collective bargaining and cooperative labor relations. While Counsel for the Acting General Counsel recognizes that there is a monetary remedy in this case, this should not override the potential benefit to collective bargaining that retroactive application would foster.

Accordingly, it is respectfully requested that the Board reverse the Administrative Law Judge's conclusion that the Respondent did not violate Section 8(a)(1) and (5) when it unilaterally ceased dues deduction after contract expiration.

Respectfully submitted,



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⁸⁷ See Levitz Furniture Co., 333 NLRB 717, 729 (2001) (explaining a higher standard of evidentiary proof may be applied retroactively where employer have adequate warning); Pattern & Model Makers Assoc., 310 NLRB 929, 931 (1993) (finding a new rule may be applied retroactively where outcome of case was uncertain); Loehmann's Plaza, 305 NLRB 663, 672 (1991) (finding a new rule may be applied retroactively where controlling law is unsettled).

Union Security

Union security provisions, including check-off and hiring arrangements, are found in all of the agreements contained in the Basic Patterns database.

Eighty-two percent of the contracts analyzed provide for one or more of the principal forms of union security—union shop, modified union shop, maintenance-of-membership, and agency shop. Check-off provisions appear in 95 percent of the sample; hiring provisions in 23 percent.

Types of Union Security

Union shop is by far the most prevalent form of security. Provided in 64 percent of the sample, union shop clauses require that all employees in the bargaining unit become members and maintain membership as a condition of employment.

Industry pattern: Union shops are found in all printing contracts and at least three-fourths of contracts in apparel, construction, retail, rubber, services, and transportation equipment. Such provisions are absent in petroleum agreements analyzed and appear in less than 50 percent of those in fabricated metal (47 percent), primary metals (44 percent), lumber (43 percent), communications and utilities (each 40 percent), mining (33 percent), and textiles (30 percent).

Modified union shop provisions are found in 10 percent of sample agreements. Of the various forms of modification, the most common requires union membership of all employees except those who were not members on or before the contract's effective date or another specified date. In a few agreements, groups such as temporary workers and religious objectors are excused from the membership requirement.

Industry pattern: Modified union shop provisions are found in 32 percent of primary metals, 25 percent of electrical machinery, 23 percent each of machinery and stone-clay-glass, and 20 percent of utilities contracts. This type of provision does not appear in any apparel, communications, furniture, leather, lumber, maritime, petroleum, printing, rubber, textiles, or transportation agreements studied.

Agency shop, which requires payment of service fees—usually equal in amount to union dues—by employees who choose not to join the union, is found in 10 percent of contracts analyzed. Of these provisions, 38 percent stipulate that agency shop exists as the sole form of union security. The remaining 63 percent of agency shop provisions appear in combination with union shop or some other form of union security in contracts covering multi-state operations. In such instances, agency shop is applicable, to the extent that it is lawful, in states that prohibit compulsory union membership.

Industry pattern: Agency shop provisions (as the sole form of union security) appear in 40 percent of communications, 17 percent of furniture, 13

percent of maritime, 12 percent of transportation, 11 percent of apparel, and 10 percent of utilities agreements in the database.

Union Security Provisions

(Frequency Expressed as Percentage of Contracts)

	Union Shop	Modified Union Shop	Agency Shop Only	Maintenance of Membership	Hiring	Check-off
ALL INDUSTRIES	64	10	4	4	23	95
MANUFACTURING	61	13	2	5	10	98
Apparel	89	—	—	—	44	100
Chemicals	56	6	—	13	6	100
Electrical Machinery	70	25	—	—	5	100
Fabricated Metals	47	16	15	16	5	95
Foods	71	10	—	5	24	100
Furniture	50	—	17	—	—	100
Leather	50	—	—	—	25	100
Lumber	43	—	—	—	—	100
Machinery	65	23	4	—	—	100
Paper	57	14	—	7	—	100
Petroleum	—	—	—	29	29	100
Primary Metals	44	32	—	4	—	100
Printing	100	—	—	—	63	50
Rubber	83	—	—	—	—	100
Stones, Clay, & Glass	69	23	—	—	8	100
Textiles	30	—	—	20	—	100
Transportation Equipment	76	3	3	—	9	100
NON-MANUFACTURING	67	7	7	3	43	90
Communications	40	—	40	—	10	100
Construction	83	7	—	—	90	76
Insurance & Finance	57	14	—	14	—	100
Maritime	50	—	13	13	100	38
Mining	33	8	—	—	—	100
Retail	85	11	—	—	44	89
Services	78	4	7	4	66	95
Transportation	64	—	12	4	8	100
Utilities	40	20	10	10	20	100

Maintenance-of-membership provisions, requiring present union members to so remain but imposing no obligation on non-members, appear in only 4 percent of sample agreements.

Industry pattern: Maintenance-of-membership provisions are found in 29 percent of petroleum, 20 percent of textiles, 16 percent of fabricated metals, 14 percent of insurance and finance, and 13 percent each of chemicals and maritime agreements.

