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**Lincoln Lutheran of Racine and Service Employees International Union Healthcare Wisconsin, SEIU-HCWI. Case 30–CA–111099**

August 27, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA,  
HIROZAWA, JOHNSON, AND MCFERRAN

The issue in this case is whether the Respondent unlawfully ceased checking off union dues after its contract with the Charging Party Union expired.<sup>1</sup> The judge dismissed the complaint, citing *Bethlehem Steel*, 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Shipbuilding v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964), which held that an employer's obligation to check off union dues ends when its collective-bargaining agreement with the union expires. The judge did not rely on *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012), which overruled *Bethlehem Steel* and its progeny, and held that an employer's obligation to check off union dues survives contract expiration. As the judge noted, at the time of the Decision and Order in *WKYC-TV*, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June, 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid.

In light of the Supreme Court's decision in *NLRB v. Noel Canning*, we reexamine in this case whether an employer's obligation to check off union dues from employees' wages terminates upon expiration of a collective-bargaining agreement. Having considered the issue de novo, we hold today 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 we find that it would be unjust to apply our new holding in this case or in other

<sup>1</sup> On August 11, 2014, Administrative Law Judge Paul Bogas issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed answering briefs. The National Right to Work Legal Defense Foundation, Inc. (NRWLDf) filed a brief amicus curiae. The Charging Party filed reply briefs.

The National Labor Relations 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.

pending cases, we shall apply our holding only prospectively.

Background

Since at least 2007, the Respondent has collectively bargained with Service Employees International Union Healthcare Wisconsin, SEIU-HCWI. The Union and the Respondent have entered into successive collective-bargaining agreements, the most recent of which was effective by its terms from June 1, 2011, to December 31, 2012. The parties agreed to extend the terms of that agreement to February 19, 2013. The agreement included a dues-checkoff provision in which the Respondent agreed to deduct union initiation fees and membership dues from the paychecks of participating unit employees and to transmit those funds to the Union.<sup>2</sup>

On December 17, 2012, the Respondent and the Union began negotiations for a successor to the expiring contract. On February 12, 2013, the Respondent informed the Union that it intended to terminate the dues-checkoff provision effective February 19, the date the contract was to expire. However, at the next bargaining session on February 18, the Respondent stated that dues-checkoff and union-security provisions would expire after the next bargaining session. The Respondent discontinued dues checkoff on March 19, 2013. The Respondent resumed dues checkoff on November 21, 2013.

<sup>2</sup> The provision states as follows:

(a) Upon receipt from a team member, Worksite Leader and/or Union Representative of a lawfully executed written authorization, Lincoln Lutheran agrees, until such authorization is revoked in accordance with its terms, to deduct the initiation fees and regular monthly Union membership dues of such team members from the team member's first two paychecks of each month and to promptly remit such deductions to the Union, the list outlining dues payments and initiation fees will be provided to the Union by electronic mail. The Union will notify Lincoln Lutheran, in writing, of the exact amount of such regular monthly membership dues to be deducted. Team members shall be provided Union authorization forms at time of hire along with other appropriate forms of employment. The authorization provided for by this Section shall conform to all applicable Federal and State laws.

The Union agrees to indemnify and hold Lincoln Lutheran harmless against any and all claims, suits, orders, or judgments brought or issued against Lincoln Lutheran as a result of any action taken or not taken by Lincoln Lutheran pursuant to any written communication from the Union under the provisions of this article.

(b) The Employer agrees to deduct and transmit to SEIU COPE, \$ \_\_\_\_\_ per pay period, from the wages of those team members who voluntarily authorize such contributions on the forms provided for that purpose by SEIU HEALTHCARE WISCONSIN. These transmittals shall occur for each payroll period. A list of names shall be sent via electronic mail/media of those team members for whom such deductions have been made. The list will include the amount deducted for each team member.

### Discussion

In holding that an employer has an obligation to continue dues checkoff after the expiration of a collective-bargaining agreement establishing that arrangement, we overrule Board law set forth in *Bethlehem Steel* and its progeny, which held that the employer's obligation ceases when the contract expires. Although this rule is longstanding, the Board had never provided a coherent explanation for it, as the Ninth Circuit noted in refusing to enforce the Board's decision in *Hacienda Resort Hotel & Casino*, 355 NLRB 742 (2010), a case in which the Board deadlocked on whether to overrule *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, applying its own analysis, the court found the *Bethlehem Steel* rule unsupportable in the case before it. 657 F.3d at 867.

After careful consideration, we find sound reasons to overrule *Bethlehem Steel* and adopt the rule we articulate today. Although our dissenting colleagues suggest that it is improper for the Board, as opposed to Congress, to change the *Bethlehem Steel* rule regarding dues checkoff, the Board "is free to change its mind on matters of law that are within its competence to determine, provided it gives a reasoned analysis in support of the change." *Auto Workers Local 1384 v. NLRB*, 756 F.2d 482, 492 (7th Cir. 1985). Thus, the Supreme Court has made clear that "a Board rule is entitled to deference even if it represents a departure from the Board's prior policy," as long as it is "rational and consistent with the Act." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990). Accord: *NLRB v. Ironworkers Local 103*, 434 U.S. 335, 350–351 (1978). For the reasons articulated below, we find that requiring employers to honor dues-checkoff arrangements after contract expiration serves the Act's goal of promoting collective bargaining, consistent with longstanding Board precedent proscribing postcontract unilateral changes in terms and conditions of employment.

#### I.

The declared policy of the Act, as stated in Section 1, is to "encourag[e] the practice and procedure of collective bargaining" and 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." It has long been established that an employer violates Section 8(a)(5) when it unilaterally changes represented employ-

ees' 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). As the Supreme Court explained in *Katz*, such unilateral action "amount[s] to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Id.* at 747.

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.

An employer's decision to unilaterally cease honoring a dues-checkoff arrangement established in an expired agreement obstructs collective bargaining just as other, prohibited unilateral changes do. Under settled Board law, widely accepted by reviewing courts,<sup>3</sup> dues checkoff is a matter related to wages, hours, and other terms and conditions of employment within the meaning of Section 8(a)(5) and (d) 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).<sup>4</sup> As the Supreme Court explained long ago, an employer's *unilateral* action regarding its employees' terms and conditions of employment, by definition, frustrates the statutory objective of establishing terms and conditions of employment through *collective* bargaining and interferes with employees' Section 7 rights by em-

<sup>3</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 Construction Co.*, 929 F.2d 1346, 1350 (8th Cir. 1991).

<sup>4</sup> Mandatory subjects of bargaining contained in a collective-bargaining agreement that survive contract expiration include a wide range of terms and conditions of employment, e.g., union bulletin boards, hiring halls, work rules, seniority in assignments. *Beverly Health & Rehabilitation Services v. NLRB*, 317 F.3d 316, 322 (D.C. Cir. 2003); *NLRB v. Southwest Security Equipment Corp.*, 736 F.2d 1332, 1334, 1337–1338 (9th Cir. 1984), *cert. denied* 470 U.S. 1087 (1985); *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1439 (9th Cir. 1995); *L & L Wine & Liquor Corp.*, 323 NLRB 848, 852–853 (1997)

phasizing to employees that there is no need for a bargaining agent. *Katz*, supra, 369 U.S. at 744; *May Department Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945).<sup>5</sup>

An employer's unilateral cancellation of dues checkoff when a collective-bargaining agreement expires both undermines the union's status as the employees' collective-bargaining representative and creates administrative hurdles that can undermine employee participation in the collective-bargaining process. Cancellation of dues checkoff eliminates the employees' existing, voluntarily-chosen mechanism for providing financial support to the union. By definition, it creates a new obstacle to employees who wish to maintain their union membership in good standing. This is significant, because employees who fail to take proactive steps to maintain their membership in the face of this new administrative hurdle lose their right to participate in the union's internal affairs, including matters directly related to the negotiations, such as the choice of a bargaining team, setting bargaining goals, and strike-authorization and contract-ratification votes.<sup>6</sup> Such a change also interferes with the union's ability to focus on bargaining, by forcing it to expend time and resources creating and implementing an alternate mechanism for dues collection during a critical bargaining period. Finally, an employer that unilaterally cancels dues checkoff sends a powerful message to employees: namely, that the employer is free to interfere with the financial lifeline between employees and the union they have chosen to represent them.

