

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

WKYC-TV, INC.

and

CASE NO. 8-CA-039190

NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES AND TECHNICIANS, LOCAL 42
a/w COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY
TO RESPONDENT'S ANSWERING BRIEF**

KELLY FREEMAN
Counsel for the Acting General Counsel
National Labor Relations Board
Region 8
1240 East 9th Street, Room 1695
Cleveland, OH 44199
kelly.freeman@nlrb.gov
(216) 522-3742

Pursuant to Section 102.46(h) of the National Labor Relations Board's Rules and Regulations, Counsel for the Acting General Counsel submits its Reply Brief to Respondent WKYC's Answering Brief.

I. The Board's decisions in the Burns successor-employer line of cases do not control this matter.

Contrary to Respondent's assertions, cases addressing whether a successor assumed its predecessor's collective bargaining agreement with an existing union do not preclude the Board from holding that an employer's unilateral cessation of dues checkoff after contract expiration violates its duty to bargain in good faith. Specifically, in deciding whether an employer has assumed the obligations of another party's contract, the Board looks at a variety of factors and does not rely solely on whether the successor continued dues checkoff.

In Ekland's Sweden House Inn, Inc.,¹ the Board affirmed the Administrative Law Judge's determination that the employer had assumed the collective bargaining agreement. In addition to the successor employer continuing dues checkoff, the Administrative Law Judge also considered that the employer relied on the provisions of the collective bargaining agreement in justifying giving raises to employees without bargaining with the union.² Further, the employer had used the existing contract as its base in negotiating a new contract.³ Thus, it was the reliance of the employer on several provisions of the contract in setting terms and conditions of employment that established the employer had assumed the contract and not simply that it had continued dues checkoff.

Likewise, in U.S. Can Co.⁴ the Board considered not only the successor employer's continuation of dues checkoff and union security, but also the successor employer's reliance on

¹ 203 NLRB 413 (1973)

² *Id.* at 418.

³ *Id.*

⁴ 305 NLRB 1127 (1992).

the management's rights clause in the predecessor's contract when the Board held that the employer had assumed the contract.⁵ In Brookville Health Care Center,⁶ the Board relied on "(1) the Respondent's failure to expressly reject the contract or any of its terms; (2) the Respondent's compliance with all of the contract terms, including contractually required mid-term changes, and the union-security and dues-check off provisions; and (3) the Respondent's participation in several arbitration proceedings without asserting as a defense the absence of a binding contract between the parties" in determining the successor employer had adopted its predecessor's contract.⁷

Thus, in concluding that a successor employer has adopted its predecessor's contract, the Board considers a variety of factors, only one of which may be an employer's continuation of dues check off. Given the Board's approach to these cases, Respondent's assertion that a decision to overrule Bethlehem Steel⁸ would necessitate overruling the contract adoption line of cases lacks merit. A finding that an employer violates its duty to bargain in good faith by unilaterally ceasing dues check off would not impact the Board's long-standing, multi-faceted analysis in such cases.

II. Respondent is not entitled to cease dues deduction as an economic weapon

Respondent asserts that the Union and the Acting General Counsel are attempting to coerce employees into assisting their union. However, it has never been Counsel for the Acting General Counsel's position that Respondent has a duty to deduct and remit dues for employees other than for those who have executed *valid authorizations* allowing the Respondent to do so. Subject to the terms of their authorization, any employee may revoke this consent if they no

⁵ Id. at 1127-28.

⁶ 337 NLRB 1064 (2002).

⁷ Id. at 1065-66.

⁸ 136 NLRB 1500 (1962).

longer wish for their dues to be deducted. There is no evidence in the record that any employee has done so. However, there is evidence that fifty-six bargaining unit employees had authorized the Respondent to deduct dues from their paycheck before Respondent unilaterally ceased doing so.⁹

The Union is the bargaining unit employees' recognized bargaining representative.¹⁰ In that capacity, the Union negotiated with the Respondent and came to agreement that Respondent would deduct dues for those employees' executing valid authorizations.¹¹ Respondent honored this agreement throughout the term of the last collective bargaining agreement, during the parties' bargaining for a successor agreement, and for nine months after implementing portions of its final offer.¹² Only then did Respondent unilaterally cease honoring that agreement. By doing so, it created an immediate obstacle to bargaining unit employees chosen method of voluntarily funding their union. Such action clearly interferes with the Section 7 rights of employees to pay their union dues in a manner of their own choosing.

