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

December 12, 2012

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS HAYES, GRIFFIN,  
AND BLOCK

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

Although, as a matter of administrative non-acquiescence, we are not bound by the Ninth Circuit's decision in *Local Joint Executive Board of Las Vegas* except as the law of the case,<sup>2</sup> we cannot ignore the concerns raised by the Ninth Circuit and by some Board Members in the underlying decisions in that case. See *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000) (Members Fox and Liebman, dissenting), vacated 309 F.3d 578 (9th Cir. 2002); *Hacienda Resort Hotel & Casino*, 351 NLRB 504 (2007) (Members Liebman and Walsh, dissenting), vacated 540 F.3d 1072 (9th Cir.

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

<sup>2</sup> See, e.g., *Provena St. Joseph Medical Center*, 350 NLRB 808, 814 fn. 29 (2007).

2008); *Hacienda Resort Hotel & Casino*, supra, 355 NLRB 742 (Chairman Liebman and Member Pearce, concurring). After careful consideration of those opinions, contrary opinions (including that of our dissenting colleague today), and the positions of the parties in this case, we find compelling statutory and policy reasons to abandon the *Bethlehem Steel* rule. We accordingly hold that, like most other terms and conditions of employment, an employer's obligation to check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement. However, because employers, including the Respondent, have long relied on *Bethlehem Steel* in their dealings with unions, we find that it would be unjust to apply our new holding in pending cases. We shall therefore dismiss the complaint.<sup>3</sup>

I.

The Respondent and the Charging Party (Union) have been parties to multiple collective-bargaining agreements, the most recent of which was effective from June 1, 2006, through June 1, 2011. The 2006–2011 contract contained a union-security agreement, which required employees to become and remain members of the union as a condition of employment.<sup>4</sup> The contract also in-

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

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

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

<sup>4</sup> Art.I of the contract pertinently states:

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

cluded a provision under which the Respondent, pursuant to signed employee authorizations, agreed to deduct union dues from employees' wages and remit them to the Union (commonly referred to as "dues checkoff").<sup>5</sup> In addition, the contract included a form whereby employees could authorize dues checkoff.<sup>6</sup>

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

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act when, following contract expiration, it ceased honoring the dues-checkoff arrangement without first providing the Union notice and an opportunity to bargain over that decision. Applying *Bethlehem Steel*, the judge found that the Respondent was free to unilaterally cease honoring the dues-checkoff arrangement when the contract expired. In their excep-

tions, the Acting General Counsel and the Union urge the Board to abandon the *Bethlehem Steel* rule and find that an employer's obligation to check off union dues survives contract expiration. The Respondent urges the Board to continue to adhere to *Bethlehem Steel* and its progeny.

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

## II.

The declared policy of the Act, as stated in Section 1, is to "encourage[e] the practice and procedure of collective bargaining" and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Because it is critically important that collective bargaining be meaningful, it has long been established that an employer violates Section 8(a)(5) when it unilaterally changes represented employees' wages, hours, and other terms and conditions of employment without providing their bargaining representative prior notice and a meaningful opportunity to bargain about the changes. *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962). Under this rule, an employer's obligation to refrain from unilaterally changing these mandatory subjects of bargaining applies both where a union is newly certified and the parties have yet to reach an initial agreement, as in *Katz*, and where the parties' existing agreement has expired and negotiations have yet to result in a subsequent agreement, as in this case. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). In the latter circumstances, an employer must continue in effect contractually established terms and conditions of employment that are mandatory subjects of bargaining, until the parties either negotiate a new agreement or bargain to a lawful impasse. *Id.* at 198–199. The Board recently explained the importance of this rule:

[T]he status quo [upon contract expiration] must be viewed as a collective whole. In the give-and-take of bargaining, a union presumably will make concessions in certain terms and conditions to achieve improve-

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

<sup>5</sup> Art. II of the contract explains:

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

<sup>6</sup> The dues-checkoff authorization form states:

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

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ments in others[.] Preserving the status quo facilitates bargaining by ensuring that the tradeoffs made by the parties in earlier bargaining remain in place. Just as the employer continues to enjoy prior union concessions after the contract expires, as part of the “status quo,” so too the union continues to enjoy its bargained-for improvements, unless . . . the union has clearly and unmistakably agreed to waive them.

*Finley Hospital*, 359 NLRB No. 9, slip op. at 2–3 (2012) (footnote omitted).