Because unilateral changes to dues checkoff undermine collective bargaining no less than other unilateral

changes, the status quo rule should apply, unless there is some overriding ground for an exception. As the *Katz* Court observed, an employer's unilateral change "will rarely be justified by any reason of substance." 369 U.S. at 747. We see no such reason here.<sup>7</sup>

It is true that a few 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 terms, however, parties have waived rights that they otherwise would enjoy in the interest of concluding a collective-bargaining agreement, and such waivers are presumed not to survive the contract. See, e.g., *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970) (no postexpiration duty to honor contractual agreement to arbitrate because agreement "is a voluntary surrender of the right of final decision which Congress has reserved to the [ ] parties," characterizing arbitration as "a consensual surrender of the economic power which the parties are

<sup>5</sup> Our dissenting colleagues maintain that dues checkoff is less important to unions than it once was, because "unions now have more options for collecting union dues *without* the employer's assistance than at any other time in history" (emphasis in original). Correct or not, that claim is irrelevant to the legal issue presented here. Dues checkoff is indisputably a term and condition of employment for purposes of the duty to bargain under Sec. 8(a)(5). If our colleagues are correct about the relative administrative convenience of checkoff, then the importance of the issue in bargaining presumably would be in decline—but our colleagues cite no evidence that this is so, and, indeed, they make dire predictions about the effect on collective bargaining of the new rule adopted today.

<sup>6</sup> As the Supreme Court has observed:

[A] union makes many decisions that "affect" its representation of nonmember employees. It may decide to call a strike, ratify a collective-bargaining agreement, or select union officers and bargaining representatives.

....

[T]he [National Labor Relations] Act allows union members to control the shape and direction of their organization, and "[n]on-union employees have no voice in the affairs of the union."

*NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192, 205 (1986) (reversing Board decision requiring that nonmembers be permitted to vote in union's affiliation election).

<sup>7</sup> To the extent that our dissenting colleagues argue that an employer's unilateral cessation of dues checkoff must be treated by the Board as a permissible economic weapon, they run afoul of Supreme Court and Board precedent. The *Katz* Court explained that while the Board is not "empowered . . . to pass judgment on the legitimacy of any particular economic weapon used in support of *genuine* negotiations," the Board "is authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement"—such as a unilateral change in terms and conditions of employment. 369 U.S. at 747 (emphasis added). Simply put, "unilateral action is not a lawful economic weapon." *Daily News of Los Angeles*, 315 NLRB 1236, 1242 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997). "To condone such a proposition," in the words of the District of Columbia Circuit, "would make a mockery of the bargaining process." *Daily News of Los Angeles v. NLRB*, 73 F.3d at 414.

We also reject our colleagues' related assertion that the bargaining process is somehow *facilitated* by permitting employers to unilaterally eliminate dues checkoff when a contract expires. The dissent's argument boils down to "random speculation"—of precisely the type that the dissent disdains—suggesting that giving employers free rein to make unilateral changes in dues checkoff will reduce employers' incentive to lock out workers during difficult negotiations, and/or that denying employers the ability to cease checkoff will make routine bargaining more difficult because employers will feel compelled to bargain for such authority. The dissent offers no empirical evidence to support either of these speculative assertions. Certainly, a lockout is a more consequential tool for employers in difficult negotiations than the elimination of dues checkoff, and it is also possible that some employers may feel that it is in their interest to seek the elimination of dues checkoff. But the need to improve employers' bargaining options in either of these scenarios is not an argument for authorizing a unilateral change that is otherwise inconsistent with the policies of the Act. Cf. *Daily News of Los Angeles*, supra, 315 NLRB at 1242–1243 (rejecting argument that where employer's lockout would have been lawful under Sec. 8(a)(3), unilateral decrease in wages and benefits should be permitted under Sec. 8(a)(5)).

otherwise free to utilize”); *Indiana & Michigan Electric Co.*, 284 NLRB 53, 58 (1987) (“because an agreement to arbitrate is a product of the parties’ mutual consent to relinquish economic weapons, such as strikes or lock-outs, otherwise available under the Act to resolve disputes . . . the duty to arbitrate . . . cannot be compared to the terms and conditions of employment routinely perpetuated by the constraints of *Katz*”)<sup>8</sup>; *Litton Financial Printing*, supra, 501 U.S. at 199 (“in recognition of the statutory right to strike, no-strike clauses are [also] excluded from the unilateral change doctrine”); *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001) (“[T]he 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.”), enfd. in relevant part 317 F.3d 316 (D.C. Cir. 2003).<sup>9</sup>

Unlike no-strike, arbitration, and management-rights clauses, a dues-checkoff provision in a collective-bargaining agreement does not involve the contractual surrender of any statutory or nonstatutory right by a party to the agreement. Rather, as the courts have recognized, such a provision simply reflects the employer’s agreement to establish a system for employees who elect to pay their union dues through automatic payroll deduction, as a matter of administrative convenience to a union and employees.<sup>10</sup> Payments via a dues-checkoff arrangement are similar to 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>11</sup> In light of the Board’s treatment of these similar checkoff procedures, it seems anomalous to hold that they survive contract expiration, but that dues-checkoff arrangements, which directly assist employees in their voluntary efforts to support their designated bargaining representatives financially, do not.<sup>12</sup>

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(c)(4), an exception to the prohibition on employer payments to unions in Section 302(a) of the Act, specifically permits dues checkoff and further states, “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> The plain terms of this provision indicate that Congress contemplated that a dues-checkoff arrangement could continue beyond the life of the collective-bargaining agreement establishing it, as it contains

<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 do not survive contract expiration because the proviso to Sec. 8(a)(3) of the Act limits such provisions to the term of the contracts containing them. *Bethlehem Steel*, supra.

<sup>10</sup> As the Fifth Circuit has explained, union-security agreements are governed by a section of the Act totally removed from the section governing dues checkoff, and . . . have a totally different purpose . . . [D]ues checkoff . . . far from being a union security provision, seems designed as a provision for administrative convenience in the collection of union dues.

*NLRB v. Atlanta Printing Specialties & Paper Products Union*, 523 F.2d 783, 786 (5th Cir. 1975). See *Food & Commercial Workers District Union Local One v. NLRB*, 975 F.2d 40, 44 (2d Cir. 1992); *Anheuser-Busch, Inc. v. Teamsters Local 822*, 584 F.2d 41, 43 (4th Cir. 1978); *Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund*, 700 F.2d 1269, 1277 (9th Cir. 1983), cert. denied 464 U.S. 825 (1983).

<sup>11</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>12</sup> We reject our dissenting colleagues’ suggestion that an employee’s dues-checkoff authorization is a waiver of the Sec. 7 right to refrain from supporting a labor organization and is therefore analogous to cases where the Board has created exceptions to the status quo rule. Properly understood, an employee’s voluntary execution of a dues-checkoff authorization is an *exercise* of Sec. 7 rights, not a waiver of such rights. When an employee authorizes other types of checkoff provided for by a collective-bargaining agreement, he is exercising a right under the agreement—and thus engaging in protected, concerted activity. See generally *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). Exercising that right does not mean *waiving* the corresponding right to refrain from engaging in protected concerted activity, not least because Sec. 302(c)(4) guarantees that an employee may revoke dues-checkoff authorization when the contract expires.

<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 Sec[.] 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.

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> Had Congress intended for dues-checkoff arrangements to automatically expire upon contract expiration, there would have been no need to say that employees can revoke their checkoff authorizations at contract expiration because there would be nothing left thereafter for an employee to revoke.<sup>16</sup> Further, the proviso to Section 302(c)(4) is concerned only with *an individual employee’s right* to withdraw his checkoff authorization; nothing therein 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. Sec. 8(a)(3) of the Act conditions the life of a union-security agreement on 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 Bd.*, 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 court decisions on this issue, some of which are cited by the Respondent on brief. See, e.g., *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869–870 (7th Cir. 1993); *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1030 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998). For the reasons discussed above, we respectfully disagree with those decisions (most of which relied in part on *Bethlehem Steel*). Moreover, neither the Seventh Circuit in *U.S. Can Co.* nor the District of Columbia Circuit in *McClatchy Newspapers* was presented with the issue of whether dues checkoff survives contract expiration. Nor, significantly, was the Supreme Court in *Litton Financial Printing*, supra; 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. Senator Taft, Chairman of the Senate Labor Committee, spoke in support of this amendment and explained its purpose as it related to the then-prevailing industry practice concerning dues checkoff. Clearly, Senator Taft was of the view that Sec. 302(c)(4) permitted dues checkoff to continue indefinitely until revoked by an individual employee:

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

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 exempting 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, parity of reasoning would require a finding that dues-checkoff arrangements can survive the expiration of such an agreement.

and simply prohibits a check-off made without any consent whatever by the employees.

