United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

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Kaiser Foundation Health Plan,
Inc., et al.,
Case 32-CA-15295

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The Region submitted this Section 8(a)(1), (3) and (5) charge for advice on the issue of whether the Employer unlawfully ceased dues checkoff deductions following the expiration of a contract.[1]

FACTS

The last contract between the Office and Professional Employees International Union, Local 29, AFL-CIO (the Union or Local 29) and Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, and The Permanente Medical Group (the Employer), all Kaiser entities, expired on October 31, 1995.[2] The parties began negotiating in late August 1995.

According to the Union, at the last bargaining session on about October 31, 1995, the Employer's representative informed Local 29 that it would continue to honor dues checkoff authorizations unless and until Local 29 undertook direct economic action against the Employer, such as strikes, sick-outs, etc. It is undisputed that the Employer had not proposed the elimination of dues checkoff during the negotiations.

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[1] The issue of whether injunctive relief is warranted will be addressed in a separate memorandum.

[2] Similar disputes arose between the Employer and other unions representing other employees of the Employer. Some of those disputes have been resolved. Remaining disputes are not relevant to this case.

The expired contract contained a union-security clause and provided for checkoff authorization. In this regard, the checkoff authorization was irrevocable for a period of one year or until the termination of the "present" contract. The authorization also provided for a period during which it could be revoked, and that, absent revocation, "this authorization shall remain in effect and be irrevocable for additional periods of one (1) year or until the termination date of the then applicable Collective Bargaining agreement between the Union and the Employer, whichever occurs sooner, subject to my right to revoke this authorization within thirty (30) days prior to the end of each additional period of irrevocability."

On March 7, 1996, the Employer notified the Unions by letter that, effective April 1, 1996, it was going to cease honoring dues checkoff authorizations.[3] On that same day, the Employer issued a general bulletin to its physicians and employees, which advised, inter alia, that "in the interest of achieving a [contract] settlement, on March 7, [we] notified union leadership that we will stop collecting union membership dues unless the contract is settled by April 1." The announcement also explained that when the contracts expired, the Employer was under no obligation to continue honoring dues checkoffs, but that it had been doing so as a "courtesy" to the Unions, and that "in ceasing to collect Union dues, [the Employer] is attempting to encourage union leaders to return to bargaining."

The parties conducted no further meetings after the Employer's announcement. On April 5, the Employer ceased honoring all dues checkoff authorizations for all of the unions, including Local 29. None of the unit employees attempted to revoke their checkoff authorization at any time material to the instant charge, nor did they engage in any informational picketing or concerted activity against the Employer.

ACTION

We conclude, for the reasons set forth below, that the Employer violated Section 8(a)(5) by ceasing to honor

[3] Previously, in November 1995, the Employer had threatened to cease honoring checkoff authorizations if the Union engaged in a "corporate campaign" of any sort, informational picketing, leafleting or strike.

checkoff authorizations because the checkoff authorizations survived the expiration of the contract and none of the employees attempted to revoke their authorization. We find that the Employer also violated Section 8(a)(1) by telling employees that it intended to cease deducting dues. However, we conclude that there is insufficient authority to support an allegation that the Employer also violated Section 8(a)(3). Accordingly, the Region should issue a Section 8(a)(5) and (1) complaint, absent settlement, and dismiss, absent withdrawal, the allegation that the Employer also independently violated Section 8(a)(3).

When a collective-bargaining agreement expires, an employer must maintain the status quo on all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations.[4] In Bethlehem Steel,[5] the Board held that the employer did not violate Section 8(a)(5) by ceasing to honor dues checkoff authorizations after collective-bargaining agreements expired. The Board noted that the union-security requirement had expired with the contracts and then tied the checkoff authorizations to union security. The Board then concluded, at 1502, "when the contracts terminated, the [r]espondent was free of its checkoff obligations to the [u]nion."

Contrary to Bethlehem Steel and its progeny, the General Counsel has recently taken the position that, after contract expiration, a provision for dues checkoff, like any other mandatory term and condition of employment, remains subject to bargaining before it can be changed.[6] Thus, where checkoff authorizations do not limit their application

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[4] Laborers Fund v. Advanced Lightweight Concrete, 484 U.S. 539 fn.6 (1988); NLRB v. Katz, 369 U.S. 736 (1962); Bottom Line Enterprises, 302 NLRB 373, 374 (1991).