Respondent asserts that ceasing dues check off after contract expiration has become recognized as a lawful economic weapon. Respondent's Answering Brief can fairly be read as an acknowledgement that it ceased dues deduction in direct response to the Union's picketing.¹³ Having done so, the Respondent justifies this conduct by arguing that it should not have to use its payroll system to fund such activity.

⁹ Ex. T (1)-T (56). Hereafter, "S.R." will be used to reference the Stipulated Record. "Ex." will be used to reference exhibits attached to the Stipulated Record

¹⁰ S.R. 16.

¹¹ S.R. 16, 18. Ex. I.

¹² S.R. 28

¹³ Respondent's Answering Brief at 21-22. During contract negotiations and continuing to August 11, 2011, the Union engaged in activity, including picketing, aimed at advertising the parties' dispute to the general public, viewing audience, and advertisers and influencing the Respondent's bargaining position. S.R. 36.

First, it must be pointed out that the Respondent was not funding any activity. The bargaining unit employees were funding the Union's actions and the Respondent interfered with their ability to do so by failing to honor its agreement to abide by the employees' authorizations.

Second, Respondent's argument that it is entitled to use the cessation of dues deduction as an economic weapon is misplaced. Respondent argues that, after not ceasing dues checkoff upon contract expiration, and not proposing the cessation of dues checkoff at any time during bargaining, it was entitled to unilaterally end it in direct response to the Union's public appeals. While Respondent correctly points out that the Board has not "forbidden the use of checkoff as a weapon,"¹⁴ Counsel for the Acting General Counsel knows of no case where the Board definitively states that the cessation of checkoff is, under the present circumstances, a lawful economic weapon. Counsel for the Acting General Counsel recognizes that in Hacienda III Members Schaumber and Hayes discuss the common use of the cessation of dues deduction as an economic weapon during bargaining for a successor contract.¹⁵ However, as Chairman Liebman and Member Pierce explain in their concurring opinion, "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."¹⁶

Counsel for the Acting General Counsel argues that the Respondent's cessation of dues deduction without providing notice and an opportunity to bargain to the Union was a violation of the Act, thus removing from Respondent any ability to stop dues deduction as an economic weapon. Further, a cessation of dues deduction done in retaliation for the Union's lawful use of

¹⁴ Respondent's Answering Brief, p.21.

¹⁵ Hacienda III, 355 NLRB No. 154 at 8 (2010).

¹⁶ Id. at 4 (2010).

public appeals would seemingly violate the Act and, thus, would not be an appropriate economic weapon.¹⁷

III. Counsel for the Acting General Counsel's requested remedy

Respondent correctly notes that, in her Brief to Administrative Law Judge Wedekind, Counsel for the Acting General Counsel argued that the Respondent should have to pay the dues it failed to deduct from its own funds. Counsel for the Acting General Counsel did not pursue this argument in her Brief in Support of its Exceptions. Rather, Counsel for the Acting General Counsel is now requesting the standard remedy for an unlawful failure to check off dues. The standard remedy provides that, where employees have individually signed valid check off authorizations, the Respondent must reimburse the union with interest for any loss of dues the union experienced due to the Respondent's failure to deduct and remit dues.¹⁸ In Bebley Enterprises, Inc.¹⁹, after affirming the Administrative Law Judge's finding that the employer had repudiated its collective bargaining agreement and unlawfully ceased deducting dues, the Board ordered the employer in that case to deduct and remit those dues pursuant to valid authorizations, with interest. Counsel for the Acting General Counsel would accept such a remedy in this case.