93 Cong.Rec. 4876 (1947), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1311 (1948) (emphasis added).

<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.”).

## II.

As the foregoing discussion makes clear, the 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.” The Board found that because the proviso explicitly conditions the legitimacy of a union-security agreement on the existence of a contract, parties can impose a union-security agreement only “[s]o long as such a contract is in force.” *Id.* Thus, once a contract expires so, too, does a union-security agreement established in that contract. As the Board explained, when an employer, following contract expiration, refuses to honor a union-security 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, compelled by the Act's plain language, is not in dispute today.

The *Bethlehem Steel* Board's treatment of dues checkoff stands on a different footing. The Board found that because of “[s]imilar considerations,” dues-checkoff arrangements, like union security, 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 mandates termination of union-security agreements following contract expiration, so too must a dues-

checkoff arrangement terminate. 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.*<sup>19</sup>

The *Bethlehem Steel* Board's reasoning is flawed in several respects. First, the Board ignored Section 302(c)(4)—the only provision of the Act that addresses dues checkoff—which clearly contemplates that checkoff normally *does* survive the expiration of a collective-bargaining agreement. Second, 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, because the fact that dues checkoff normally is an arrangement created by contract simply does not compel the conclusion that checkoff expires with the contract that created it.<sup>20</sup> Although the contracts in *Bethlehem Steel* contained both union-security and dues-checkoff provisions, that is by no means true of 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.<sup>21</sup>

Third, the *Bethlehem Steel* Board mistakenly ignored that the provisos to Section 8(a)(3) and to Section 302(c)(4)—enacted by the same Congress at the same time—treat union security and dues checkoff quite differently. The language of the 8(a)(3) proviso makes

<sup>19</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 Sec[.] 8(a)(3) which requires a contract for the enforcement of union security, even though Sec[.] 8(a)(3) does not explicitly mention dues checkoff”).

<sup>20</sup> As shown, unlike no-strike, arbitration, and management-rights clauses, a dues-checkoff provision in a collective-bargaining agreement does not involve the contractual surrender of any statutory or nonstatutory right by a party to the agreement.

<sup>21</sup> The independence of union-security agreements from dues-checkoff provisions is illustrated most clearly in “right-to-work” States, which, pursuant to Sec. 14(b), bar union-security agreements. Dues-checkoff arrangements exist in these States, even though union-security clauses are prohibited. Notably, that was the circumstance in *Tampa Sheet Metal Co.*, 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 fallacy of *Bethlehem Steel*'s premise that dues checkoff “implements” a union-security agreement, and exposes the fundamental infirmity of the *Bethlehem Steel* holding.

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 the Section 8(a)(3) proviso does not mention dues checkoff, let alone limit the effectiveness of a dues-checkoff provision to the life of a collective-bargaining agreement. Further, the language and the legislative history of Section 302(c)(4) unambiguously indicate that Congress contemplated that dues checkoff would survive contract expiration.

Fourth, *Bethlehem Steel* failed to acknowledge another crucial dissimilarity between dues checkoff and union security: the fundamental difference between their compulsory and voluntary natures. Under a union-security agreement, employees are compelled to pay union dues or agency fees, or face discharge. 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>22</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. 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>23</sup> As noted above, the unique administrative nature of a dues-checkoff ar-

angement further distinguishes it from a union-security agreement.<sup>24</sup>

Last, developments in the Board's case law since *Bethlehem Steel* 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 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>25</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*.

### III.

The Respondent and amicus NRWLDF nevertheless contend that an employer has no duty to check off union dues in the absence of an existing collective-bargaining agreement. We turn now to the arguments made by the Respondent and/or NRWLDF that have not already been addressed. They do not persuade us.

<sup>22</sup> See also *IBEC Housing Corp.*, 245 NLRB 1282, 1283 (1979) ("[a]n employee has a Sec[.] 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 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>23</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. 693, 708 (1983). 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*, 362 NLRB No. 102, slip op. at 3-4 (2015); *Allied Signal, Inc.*, 330 NLRB 1216 (2000), review denied sub nom. *Honeywell International, Inc. v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001); *General Tire & Rubber Co.*, 274 NLRB 591, 593 (1985), enf'd. 795 F.2d 585 (6th Cir. 1986).

<sup>24</sup> Our dissenting colleagues insist that "dues checkoff is a form of union security" (emphasis in original), but their effort to equate dues checkoff and a union-security clause necessarily fails, for reasons already demonstrated. Dues checkoff is voluntary; union security, compulsory. Dues checkoff can, and does, exist in the absence of a union-security clause—whether because the collective-bargaining agreement never contained such a clause or because the clause necessarily expired with the agreement. Sec. 8(a)(3) governing union-security clauses is totally removed from Sec. 302(c)(4) governing dues checkoff. Employees can never be compelled to authorize dues checkoff. If employees do voluntarily authorize checkoff, they remain free to revoke that authorization when the collective-bargaining agreement expires. See Sec. 302(c)(4) (dues-checkoff authorization "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"). Here, of course, we are dealing precisely with the postcontract expiration period. Requiring the employer to honor dues checkoff for employees who have authorized it during the postcontract period in no way involuntarily compels employees to provide financial support to the union—in obvious contrast to a union-security clause, which requires only the agreement of the union and the employer, not the consent of individual employees. In short, the dissent's contention—that dues checkoff is a form of union security—is simply "flaw[ed]." *NLRB v. Atlanta Printing Specialties* supra, 523 F.2d at 786.

<sup>25</sup> See also *Lowell Corrugated Container Corp.*, 177 NLRB 169, 173 (1969), enf'd. 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).

First, the Respondent argues that dues-checkoff arrangements do not substantially affect employees' terms and conditions of employment. The Respondent characterizes dues checkoff as essentially an administrative convenience for unions alone, arising out of the relationship between an employer and a union, as opposed to that between the employer and its employees. This argument, however, is supported by nothing in the policies of the Act, or its legislative history, or relevant Board or court precedent. The asserted dichotomy between "employer-employee" and "employer-union" arrangements in this context is a false one. Although checkoff clearly benefits unions, it also benefits employees by giving them a simple and reliable means of supporting the unions that represent them, and this is true whether financial support is mandatory (under a union-security arrangement) or not. That employees benefit from checkoff is clear from the fact that many employees participate in the system, even though participation is entirely voluntary and even in the absence of union security.

Second, the Respondent and NRWLDF contend that unlike wages, benefits, working hours, and certain other terms and conditions of employment, which exist in the absence of collective-bargaining agreements, dues checkoff comes into existence only through collective-bargaining agreements, and exists only for the duration of the contract. As shown, however, the fact that dues checkoff normally is an arrangement created by contract<sup>26</sup> simply does not compel the conclusion that checkoff expires with the contract that created it. Moreover, the purported distinction between checkoff and other terms and conditions of employment ignores the fact that virtually all, if not all, of employees' terms and conditions of employment are the result of collective bargaining between their union and employer. "[T]he 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." *Hacienda Resort Hotel & Casino*, 355 NLRB at 743 (concurring opinion of Chairman Liebman and Member Pearce).

Next, NRWLDF asserts that permitting employers not to collect dues absent a contract protects the Act's fundamental principle of voluntary unionism. In NRWLDF's view, forcing employers to continue to implement a dues-checkoff clause when there is no contract

in place is inconsistent with the principles of *employee* free choice that the Act promotes. NRWLDF further contends that employees who signed dues-checkoff authorizations merely to comply with union-security clauses, and not because they support unions, would not want employers to continue to deduct dues after a union-security clause has expired. Finally, NRWLDF argues that employees' right to refrain from supporting unions is not adequately protected by the right to revoke their dues-checkoff authorizations when the contract expires.

We find no merit in any of these arguments. First, there is no reason to suppose that employees who voluntarily support their unions cease to do so simply because a collective-bargaining agreement has expired. As for employees who authorize dues checkoff only to comply with union-security provisions, Section 302(c)(4) explicitly states that they can revoke their authorizations when the union-security clause expires. And we reject the unsupported assumption that employees are not capable of understanding their right to revoke dues-checkoff authorizations. The language and legislative history of Section 302(c)(4), discussed above, indicate that Congress had more confidence in employees than that. 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). In short, there is no reason why employees who wish to support their union financially should be denied the administrative convenience of voluntary dues checkoff, simply because the collective-bargaining agreement has expired.

