

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

# Advice Memorandum

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SUBJECT: United Ready Mix & Teamsters Local Union 436 548-6090  
a/w International  
Cases Nos. 8-CA-34877-1, and 8-CB-10060-1

The Region submitted these cases for advice on (1) whether the Employer lawfully may honor checkoff authorizations and remit union dues to the Union and, to the extent relevant to this issue, whether the parties' collective-bargaining agreement has automatically renewed and (2) whether the Employer and the Union violated Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2) of the Act by (a) according superseniority to a Union steward in the absence of a written superseniority provision in any bargaining agreement; and (b) reducing employees' pay by \$1.35 per hour and paying such amounts to Union benefit plans.

We conclude that (1) the parties' contract did not automatically renew; the 1997 "letter agreement" signed by the parties constituted a new contract; and in any event if a valid dues checkoff authorization exists, an employer may honor it after the expiration of a contract that references checkoff, although it is not obligated to do so; thus here the Employer and the Union acted unlawfully with respect to remitted dues only where valid individual wage assignments did not exist; and (2) the Employer and Union did not violate Sections 8(a)(3) and 8(b)(1)(A) and 8(b)(2) of the Act by either (a) applying their superseniority practice, or (b) reducing the employees' wages to pay increased pension rates, after the Union agreed, with the approval of a Local membership vote, to have those costs passed on through their wages. Accordingly, the Region should issue a complaint, absent settlement, against both the Union and the Employer alleging respectively violations of Sections 8(a)(3) and 8(b)(1)(A) and 8(b)(2) of the Act for those dues collected from employees for whom no valid wage assignment has been produced. The Region should dismiss all the remaining charges, absent withdrawal.

**FACTS**

The Employer is engaged in the manufacturing and delivery of ready mix concrete. The Charging Party is an individual who began his employment with the Employer in 1987 as a truck driver. Some time after 1972, the Employer began a bargaining relationship with Teamsters Local 436 (Union). The Employer signed an individual collective-bargaining agreement with the Union on June 1, 1988, effective by its terms from May 1, 1988 through May 31, 1991. Article XVII section 1 of that agreement is entitled EXPIRATION AND RENEWAL and states as follows:

This Agreement shall become effective as of June 1, 1988 and shall remain in full force and effect until May 31, 1991 and thereafter shall continue in full force and effect for successive periods of one year unless notice of intention to terminate, amend, change or modify is given as hereinafter provided.<sup>1</sup>

The express terms of the agreement did not contain a union steward superseniority clause. However, at all times during their bargaining relationship, the parties have applied superseniority for purposes of layoff and recall to the on-site Union steward. This agreement contained a standard union-security clause and also contained a dues check off provision that provided:

The Employer shall deduct from the wages payable to any employee, and pay to the Union, the amount of monies which that employee has authorized the Employer to deduct by a written assignment and authorization ... The Employer agrees to notify the Union whenever any employee shall revoke a written assignment and authorization previously delivered to the Employer.

In May 1991, the parties executed a letter of agreement to extend the terms and conditions of the above original agreement. The Union contends that the parties executed other extension agreements annually until at least until May 1, 1996. However, the Union could provide only one other letter of agreement to extend the original agreement: a 1996 agreement that covered the period of May

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<sup>1</sup> Despite this language, this agreement did not thereafter provide any specific means for the parties to serve notice to terminate, amend, change or modify their agreement.

1, 1996 through January 1, 1997, entitled "Addendum between Teamsters Local #436 and United Ready Mix." This 1996 agreement provided for wage increases effective May 1 and August 1, 1996, and also specified pension and welfare contributions. The 1996 agreement finally stated: "All language in the current labor agreement between Teamsters Local #436 and United Ready Mix shall remain in full force and effect."

On July 10, 1997, the parties signed another letter agreement that provided:

[T]he agreement reached between both parties is as follows:

1. A signed agreement between United Ready Mix and Teamsters Local Union #436 by noon on July 11, 1997.
2. Retroactive pay of \$.45 per hour from July 1, 1997 contingent on the rewarding of the Federal Court House job to United Ready Mix and the flow of revenue from said job.
3. In the event United Ready Mix is not awarded the Federal Court House job. United Ready Mix agrees effective May 1, 1998 the Company will pay the Ready Mix Association negotiated wage rate at that time.
4. The Welfare contribution shall remain at \$2.00 per hour and the Pension contribution shall remain at \$1.00 per hour with a forty hour maximum on both.