[5] 136 NLRB 1500 (1962), enf. denied on other grounds, 320 F.2d 615 (3d Cir. 1963), cert. denied, 375 U.S. 984 (1964). See, e.g., Peerless Roofing Co., 247 NLRB 500, 505 (1980) (an employer does not violate the Act by failing to deduct union dues in the absence of a current collective-bargaining agreement requiring it to do so).

[6] See Hillhaven Corp., Case 20-CA-26687, General Counsel's Appeal Minute, dated December 7, 1995.

and duration to the union security-requirement and where employees did not seek to revoke their authorizations, an employer should not presume that the authorizations have expired with the expiration of the collective-bargaining agreement.

A Section 8(a)(5) complaint is warranted in the instant case consistent with the Hillhaven analysis. The checkoff authorization signed by the employees in this case did not indicate that it would automatically become ineffective upon contract expiration. And there is no evidence that any of the employees revoked their checkoff authorizations.

In reaching this result, we concluded that the Union did not waive its right to bargain about the Employer's change concerning this subject.

The Employer contends that the Union waived its right to bargain about checkoffs because it made no affirmative effort to resolve this matter by responding to the Employer's March 7 letter. We reject this contention. The Employer admits that it threatened to, and actually did, cease honoring checkoff authorizations to prompt the Union to return to negotiations. This is not the usual case where an employer proposes changes in a subject in order to instigate bargaining over that that subject. To the contrary, the Employer here proposed rescission of a subject in order to promote bargaining over other subjects. Thus, a change in checkoff was not a subject of bargaining; it was merely a bargaining tactic. It would have been futile for the Union to offer to bargain over checkoffs because such a response would not have addressed the Employer's real concern - the state of contract negotiations. In these circumstances, because the Employer was not proposing bargaining over a change in its practice concerning checkoffs, the Union's failure to respond to the Employer's March 7 letter cannot be construed as a waiver of the Union's right to bargain over that subject.

Moreover, even if checkoff were viewed as a subject of bargaining because the parties had been negotiating a successor to a contract that had contained a checkoff provision and presumably would have addressed checkoffs in such a successor agreement, we still would not find a waiver.

The rights of parties in a collective-bargaining relationship differ depending on whether the parties are in a nonnegotiation setting or whether they are engaged in

bargaining. In Intermountain Rural Electric Assn.,[7] the Board stated:

> In a nonnegotiation setting, it is incumbent upon a union to request bargaining when it receives sufficient notice to permit meaningful bargaining over an employer's proposal to change terms or conditions of employment. If a union fails to act diligently in seeking bargaining, it may be found to have waived its right and it is not unlawful for an employer to implement the change unilaterally. (Footnote omitted). What period of time is found sufficient for a union to request bargaining will depend upon the facts of each case. (Footnote omitted.)
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> When parties are engaged in negotiations for a collective-bargaining agreement, however, their obligations are somewhat different. Because the parties are in fact bargaining on various proposals, there is no need for additional requests for bargaining on those proposals. During negotiations, a union must clearly intend, express, and manifest a conscious relinquishment of its right to bargain before it will be deemed to have waived its bargaining rights. (Footnote omitted.) Absent such manifestation by the union, an employer must not only give notice and an opportunity to bargain, but also must refrain from implementation unless and until impasse is reached on negotiations as a whole. (Footnote omitted.)

This distribution of rights best promotes the overall process of negotiating collective-bargaining agreements. The Board has stated that the process would be at least diminished if, before overall impasse, employers were allowed to implement piecemeal changes each time agreement could not be reached in a particular subject. "By utilizing this approach with respect to various employment conditions seriatim, an employer eventually would be able to implement any and all changes it desired regardless of the state of negotiations between the bargaining representative of its

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[7] 305 NLRB 783, 786 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993).

employees and itself." Winn-Dixie Stores, 243 NLRB 972, 974 (1979).