#### IV.

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.<sup>27</sup> As shown, the Board's holding to that effect in *Bethlehem Steel* 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

<sup>26</sup> This is not always the case, however. See *Tribune Publishing Co. v. NLRB*, supra, 564 F.3d at 1335. Interestingly, although the Respondent here resumed checking off union dues in November 2013, there is no record evidence that it did so pursuant to a successor collective-bargaining agreement.

<sup>27</sup> See *Goya Foods of Florida*, 356 NLRB No. 184, slip op. at 3 (2011) (explaining decision to overrule precedent).



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policy. But we decline to keep following a course that has never been cogently explained—and, in our view, cannot be. 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 a successor collective-bargaining agreement or a valid overall bargaining impasse permits unilateral action by the employer.<sup>28</sup>

V.

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 in unfair labor practice cases is to apply new policies and standards retroactively “to all pending cases in whatever stage,” unless retroactive application would work a “manifest injustice.” *SNE Enterprises*, 344 NLRB 673, 673 (2005). In determining whether retroactive application would result in “manifest injustice,” the Board considers “the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.” *Id.* at 673.

Having considered these principles, we conclude that finding a violation under a retroactive application of this rule would work a manifest injustice. Today’s ruling definitively changes longstanding substantive Board law governing parties’ conduct, rather than merely changing 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). Employers relied upon *Bethlehem Steel* for 50 years when considering whether to cease honoring dues-checkoff arrangements following contract expiration. As the Board has done in other cases involving departures from longstanding precedent, we conclude that this reliance interest warrants prospective application only of today’s decision.<sup>29</sup> We therefore shall decide this case and all other cases where the employer’s unilateral cessation of contractually established dues-checkoff arrangements, following contract expiration, occurred before the date of this decision, un-

<sup>28</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> See *Piedmont Gardens*, 362 NLRB No. 139, slip op. at 6 (2015); *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 729 (2001).

der *Bethlehem Steel*. Accordingly, we agree with the judge that the complaint in this case should be dismissed.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. August 27, 2015

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

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA and MEMBER JOHNSON, dissenting in part.

In 1962, the Supreme Court endorsed the Board’s rule that an employer violates Section 8(a)(5) of the Act by unilaterally changing terms and conditions of employment without first providing the union with notice and an opportunity to bargain, unless the parties have first reached lawful impasse. See *NLRB v. Katz*, 369 U.S. 736 (1962). But the Board has always recognized, as it must, that not all terms and conditions of employment are subject to this rule. Indeed, a month before the Court decided *Katz*, the Board held in *Bethlehem Steel* that a dues-checkoff arrangement was among those exceptions.<sup>1</sup> While binding for the term of the contract that contains it, dues checkoff could lawfully be unilaterally discontinued at contract expiration. For the entire time that the *Katz* rule has been in effect, this principle has been an established part of the collective-bargaining process.

The majority today abandons that longstanding precedent and instead subjects dues checkoff, following contract expiration, to the *Katz* rule requiring postcontract-expiration bargaining over other terms and conditions of employment. As explained below, the *Bethlehem Steel* exception is justified by statutory and policy considerations that warrant its continuation, and the primary con-

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

sequence of this change is to substantially alter the current balance that exists between the interests of employers and unions upon contract expiration. In our view, this type of change should be the province of the Congress, not the Board. Accordingly, we respectfully disagree with our colleagues' decision to overrule *Bethlehem Steel*. We concur in the outcome only because our colleagues refrain from applying their changed standard retroactively to the parties in the instant case.<sup>2</sup>

#### Discussion

The National Labor Relations Act permits, and regulates, union-security arrangements, which obligate employees to provide financial support to their exclusive representative as a condition of employment. From the earliest days of the Act, employers have agreed to provide payroll deduction services, or "dues checkoff," as a method by which employees could satisfy their union-security obligations.<sup>3</sup> Unions and employers found it mutually advantageous to agree to dues checkoff, where union security was 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>4</sup> Indeed, dues checkoff was arguably the only reasonable means by which such payments could be made in the 1930s and 1940s, a time when most households did not have checking accounts.<sup>5</sup> The Board has always recognized that dues-checkoff obligations are closely related to an employee's contractual union-security obligations, when they exist,<sup>6</sup> which makes dues checkoff a form of union security itself.<sup>7</sup>

<sup>2</sup> The majority concludes, correctly, that the change in the law they have wrought should not be applied retroactively, and so they dismiss the complaint. We agree that the complaint should be dismissed, but for very different reasons.

<sup>3</sup> See, e.g., *M. T. Stevens & Sons, Co.*, 68 NLRB 229, 230 (1946); *United States Gypsum Co.*, 94 NLRB 112, 113 (1951), *enfd.* as modified 206 F.2d 410 (5th Cir. 1953), *cert. denied* 347 U.S. 912 (1954).

<sup>4</sup> *Electrical Workers Local 20188 (Lockheed Space Operations)*, 302 NLRB 322, 326 *fn.* 12 (1991).

<sup>5</sup> Only 34 percent of households had checking accounts in 1946. Klebaner, Benjamin J., *American Commercial Banking: A History* (Beard Books, 1990) at 214. In 2013, 88 percent of households had checking accounts, and 80 percent of those accounts had direct deposit or automatic debit transactions. 2013 FDIC Survey of Unbanked and Underbanked Households (October 2014) at 4.

<sup>6</sup> *Penn Cork & Closures, Inc.*, 156 NLRB 411 (1965) (where contract included both union-security and dues-checkoff clauses, "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."), *enfd.* 376 F.2d 52 (2d Cir. 1967), *cert. denied* 389 U.S. 843 (1967).

<sup>7</sup> *Bedford Can Mfg. Co.*, 162 NLRB 1428, 1431 (1967). See also H. Report No. 245 on HR 3020 (80th Cong. 1st Sess.) at 29 (Dues

The Board held in *Bethlehem Steel* that a union-security clause becomes "inoperative" upon contract expiration as a matter of law, such that it is not an unfair labor practice for the employer to cease applying it. 136 NLRB at 1502.<sup>8</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 contracts and became a contractual right which continued to exist so long as the contracts remained in force." *Id.* And because dues checkoff is "an implementation" of union security, checkoff authorizations become revocable regardless of their terms when employees vote to deauthorize union security. *Bedford Can Mfg. Co.*, above; see also *Penn Cork & Closures, Inc.*, above (same). This is true for checkoff authorizations executed before the union-security clause was in place as well as those first executed while the union-security clause was in force. *Bedford Can Mfg. Co.*, above.

Other terms and conditions of employment likewise fail to survive contract expiration. For example, arbitration clauses are not subject to the *Katz* postexpiration bargaining requirement. As the Board recognized in *Indiana & Michigan Electric Co.*, 284 NLRB 53, 58 (1987),

[t]o conclude otherwise flies in the face of the specific admonition of the Court and the clear intent of Congress that submission to arbitration is purely a matter of consent and cannot be mandated by operation of the Act. Rather, we find, 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, that the duty to arbitrate is *sui generis*. It cannot be compared to the terms and conditions of employment routinely perpetuated by the constraints of *Katz*.

No-strike and no-lockout clauses likewise fail to survive contract expiration, "in recognition of the statutory right to strike." *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991). Finally, the Board has also exempted management-rights clauses from *Katz*, on the theory that such clauses waive the union's right to bargain, and "[o]nce the clause expires, the waiver ex-

checkoff "is a form of 'union security' that is in effect at many plants, where it has proved popular with employers, employees, and unions, saving time and trouble for all of them."), I Legislative History of the Labor Management Relations Act, 1947 320 (GPO 1985).

<sup>8</sup> The majority correctly recognizes that this holding is "compelled by the Act's plain language."

pires. . . .” *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), enf. in relevant part 317 F.3d 316 (D.C. Cir. 2003).

