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WASHINGTON, DC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WKYC-TV, INC.)	CASE NO: 8-CA-39190
)	
and)	ADMINISTRATIVE LAW JUDGE:
)	JEFFREY D. WEDEKIND
NATIONAL ASSOCIATION OF BROADCAST)	
EMPLOYEES AND TECHNICIANS, LOCAL)	<u>CHARGING PARTY'S EXCEPTIONS,</u>
42 a/w COMMUNICATIONS WORKERS OF)	<u>ARGUMENT AND REQUEST TO</u>
AMERICA, AFL-CIO)	<u>PRESENT ORAL ARGUMENT</u>
)	<u>BEFORE THE BOARD</u>

The Charging Party (Union) hereby notices the following exceptions to the Administrative Law Judge's Order of September 30, 2011 in the above captioned matter.

EXCEPTION #1. That the Administrative Law Judge misinterpreted the alternate argument offered by the General Counsel and the Charging Party, relying on the holding of Tribune Publishing Co., 351 NLRB 196. The "immaterial" distinction lies in the somewhat similar facts between the "terminated use of direct deposit of union dues" v. complete "cessation of dues check-off" here. In the instant case the Union is forced to recover its money through its own means. The Union has fallen thousands and thousands of dollars behind and now must chose between disciplining members, challenging their employment status, or even taking them to court.

The holding in Tribune addressed the "unilateral termination" of the direct deposit agreement. The employer agreed to its terms and the Board found that they should live up to their end of the bargain. Here, the Employer implemented posted terms after reaching impasse. There was no dues check-off in the posted terms. However, even without check-off language in the posted terms, the Employer never ceased the dues deduction. In effect, by continuing the dues check-off they re-

implemented what they had unilaterally terminated. This is the same situation as found in Tribune. The employer took away what they gave the union, without bargaining. This simple fact is also what distinguishes this case from those cited by the Administrative Law Judge in his Order. Hacienda Resort Hotel & Casino, 355 NLRB 154, (ceased dues check-off over 1 year after contact expiration). West Co., 333 NLRB 1314, 1315 fn, 6 and 1319-1320 (2001) (ceased dues check-off 3 months after contact expired). And, 51st Ave. Owners Corp., 320 NLRB 993 (1996). (ceased dues-check off 7 months after contract expired). The clear difference between the cases cited, is that the Employer here intended to cease the dues-check off as evidenced by its posted terms. But, they “forgot” for 16 months and only then terminated the dues deduction. The Employer forced the Union to live with its posted terms for 16 months and should be held to the same standard when they unilaterally “re-implemented” the dues check-off. None of the cited cases relied upon have this factual component of intending to stop the dues deduction, then unilaterally “re-implementing them, and then ceasing them without bargaining, when the Union begins its very public mobilization campaign against the Employer.

CONCLUSION FOR EXCEPTION #1

In the instant matter, the Union has clearly established that the cited cases by the Administrative Law Judge did not mirror the facts presented in this case in order to terminate dues check-off months after the contract expired. The facts are unique here because this is the only case where the Employer actually intended to cease the dues check-off in written posted terms. Then 16 months later claiming they forgot, they unilaterally terminated what they previously reinstated and ratified by their own actions. This is a reasonable interpretation of Tribune Publishing Co., and therefore, an 8(a)(5) violation.

EXCEPTION # 2. Counsel for the General Counsel and the Charging Party argue that dues check-off should survive the post impasse rule established in NLRB v. Katz, 369 U.S. 736 (1962) Further, the Administrative Law Judge concedes that he is “bound by Board precedent unless and until it has been reversed by the Supreme Court.” Pathmark Stores, Inc., 342 NLRB 378 fn. 1 (2004). The Union takes exception and believes that Bethlehem Steel Co. (Shipbuilding Div.), 136 NLRB 1500 (1962) and its progeny, including Tampa Sheet Metal, 288 NLRB 322, 326 fn 15 (1988) be overruled.