In fact, no successor agreement as contemplated in #1 above was ever executed, and the Employer was not awarded the Federal Court House job as contemplated in #3 above. However, the Charging Party states that employees did receive an additional \$.45 an hour, presumably the Ready Mix Association rate, in 1998.

Since the 1997 agreement, the parties have not signed any other agreements, nor have there been any wage increases since 1998. Sometime in 1997, the Union met with the Employer in an effort to negotiate over the Multi Employer Ready Mix Concrete Association terms. The Employer refused to execute the Association contract due to its financial condition. The Union attempted to call a strike but called it off for lack of employee support. Despite the fact that the parties had not agreed to the Multi Employer Ready Mix Concrete Association contract, the

Employer asserts it attempted to follow most of the terms in that contract. The Employer also continued to deduct union dues from the wages of its employees, and continued to contribute to the Pension, and Health and Welfare funds on their behalf.

In 2003, the Union's Pension and Health and Welfare Funds required an increase of \$1.35 per hour per employee to maintain existing benefits. Employees from approximately 40 businesses, including the Employer's employees, voted to reduce their wages by this amount to maintain their benefits.<sup>2</sup> The Employer complied with the employees' vote, reduced each employee's wages by \$1.35 per hour and remitted those funds to the Union funds.

Since 1998, the Union has had minimal contact with the Employer and has maintained a limited presence at the Employer's facility. There have been no negotiations, or changes in the terms and conditions of employment, except for the 2003 wage reduction of \$1.35 per hour to cover increased fund costs. Employees continue to pay dues, receive health and welfare benefits, and have a Union appointed steward.

The instant case arose when the Charging Party was laid off from December 2003 to April 12, 2004 for lack of work. Among other things, the Charging Party alleges his layoff was unlawful because the less senior Union steward continued to work pursuant to the parties' established past practice of according superseniority to the onsite Union steward. In addition, the Charging Party alleges that the Union violated its duty of fair representation and the Employer violated Section 8(a)(3) by continuing to deduct union dues and by failing to pay him the appropriate wage rate.

#### **ACTION**

We conclude that (1) the parties' contract did not automatically renew; the 1997 "letter agreement" constituted a new contract, albeit with limited terms and of unlimited duration; the Employer and the Union acted unlawfully with respect to remitted dues only where the dues were not deducted pursuant to valid individual wage assignments; and (2) the Employer and Union did not violate Sections 8(a)(3) and 8(b)(1)(A) and 8(b)(2) of the Act by either (a) continuing their superseniority practice, or (b) reducing the employees' wages to pay increased pension

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<sup>2</sup> The Charging Party states that he received a ballot to vote on this issue, but does not recall whether he voted.

rates, after the Local's membership voted to have those costs passed on through their wages.

1. **The labor agreement providing for dues checkoff did not automatically renew; nevertheless continued dues checkoff is unlawful only where dues were deducted without valid authorization.**

#### Contract Renewal

The Board has held that parties to a collective-bargaining agreement containing an automatic renewal clause may, by their conduct, express their intentions not to be bound by that automatic renewal clause. The commencement of substantive negotiations for a new contract, prior to the time when notice of termination is due, prevents automatic renewal.<sup>3</sup> Beginning substantive bargaining sessions following an untimely or otherwise defective notice to terminate, without asserting a defect in that notice until after the first session, also prevents automatic renewal.<sup>4</sup> Moreover, the Board has found that when an employer agreed to be bound by a collective-bargaining agreement to be later negotiated between the union and the employer's competitors, the employer necessarily intended not to be bound by automatic renewal of its prior contract.<sup>5</sup>

Here, the parties' 1997 agreement prevented the automatic renewal of the prior agreement for several reasons. First, the 1997 agreement was not itself an

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<sup>3</sup> See Ship Shape Maintenance Co., 187 NLRB 289, 291 (1970) (the employer began negotiations with the union 75 days before the expiration date of the contract covering one unit; when the employer specifically requested wage proposals regarding other units covered by other contracts expiring later, the employer waived the contractual requirement for 60-day written notice to forestall automatic renewal of the other contracts for those other units).