Holding that these contractual provisions do not automatically continue under *Katz* is consistent with the Act because it frees the parties to apply economic pressure during negotiations for a new agreement. See *NLRB v. Insurance Agents’ International Union*, 361 U.S. 477, 489 (1960) (“The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.”). Similar considerations apply to dues-checkoff clauses, consistent with the principle that “an employer is not required to finance a strike against itself. . . .” *Texaco, Inc.*, 285 NLRB 241, 245 (1987).<sup>9</sup>

Both the District of Columbia and Seventh Circuits have endorsed *Bethlehem Steel*.<sup>10</sup> The Ninth Circuit has stated that the dues-checkoff obligation survives contract expiration in right-to-work states, where, in the court’s view, “dues checkoff does not exist to implement union security.”<sup>11</sup> However, regarding situations like the instant case, where the collective-bargaining agreement contained dues checkoff and union-security provisions, the Ninth Circuit has stated, “[W]e see why the Board would treat dues-checkoff in the same manner as union security. . . .”<sup>12</sup>

Now, the majority overrules this 50-year-old arrangement and holds that employers must continue dues checkoff after a contract expires, until the parties reach

impasse or an agreement to discontinue dues checkoff. The majority suggests this is necessary to protect the bargaining process, and posits that the “unilateral cancellation” of dues checkoff pursuant to *Bethlehem Steel* interferes with employees’ ability to maintain their union membership and undermines the union by cutting off its “financial lifeline.” Our colleagues further assert that the other exceptions to the *Katz* rule involve the waiver of statutory rights and, finding no such waiver in the case of dues checkoff, conclude that the *Katz* rule must apply. In this regard, our colleagues unreasonably deny that dues checkoff is itself a form of union security. We believe they also unreasonably contend that, if dues checkoff were considered a type of union-security arrangement, then its postexpiration continuation by employers, on a voluntary basis, would be as unlawful. We respectfully disagree with these propositions for several reasons.

First, dues checkoff *is a form* of union security. Union-security clauses insure that the exclusive representative of bargaining unit employees receives a steady source of funds, by subjecting the employees to discharge if they fail to pay. Dues checkoff serves precisely the same function, by creating an automatic deduction from employees’ pay for the benefit of the union. That wage assignment may lawfully be made irrevocable for the periods of time defined in Section 302(c)(4), as is the case with the dues-checkoff authorizations used in this case.<sup>13</sup> During those periods of irrevocability, employees are contractually required to continue their financial support of the union much as if a union-security clause were in place. And dues checkoff provides union-security benefits even when revocable because the deduction continues unless and until employees take affirmative action to cancel it. Congress has plainly stated that dues checkoff is a form of union security for these very rea-

<sup>9</sup> While *Texaco* involved violations of Section 8(a)(3), we believe the principle stated above is applicable to the issue presented in this case as well.

<sup>10</sup> See *Office Employees Local 95 v. Wood County Telephone Co.*, 408 F.3d 314 (7th Cir. 2005); *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1030 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869-870 (7th Cir. 1993); *Microimage Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245, 254-255 (D.C. Cir. 1991); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986).

The Supreme Court has likewise acknowledged the special status of dues-checkoff provisions as an exception to the *Katz* rule. See *Litton Financial Printing Division v. NLRB*, above, 501 U.S. at 199.

<sup>11</sup> *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865, 876 (9th Cir. 2011), denying enf. to *Hacienda Resort Hotel & Casino*, 355 NLRB 742 (2010) (*Hacienda*).

<sup>12</sup> *Id.* at 875. We disagree with any implication in the majority opinion that the Ninth Circuit rejected *Bethlehem Steel* in cases where, as here, a union-security obligation was in force, or found its holding “unsupportable” in that context.

As noted herein, dues checkoff is a form of union security even when the payment of dues is not required as a condition of employment. For this reason, and for the reasons stated in Members Schaumber and Hayes’ joint concurrence in *Hacienda*, we 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>13</sup> Those forms provided:

You are hereby authorized and directed to deduct from my wages an amount equal to the initiation fee and dues as those amounts are established from time to time by SEIU Healthcare Wisconsin, and to remit all such deductions so made to SEIU Healthcare Wisconsin no later than the fifth day of each month immediately following the date of deduction or following the date provided in the collective bargaining agreement for such deduction. I authorize these deductions for and in consideration of the Union’s activities in representing me with respect to collective bargaining and without regard to my present or future membership in SEIU. This authorization and assignment shall be irrevocable for one year from the date of this authorization or the term of the applicable collective bargaining agreement whichever is less, and shall be automatically renewed and irrevocable for successive yearly or applicable contract periods thereafter, whichever is less, unless I revoke by giving written notice to SEIU Healthcare Wisconsin and my employer at least 30 days immediately preceding any periodic renewal date of this authorization and assignment.

sons, and our colleagues present no valid reason for their contrary view.<sup>14</sup>

Second, we believe our colleagues in the majority incorrectly reason that dues checkoff involves no waiver of statutory rights, which therefore makes dues checkoff “similar to other voluntary checkoff agreements, such as employee savings accounts and charitable contributions.” Like union-security agreements, dues-checkoff arrangements limit the Section 7 right of employees to refrain from supporting a labor organization. As such, a wage deduction for the purpose of paying union dues and fees—unlike deductions related to employee savings accounts, charitable contributions, or health insurance, for example—violates the Act absent a valid dues-checkoff authorization as required by the Act. *Industrial Towel & Uniform Service*, 195 NLRB 1121 (1977), enf. denied other grounds 473 F.2d 1258 (6th Cir. 1973). Moreover, coercing employees to sign a checkoff authorization violates the Act. *Rochester Mfg. Co.*, 323 NLRB 260 (1997), affd. sub nom. *Cecil v. NLRB*, 194 F.3d 1311 (6th Cir. 1999), cert. denied 529 U.S. 1066 (2000); *Steelworkers (American Screw Co.)*, 122 NLRB 485 (1958) (union unlawfully required employees to travel to another city to tender dues as only alternative to use of dues checkoff). Accordingly, dues checkoff cannot validly be compared to deductions from employees’ pay for other purposes.

It is important to recognize that the majority’s conclusion that *Katz* exceptions are limited to those provisions that waive “statutory or nonstatutory rights” is an after-the-fact recharacterization of Board precedent. Prior cases have instead focused on the “contractual” nature of no-strike and arbitration clauses, acknowledging that for purposes of the *Katz* rule they are “sui generis” and therefore “cannot be compared to the terms and conditions of employment routinely perpetuated by the constraints of *Katz*.” *Indiana & Michigan Electric Co.*, 284 NLRB at 58 (reaffirming *Bethlehem Steel*). Indeed, submission to dues checkoff, like submission to arbitration, “is purely a matter of consent and cannot be mandated by operation of the Act.” *Id.* Even accepting at face value the majority’s newly fashioned “waiver-only” characterization, however, dues checkoff fits well within that description because, as discussed above, dues checkoff *does* involve a waiver of statutory rights.<sup>15</sup>

<sup>14</sup> The majority’s insistence that dues checkoff and union security are “distinct and separate matters” severely erodes the holdings in *Penn Cork & Closures, Inc.*, above, and *Bedford Can Mfg. Co.*, above, and leaves open the question of whether those cases remain good law in the majority’s view.

<sup>15</sup> It is true that dues checkoff is a waiver of *employee* Sec. 7 rights, rather than employer or union rights, but that is no reason to give them

Nor do we agree that *Bethlehem Steel* erroneously held dues-checkoff clauses present “similar considerations” to union-security clauses, which cannot lawfully be given effect following contract expiration. Of course, neither a union-security clause nor dues checkoff can exist absent the employer’s consent. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (Board lacks authority to compel party to agree to any specific bargaining proposal, including dues checkoff at issue in that case). Moreover, Congress has established special rules—not applicable to other terms and conditions of employment—that pertain to dues checkoff and union-security clauses.<sup>16</sup> Those rules are not *identical*, but *Bethlehem Steel* never stated that they were. Instead, Congress prohibited employers from consenting to postexpiration demands that employees be discharged for nonpayment of dues. However, dues-checkoff arrangements involve a ministerial deduction from wages of dues obligations payable to the union,

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less weight. The Supreme Court’s holding in *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322 (1974), is precisely to the contrary. There, the Court held that an employer and union could not lawfully agree to waive employees’ Sec. 7 right to solicit and distribute literature in the plant absent production considerations necessitating special restrictions.

<sup>16</sup> Sec. 8(a)(3) of the Act prohibits discrimination by employers to encourage or discourage union membership, but with an exception that permits employers to make an agreement with a union “to require as a condition of employment membership therein” (subject to various requirements not relevant here). Sec. 302 of the Labor Management Relations Act broadly prohibits employers from making payments to any union, but with an exception in Sec. 302(c)(4) that permits employers to deduct union dues from employees’ pay and forward them 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.” Sec. 302(c)(4) obviously limits the postexpiration irrevocability of written dues-checkoff assignments. This provision also permits employers to continue dues checkoff after contract expiration, unlike with union-security clauses. But it does not require employers to do so. Indeed, because Sec. 302(c)(4) is an exception to the general prohibition on payments by employers to unions, it would be unreasonable to construe it to require employers to do anything.

