UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

USIC LOCATING SERVICES, INC.

and

Case 06-CA-037328

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

COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

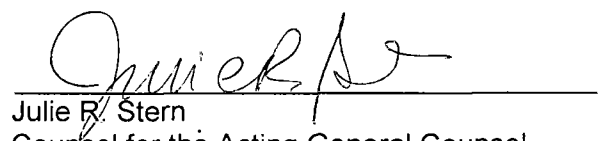
Counsel for the Acting General Counsel hereby files and respectfully requests the Board to consider the following Exception to Administrative Law Judge David Goldman's Decision in the above-entitled matter, which issued on January 10, 2012.

1. **Page 9, Line 4**: The Administrative Law Judge's failure to conclude that Respondent violated Section 8(a)(5) of the Act as alleged in the Amended Complaint.

In support of the above Exception, Counsel for the Acting General Counsel relies on the record herein and the accompanying Brief in Support of Exception.

Dated at Pittsburgh, Pennsylvania, this 22nd day of February, 2012.

Respectfully submitted,



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Submitted by:

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NATIONAL LABOR RELATIONS BOARD
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Dated at Pittsburgh, Pennsylvania,

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COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Counsel for the Acting General Counsel hereby files this Brief in Support of its Exception to the Decision of Administrative Law Judge David Goldman which was issued on January 10, 2012.

I. PRELIMINARY STATEMENT

The charge in this proceeding was filed by the Charging Party on June 6, 2011. On August 30, 2011, the Regional Director for Region Six of the National Labor Relations Board issued a Complaint and Notice of Hearing in this proceeding alleging the Respondent violated the National Labor Relations Act. Respondent filed an Answer on September 9, 2011. An Amended Complaint was issued on November 18, 2011, and Respondent filed an Amended Answer on December 9, 2011.[1]

On November 15, 2011, the parties filed a Joint Motion and Stipulation of Facts. The parties moved to waive a hearing and to submit this case directly to Administrative Law Judge

[1] The Amended Complaint and Amended Answer were made part of the record herein as Exhibits M and N, respectively, in accordance with Administrative Law Judge David Goldman's order dated November 16, 2011.

David Goldman pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations for a decision based on the record of this case as defined in the Stipulation of Facts.

On November 16, 2011, Judge David Goldman granted the parties' motion, and on January 10, 2012, he issued his decision recommending that the complaint be dismissed. The stipulated record in this matter presents the issues as stated below.[2]

II. ISSUES

(a) Whether Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally failing and refusing, since December 7, 2010, to continue to honor dues authorizations submitted by bargaining unit employees before December 4, 2009.

(b) Whether Respondent violated Section 8(a)(1) and (5) of the Act since May 13, 2011, by refusing the Local Union's request to process dues authorization cards.

Counsel for the Acting General Counsel maintains that Respondent has violated Section 8(a)(1) and (5) in two separate instances. Counsel for the Acting General Counsel contends that the precedent established by Bethlehem Steel[3] and its progeny rests on a flawed rationale and thus that decision should be overruled. Respondent violated Section 8(a)(1) and (5) of the Act by ceasing dues deductions at the time the collective bargaining agreement expired on December 4, 2009;[4] and again by refusing the Union's request to honor newly-submitted dues checkoff authorizations on May 13, 2011.

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[2] "S R." will be used to reference paragraphs of the Stipulated Record; "Ex." will be used to reference exhibits attached to the Stipulated Record; "ALJD, p." will be used to reference pages of the Administrative Law Judge's Decision in this matter.

[3] Bethlehem Steel Co. (Shipbuilding Div.), 136 NLRB 1500, 1502 (1962).

[4] Counsel for the Acting General Counsel contends that Respondent's failure to continue to deduct and remit dues following expiration of the collective bargaining agreement is a continuing violation, with the understanding that a remedy is appropriate dating back six months prior to the filing of the charge in this matter. It should be noted that the Administrative Law Judge specifically did not rule on Respondent's contention that the charge should be dismissed as untimely under Section 10(b) of the Act. (ALJD, p. 8, n. 6)

III. STATEMENT OF FACTS

The Charging Party, herein called the Local Union, has, through its administrative unit Unit 112, represented a unit of employees employed by the Respondent and its predecessors for several years.[5] The most recent collective bargaining agreement between the Local Union and Respondent's predecessor, which was adopted by Respondent, was effective by its terms from November 1, 2006 through October 30, 2009. The parties agreed to extend the agreement through November 18, 2009, and then agreed to further extend the agreement December 4, 2009.[6]

The collective bargaining agreement, at Article IV, provided that Respondent would deduct dues from those bargaining unit employees who had authorized such deductions.[7] Respondent ceased making such deductions at the time the second extension of the expired agreement expired on December 4, 2009.[8]

In May 2011, the Local Union submitted to Respondent eleven additional dues checkoff authorizations and requested that Respondent honor those authorizations. Respondent refused to do so.[9]

IV. ARGUMENT AND AUTHORITIES

The Board should overrule Bethlehem Steel to the extent it holds that dues checkoff does not survive contract expiration. There is no dispute that the parties' collective bargaining

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[5] S.R. 12; ALJD, p. 2.