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

It is certainly true that a select group of contractually established terms and conditions of employment—arbitration provisions, no-strike clauses, and management-rights clauses—do *not* survive contract expiration, even though they are mandatory subjects of bargaining. In agreeing to each of these arrangements, however, parties have waived rights that they otherwise would enjoy in the interest of concluding an agreement, and such waivers are presumed not to survive the contract. For example, in *Hilton-Davis Chemical Co.*, the Board held that parties have no postexpiration duty to honor a contractual agreement to arbitrate, reasoning that such an agreement “is a voluntary surrender of the right of final decision which Congress has reserved to the[ ] parties” because arbitration is, “at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize.” 185 NLRB 241, 242 (1970). As the Board later explained, “because an agreement to arbitrate is a product of the parties’ mutual consent to relinquish economic weapons, such as strikes or lockouts, otherwise available under the Act to resolve disputes . . . the duty to arbitrate

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

. . . cannot be compared to the terms and conditions of employment routinely perpetuated by the constraints of *Katz*.” *Indiana & Michigan Electric Co.*, 284 NLRB 53, 58 (1987).<sup>8</sup> For similar reasons, a contractual no-strike clause normally does not act as a clear and unmistakable waiver of the union’s right to strike after the contract expires. *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986) (citations omitted). Accordingly, “in recognition of the statutory right to strike, no-strike clauses are [also] excluded from the unilateral change doctrine.” *Litton Financial Printing*, *supra*, 501 U.S. at 199. The Board has also held that a management-rights clause normally does not survive contract expiration, because “the essence of [a] management-rights clause is the union’s waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls.” *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), *enfd.* in relevant part 317 F.3d 316 (D.C. Cir. 2003).<sup>9</sup>

The rationale behind these narrowly drawn exceptions to *Katz* does not apply to dues checkoff. Unlike no-strike, arbitration, and management-rights clauses, a dues-checkoff arrangement does not involve the contractual surrender of any statutory or nonstatutory right.<sup>10</sup> Rather, it is simply a matter of administrative convenience to a union and employees whereby an employer agrees that it will establish a system where employees may, if they choose, pay their union dues through automatic payroll deduction.<sup>11</sup> Payments via a dues-checkoff

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

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

<sup>10</sup> The dissent argues, incorrectly, that “dues checkoff limits the statutory right to refrain from supporting any labor organization.” To the contrary, a dues-checkoff provision limits no one’s rights, because checkoff is purely voluntary.

<sup>11</sup> Reviewing courts have recognized that dues-checkoff arrangements serve a unique role as a tool for administrative convenience. See *NLRB v. Atlanta Printing Specialties & Paper Products Union*, 523 F.2d 783, 786 (5th Cir. 1975) (union-security agreements are “governed by a section of the Act totally removed from the section governing dues checkoff, and which have a totally different purpose . . . dues checkoff . . . far from being a union security provision, seems designed as a provision for administrative convenience in the collection of union dues.”); *Food & Commercial Workers Local 1 v. NLRB*, 975 F.2d 40, 44 (2d Cir. 1992); *Anheuser-Busch, Inc. v. Teamsters Local 822*, 584 F.2d 41, 43 (4th Cir. 1978); *Associated Builders & Contractors v. Car-*

arrangement are thus no different from other voluntary checkoff agreements, such as employee savings accounts and charitable contributions, which the Board has recognized also create “administrative convenience” and— notably—survive the contracts that establish them. *Quality House of Graphics*, 336 NLRB 497, 497 fn. 3 (2001).<sup>12</sup> In light of the Board’s treatment of these similar checkoff procedures, it is anomalous to hold that they survive contract expiration, but that dues-checkoff arrangements, which directly assist employees in their efforts to support their designated bargaining representatives financially, do not.

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

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

*penters Vacation & Holiday Trust Fund*, 700 F.2d 1269, 1277 (9th Cir. 1983), cert. denied 464 U.S. 825 (1983).

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

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

<sup>14</sup> This is the only provision in the Act that regulates dues checkoff.

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

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

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

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

<sup>17</sup> Further support for our interpretation of Sec. 302(c)(4) is found in its legislative history. Sec. 302(c)(4) was enacted in 1947 as part of the Taft-Hartley amendments to the Act. This section of the Taft-Hartley amendments was added as a floor amendment to the Senate bill. Senator Taft, Chairman of the Senate Labor Committee, spoke in support of this amendment and explained its purpose as it related to the then-prevailing industry practice concerning dues checkoff. Clearly, Senator

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

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

Section 302(c)(4) could be read as making dues-checkoff arrangements dependent on the existence of a collective-bargaining agreement, as the Respondent argues, parity of reasoning would require a finding that dues-checkoff arrangements survive the expiration of such an agreement.