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 provide that the obligation to make the payments authorized therein becomes revocable when such an agreement expires. 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.

with no risk of discharge. This makes it understandable that Congress imposed no absolute bar, after contract expiration, on an employer's *voluntary* continuation of dues-checkoff deductions. Rather, Congress made the judgment (in Sec. 302(c)(4) of the Labor Management Relations Act) that employees were adequately protected by the requirement that, upon contract expiration, each employee be permitted to choose to revoke his or her dues-checkoff authorization.<sup>17</sup> Again, as the Board properly reasoned in *Bethlehem Steel*, union security and dues checkoff present *similar* considerations in that both implicate employee Section 7 rights and are, accordingly, subject to comparable restrictions under Federal law. Although the restrictions are not identical, the differences in treatment, described above, were clearly within the province of Congress and do not invalidate the holding in *Bethlehem Steel* that neither union security nor dues checkoff is among the terms and conditions of employment that cannot be changed, following contract expiration, without bargaining.

Third, we also disagree with the majority's argument that the postexpiration discontinuance of dues checkoff improperly obstructs employees' ability to maintain union membership or undermines the union by cutting off its "financial lifeline." For one thing, the consequences of an employer's discontinuing dues checkoff are no different in regard to the ease or difficulty of paying or collecting dues than the consequences of an employer's refusal to agree to dues checkoff in the first place. As noted above, the Supreme Court has squarely held that the Act does not compel an employer to agree to dues checkoff. *H. K. Porter*, above.<sup>18</sup> Our colleagues' view that an employer, having once agreed to dues checkoff, can never discontinue it without thereby interfering with employees' union membership and undermining the union cannot be reconciled with this principle.<sup>19</sup> Additionally, we believe the majority overstates the consequences

of discontinuing dues checkoff. As explained below, employees and unions have many options besides dues checkoff for the collection of dues in today's workplace. And the impact of any employee's failure to remit dues in the absence of dues checkoff is solely a consequence of the employee's choice or the union's application of its own internal rules. It is misdirected to attribute that consequence to the employer, especially given that the employer agreed to whatever dues-checkoff provisions were contained in the expired collective-bargaining agreement, nor do we believe the Board should dictate any particular treatment of dues-checkoff provisions during the period in which there is no applicable agreement.

The practical result of the majority's new rule will be to increase the difficulties parties will face when attempting to reach agreements in collective bargaining. For starters, it bears emphasis that the majority's new standard only affects parties that have already enjoyed past success in bargaining, as reflected in the expiring collective-bargaining agreement that contains a dues-checkoff arrangement. Moreover, under the prior *Bethlehem Steel* standard (a) most employers do not propose to change or discontinue dues checkoff in their initial proposals, and most employers do not immediately stop dues checkoff once the agreement expires; (b) the employer retains the right at any time—in the event of protracted bargaining without an agreement, for example—to unilaterally discontinue dues checkoff, which obviously is much less destructive to employees than a lockout; and (c) any new agreement will contain a dues-checkoff provision unless the employer has taken the unusual step of formulating, presenting and engaging the union in bargaining over the discontinuation of dues checkoff.

By comparison, our colleagues' new standard will have the *short-term* consequence of mandating the indefinite continuation of dues checkoff upon contract expiration unless and until the employer has taken the "unusual step" described in the preceding paragraph (i.e., where the employer formulates, presents and bargains over a proposal to discontinue dues checkoff). The likely outcome is entirely predictable: it will adversely affect current bargaining practices that, as described above, have promoted labor relations stability. Regarding point "(a)" in the preceding paragraph, and in contrast to current bargaining practice, it is a near-certainty that more employers will routinely include in their *initial* proposals the proposed discontinuation of dues checkoff; and since dues checkoff is obviously important to the union, such a proposal will substantially impede bargaining over all

<sup>17</sup> See fn. 16 supra.

<sup>18</sup> In so holding, the Court rejected an underlying court of appeals opinion that reached the opposite conclusion relying on the same considerations our colleagues advance today. See *Steel Workers v. NLRB*, 389 F.2d 295, 302 and fn. 15 (D.C. Cir. 1967) (noting that "collection of dues without a checkoff would have presented the union with a substantial problem of communication and transportation," and stating that "the checkoff provision . . . is likely to be of life or death import to the fledgling union, while it is of no consequence whatever to the employer") (footnotes omitted). Our colleagues resurrect this discredited position.

<sup>19</sup> The majority presumably agrees that an employer may lawfully cease dues checkoff after bargaining in good faith to impasse, but it is difficult to see how the prior occurrence of such bargaining would change the impact that our colleagues claim the cessation of dues checkoff would have on the "financial lifeline" of unions and employees' ability to maintain their union membership.

other issues.<sup>20</sup> Regarding point “(b),” overruling *Bethlehem Steel* eliminates the postexpiration discontinuation of dues checkoff as a form of incremental leverage, leaving the employer with the option of implementing a *lockout*, which has much more onerous consequences for employees, the union, and the employer. Alternatively, upon reaching an impasse in bargaining, the employer may *lawfully* discontinue dues checkoff *and make other unilateral wage and benefit changes*, which would also have a greater adverse impact on employees. Regarding point “(c),” in contrast to the status quo—where employers almost never propose the discontinuation of dues checkoff, which means dues checkoff will continue in successive new agreements—one can expect to see a substantial increase in new agreements that do *not* provide for dues checkoff because so many more employers will have already bargained over its discontinuation.

We believe our colleagues’ insistence on this state of affairs is misguided for another reason: unions now have more options for collecting union dues *without* the employer’s assistance than at any other time in history. Today, nothing about the collection of dues requires it to be done through the employer. Most employees have checking accounts, and a wide variety of direct debit arrangements are available through which employees could direct the automatic payment of union dues. These payment methods would afford unions most, if not all, of the administrative benefits of employer-provided dues-checkoff arrangements, including the security of having such payments continue unless the employee affirmative-ly acts to stop them.

The majority’s position here is likely to produce a situation that resembles the dog in Aesop’s fable, which had

<sup>20</sup> Our prediction that more employers will routinely include the proposed discontinuation of dues checkoff in their initial bargaining proposals is not random speculation. Rather, this follows directly from other Board principles that govern good-faith bargaining. Most employers would be reluctant to incur an indefinite obligation to finance a union’s potentially lengthy postexpiration labor dispute against the employer. Under the majority’s new standard, this can be avoided *only* if the employer bargains to impasse over an employer-formulated proposal to discontinue dues checkoff when the contract expires (or refuses to agree to dues checkoff in the first place). Yet, if an employer delays proposing discontinuation of dues checkoff until some midpoint in bargaining, this would create a substantial risk that the Board would find the employer to have engaged in “regressive” proposals (where the employer formulates more onerous proposals than those preceding them), which the Board has often viewed as a hallmark characteristic of bad-faith bargaining that violates Sec. 8(a)(5). See, e.g., *Quality House of Graphics, Inc.*, 336 NLRB 497, 515 (2001) (“regressive proposal . . . calling for the elimination of the dues-checkoff clauses” was “strongly suggestive that the Respondent bargained in bad faith with the Union” based on the “timing of [the] proposal, its drastic, unprecedented nature and the fact that the Respondent had not raised this issue previously in bargaining”).

a self-destructive “desire for more, rather than being content with what one has.”<sup>21</sup> The Board can require parties to negotiate over mandatory bargaining subjects, but we cannot impose specific contract terms on parties.<sup>22</sup> Consequently, we suspect our colleagues will be disappointed in the outcome of the bargaining that they now require: we will have more bargaining over proposals to eliminate dues checkoff, even though such proposals have been extremely rare in the past, and we are likely to see more agreements that have no dues-checkoff provisions, especially given the array of options enabling employees to directly control whether and how they make union dues payments. This outcome will depend on the parties, not the Board, but the process by which parties sort out these issues is likely to undermine bargaining relationships and cause more contentious bargaining, contrary to the Act’s objective of fostering labor relations stability.<sup>23</sup>

Our final concern relates to the fundamental nature of the change our colleagues adopt today. We do not favor the discontinuation of dues checkoff any more than we favor strikes, lockouts and other types of threatened or inflicted economic injury that are protected under our Act. Our *statute* protects these types of economic weapons.<sup>24</sup> Their availability, combined with their “actual

<sup>21</sup> Wikipedia, *The Dog and Its Reflection* ([http://en.wikipedia.org/wiki/The\\_Dog\\_and\\_Its\\_Reflection](http://en.wikipedia.org/wiki/The_Dog_and_Its_Reflection)) (viewed June 11, 2015) (“If a dog swims across a river carrying a piece of meat . . . and sees its shadow, it opens its mouth and in hastening to seize the other piece of meat, it loses the one it was carrying.”) (citation omitted).