[6] S.R. 13; ALJD, pp. 2-3.

[7] Exh. F. Article IV, in relevant part, reads as follows: "All employees who are members of the Union or who are obligated to tender to the Union amounts equal to periodic dues on the effective date of this Agreement, or who later become members, and all employees entering into the bargaining unit on or after the effective date of this Agreement, shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members from such effective date or, in the case of such employees entering the bargaining unit after the effective date, on the thirtieth day after such entrance, until the termination of this contract."

[8] S.R. 16(a); ALJD, p. 3.

[9] S.R. 18; ALJD, p. 4.

agreement had expired when Respondent ceased dues deduction.[10] Under the precedent exemplified by Bethlehem Steel, the Respondent has argued that it was privileged to cease dues deduction. However, as explained more fully below, it is the Counsel for the Acting General Counsel's position that Bethlehem Steel and its progeny should be overturned.

A. Introduction

In Bethlehem Steel, 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.[11] 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)."[12] The Board found that "similar considerations" applied to dues checkoff provisions, because the clauses "implemented the union-security provisions."[13] In a later decision,[14] the Board also based excepting checkoff from the unilateral change rule on Section 302(c)(4), which permits checkoff only if "the employer has received from each employee, on whose account such deductions are made, a written assignment which

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[10] S.R. 16(a).

[11] Id at 1502.

[12] Id. (Emphasis added.)

[13] 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. As noted by the Administrative Law Judge, in this case, dues checkoff is referenced only indirectly in the agency shop clause and there is arguably no specific contractual language limiting checkoff to the period when the contract is in effect. (ALJD, p. 7; Exh. F)

[14] *See* Hudson Chemical Company, 258 NLRB 152, 157 (1981) (adopting ALJ decision without comment). *See also* Litton Financial 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)).

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[.]"[15]

The Ninth Circuit has 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 state.[16] On remand in Hacienda III,[17] the four members of the Board eligible to participate deadlocked, reaching different conclusions reflected by their separate opinions. Chairman Liebman and Member Pearce in their opinion 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."[18]

Thereafter, the Ninth Circuit granted the union's petition for review of the decision in Hacienda III and vacated the Board's decision.[19] The Ninth Circuit held that, in right to work states, dues checkoff cannot lawfully be unilaterally terminated after contract expiration.[20] The Ninth Circuit's decision did not address the situation in this matter, where the collective bargaining agreement contained both a dues checkoff provision and a union security clause.[21]

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

[16] 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).

[17] Hacienda Resort Hotel & Casino (Hacienda III), 355 NLRB No. 154 (2010).

[18] 355 NLRB No. 154, slip op. at 2.

[19] Local Joint Executive Bd. of Las Vegas v. NLRB, 657 F.3d 865 (9th Cir., Sept. 13, 2011).

[20] Id., at 874-875. (The Ninth Circuit remanded on only the issue of what appropriate remedy should be given its decision.)

[21] It is Counsel for the Acting General Counsel's position that the Ninth Circuit should have deferred to the Board's tradition of not overturning precedent in 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, 657 F.3d 865 (9th Cir., Sept. 13, 2011). This position is based on administrative law principles calling for judicial deference to an agency's decision-making procedures and not on any position that the legal precedent of Bethlehem Steel and its progeny should remain Board law

Counsel for the Acting General Counsel argues that there is no principled rationale for excluding checkoff from the unilateral change rule regardless of whether the checkoff provision exists alongside a union security clause.

Subsequent to NLRB v. Katz,[22] 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 do not survive contract expiration.[23]

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."[24] 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

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[22] 369 U.S. 736 (1962).

[23] The Administrative Law Judge noted that Counsel for the Acting General Counsel's arguments in support of this proposition are "substantial". (ALJD, p. 7) The Administrative Law Judge was bound, however, by extant Board precedent in making his decision in this case. (ALJD, p. 8)

[24] National Labor Relations Act, 29 U.S.C. § 158(d).

inquiry into the employer's subjective good faith.[25] 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.[26]

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.[27] 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.[28] 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."[29]

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[25] 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").

[26] *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, Inc., 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").

[27] *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* Board's Brief to the Supreme Court in NLRB v. Katz, 1962 WL 115568, at **33-35.