The Board has recognized two limited exceptions to the Intermountain standard: (1) a union's efforts to delay or avoid bargaining in the face of an employer's honest and diligent efforts;[8] and (2) an economic business emergency that requires prompt action.[9] Where a collective-bargaining agreement has expired and the employer makes unilateral changes during negotiations for a successor agreement, the employer has the burden of demonstrating that the exceptions apply.[10]

Here, neither the Act nor the case law imposes an affirmative duty on the Union to request bargaining over a proposed change when the Union is already engaged in negotiations. Intermountain, supra.[11] We also note that the Union did promptly file a charge. Although this not ordinarily is not sufficient to preserve bargaining rights,[12] it is an indication that the Union did not intend to relinquish its right to bargain. Intermountain, supra, at 786. Therefore, since the Union did not clearly intend, express, and manifest a conscious relinquishment of its right to bargain about the cessation of dues deductions, it was not enough for the Employer to give the Union notice of the change and an opportunity to bargain. Rather, the Employer also had to refrain from implementation unless and until impasse was reached on negotiations as a whole.[13]

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[8] M&M Contractors, 262 NLRB 1472 (1982), and AAA Motor Lines, 215 NLRB 793 (1974).

[9] Winn-Dixie Stores, 243 NLRB 972, 974 and fn. 9 (1979).

[10] Triple A Fire Protection, 315 NLRB 409, 414 (1994).

[11] See also Triple A Fire Protection, supra, 315 NLRB at 417, and Bottom Line Enterprises, supra, 302 NLRB at 374.

[12] Ventura Country Star Free Press, 279 NLRB 412 (1986).

[13] There is no indication that the Employer was otherwise privileged to cease honoring the checkoff authorizations because it was faced with one of the narrow exceptions set forth in Intermountain. There is no indication that the Employer was faced with an economic emergency or that the Union had engaged in delaying tactics.

We further conclude that the Region should not allege that the Employer violated Section 8(a)(3) by this conduct. While it is well settled that an employer violates Section 8(a)(3), (2) and (1) if it continues to withhold dues from employees' wages after the employees have validly revoked their checkoff authorization,[14] we have been unable to find case support for finding a violation of Section 8(a)(3) where an employer ceases to withhold dues in a situation such as this.[15] A checkoff authorization is a partial assignment of a future right, that is, an employee assigns to his union a designated part of the wages he will have a right to receive from his employer in the future, so long as he continues his employment. The employer is thereby authorized to pay the specified amounts to the union when the employee's right to wage payments accrues.[16] Thus, in our view, although checkoff is a mandatory subject of bargaining, checkoff authorizations are merely a convenience to employees in paying their union dues,[17] and the Employer's ceasing to deduct and transmit dues does not

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[14] Industrial Towel and Uniform Service, 195 NLRB 1121 (1972).

[15] Cf. Albert Van Luit & Company, 229 NLRB 811 (1977), supp. dec. 234 NLRB 1087 (1978), enfd. 597 F.2d 681 (9th Cir. 1979) where the Board held that the employer violated Section 8(a)(3), as well as 8(a)(5) and (1), by discriminatorily refusing to withhold checkoff moneys from employees who had submitted invalid revocations, while withholding moneys from those who had not. This determination was clearly based on the finding that the employer solicited the employees' revocations and that the revocations were ineffective between the dates of their execution following the election and the Board's certification of the results of the election. Thus, the holding of Albert Van Luit is limited to the particular facts of that case and not applicable to the different circumstances of the instant case.

[16] Lockheed Space Operations Company, 302 NLRB 322, 327 (1991).

[17] NLRB v. Atlantic Printing Specialties, 523 F.2d 783, 786 (5th Cir. 1975).

affect the economic benefits that employees receive from the Employer.

Furthermore, no additional relief would be gained by finding an 8(a)(3) violation in addition to the 8(a)(5) violation. We would seek the same order to remedy both violations, one requiring the Employer to cease and desist from failing and refusing to check off union dues and to remit dues to the Union and, affirmatively, to honor the expired contract checkoff provision and the valid dues checkoff authorizations filed by the employees. Therefore, the Region should dismiss the 8(a)(3) allegation.