<sup>22</sup> Sec. 8(d) (duty to bargain “does not compel either party to agree to a proposal or require the making of a concession”); *H. K. Porter Co., Inc. v. NLRB*, above, 397 U.S. at 107–108 (“It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.”).

<sup>23</sup> One of the Board’s primary functions is to foster stability in labor relations, to encourage good-faith negotiation, and to give effect to the parties’ agreements. See, e.g., *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) (“To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.”); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (“[A] basic policy of the Act [is] to achieve stability of labor relations.”). Our colleagues do not meet the substance of our discussion of the predictable consequences of the change they make today. Instead, they fault us for not offering empirical evidence that cannot possibly exist, given that the precedent they overrule has been in place since 1962.

<sup>24</sup> There is no merit to the majority’s view that the discontinuance of dues checkoff authorized by *Bethlehem Steel* is not a legitimate economic weapon simply because it involves a unilateral change in a term or condition of employment. Unlike the discontinuance of merit pay at issue in *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997), cited by our colleagues, dues checkoff does not involve “wages and benefits” paid to employees but is instead a provision under which an employer

exercise on occasion by the parties,”<sup>25</sup> has produced virtually all of the agreements reached in the Act’s history. The Board is entrusted with the “responsibility to adapt the Act to changing patterns of industrial life.”<sup>26</sup> However, our colleagues do not identify *any* “changing pattern” that warrants the abandonment of *Bethlehem Steel*, which has permitted the unilateral discontinuation of dues checkoff upon contract expiration for a period exceeding five decades. As noted previously, this spans the entire time that the Supreme Court, starting with *Katz*, has recognized a statutory obligation to have post-expiration bargaining over *other* employment terms.

Shortly before *Bethlehem Steel* and *Katz* were decided, the Supreme Court held it is improper for the Board to function “as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.”<sup>27</sup> This was reinforced when the Supreme Court reiterated, shortly after *Bethlehem Steel* and *Katz*, that the Board is not vested with “general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party’s bargaining power.”<sup>28</sup> Absent a compelling reason for making this change, we believe the majority’s decision to overrule *Bethlehem Steel*, though cloaked in the language of our statute, modifies one of the established “substantive aspects of the bargaining process to an extent Congress has not countenanced.”<sup>29</sup>

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makes its payroll system available to assist the union in collecting dues. Moreover, their argument that our position “run[s] afoul” of *Katz* begs the question by taking as its premise the conclusion it reaches—namely, that dues checkoff is to be subjected to the rule of *Katz*. Obviously, if dues checkoff is held exempt from that rule—as, until today, it has been for more than 50 years—its unilateral cessation *is* a lawful economic weapon.

<sup>25</sup> *NLRB v. Insurance Agents’ International Union*, above, 361 U.S. at 487–489.

<sup>26</sup> *NLRB v. J. Weingarten*, 420 U.S. 251, 266–267 (1975).

<sup>27</sup> *Insurance Agents*, 361 U.S. at 497.

<sup>28</sup> *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965).

<sup>29</sup> *Insurance Agents*, 361 U.S. at 497–498. Indeed, as recognized in *Insurance Agents*, when Congress added to the Act Sec. 8(d), which precludes the Board from imposing substantive contract obligations on the parties in the guise of enforcing the duty to bargain, this was a response to the fact that the Board had “gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make.” *Id.* at 486 (quoting H.R. Rep. No. 245, 80th Cong., at 19, reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act (LMRA Hist.), at 310 (1948)). Significantly, the specific example referenced in the House Report was the Board’s insistence that employers violated the duty to bargain if they failed to require employees “to become and remain members of unions” (commonly referred to as a “closed shop”). H.R. Rep. No. 245, at 19, reprinted in 1 LMRA Hist. at 310. Here, instead of requiring employees to “remain members

## Conclusion

Congress determined that it furthers the national labor policy to permit employers and unions to agree to both union-security clauses, under which an employee is obligated to pay union dues as a condition of employment, and dues-checkoff arrangements, by which unions can rely on an employer to collect and transmit union dues. At the same time, based on the right of employees to refrain from engaging in protected activity, Congress has imposed statutory limits on both of these forms of union security. In our opinion, *Bethlehem Steel* reflects the national labor policy Congress has established better than the alternative our colleagues endorse today. Accordingly, as to these issues, we respectfully dissent.

Dated, Washington, D.C. August 27, 2015

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Philip A. Miscimarra, Member

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Harry I. Johnson, III, Member

## NATIONAL LABOR RELATIONS BOARD

*Angela B. Jaenke, Esq.*, for the General Counsel.  
*John H. Zawadsky, Esq. (Reinhart, Boerner, Van Deuren, S.C.)*,  
of Madison, Wisconsin, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on April 28, 2014.<sup>1</sup> Service Employees International Union Healthcare Wisconsin, SEIU-HCWI (the Union or the Charging Party) filed the charge on August 13, 2013, and the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued the complaint and notice of hearing on December 19, 2013.<sup>2</sup> The

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of unions,” *id.*, the majority makes it unlawful not to continue post-contract expiration remittance of *union dues* deducted from their pay. For the reasons explained in the text, given the five decades in which the *Bethlehem Steel* rule has existed, we believe this is the type of change that would more appropriately be addressed by Congress and not the Board.

<sup>1</sup> The two witnesses and counsel for the parties were present in Milwaukee, Wisconsin. With the agreement of the parties, and given that stipulations had alleviated the need for all but very brief testimony, I conducted the hearing by teleconference in the interests of preserving governmental resources.

<sup>2</sup> The complaint as issued on December 19 consolidated a case from Subregion 30 (Case 30-CA-111099) and a case from Region 18 (Case 18-CA-112504). On March 27, 2014, following a partial settlement reached by the parties, all the allegations in the complaint that did not

complaint alleges that Lincoln Lutheran of Racine (the Respondent) violated Section 8(a)(5) and (1) when, on March 19, 2013, it ceased dues checkoff for unit employees after the collective-bargaining agreement between the parties expired. The Respondent filed a timely answer in which it denied that it violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel<sup>3</sup> and the Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, a corporation, operates a nursing home providing in-patient medical care in Racine, Wisconsin. In conducting its operations, the Respondent annually derives gross revenues in excess of \$100,000 and purchases and receives at its facility in Racine, Wisconsin products, goods, and materials valued in excess of \$5000 directly from points outside the State of Wisconsin. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a nursing home operator with facilities in Racine, Wisconsin. Since at least 2007, the Respondent has recognized the Union as the collective-bargaining representative of a unit comprised of certified nurse aides, maintenance employees, laundry employees, housekeeping employees, and certain other employees. The Union and the Respondent have entered into successive collective-bargaining agreements covering the unit, the most recent of which was effective by its terms from June 1, 2011, to December 31, 2012. The parties agreed to extend the term of that agreement to February 19, 2013. The agreement includes a dues-checkoff provision in which the Respondent agrees to deduct union initiation fees and membership dues from the paychecks of participating unit employees and to transmit those funds to the Union.<sup>4</sup>

pertain to the Respondent's cessation of dues checkoff were dismissed. In addition, the two cases were severed and the Region 18 case is not part of the proceeding before me.

<sup>3</sup> The Respondent moved to strike portions of the General Counsel's brief because "rather than presenting only the General Counsel's argument, the General Counsel took advantage of Lincoln Lutheran having filed its brief earlier in the day by responding to Lincoln Lutheran's arguments." The General Counsel opposed the motion and it is hereby denied. I set a June 2, 2014, due date for both parties' briefs, but did not order that the briefs be filed simultaneously or otherwise foreclose one party from responding directly to arguments in the other party's earlier filed brief. The Respondent cites no authority at all for striking a brief, in whole or in part, under such circumstances.