[28] *See* Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539, 544 f n. 6 (1988).

[29] Litton Financial Printing Div. v. NLRB, 501 U.S. at 206-07.

C. No statutory basis exists for excluding dues checkoff 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.[30]

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,"[31] 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 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.[32]

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[30] *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).

[31] 29 U.S.C. §158(a)(3).

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

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.[33] 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.[34] The Board has held that such wage assignments survive the expiration of the collective-bargaining agreement when the employee's authorization so intends.[35] 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 purpose of dues checkoff is "administrative convenience in the collection of union dues."[36] Finally, checkoff provisions have often appeared in collective-bargaining agreements that have no union security provision.[37]

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[33] *See, e.g.*, Shen-Mar Food Products, Inc., 221 NLRB 1329, 1330 (1976), *enfd. as modified* 557 F.2d 396 (4th Cir. 1977) (checkoff 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 and Paper Products Union 527, AFL-CIO, 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' Association, 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").

[34] 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. Thus, 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.

[35] *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).

[36] NLRB v. Atlanta Printing Specialties and Paper Products Union 527, AFL-CIO, 523 F.2d at 786.

[37] 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

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

Section 302(c)(4)[38] 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.[39] 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."[40] In other words, checkoff is lawful if the employee has the option to revoke the checkoff 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 checkoff continuing after contract expiration.[41] Indeed, Senator Taft, speaking in favor of

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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 CHECKOFF 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).

[38] 29 U.S.C. §186(c)(4).

[39] Frito-Lay, 243 NLRB at 138. Section 302's general proscription was intended to deal with labor racketeering. Id.

[40] 29 U.S.C. §186(c)(4).

[41] Tribune Publishing 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").

enacting the Section 302(c)(4) checkoff exception, stated that checkoff authorizations under that provision "may continue indefinitely until revoked" by the employee.[42]

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 . . . ."[43] 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.[44] 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 the employer and union.[45] Those decisions, however, do not provide any reasoned explanation for that interpretation. Moreover, the two D.C. Circuit decisions are inconsistent with that court's subsequent finding in Tribune Publishing Co. v.

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

[43] 29 U.S.C. §186(c)(5) (Emphasis added).

[44] Concord Metal, 298 NLRB 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, Ltd. v. NLRB, 641 F.2d 734, 736 (9th Cir. 1981) (trust fund agreements and expired contract satisfy "written agreement" requirement).

[45] *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).

NLRB, that Section 302(c)(4) "does not require a written collective bargaining agreement."[46] Counsel for the Acting 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.[47]

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."[48]

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.[49] Indeed, an employer that continues to enforce a union security requirement after contract expiration would violate Section 8(a)(3). Therefore, union security requirements are exempted from the unilateral change rule after contract

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[46] 564 F.3d at 1335.

[47] Litton Financial Printing Div. v. NLRB, 501 U.S. at 199.

[48] 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 Board 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).

[49] Bethlehem Steel Company (Shipbuilding Div.), 136 NLRB at 1502. *See also* Litton Financial Printing Div. v. NLRB, 501 U.S. at 199-200.

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.[50] As the Board observed in Indiana & Michigan Electric Co.,[51] 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.[52] 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."[53] 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.[54]

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[50] Indiana & Michigan Electric 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").

[51] 284 NLRB at 57.

[52] The Hilton-Davis Chemical Company, 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).

[53] Indiana & Michigan Electric Co., 284 NLRB at 58.

[54] Litton Financial 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,[55] 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.[56]

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.[57] 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.[58] 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."[59] 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.[60]

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[55] 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 Financial Printing Div. v. NLRB, 501 U.S. at 199.

[56] Gateway Co. v. United Mine Workers, 414 U.S. at 382.

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

[58] Provena St. Joseph Medical Center, 350 NLRB 808, 811 (2007).

[59] Id.

[60] Ironton Publications, 321 NLRB at 1048.

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 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.[61] 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

[61] Honeywell International, Inc. v. NLRB, 253 F.3d 125, 131-33 (D.C. Cir. 2001) (general durational clause, without more, does not defeat unilateral change doctrine).

subject following contract expiration.[62] If a union and employer want to negotiate a contract that provides for checkoff to cease after contract expiration, the Board's post-Bethlehem Steel precedent provides ample guidance.[63] The Board should therefore confirm that its current contract-waiver standards apply to checkoff.

