

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

USIC LOCATING SERVICES, INC.,

and

Case 6-CA-37328

**COMMUNICATION WORKERS OF AMERICA,
LOCAL 13000, AFL-CIO, CLC.**

*Julie R. Stern, Esq. (NLRB Region 6),
for the General Counsel*

*Cynthia K. Springer, Esq. (Baker & Daniels LLP),
of Indianapolis, Indiana, for the Respondent*

*Jonathan Walters, Esq. (Markowitz & Richman),
of Philadelphia, Pennsylvania, for the Charging Party*

DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case is about the claim that an employer violated the National Labor Relations Act (Act) by ceasing to honor employee union dues-checkoff authorizations after expiration of a collective-bargaining agreement.

The government contends that the employer's checkoff of union dues during the term of a collective-bargaining agreement (pursuant to valid individual employee authorizations) is a mandatory subject of bargaining that must, like mandatory subjects generally, be maintained in effect after contract expiration and subject to the collective-bargaining process. The government alleges that the employer's unilateral failure to continue dues checkoff after expiration of the contract in December 2009, constituted an unlawful unilateral change in terms and conditions of employment in violation of Section 8(a)(1) and (5) of the Act. Further, the government alleges that the employer's refusal to honor newly-submitted dues-checkoff authorizations in May 2011, was similarly violative of the Act.

STATEMENT OF THE CASE

On June 6, 2011, the Communication Workers of America, Local 13000, AFL-CIO, CLC (Local Union) filed an unfair labor practice charge against USIC Locating Services, Inc. (Employer or USIC), docketed by Region 6 of the National Labor Relations Board (Board) as Case 6-CA-37328.

On August 30, 2011, based on an investigation into the charge filed by the Local Union, the Acting General Counsel (General Counsel), by the Regional Director for Region 6, issued a complaint and notice of hearing against USIC alleging a violation of Section 8(a)(1) and (5) of the Act. USIC filed an answer denying all violations of the Act.

On November 16, 2011, the parties filed a joint motion to waive the hearing and have the matter decided on a stipulated record. That day I granted the motion and approved the stipulation, including a five page "Stipulation of Facts" which, with attached exhibits and a subsequently-filed amended complaint and answer, constitutes the record in this matter.

The amended complaint was filed November 18, 2011. The amended answer was filed by December 9, 2011. Counsel for the General Counsel, the Respondent, and the Union filed briefs in support of their positions by December 14, 2011. On the entire record, I make the following findings, conclusions of law, and recommended order.

JURISDICTION

The parties stipulate that at all material times, the Respondent was an Indiana corporation with an office and place of business in Bridgeville, Pennsylvania, where it engaged in the business of providing utility locating services. The parties further stipulate that during the 12-month period ending May 31, 2011, Respondent, in conducting its operations purchased and received at its Bridgeville, Pennsylvania facility goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. The parties stipulate that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Local Union and the Communication Workers of America, AFL-CIO, CLC (the International Union), are labor organizations within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Background facts

On January 5, 1995, the International Union was certified as the exclusive collective-bargaining representative of the following bargaining unit:

All full-time locators employed by the Employer in the State of Pennsylvania as certified on January 5, 1995 by the NLRB in Case 5-RC-14105 and excluding all locators performing any locating work in Bucks, Montgomery, Chester, Delaware and Philadelphia Counties, Casual Flaggers, Surveillance Technicians, Service Technicians, Office Clerical employees, guards and supervisors, as defined in the National Labor Relations Act.¹

At all material times, the Local Union, through its administrative unit, unit 112, has been designated by the International Union as the representative of the unit employees. Since, January 5, 1995, the International Union and the Local Union, through its administrative unit, unit 112, have been recognized by the employing entity as the collective-bargaining representative of the bargaining unit employees. This recognition was embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms from November 1, 2006 through October 30, 2009 (the 2006 Agreement), as extended by agreement

¹The parties agree that this unit constitutes an appropriate unit for purposes of collective bargaining within the meaning of Sec. 9(b) of the Act.

of the parties through November 18, 2009, and further extended by agreement of the parties to December 4, 2009.

5 At the time the 2006 Agreement went into effect, the entity employing the bargaining unit employees was Central Locating Services. On April 1, 2008, United States Infrastructure Corporation acquired Central Locating Services, then merged Central Locating Services into sister company SM&P Utility Resources, Inc. The resulting entity was the Respondent, USIC, and since then USIC has continued to operate the business of Central Locating Services in basically unchanged form, has employed as a majority of its employees individuals who were previously employees of Central Locating Services, and has adopted the 2006 Agreement. The parties stipulate that USIC has continued the employing entity and is a successor to Central Locating Services.

15 Article IV of the 2006 Agreement includes a form of a union security clause and addresses payroll dues deduction.² From December 4, 2009, and continuing during the six months prior to the filing of the charge in this case—i.e., June 6, 2011—the Respondent failed and refused to continue to honor dues authorizations submitted by bargaining unit employees. Although the obligation to check off dues during the term of the contract is less than clear in the 2006 Agreement, it appears to have been the consistent practice of the Respondent and in its amended answer the Respondent admits it “was required to and had the right to deduct union dues” “until the termination of th[e] contract.” (Amended Answer at ¶4 of “Other Defenses” (quoting Article IV of the 2006 Agreement)).