<sup>4</sup> Industrial Workers AIW Local 770 (Hutco Equipment), 285 NLRB 651, fn. 1 (1987) (union waived its right to object to the timeliness of the employer's notice to reopen the contract, where it only raised the issue after the conclusion of the first session, at which it received what it considered to be an unfavorable proposal).

<sup>5</sup> Farm Crest Bakeries, 241 NLRB 1191, 1197 (1979).

extension of the prior agreement. We note that when the parties wanted to extend the prior agreement as they did in 1996, they explicitly included that intent in the 1996 agreement. They did not do so in the 1997 agreement. Second, the 1997 agreement states that the parties had met to negotiate a new agreement. Those contract negotiations themselves prevented automatic renewal.<sup>6</sup> Last, despite the fact that no additional agreement was ever signed, the 1997 agreement itself provided wage and pension terms. If the 1997 agreement constituted a new valid collective-bargaining agreement, such an agreement clearly would have prevented automatic renewal.<sup>7</sup> We conclude that the 1997 agreement did constitute a valid collective-bargaining agreement.

Neither the Board nor Congress, in its description of the subjects of bargaining in Section 8(d), has articulated a minimum quantum of topics required to create a collective-bargaining agreement. Rather, the Board has simply acknowledged that, "[b]y definition, a collective-bargaining agreement is the embodiment of the terms and conditions of employment reached as the result of contract negotiations between the employer and the accredited representative of his employees."<sup>8</sup> The 1997 agreement does lawfully settle two employment terms reached as a result of negotiations between the Employer and the Union. The 1997 agreement also clearly is court enforceable, because an agreement need not settle all employment terms to be enforceable under Section 301.<sup>9</sup> Since the 1997 agreement

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<sup>6</sup> See Ship Shape Maintenance Co., supra.

<sup>7</sup> See Farm Crest Bakeries, supra.

<sup>8</sup> American Smelting and Refining Co., 167 NLRB 204, 209 (1967), enf'd 406 F.2d 552 (9th Cir. 1969), cert. den. 395 U.S. 935 (1969).

<sup>9</sup> Retail Clerks v. Lion Dry Goods, 369 U.S. 17 (1962) (strike settlement agreement). See also Hotel & Restaurant Workers v. J.P. Morgan Hotel, 996 F.2d 561, 566-567 (2d Cir. 1993) (neutrality agreement); Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc., 845 F.2d 1250, 1252-1253 (4<sup>th</sup> Cir. 1988) (election agreement); International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers-Local 1603 v. Transue & Williams Corp., 879 F.2d 1388, 1392 (6<sup>th</sup> Cir. 1989) (arbitration agreement); Frech v. Pensacola Steamship

itself is a court enforceable, collective-bargaining agreement, it necessarily prevented the automatic renewal of the parties' prior agreement.<sup>10</sup>

Dues Check off

Regarding dues check off, Section 302(c)(4) requires that there be a "written assignment" by the employee, and that the authorization be revocable at times specified there.<sup>11</sup> In litigation under Section 302, the courts have long held that it is unlawful for an employer to check off dues in the absence of written authorizations.<sup>12</sup> However, there is nothing in either Section 302 or in the NLRA which requires that an employer's practice of checking off dues and remitting them to a union must also be authorized by a clause in a collective-bargaining agreement.

Indeed, in a case arising under Section 302, the Second Circuit has held that pursuant to appropriate written employee authorizations, bandleader-employers lawfully checked off dues even in the absence of a collective-bargaining relationship with the union.<sup>13</sup> And

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Association, 903 F.2d 1471, 1475 (11<sup>th</sup> Cir. 1990) (working agreement providing preferred hiring status to employees).