The agency shop provision in the expired contract between the Respondent and the Local Union in this case states that bargaining unit members are obligated to tender dues to the Local Union from the effective date " . . . until the termination of this contract."[64] As noted above in footnote 13, the Administrative Law Judge stated that in this case, there is arguably no specific contract language limiting checkoff to the period when the contract is in effect. Thus, the language of the Bethlehem Steel checkoff provision, the agency shop provision in the terminated contract certainly does not evince a clear and unmistakable waiver under Cauthorne Trucking, 256 NLRB 721 (1981). Of course, the Board will consider evidence in addition to contract language, if available, in determining whether a clear and unmistakable waiver has occurred.[65] 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

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[62] *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 Construction Co., 286 NLRB 342, 366 (1987) (language requiring that employer contributions to pension fund be "in accordance with" a pension 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").

[63] *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).

[64] Ex. F, Article IV.

[65] *See, e.g.*, Provena St. Joseph Medical Center, 350 NLRB at 815.

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 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 fifty years, the Board has never provided a principled rationale for doing so. Thus, Counsel for the Acting General Counsel respectfully argues that the precedent of Bethlehem Steel should be overturned, to the extent it holds that dues checkoff arrangements do not survive contract expiration.

V. CONCLUSION AND REQUESTED REMEDY

Counsel for the Acting General Counsel respectfully seeks the standard remedy for an unlawful failure to checkoff dues and requests that the Respondent be ordered to reimburse the Local 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.[66] Further, Counsel for the Acting General Counsel respectfully requests that the Respondent be ordered to pay these losses out of its own funds.

Counsel for the Acting General Counsel recognizes there is ambiguity in the law regarding who, ultimately, has responsibility for paying the lost dues. Thus, for example, the

[66] *See, e.g.* YWCA of Western Massachusetts, 349 NLRB 762, 764-65 (2007); Plymouth Court, 341 NLRB 363, 363 (2004); Sommerville Construction Co., 327 NLRB 514 (1999).

Board in Ogle Protection Service, Inc.[67] allowed the employer to deduct the back dues it owed to the union from back pay the employer owed to individual employees. However, as the standard remedy in a unilateral change case is aimed at restoring the pre-change status quo, and given that the Local Union has gone without dues as a result of the Respondent's unlawful actions, it would be inequitable at this stage to allow the Respondent to avoid its liability by deducting the back dues from employees' pay.

Although extant Board law permitted Respondent to unilaterally cease checkoff following contract expiration, nothing *required* it to do so. Considering also that the question of whether dues checkoff requirements survive contract expiration has been an issue in and the subject of litigation for nearly 20 years,[68] Respondent bore the risk that its decision to unilaterally cease dues checkoff would be found unlawful.

In this case, Respondent should be found solely responsible for reimbursing the Local Union. Recoupment from employees would undermine the policies of the Act. It would adversely affect the unit employees, who have done nothing wrong and who have fulfilled their end of a contract with Respondent (that the latter would transmit their tender of dues to the Local Union) at the time they executed checkoff authorizations, by further reducing their future paychecks.[69] Employees might blame the Local Union for the effective pay cut, further undermining the Local Union's representational status. Thus, rather than effectuating the policies of the Act, recoupment would exacerbate the harmful effects of the violation.[70]

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[67] 183 NLRB 682 (1970).

[68] See, e.g., Hacienda Resort Hotel & Casino, 331 NLRB 665 (2000), vacated and remanded 309 F.3d 578 (9th Cir. 2002), on remand to 351 NLRB 504 (2007), vacated and remanded 540 F.2d 1072 (9th Cir. 2008), on remand to 355 NLRB No. 154 (2010), vacated 657 F.3d 865 (9th Cir 2011).

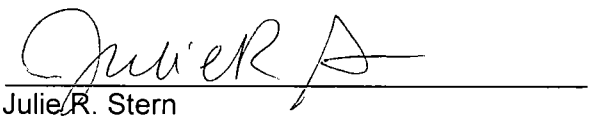
[69] West Coast Cintas, 291 NLRB 152, 156, n.6. Moreover, we note that cases permitting employers to offset back dues owed to a union from *backpay* owed to individual employees are distinguishable from the instant case, where there is no backpay remedy from which to offset dues. Compare Ogle Protection Service, Inc., 183 NLRB at 683 (permitting offset against backpay); Dura-Vent Corp., 257 NLRB 430, 433 (1981) (same).

[70] See NLRB v. Hardesty Co., 308 F.3d at 865 (unilateral changes undermine unions by signaling to employees that their union is "ineffectual, impotent, and unable to effectively represent them").

Finally, a remedy that expressly leaves the issue of recoupment to bargaining between the parties would not be appropriate, because resolving an unfair labor practice is not a mandatory subject of bargaining.[71]

Dated at Pittsburgh, Pennsylvania, this 22nd day of February, 2012.

Respectfully submitted,



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[71] See Magic Chef, 288 NLRB 2, 10 (1988) (withdrawal of pending unfair labor practice charges and settlement of proceedings pending before the Board are nonmandatory subjects of bargaining).