However, Counsel for the Acting General Counsel believes there is serious ambiguity regarding whom, ultimately, has responsibility for paying the lost dues under this remedial language. The Board in Ogle Protection Services, Inc.²⁰ allowed the employer to deduct the back dues it owed to the union from back pay the employer owed to individual employees. However,

¹⁷ Cf. Equitable Gas Co., 303 NLRB 925, 927 (1991) (holding Employer violated 8(a)(1) when manager told employees the company would insist on the elimination of checkoff in future negotiation because the Union had filed numerous unfair labor practice charges.); Quality House of Graphics, Inc., 336 NLRB 497, 515 (2001) (adopting ALJ's finding that Employer violated 8(a)(1) and (5) by making a regressive bargaining proposal calling for the elimination of dues checkoff in retaliation for Union filing an unfair labor practice charge.)

¹⁸ See, e.g. YWCA of Western Massachusetts, 349 NLRB 762, 764-65 (2007); Plymouth Court, 341 NLRB 363, 363 (2004).

¹⁹ 356 NLRB No. 64, slip op. at 2 (2010).

²⁰ 183 NLRB 682 (1970).

the case did not address the issue of what would occur where there is no back pay remedy from which to offset the dues. The cases providing that the employer “reimburse” the union for lost dues do not specify where the money is to come from. Even Bebley Enterprises, Inc. provides that the remedy must include interest. Surely, the Board did not intend that the employees pay the interest on the dues owed the union due to their employer’s unlawful conduct. Thus, while Counsel for the Acting General Counsel would accept a remedy providing for deduction and remittance of the lost dues, she recognizes that the Board may find another remedy appropriate as well. This case offers the Board the opportunity to address this unresolved issue.

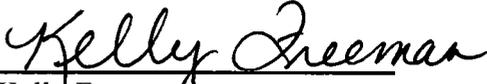
IV. Conclusion

There is no contractual or statutory justification to exclude dues check off from the unilateral change doctrine. As such, Counsel for the Acting General Counsel asserts it is time for the Board to overturn the precedent of Bethlehem Steel²¹ and uphold employees’ Section 7 rights by requiring employers to either honor their dues check off agreements with their employees’ collective bargaining representatives, or to bargain in good faith to impasse on the issue before ceasing dues check off.²²

²¹ 136 NLRB 1500 (1962).

²² Respondent objects to Attachments 1 and 2 of Counsel for the Acting General Counsel’s Brief in Support of Exceptions. In footnote 48 of Counsel for the Acting General Counsel’s Brief in Support of Exceptions, Counsel cites two Bureau of National Affairs publications. These sources were not readily available, so Counsel attached the relevant portions to her Brief for the convenience of the Board and the parties. The attachments and the citations they represent were included in Counsel for the Acting General Counsel’s Brief to Administrative Law Judge Wedekind, and Respondent did not file a Motion to Strike at that time. The publications report the statistical results of reviews of various components of collective bargaining agreements and are illustrative of Counsel for the Acting General Counsel’s legal argument that check off and union security are separate and distinct provisions. The reports themselves report facts not presenting credibility issues. The Board has taken administrative notice of similar statistical reports in past decisions. *See The Pep Boys-Manny, Moe & Jack*, 172 NLRB 246, fn. 1 (1968). Further, the reports fall under the commercial publication exception to the hearsay rule. FRE 803 (17).

Respectfully submitted,


Kelly Freeman

Counsel for the Acting General Counsel
National Labor Relations Board
1695 AJC Federal Building
1240 East 9th Street
Cleveland, Ohio 44199
kelly.freeman@nlrb.gov
(216) 522-3742

Proof of Service

I hereby assert that copies of the foregoing Counsel for the Acting General Counsel's Reply to Respondent's Answering Brief were served by electronic mail this 23rd day of November, 2011 to the following:

Mr. William Behan
Labor Counsel for WKYC-TV, Inc.
Gannett Co. Inc.
7950 Jones Branch Drive
McLean, Virginia 22107
wbehan@gannett.com

Mr. Charles DeGross
Counsel for NABET, Local 42
a/w Communications Workers of America, AFL-CIO
1400 East Schaaf Road
Brooklyn Heights, Ohio 44131
cwalocal4340law@hotmail.com


Kelly Freeman
Kelly Freeman
Counsel for the Acting General Counsel
National Labor Relations Board
1695 AJC Federal Building
1240 East 9th Street
Cleveland, Ohio 44199
kelly.freeman@nlrb.gov
216-522-3742