<sup>10</sup> It is irrelevant that the 1997 agreement may be insufficient for all purposes, e.g., it may not bar an election petition. See, J.P. Sand and Gravel, 222 NLRB 83 (1976) (agreement containing only wages and fringe benefits settled an insufficient number of employment terms to bar an election petition, citing Appalachian Shale Products, 121 NLRB 1160 (1958)); Hope Webbing Co., Inc., 119 NLRB 145 (1957) (agreement of indefinite duration no bar to election).

<sup>11</sup> The Board has added a further requirement that the authorization must have been freely given and not coerced. Luke Construction Co., 211 NLRB 602 (1974); NLRB v. Atlanta Printing Specialties, 523 F.2d 783, 90 LRRM 3121 (6th Cir. 1975), enfg. 215 NLRB 237 (1974); Zurn Nepco, 316 NLRB 811, 818-819 (1995).

<sup>12</sup> ILA v. SeaTrain Lines, Inc., 326 F. 2d 916, 55 LRRM 2278 (2d Cir. 1964); Schwartz v. Associated Musicians of Greater New York, Local 802, 340 F. 2d 228, 58 LRRM 2133 (2d Cir. 1964).

the Board has held that where check off authorizations have not been revoked, an employer does not violate Section 8(a)(3) when it continues dues check off after the expiration of the parties' bargaining agreement.<sup>14</sup> The Board has also stated that check off authorization is a form of contract between an employee and his employer, pursuant to which the employee assigns to his bargaining representative the right to receive a portion of his wages.<sup>15</sup> Therefore, the relevant contract is one between the employer and the employee to which the Union is merely a third-party beneficiary. In that regard, an Employer and Union who deduct and receive union dues in the absence of a valid checkoff authorization signed by the employee, violate Sections 8(a)(3) and 8(b)(1)(A) and 8(b)(2) respectively.<sup>16</sup>

Here, we note that neither the Employer nor the Union has been able to produce a checkoff authorization executed by the Charging Party, Timothy Kinney, in this case. Additionally, while the record includes valid checkoffs for five of the Employer's nine unit employees, neither the Employer nor the Union was able to provide checkoff authorizations for all of the Employer's current employees.<sup>17</sup> Thus, the Employer and the Union violated

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<sup>13</sup> Schwartz v. Associated Musicians of Greater New York, 340 F.2d 228, 58 LRRM 2133 (2nd Cir. 1964).

<sup>14</sup> Lowell Corrugated Container Corp., 177 NLRB 169, 173 (1969), enfd. 434 F.2d 1047, 75 LRRM 2346 (1st Cir. 1970); Yaloz Mold & Die Co., 256 NLRB 30 (1981).

<sup>15</sup> NLRB v. Atlanta Printing Specialties, *supra*; Trico Products Corporation, 238 NLRB 1306 (1978); Frito-Lay, 243 NLRB 137 (1979); Electrical Workers IBEW Local 2088 (Lockheed Space Operations), 302 NLRB 322 (1991).

<sup>16</sup> See Edward L. Nezelek, Inc., 252 NLRB 616 (1980).

<sup>17</sup> The Employer supplied valid authorizations signed by four employees, Marcus P. Traylor, Ronald White, Anthony Johnson, and Wayne Walker; the Union supplied only one additional valid authorization from a current employee, Timothy Sherman. The Region noted that Gregory Kinney (the Charging Party's cousin) had also executed a checkoff, but a review of the material revealed two documents, including an application for union membership, but no checkoff authorization.

Sections 8(a)(3) and 8(b)(1)(A) and 8(b)(2) respectively with regard to those dues collected from employees for whom no valid authorizations had been executed.<sup>18</sup>

On the other hand, with regard to those employees who have executed valid and unrevoked checkoff authorizations, we conclude consistent with Lowell Corrugated, supra, that neither the Employer nor the Union violated the Act by continuing to deduct authorized union dues from their wages. The mere fact that the 1997 agreement did not obligate the Employer under Section 8(a)(5) of the Act to continue the practice of remitting dues to the Union (or that the 1988-1991 check-off term may not have continued past that contract's expiration), does not make the Employer's choice to honor the valid wage assignments of its employees unlawful under Section 8(a)(3).<sup>19</sup>