## III.

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

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Taft was of the view that Sec. 302(c)(4) permitted dues checkoff to continue indefinitely until revoked by an individual employee:

If [an employee] once signs such an assignment [authorizing dues check-off] under the collective-bargaining agreement, *it may continue indefinitely until revoked*, and it may be *irrevocable* during the life of the particular contract, or for a period of 12 months. That, I think, is substantially in accord with nine-tenths of all check-off agreements, and simply prohibits a check-off made without any consent whatever by the employees.<sup>93</sup> Cong.Rec. 4876 (1947), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1311 (1948) (emphasis added).

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

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

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

ion-security agreement only “[s]o long as such a contract is in force.” *Id.* Thus, once a contract expires so, too, does a union-security agreement established in that contract. As the Board explained, when an employer, following contract expiration, refuses to honor a union-security agreement established in that contract, the employer acts “in accordance with the mandate of the Act,” and thus does not violate Section 8(a)(5). *Id.* This finding is not in dispute today.

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

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

Second, the Board found that “[s]imilar considerations”—unspecified—“prevail with respect to [checkoff].” The Board apparently reasoned that because the checkoff provisions in the contract “implemented” the union-security provisions, the proviso to Section 8(a)(3) dictated that dues checkoff, as well as union security, expired upon contract termination. If so, the Board’s finding is a non sequitur. Although the contracts in *Beth-*

*lehem Steel* contained both union-security and dues-checkoff provisions, that is by no means true of all or even nearly all collective-bargaining agreements. Parties have the option of negotiating either without the other: they may agree to union security, but not to dues checkoff, and vice versa.

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

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

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

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

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

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

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

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

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

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

<sup>27</sup> As stated above, the *Bethlehem Steel* Board seemingly based its decision in part on the language of the contractual checkoff clause in that case, i.e., that checkoff would continue "so long as this Agreement shall remain in effect[.]" If so, that reasoning is inconsistent with the long-established principle that any waiver of a statutory right must be "clear and unmistakable," *Metropolitan Edison Co. v. NLRB*, 460 U.S.

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

## IV.

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

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

693, 708 (1983), and language such as appeared in *Bethlehem Steel's* contracts has repeatedly been held *not* to constitute a waiver of the union's statutory right to bargain over changes in terms and conditions of employment after contract expiration. See, e.g., *Finley Hospital*, supra, 359 NLRB No. 9, slip op. at 1-4, and cases cited.

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

The dissent contends, however, that the right to revoke is not enough, and that employers must be allowed to cease honoring the contractual dues-checkoff provision upon contract expiration in order to effectively protect employees' right not to support unions. In this regard, the dissent relies entirely on speculation and on the implicit assumption that employees are not capable of understanding their right to revoke. As we have shown, the language and legislative history of Section 302(c)(4) indicate that Congress had more confidence in employees than that, and so do we. In any event, as the Supreme Court put it in another context, "[t]he Board is . . . entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union. . . . There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996).

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

Finally, consistent with his position in *Hacienda III*, our dissenting colleague claims that, like arbitration and no-strike clauses, dues checkoff arrangements are "uniquely of a contractual nature" and "cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound." By contrast, in our colleague's view, most other terms and conditions of employment "exist from the commencement of a bargaining relationship," and "[t]he obligation to maintain them does not

arise with or depend on the existence of a contract." In their concurrence in *Hacienda III*, however, then-Chairman Liebman and then-Member Pearce pointed out, correctly, that "the economic terms of a collective-bargaining agreement, such as wage rates, are no less contractual requirements than is a dues-checkoff obligation. The agreement is the only source of the employer's obligation to provide those particular wages and benefits." *Id.* at 743.

## V.

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

## VI.

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

<sup>30</sup> See *Goya Foods of Florida*, 356 NLRB No. 184, slip op. at 3 (2011) (explaining decision to overrule precedent).

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

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



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whether retroactive application would result in “manifest injustice,” the Board considers “the 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.” *Id.* at 673.

We find that retroactive application of today’s holding would work a manifest injustice. Mistaken or not, *Bethlehem Steel* has been the law for 50 years. Employers, like the Respondent, have relied upon it when considering whether to cease honoring dues-checkoff arrangements following contract expiration.<sup>32</sup> Although the validity of *Bethlehem Steel* had been called into question on several recent occasions, the Respondent and other similarly situated employers did not have adequate warning that the Board was about to change the law at the time of the events in any currently pending cases. Moreover, today’s ruling represents a change in longstanding substantive Board law governing parties’ conduct, rather than a mere change to a remedial matter. See *SNE Enterprises*, supra, 344 NLRB at 673; cf. *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 5 (2010). We therefore shall decide all pending cases involving unilateral cessation of contractually established dues-checkoff arrangements, following contract expiration, under *Bethlehem Steel*.