Right-to-work laws, prohibiting compulsory union membership (in effect in 21 states), influence union security provisions in 26 percent of contracts in the database. Sixteen percent of contracts analyzed cover bargaining units

located wholly in right-to-work states, some of which are located in right-to-work states. Some of the contracts surveyed either provide for a right-to-work provision or other limiting provisions.

Hiring Arrangements

Hiring provisions are found in 23 percent in manufacturing contracts.

Industry pattern: Hiring provisions were analyzed, and in 90 percent of services, 44 percent each of manufacturing and transportation agreements.

Hiring-preference provisions are given to workers in manufacturing industry, are found in 40 percent of the entire sample.

Industry pattern: Provisions for hiring preference are found in construction (59 percent of contracts). Such clauses also are found in services, and utilities.

Hiring procedures, requiring union employment, are found in 43 percent of contracts. Such provisions call for union operation or management operation. Such provisions are found in 100 percent of communications applicants from other sources.

Industry pattern: Hiring preference provisions are found in construction, 88 percent of services, 44 percent of retail, and 10 percent of utilities.

Check-off

Provisions for check-off are found in 95 percent of manufacturing and 98 percent of non-manufacturing agreements.

Industry pattern: Check-off provisions are found in the industry except services (89 percent), construction (88 percent), and transportation (38 percent).

Items to be deducted from dues are found in 75 percent of contracts. Of these agreements, 75 percent provide for a check-off item to be deducted; 75 percent provide for a check-off item to be deducted; 75 percent provide for a check-off item to be deducted.

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of Contracts)

Industry	Maintenance of Membership	Hiring	Check-off
4	4	23	95
2	5	10	98
—	—	44	100
—	18	6	100
—	—	5	100
15	16	5	95
—	5	24	100
17	—	—	100
—	—	25	100
—	—	—	100
4	—	—	100
—	7	—	100
—	29	29	100
—	4	—	100
—	—	63	50
—	—	—	100
—	—	8	100
—	20	—	100
3	—	9	100
7	3	43	90
40	—	10	100
—	—	90	76
—	14	—	100
13	13	100	38
—	—	—	100
—	—	44	89
7	4	56	96
12	4	8	100
10	10	20	100

quiring present union membership, non-members, appear in

provisions are found in 29 percent of fabricated metals, 29 percent each of chemicals and

union membership (in effect in 26 percent of contracts in which the contract provided cover bargaining units

located wholly in right-to-work states; 11 percent cover multistate units, some of which are located in right-to-work states. Further, 5 percent of the contracts surveyed either call for a first union security provision or a stronger provision than that already appearing in the contract should right-to-work or other limiting laws be repealed.

Hiring Arrangements

Hiring provisions are found in 23 percent of contracts in the database—10 percent in manufacturing and 43 percent in non-manufacturing.

Industry pattern: Hiring provisions are found in all maritime agreements analyzed, and in 90 percent of construction, 63 percent of printing, 56 percent of services, 44 percent each of apparel and retail, and 29 percent of petroleum agreements.

Hiring-preference provisions, requiring that preference in employment be given to workers in the area and/or to those with experience in the industry, are found in 40 percent of contracts with hiring provisions, or in 9 percent of the entire sample.

Industry pattern: Provisions for preference in hiring are most common in construction (59 percent) and maritime and printing (each 25 percent) contracts. Such clauses also appear in at least 10 percent of communications, foods, services, and utilities agreements.

Hiring procedures, referring to a union role in furnishing candidates for employment, are found in 21 percent of the database—8 percent in manufacturing and 41 percent in non-manufacturing. Of these provisions, 95 percent call for union operation of a hiring hall; the remainder call for a joint labor-management operation. In many cases, however, the employer may seek job applicants from other sources either simultaneously or after the union has been given the first opportunity to supply candidates.

Industry pattern: Hiring hall provisions are found in 90 percent of construction, 88 percent of maritime, 63 percent of printing, 52 percent of services, 44 percent of retail, and 33 percent of apparel agreements.

Check-off

Provisions for check-off are contained in 95 percent of contracts studied—98 percent of manufacturing and 90 percent of non-manufacturing agreements.

Industry pattern: Check-off provisions appear in all contracts in every industry except services (96 percent), fabricated metals (95 percent), retail (89 percent), construction (76 percent), printing (50 percent), and maritime (38 percent).

Items to be deducted are specified in all contracts containing check-off provisions. Of these agreements, only two do not mention union dues as an item to be deducted; 75 percent mention initiation fees; 30 percent mention

assessments; 25 percent mention political action contributions; and 20 percent mention other fees such as reinstatement and/or agency fees. A contract may provide for only one type of deduction or may permit a combination of the specified deductions.

Amounts to be deducted are referred to in 8 percent of contracts containing check-off provisions. Of these, 72 percent specify a fixed amount of dues to be deducted, and the other 28 percent place limitations on deductions.

Revocation of check-off authorization is mentioned in 45 percent of sample agreements providing for check-off. Of these, 86 percent hold authorizations to be irrevocable for the term of the contract or one year, whichever is shorter, and 12 percent allow employees to revoke at any time or upon short notice.