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<sup>18</sup> Edward L. Nezelek, Inc., supra

<sup>19</sup> In his brief to the Board on remand of Hacienda Hotel, 331 NLRB 665 (2000), the General Counsel argued that the Board could reaffirm its decision that an employer does not violate Section 8(a)(5) by unilaterally canceling dues checkoff after the expiration of a contract. He noted a potential inconsistency between the rationale for that position, and the rationale of Lowell Corrugated, supra, i.e., holding that an employer does not violate Section 8(a)(3) by continuing dues checkoff after contract expiration. See Hacienda Hotel, No. 28-CA-13274 & 28-CA-13275, G.C.'s Brief to Board p. 13 fn. 7, (May 15, 2003). However, Hacienda Hotel involved whether a dues checkoff provision survived the expiration of a collective bargaining agreement. Here, the charge does not involve the Employer's refusal to check off dues under Section 8(a)(5), but rather the lawfulness of its continuing dues check off under Sections 8(a)(3), and 8(b)(2) and 8(b)(1)(A). Hacienda Hotel also involved a check off provision expressly limited in its duration to the term of the agreement. This case does not arise in the context of a contract provision which expressly limited dues checkoff to the term of the contract. The 1988-1991 contract that had rolled over through 1996 had no duration in the checkoff provision; and the 1997 agreement between the parties has neither a union-security clause nor a dues check off provision. Accordingly, the General Counsel's argument in Hacienda Hotel is not at all implicated in this case.

**2. The Employer lawfully granted the Union's designated steward a preference in the layoff; and lawfully complied with Union's request, ratified by a vote of the Union's membership, that the Employer reduce employees' wages to pay increased pension cost.**

Superseniority

Superseniority for layoff and recall is presumptively lawful so that union officers may be on the job to accomplish duties which are directly related to contract administration and/or grievance processing.<sup>20</sup> Since the 1997 agreement was a valid contract, the Employer's according of superseniority for the steward's on-the-job presence was clearly lawful as directly related to contract administration. However, we would find the according of superseniority here lawful even if we had concluded that the last written collective-bargaining agreement between the parties had not renewed, and that no other agreement existed between the parties. The absence of a bargaining agreement does not obviate the rationale for superseniority, as the on-site steward could still process grievances.<sup>21</sup> The Employer therefore lawfully granted the Union's designated steward a preference in the layoff.

Reduced Wages for Pension And Welfare Payments

There are no facts which would indicate that these payments were coerced and/or discriminatory. The Union and the Employer agreed to pay for the increased pension costs by a reduction in employee wages after the Local's membership had ratified this change. We note that the Charging Party is an individual and no Section 8(a)(5) charge has been filed over these deductions. However, even viewing this wage reduction as a change in employment conditions, the wage reduction appears to be a consensual, lawful mid-term contract modification.<sup>22</sup> In sum, there is

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<sup>20</sup> International Union of Electronic, Electrical, Technical, Salaried and Machine Workers Local 663 (Gulton II), 276 NLRB 1043 (1985).

<sup>21</sup> See, e.g., Telford & Doolen, Inc., 277 NLRB 1054 (1985) (superseniority lawfully applied during contract hiatus).

<sup>22</sup> Although the 1988-1991 contract had expired, the underlying fund agreements would continue past the expiration of that agreement, validating these payments. See Hen House Market No. 3, 175 NLRB 596 (1969).

no evidence showing that the Employer's paying the additional monies to the Union's Pension and Health and Welfare funds from employees wages in 2003 was coerced or discriminatory, in violation of Sections 8(a)(3) and/or 8(b)(1)(A) and 8(b)(2).

Accordingly, the Region should issue complaint, absent settlement, alleging violations of Sections 8(a)(3) and 8(b)(1)(A) and 8(b)(2) for those dues collected from employees for whom no valid wage assignment has been produced. The Region should dismiss all the remaining charges, absent withdrawal, including those relating to the collection of Union dues pursuant an unrevoked and valid checkoff authorization.

B.J.K.