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

## ORDER

The complaint is dismissed.

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

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

Dated, Washington, D.C. December 12, 2012

\_\_\_\_\_  
Mark Gaston Pearce, Chairman

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Richard F. Griffin, Jr., Member

\_\_\_\_\_  
Sharon Block Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, concurring and dissenting.

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

In *Bethlehem Steel*, as here, expired collective-bargaining agreements contained both union security and dues checkoff clauses. The Board held that the union security clause became “inoperative” upon contract expiration as a matter of law, such that it was not an unfair labor practice for the employer to cease applying it.<sup>3</sup> “Similar considerations prevail with respect to the Respondent’s refusal to continue to checkoff dues after the end of the contracts,” the Board ruled. “The Union’s right to such checkoffs in its favor, like its right to the imposition of union security, was created by the con-

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

<sup>2</sup> Because I would adhere to *Bethlehem Steel*, and because the Respondent’s conduct was undisputedly lawful under that precedent, I concur in the majority’s conclusion that the complaint should be dismissed.

<sup>3</sup> 136 NLRB at 1502. The majority says that this holding is not in dispute “today.” I do not believe it could validly be called into question at any time.

tracts and became a contractual right which continued to exist so long as the contracts remained in force.” Id. Both the District of Columbia and Seventh Circuits have endorsed this view.<sup>4</sup> The Ninth Circuit has stated that the dues checkoff obligation survives contract expiration in right-to-work states, “where dues checkoff does not exist to implement union security.” But that court has also stated (without deciding the issue) that it “can see why the Board would treat dues-checkoff in the same manner as union security when both are present.”<sup>5</sup>

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

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

so apart from the existence of the union-security provision and the necessity of paying union dues, or to infer that these same employees would, as a whole, wish to continue their checkoff authorizations even after the union security provision was inoperative.<sup>6</sup>

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

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

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

<sup>4</sup> See *Office & Professional Employees Local 95 v. Wood County Telephone Co.*, 408 F.3d 314 (7th Cir. 2005); *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1030 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998); *U. S. Can Co. v. NLRB*, 984 F.2d 864, 869-70 (7th Cir. 1993); *Microimage Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245, 254-255 (D.C. Cir. 1991); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986). The Supreme Court has likewise acknowledged the special status of dues-checkoff provisions as an exception to the rule regarding unilateral changes established in *NLRB v. Katz*, 369 U.S. 736 (1962). See *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991).

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

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

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

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

<sup>8</sup> *Lockheed*, supra, 302 NLRB at 327.

<sup>9</sup> *Fry’s Food Stores*, 358 NLRB No. 66, slip op. at 3 (2012).

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

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

The majority acknowledges that the *Bethlehem Steel* rule concerning dues checkoff is not the sole exception to the *Katz* rule, and that other contractually established terms concerning mandatory subjects of bargaining also lapse at contract expiration. The majority argues that those exceptions all share a common feature that dues checkoff lacks. Their argument fails to persuade, however, because it ignores the fact that some of the exceptions they would group together rest on fundamentally different rationales. Management-rights provisions are excepted from the *Katz* rule because of the Act’s *extent*. The Act creates and protects the right to bargain collectively. A management-rights provision represents a waiver of that statutory right, and the Board will not infer an intent to continue that waiver post-contract expiration absent clear and unmistakable evidence to the contrary.<sup>12</sup>

<sup>10</sup> *Atlanta Printing Specialties*, 215 NLRB 237 (1974).

<sup>11</sup> The majority terms these concerns “speculation,” but they are well grounded in the Board’s long-standing experience in the administration of the Act. See, e.g., *Penn Cork & Closures, Inc.*, *supra*.

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

Arbitration provisions, by contrast, are excepted from *Katz* because of the Act’s *limits*. The duty to bargain under Section 8(d) is limited to a duty to meet and confer in good faith concerning mandatory subjects of bargaining; it “does not compel either party to agree to a proposal or require the making of a concession.” Both parties retain the right to impose their will through economic force. Contractual arbitration provisions represent the parties’ mutual relinquishment of that right. When the contract expires, that extra-statutory right is resumed.<sup>13</sup>

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

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

<sup>13</sup> See, e.g., *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970).

<sup>14</sup> *Indiana & Michigan Electric Co.*, 284 NLRB 53, 58 (1987) (reaffirming *Bethlehem Steel*).

