CLIENT ALERT: NLRB Rules that Union Dues Checkoff Survives Expiration of a Collective Bargaining Agreement

In a major reversal of Board precedent, the NLRB has overturned 50 years of precedent by ruling that an employer's obligation to check off union dues continues after the expiration of a collective bargaining agreement. *WKYC-TV*, 359 NLRB No. 30 (December 12, 2012). In a 3-1 decision, the Board reversed *Bethlehem Steel*, 136 NLRB 1500 (1962), which established that an employer had no obligation to continue a dues checkoff provision after the contract expired. This had been basic labor law for half a century.

In reversing this long standing precedent, the Board majority (Chairman Pearce and Members Griffin and Block) found that the previous Board in its *Bethlehem Steel* decision had no rational basis finding that the provision should expire and that instead the dues check off clause, like any other term and condition of employment, should continue as part of the status quo, even if the collective bargaining agreement itself has expired.

The Board began by noting that "it has long been established that an employer violates Section 8 (a) (5) when it unilaterally changes represented employees' wages, hours and other terms and conditions of employment without providing their bargaining representative prior notice and a meaningful opportunity to bargain about the changes." *NLRB v. Katz*, 369 U.S. 736, 742 (1962). Under this rule, an employer's obligation to refrain from unilaterally changing these mandatory subjects of bargaining applies both where a union is newly certified and the parties have yet to reach an initial agreement, as in *Katz*, and where the parties' existing agreement has expired and negotiations have yet to result in a subsequent agreement. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). The Board then states:

> An employer's decision to unilaterally cease honoring a dues-checkoff arrangement established in an expired collective bargaining agreement plainly contravenes these salutary principles. Under settled Board law, widely accepted by reviewing courts, dues

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> checkoff is a matter relating to wages, hours and other terms and conditions of employment within the meaning of the Act and is therefore a mandatory subject of bargaining…. The status quo rule, then, should apply to dues checkoff, unless there is some cogent reason for an exception. We see no such reason.

It is true, the Board acknowledged, that some contract clauses do indeed expire with the contract. Thus, no strike, arbitration, union security, management rights clauses do not survive the expiration of a collective bargaining agreement, even though they are mandatory subjects of bargaining. In agreeing to each of these arrangements, however, the parties have waived statutory rights that they otherwise would enjoy in the interest of concluding an agreement, and such waivers are presumed not to survive the contract.

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

The Board then rejected an argument that section 302(c) of the Act requires that dues deductions cease upon contract expiration. Under 302 (c), employers are prohibited from making financial payments to unions, with the exception of certain payments, including dues checkoff, as long as the employer had receives a written authorization *which shall not be irrevocable for a period of more than one year or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner.* This language does not, in the Board's view, require that dues checkoff end with the contract. It only has to do with the *employee's i*ndividual right to revoke such authorization, not the *employer's* right to end it.

In addressing the *Bethlehem Steel* decision itself, the Board explained that the decision in that case first made it clear that union security clauses do not survive the expiration of a contract; that part of the decision was indeed appropriate. The rationale for the expiration of union security clauses with the expiration of the contract can be found in Section 8(a)(3), which states that even though an employer cannot discriminate against

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employees because they refrain from union activity (as well as support it), "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 has interpreted this language to mean that the maintenance of union membership as a condition of employment can only be required under a contract that comports to the proviso. Thus, once the contract expires, once no agreement is in place, then the employees should be free to refrain from union membership and not be penalized with loss of employment.

However, the Board majority then wrote that the prior Board erred by then ruling that dues checkoff was so inextricably bound up with union security that it, too, had to expire with the end of the collective bargaining agreement. In *Bethlehem Steel,* the Board reasoned that because the checkoff provision 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, says the current Board, that finding was "a non sequitur." Although the contracts in *Bethlehem Steel* contained both union-security and dues-checkoff provisions, that is by no means true of all or even nearly all collective bargaining agreements. Parties have the option of negotiating either without the other; they may agree to union security, but not dues checkoff, and vice versa. The best example of the separate nature of each, the Board explained, was in right-to-work states, where contracts cannot have union security clauses but often have dues checkoff provisions. By tightly linking the two, the 1962 Board erred.

The Board also stressed that dues checkoff, unlike union security clauses, is a voluntary matter. An employee does not have to have his or her dues checked off; the employee has the right to select or reject dues checkoff as the method by which to pay union dues. Unlike union security, where the employee is forced to support a union for the period of the "agreement," an employee is simply choosing a method of payment and deciding on a preference to have the dues taken out of the paycheck regularly rather than pay the bill directly.

Finally, the Board opined that if dues checkoff ends with the contract, then "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." But, they underlined, no cases

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since *Bethlehem Steel* have so held and indeed the Board has held quite the contrary and allowed employers to continue dues checkoff if they so desired without running afoul of the Act.

The Board did not apply the new rule retroactively, but only prospectively, given the fact that *Bethlehem Steel* has been good law for 50 years and employers should have been able to reasonably rely upon it.

In dissent, Member Hayes links the existence of a dues checkoff provision with the existence of a union security provision. Both should stand or fall together, and he cites various federal circuit court decisions to support that view. The Board has long understood that a union security clause operates as "a powerful inducement for employees to authorize dues checkoff, and that it is unreasonable to think that employees would generally wish to continue having dues deducted from their pay once their employment no longer depends on it." Further, he notes that the elaborate language that sometimes accompanies employees' rights to revocation of dues deducion can be confusing, and employees may not understand their limited ability to revoke, whereas the expiration of the contract is a clean line under which the obligation ceases. Employees need to be protected in their rights to refrain, as well as engage in, union activity and support.

Member Hayes also argues that dues checkoff should be in that special grouping of clauses that are not part of the status quo, and this issue must be seen in the context of the economic power of the parties and not just whether or not a particular statutory right is being waived. In the end, he contends that the majority's decision to upset 50 years of settled law was based on another agenda.

> My colleagues know well that an employer's ability to cease dues checkoff upon contract expiration has long been recognized as a legitimate economic weapon in bargaining for a successor agreement. The ability of parties to wield such weapons is an integral part of the system of collective bargaining that the Wagner Act and the Taft-Hartley Act envisioned for the peaceful resolution of industrial disputes. To strip employers of that opportunity would significantly alter the playing field that labor and management have come to know and rely on. Indeed, even in times of union boycott and other economic actions in opposition to an employer's legitimate bargaining position, the employer will be forced to act

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> as the collection agent for dues to finance this opposition. This is the unspoken object of today's decision, and it contravenes the well-established doctrine that the Board may not function "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."

Employers are encouraged to speak with their MBJ attorney about any questions they have with dues checkoff and recent developments at the NLRB.

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