Automatic renewal of check-off authorization takes place if an employee fails to cancel under 30 percent of check-off provisions. In 93 percent of these cases, the renewed authorization continues to be irrevocable for specified periods, and in 7 percent it continues on a revocable basis. Authorizations revocable from the outset remain in effect until cancelled; therefore renewal problems do not arise.

Escape periods, during which resignation from check-off and/or union membership is permitted, are specified in 34 percent of sample agreements—42 percent in manufacturing and 21 percent in non-manufacturing. These provisions are found in 83 percent each of furniture and rubber contracts, and in 60 percent of textiles, 57 percent each of insurance and finance and petroleum, and 50 percent each of chemicals and paper agreements.

Frequency of Check-off Provisions

(Frequency Expressed as Number of Contracts)

	All Industries	Manufacturing	Non-manufacturing
Provision for Authorized Check-off	379	240	139
Type of Authorization:			
Revocable at Will	20	7	13
Irrevocable for Contract Term or One Year	147	112	35
Automatic Renewal*			
Becomes Revocable	8	6	2
Continues Irrevocable	106	87	19
Deductions in Addition to Dues			
Assessments	112	64	48
Initiation Fees	285	195	89
Political Action Contributions	94	52	42

*After "escape" period.

Vacations

Vacation provisions a Basic Patterns database except construction.

Vacation provisions a in only five contracts in in apparel, transportati

Amount of Vacatio

The latest survey reve age of sample contracts One-week vacations are tions because a numbe: weeks or longer.

Five-week vacations : risen in frequency from year's survey. Six-week percent in the 1971 stuc year's analysis.

Trend in

(Frequency)

	1971
Three weeks	86
Four weeks	73
Five weeks	22
Six weeks	5

Industry pattern: Vac manufacturing than nor of vacation provisions i more than six weeks, ho turing. Four weeks is the

Five weeks vacation is leum, rubber, and utiliti eight other industries: c machinery (90 percent), l percent), lumber (71 per

The only industries in vacations are paper, pet tion (64 percent); utilitie (50 percent).

in all, or nearly all, of the electrical machinery, foods, oils, textiles, transportation sportation. They are found in manufacturing industry, printing industries, construc-

off provisions permit revocation at will or upon short notice that the authorization of the contract or one year, of irrevocability permitted. Some fail to indicate the type of authorization somewhat more common, in nonmanufacturing-

revocable authorizations are to cancel at the end of the term. In nine out of ten cases the authorization is revocable for annual periods; in some cases on a month-to-month basis.

In some cases, the authorization continues in effect until renewal is required.

Some contracts envision membership dues are envisioned in some contracts call for checkoff for deduction of initiation fees. Some (but not all) include fines — which are advisory memorandum issued by other agreements, however, are checked off but use general.

Some of union dues increases, in bulk of agreements appear in some amounts without further notice to the worker and union. Such agreements accommodate automatically by agreement to deduct.

Some specify a fixed or maximum amount which differs as between the worker and the union; the former may not vary — or vice versa — and

Most indicated maximums pertain to dues, though occasionally they apply also to initiation fees.

Only 1 percent of contracts require that new authorizations be executed when dues are changed.

Checkoff v. Union Security

As noted above, checkoff provisions are somewhat more common than other types of union security, appearing in 82 percent of contracts, compared to about 76 percent for the other types combined—union shop, maintenance of membership, agency shop, and closed shop.

About 15 percent of contracts provide for the voluntary checkoff of union dues but make no requirement of union membership or financial support. Only 3 percent of agreements lack any type of union security provision (including hiring arrangements).

Impact of Right-to-Work Laws

About 17 percent of the contracts in the sample (19 percent of manufacturing, 11 percent of nonmanufacturing) cover units located wholly in states prohibiting compulsory union membership. Only 12 percent of these agreements have provisions requiring union membership as a condition of employment, and three quarters of these contain riders making the provisions subordinate to state law; it is presumed that the other quarter are similarly ineffective. Another 9 percent of contracts in right-to-work states have agency-shop clauses; the corresponding figure for contracts covering no employees in right-to-work states is only 3 percent. There is little difference between right-to-work states and other states in the frequency of checkoff clauses—85 percent of contracts in the former compared with 82 percent of agreements in the latter.

Sixty-six percent of the agreements in the sample cover single-state bargaining units for which compulsory-membership provisions lawfully may be negotiated. Another 17 percent cover multistate units located wholly or in part in states permitting the making of compulsory-membership agreements. Taking these two groups together, 86 percent have provisions requiring some or all employees to maintain union membership, and 6 percent contain agency-shop clauses.

Impact of Right-to-Work Laws

(Frequency Expressed as Percentage of Contracts)

	Compulsory Membership Clauses	Agency-Shop Clauses	Checkoff Clauses
Over-all Frequency	73	6	82
Units in Right-to-Work States	12*	9	85
Units in Other States	86	6	82

* Three fourths are expressly made subordinate to state law; others are presumed to be ineffective.

Proof of Service

I hereby assert that copies of the foregoing Exceptions of Counsel for the Acting General Counsel and Brief in Support of Exceptions with attachments were served by electronic mail this 31st day of October, 2011 to the following:

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