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

The majority also contends that their decision to overrule *Bethlehem Steel* finds support in the text of Section 302(c)(4). I disagree. My colleagues are quite correct that Section 302(c)(4) allows employers to deduct union dues from employees' pay and forward it to the union if the employee has executed a "written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner." This provision plainly limits the postexpiration durability of the written *assignment*. Even if it suggests that such assignments, while revocable, may continue beyond the life of the collective-bargaining agreement without violating Section 302, it does not mandate that the dues-checkoff *clause* in the expired collective-bargaining agreement likewise continue.<sup>16</sup> Moreover, to the extent the majority argues that Section 302(c)(4) evidences congressional intent to continue dues-checkoff postcontract expiration, *Bethlehem Steel* has been the law for 50 years, and Congress has never legislatively overruled it.

Citing *Finley Hospital*,<sup>17</sup> the majority posits that compulsory continuation of dues checkoff following contract expiration is necessary to protect the bargaining process. An employer's status quo obligation "must be viewed as a collective whole" that includes dues checkoff (the reasoning goes) because the employer may have agreed to it in return for a union concession on some other term that continues as part of the status quo. But this argument ignores the fact that for 50 years, it has been settled law that dues checkoff, if agreed to, will not survive the contract. Both sides know the rules. If a union deems dues checkoff sufficiently important that it is willing to secure it through a concession on a term subject to the *Katz* rule,

it understands the deal it is striking—just as an employer understands the deal it is striking if it makes a concession on a term subject to *Katz* in exchange for desired language in a management-rights provision. In both situations, both sides know that they are conceding on a term that will continue postcontract in exchange for one that will end with the contract. The bargaining process is better protected by preserving the settled rules with respect to both management rights *and* dues checkoff. It hardly advances collective bargaining to require that some portions of negotiated agreements—i.e., those favorable to the union—survive contract expiration, while others—those favorable to the employer—do not.<sup>18</sup>

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

On the other hand, my colleagues know well that an employer's ability to cease dues checkoff upon contract expiration has long been recognized as a legitimate economic weapon in bargaining for a successor agreement. The ability of parties to wield such weapons is an integral part of the system of collective bargaining that the Wagner and Taft-Hartley Acts envisioned for the peaceful resolution of industrial disputes. To strip employers of that opportunity would significantly alter the playing field that labor and management have come to know and rely on. Indeed, even in times of union boycott and other economic actions in opposition to an employer's legitimate bargaining position, the employer will be forced to act as the collection agent for dues to finance this opposition. This is the unspoken object of today's decision, and it contravenes the well-established doctrine that the Board may not function "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."<sup>20</sup>

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

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

<sup>17</sup> 359 NLRB No. 9 (2012). I relevantly dissented in that case.

<sup>18</sup> See, e.g., *Omaha World Herald*, 357 NLRB No. 156 (2011) (employer not privileged to make unilateral changes in 401(k) plan that applies equally to unit and nonunit employees after collective-bargaining agreement expired despite "reservation of rights" clause in plan documents authorizing such changes). I relevantly dissented in that case.

<sup>19</sup> See, e.g., *Erie Brush*, 357 NLRB No. 46 (2011), enf. denied 700 F.3d 17 (D.C. Cir. 2012). I relevantly dissented in that case.

<sup>20</sup> *NLRB v. Insurance Agents*, 361 U.S. 477, 497 (1970). My colleagues say that one who deploys economic weaponry "must at the

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In sum, dues-checkoff clauses, like arbitration clauses, are “sui generis” and do not fit neatly into the *Katz* scheme regarding employers’ status quo obligations. On its best days, the Board has recognized in other settings that the complex situations that arise under the Act cannot always be forced into neat categories, and has responded flexibly in an effort to implement to the fullest

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same time be engaged in lawful bargaining.” I agree—and until today, postcontract cessation of dues checkoff was long accepted by the Board, with the approval of reviewing courts, as fully consistent with lawful bargaining.

possible extent the Federal labor policy Congress has established.<sup>21</sup> For the past 50 years, the Board has done so in the area of dues checkoff as well. My colleagues point to no evidence that this approach has impeded collective bargaining or the peaceful resolution of labor disputes, but today they abandon it all the same. For my part, I respectfully dissent.

Dated, Washington, D.C. December 12, 2012

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Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD

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<sup>21</sup> See, e.g., *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd.* 843 F.2d 770 (3d Cir. 1988), *cert. denied* 488 U.S. 889 (1988) (union recognition extended under Sec. 8(f) confers limited Sec. 9(a) status on union for purpose of enforcing contract during its term); *Servicenet, Inc.*, 340 NLRB 1245 (2003) (duration clause normally mandatory subject, but clause of indefinite duration was exception because it required parties to forgo right to take economic action in support of bargaining positions for successor agreement).