<sup>4</sup> The provision states as follows:

(a) Upon receipt from a team member, Worksite Leader and/or Union Representative of a lawfully executed written authorization, Lincoln Lutheran agrees, until such authorization is revoked in accordance with its terms, to deduct the initiation fees and the regular monthly Union membership dues of such team members from the team mem-

On December 17, 2012, the Respondent and the Union began negotiations for a successor to the expiring contract. The Respondent's lead negotiator was Butch Patterson, the Respondent's vice president for human resources. The Union's lead negotiator was Bonnie Strauss, a union project director. In the parties' written proposals during negotiations for a successor contract, both the Respondent and the Union proposed the same dues-checkoff language that was present in the expiring contract. In a February 12, 2012 email, Patterson for the first time informed Strauss that the Respondent was proposing to terminate the dues-checkoff provision effective upon the expiration of the contract on February 19. Patterson stated that the Respondent was prepared to discuss the dues-checkoff proposal at the negotiating session scheduled for February 18. Patterson further stated that the contract's union-security clause and arbitration provisions would also terminate on February 19. Later that day, Strauss responded to Patterson by email as follows:

Butch,

So why the heavy hand? This seems out of character given our working relationship. Please advise.

Patterson responded by email:

Hi Bonnie,

We do have a positive working relationship and I hope it continues. We simply need to move forward quickly with our economic proposals because of continued fiscal issues. We especially need to achieve the projected labor savings regarding the shift reduction proposal. January financials did not meet budget. I am concerned that further delaying the process will make the negotiation process even more difficult. I'm looking forward to a productive session on the 18th.

The parties met to negotiate on February 18. Present for the Respondent were Patterson and three other company officials,

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ber's first two paychecks of each month and to promptly remit such deduction to the Union, the list outlining dues payments and initiation fees will be provided to the Union by electronic mail. The Union will notify Lincoln Lutheran, in writing, of the exact amount of such regular monthly membership dues to be deducted. Team members shall be provided Union authorization forms at time of hire along with the other appropriate forms of employment. The authorization provided for by this Section shall conform to all applicable Federal and State laws.

The Union Agrees to indemnify and hold Lincoln Lutheran harmless against any and all claims, suits, orders, or judgments brought or issued against Lincoln Lutheran as a result of any action taken or not taken by Lincoln Lutheran pursuant to any written communication from the Union under the provisions of this article.

(b) The Employer agrees to deduct and transmit to SEIU COPE, \$ \_\_\_\_ per pay period, from the wages of those team members who voluntarily authorize such contributions on the forms provided for that purpose by SEIU HEALTHCARE WISCONSIN. These transmittals shall occur for each payroll period. A list of names shall be sent via electronic mail/media of those team members for whom such deductions have been made. The list will include the amount deducted for each team member.



## LINCOLN LUTHERAN OF RACINE

one of whom, the Respondent's chief executive officer, left early in the meeting. Present for the Respondent were Strauss and a union staff representative. The session lasted from approximately 9 a.m. to 4 p.m. The parties did not discuss the dues-checkoff issue until the end of that period. At that time, Patterson stated that when the contract expired—which was set to occur the next day—the Respondent would no longer honor the union arbitration procedure, and that “after the next bargaining session,” which was set for March 5, “the union security and union check off would discontinue.” Strauss responded to Patterson by stating that this “was not a good way to have a good relationship, and that it would not in any way, shape or form change the way that we would represent our members, nor would it change the way that we would approach the bargain.” Then Strauss asked Patterson to reconsider. At that point the management team left the session.<sup>5</sup>

Patterson subsequently canceled the March 5 bargaining session. In a February 28 email to Strauss, he proposed alternative dates for negotiations in March and April and stated that the Respondent “proposes the termination of the check off provision of the Agreement (see art. 18 of the contract) effective on the next day immediately following the date of our next bargaining session” and that the Respondent “w[ould] be prepared to discuss this proposal at the next meeting.” The parties held their next bargaining session for a successor contract on March 14. During that session neither side raised the subject of dues checkoff or the discontinuation of dues checkoff.

Patterson, in a March 18 email to Strauss, stated that “As previously notified (2/28/2013), Lincoln Lutheran is confirming the termination of the union-checkoff provision of the Agreement . . . effective Tuesday, March 19, 2013.” On March 19, the Respondent carried through with this action, and discontinued checkoff for unit employees. As of that time, the Union's written proposal still included the dues-checkoff language contained in the expired agreement. During negotiations, the Respondent never claimed to the Union that administering dues checkoff was a financial hardship for the Company.

<sup>5</sup> Of the persons who attended the meeting, only Strauss and Patterson were called to testify. Regarding what Patterson said at the meeting, the testimony of Strauss and Patterson was consistent and I credit that testimony. I also credit Strauss' testimony regarding what she said in response to Patterson, and that is the basis for the version of her response that is set forth above. Based on Strauss' demeanor and testimony as a whole, and after considering the documentary evidence regarding the February 18 meeting, I find that testimony credible. Patterson's very minimal testimony on the subject of what Strauss said does not corroborate Strauss' testimony, but also does not directly contradict it. When Patterson was asked whether there was any response from the Union to his statement that the Respondent would cease honoring the arbitration, union security, and dues-checkoff provisions, he testified, “[N]ot regarding the union dues.” This nonspecific testimony does not directly contradict Strauss' testimony because Strauss did not claim that she explicitly mentioned union dues. Patterson was not asked to recount exactly what Strauss said to him at the end of the meeting or to confirm or deny Strauss' testimony about what she said.

After March 19, 2013, the parties continued to negotiate for a successor to the collective-bargaining agreement. On about November 21, 2013, the Respondent resumed dues checkoff.

## III. ANALYSIS AND DISCUSSION

The Respondent stopped following the dues-checkoff provision in the contract on March 19, 2013, subsequent to the expiration of that contract on February 19, 2013. At the time the Region issued the complaint in this case, as well as at the time of trial, the Board's most recent ruling on the subject was that an employer's obligation to adhere to a contractual dues-checkoff provision continues after the expiration of the contract. See *Alamo Rent-A-Car*, 359 NLRB No. 149, slip op. at 4 (2013), decision set aside by 2014 WL 2929754 (NLRB June 27, 2014), and *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012). In *WKYC-TV*, the Board stated, “[T]hat, 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. Slip op. at 1. The Board acknowledged in *WKYC-TV* that it was overturning the rule set forth in *Bethlehem Steel*,<sup>6</sup> and its progeny, which was that the “obligation to check off union dues from employees' wages terminates upon expiration of a collective-bargaining agreement that establishes such an arrangement.” Id. The Board explained that a coherent explanation for the *Bethlehem Steel* rule had never been provided, and noted that the U.S. Court of Appeals for the Ninth Circuit had recently refused to enforce a Board decision following the *Bethlehem Steel* rule because, in the court's words, the Board “continue[d] to be unable to form a reasoned analysis in support of” that rule. Id., quoting *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865, 867 (9th Cir. 2011).

Subsequently, the U.S. Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the Board lacked the quorum necessary for the issuance of decisions from January 4, 2012, through August 4, 2013. Both *Alamo* and *WKYC-TV*, supra, and *WKYC-TV*, supra, were issued during the period when the Board lacked the necessary quorum and neither decision is currently valid precedent. I find that the Board's prior rule, as set forth in *Bethlehem Steel*, is therefore controlling and that the Respondent did not violate Section 8(a)(5) and (1) on March 19, 2013, by ceasing to follow the dues-checkoff provision after expiration of the collective-bargaining agreement.<sup>7</sup>

<sup>6</sup> 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Shipbuilding v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

<sup>7</sup> The parties presented evidence going to the question of whether the Union waived bargaining regarding the Respondent's discontinuation of dues checkoff. Given the applicability, at least until further notice, of the *Bethlehem Steel* rule, it is not necessary for me to reach the waiver issue. Nevertheless, in the previous section of this decision, I have included all the factual findings relating to the waiver issue that are supported by the record.

I also note that in the stipulation of facts the parties entered into on April 14, 2014, they stipulated to the following: “[N]o historical information regarding the parties' bargaining history on dues check off has been set forth as it is not relevant to the current discontinuation of

For the reasons discussed above, the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act when it discontinued dues checkoff should be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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dues check off or the Employer's affirmative defenses thereto."; and "[N]o past practices regarding discontinuation of dues check off has been set forth as it is not relevant to the current discontinuation of dues check off or the Employer's affirmative defenses thereto."

3. The Respondent was not shown to have violated Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 11, 2014.

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<sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.