Finally, we also conclude that the Employer independently violated Section 8(a)(1) in November 1995 by threatening to cease honoring the employees' checkoff authorizations if the Union engaged in a "corporate campaign" and in March 1996 by threatening to cease honoring checkoffs in order to pressure to Union to resume negotiations.[18]

In PRC Recording Co., [19] the Board affirmed the ALJ's finding that the employer's statement that it would retract its last contract offer and substitute a less desirable one if the employees rejected the final offer and struck was not an "economic forecast" but rather a threat of retaliation if employees exercised their right to strike. Id. at fn. 2. In the same manner the Employer in this case violated Section 8(a)(1) in November by threatening to cease honoring a provision that had survived the expired contract to provide for the administrative convenience of checkoff authorization if employees engaged in protected Section 7 activity.

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[18] The Union's Section 8(a)(1) theory of violation is not clear. The Union appears to contend that the Employer breached an agreement to continue to honor the checkoff authorizations as a quid pro quo for the Union's agreement not to handbill or picket. At the same time, however, the Union also alleges that the statement was a threat that the Employer would retaliate against the employees if they engaged in such activity.

[19] 280 NLRB 615, 646 (1986), enfd. 836 F.2d 289 7th Cir. (1987).

Moreover, in March the Employer impermissibly threatened or pressured the Union to resume negotiations by threatening to cease honoring checkoff authorizations. Under a Hillhaven analysis, the Employer could not cease honoring checkoffs. Therefore, we conclude that it could not threaten to do so.

Moreover, the threat was not a lawful bargaining tactic even though we recognize the argument that the threat might have been lawful if it had been in support of the Employer's lawful bargaining position, specifically its efforts to get the Union to resume negotiations.[20] In Toyota of San Francisco,[21] the employer violated Section 8(a)(1) during contract negotiations by sending each employee an individualized statement asserting that he or she might owe the employer a specific amount of money in overpaid commissions. The ALJ stated that the letter was

> ...intended to influence the Union's bargaining stance by squeezing the affected employees...an effort to undermine the Union's position taken at the bargaining table. It is irrelevant that the most favored nations clause may have given the [Employer] the right to do what it said it could do. [The Employer] had no right to directly pressure the employees into influencing the Union's stance at the bargaining table. This letter had no other purpose than to bypass the Union and to undermine its collective- bargaining position.

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[20] See NLRB v. Insurance Agents International Union, 361 U.S. 477 (1960). See also Plumbers Local 66 (Tri-State Contractors), 287 NLRB 583 (1987). Compare Highland Superstores, 314 NLRB 146 (1994) (employer violated Section 8(a)(1) by threatening employees during negotiations with termination and threatening withdrawal of its severance package proposal in retaliation for employee handbilling; because the employer did not explain until the hearing that it had locked out employees in support of its bargaining position, the employer could not characterize its threats and lockout as lawful bargaining tactics in support of its bargaining position).

[21] 280 NLRB 784, 791 (1986).

Similarly, in this case, the Employer's March letter to employees was clearly an effort to undermine the Union by making it more difficult for employees to support the Union and to stay current in their membership dues. Moreover, the Employer put the onus on the Union for its unlawful conduct. Thus, as in Toyota, such conduct was an unlawful tactic aimed at pressuring the employees to influence the Union to return to the bargaining table.[22]

[22] Note the differences in the theories of 8(a)(1) violations found in the following cases involving checkoffs: In West Coast Cintas Corp., 291 NLRB 152, 156 (1988), between the date of a deauthorization vote and certification of results, the employer violated Section 8(a)(1) by telling employees it would no longer deduct union dues pursuant to checkoff authorizations unless the employees reaffirmed their authorizations. There, the employer's statement caused the employees to reveal their union sentiments and was thus coercive in nature. In Shen-Mar Food Products, Inc., 221 NLRB 1329 (1976), enf'd as modified 557 F.2d 396 (4th Cir. 1977), the employer engaged in unlawful interference under Section 8(a)(1) by failing to deduct and remit dues of employees following their resignation from the union and their untimely cancellation of voluntary checkoff authorizations. The violation was based on the employer's interference in the relationship between employees and their representative. However, in contrast, none of the employees in the instant case attempted to revoke their checkoff authorizations or resign their membership in the Union.

For all of the above reasons, we conclude that the Region should issue a Section 8(a)(5) and (1) complaint, absent settlement, and dismiss the Section 8(a)(3) allegation, absent withdrawal.

B.J.K.