In Hacienda Resort Hotel, Inc., (Hacienda III) 355 NLRB 154 (2010), Members Schaumber and Hayes, in their concurrence dismissing the complaint, wrote, “...like strikes and lockouts, an employer's ability to cease dues checkoff upon contract expiration has become a recognized economic weapon in the context of bargaining for a successor agreement. The ability of parties to wield such weapons is “part and parcel” of the system that the Wagner and Taft-Hartley Acts envisioned.” In the instant case, the Employer has repeatedly agreed with this position. The Employer argues that the cessation of the dues check-off was a necessary economic weapon to combat the Union's public mobilization campaign against them. (Stip. R. 36, Emp. Brief p. 4). The weakness of the Employer's argument is that they took this action far outside of the “context of bargaining for a successor agreement,” as required by the two Members stated above.

Here, the parties had not met for approximately a year and one-half. There was no bargaining, or even discussions. It was either take the highly concessionary contract or continue with the posted terms. The Union agrees with Chairman Liebman and Member Pearce, concurring in Hacienda III, “(T)he concurrence also contends that the ability to cease dues-checkoff upon contract expiration has become a recognized economic weapon, and asserts that “[t]o strip employers of that [weapon] would significantly alter the playing field that labor and management have come to know and expect.” “ As the Board and courts have repeatedly recognized, however, the availability of economic weaponry is subject to one crucial qualification-the party utilizing it must at the same time be engaged in lawful

bargaining.” (underline added).

This point was emphasized in Katz, where the Supreme Court, while recognizing that the Board “may not pass judgment on the legitimacy of any particular economic weapon used in support of genuine negotiations,” made clear that the Board “is authorized to order the cessation of behavior which is in effect is a refusal to negotiate.” The Employer here stretched the Katz exception in ceasing dues check-off, claiming its use as an economic weapon. But in reality, the parties were at impasse without any bargaining whatsoever, for approximately one-and-one-half years. Improving their bargaining position was not their motive, it was done in retaliation to the Union's public mobilization campaign. The cessation of the dues-check off was implemented at almost the exact moment in time as the beginning of the Union's campaign. (Stip. R. 36 (a),(b)). It was done to punish the Union for fighting for a decent contract.

Bethlehem Steel's holding in 1962 is now being misinterpreted and abused as in this case. The facts here are clear; the employer never bargained over dues check-off. They made a “final and firm” offer which included the check-off provision. The membership rejected that offer. They posted written conditions without the check-off provision. They intended to cease the dues check-off. For 16 months they continued to deduct dues, in effect re-implementing the article. The Union began its public mobilization campaign which embarrassed the Employer. Immediately after the campaign began the Employer sent notice to the Union ceasing the dues check-off, without offering to bargain over the issue. There is absolutely no evidence in the record that the Union had any economic advantage that forced the Employer to use their nuclear weapon.

The holdings of Bethlehem Steel and Katz did not anticipate the delayed responses of employers ceasing dues-check off. The cases cited in Exception #1 began with a 3 month delay, then 7 months, then more than 1 year and now 16 months. Employer's will ride this “slippery slope” and threaten unions with cessation of dues check-off at every bargaining session, unless they agree to concessions. Under this current interpretation of law, they know they can “pull the plug” on the union's

finances any time they please. This could not have been the intent of either Bethlehem Steel or Katz.

CONCLUSION FOR EXCEPTION #2

For the reasons outlined above the Union respectfully urges the Board to overrule Bethlehem Steel and its progeny, including Tampa Sheet Metal. In Hacienda III, Chairman Liebman and Member Pearce, "...would consider overruling" these cases. This is the case. Labor law and sound labor policy require balance at the bargaining table. That balance is not even close under current interpretations of dues check-off law.

Finally, Counsel for the Charging Party, NABET Local 42, respectfully requests to make an Oral Argument when the case is heard before the National Labor Relations Board.

Respectfully Submitted,

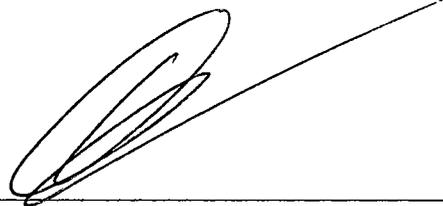
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SERVICE

I hereby assert that copies of the foregoing Charging Party's Exceptions, Argument and Request to Present Oral Argument before the NLRB were served by regular U.S. Mail on this 27th day of October, 2011.

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Exceptions