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²Article IV of the 2006 Agreement states:

ARTICLE IV - AGENCY SHOP/PAYROLL DEDUCTIONS

All employees who are members of the Union or who are obligated to tender to the Union amounts equal to periodic dues on the effective date of this Agreement, or who later become members, and all employees entering into the bargaining unit on or after the effective date of this Agreement, shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members from such effective date or, in the case of such employees entering into the bargaining unit after the effective date, on the thirtieth day after such entrance, until the termination of this contract.

The condition of employment specified above shall not apply during periods of formal separation from the bargaining unit by any such employee but shall reapply to such employee on the thirtieth day following his return to the bargaining unit.

The Company may request an updated payroll deduction authorization card as may be required under the Company's administrative and accounting procedures.

The Union agrees to hold the Company harmless against any claims that might be made by any employee against the Employer in complying with the provisions of this Article.

At the parties' negotiating session on November 18, 2009, the Respondent notified the Local Union of its intent to refuse to continue to honor dues deduction authorizations upon the expiration of the contract extension on December 4, 2009. At the November 18, 2009, bargaining session the Respondent tendered its final proposal (referred to by the parties as the Respondent's Last, Best and Final Offer). The parties did not engage in bargaining over Respondent's stated intent to cease honoring dues deduction authorizations.

On February 2, 2010, the Respondent notified the Local Union that when it implemented its final proposal on March 1, 2010, it would not implement the tentatively agreed-to dues-checkoff provision that was part of the final offer. The Respondent notified the Local Union that it should contact the Respondent's Attorney Cynthia K. Springer if it wanted to discuss the issue.³

On March 1, 2010, Respondent implemented its final proposal (but not dues checkoff).⁴ Thereafter, on June 17, 2010, Respondent and the Local Union reached agreement concerning dues deductions, including back dues payments to March 1, 2010, but, on June 19, 2010, the bargaining unit members failed to ratify such agreement. The Local Union has not made any further request to bargain.

By letter dated May 6, 2011, the Local Union requested that the Respondent process dues authorization cards for eleven members of the unit. On about May 13, 2011, the Respondent, in a letter from Attorney Springer, refused the Local Union's May 6, 2011 request to process the new authorization cards. Springer wrote, in relevant part, that

USIC currently does not have a collective-bargaining agreement with CWA Local 13000 covering its Pennsylvania employees. Accordingly, USIC is not legally required to, and will not, process such dues authorization cards.

Analysis

Introduction

The government alleges that USIC violated Section 8(a)(1) and (5) of the Act by failing and refusing to honor existing dues-checkoff authorizations after the December 4, 2009 expiration of the 2006 Agreement, and, also by refusing, since May 13, 2011, the Union's request to process additional dues-checkoff authorizations. The government contends that USIC's unilateral refusal to continue checking off dues after the contract's expiration constituted a unilateral change in a mandatory subject of bargaining, and thus, was unlawful when, as admitted here, undertaken during bargaining for a new contract without first bargaining to a valid impasse. Similarly, and employing the same theory, the government contends that USIC's subsequent refusal to honor new dues deduction authorizations in May 2011 constituted an independent violation of the Act.

The Respondent rejects the government's contention that it acted unlawfully. It marshals a number of arguments in this regard: it claims that the deduction of dues was not required by

³The parties stipulate that at all material times Springer has been an agent of the Respondent within the meaning of Sec. 2(13) of the Act.

⁴The Local Union did not file an unfair labor practice charge over the implementation and its lawfulness is not challenged or at issue here.

the contract, much less required after the expiration of the contract; it claims that Sec. 302 of the Taft-Hartley Act, 29 U.S.C. § 186, forbids checkoff after the expiration of the contract. It mounts other arguments as well, including the claim the union's charge was filed outside the statute of limitation period specified in Section 10(b) of the Act. But the Respondent's central argument is one conceded by the General Counsel: that longstanding Board precedent endorses the Respondent's conduct here and holds that an employer's obligation under the Act to continue to honor dues checkoff ends with the expiration of the labor agreement under which the checkoff procedure had been maintained.

The Unilateral Change Rule

Sections 8(a)(5) and 8(d) of the Act make it an unfair labor practice for an employer to refuse to "confer in good faith with respect to wages, hours, and other terms and conditions of employment."

Since at least the seminal case of *NLRB v. Katz*, 369 U.S. 736 (1962), Board precedent has been settled that the general rule is that during negotiations for a collective-bargaining agreement an employer may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. "[F]or it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. at 743.

Unilateral changes are a per se breach of the section 8(a)(5) duty to bargain, without regard to the employer's subjective bad faith. *Id.* at 743 ("though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end . . . an employer's unilateral change in conditions of employment under negotiation is [] a violation of § 8(a)(5)"). See also, *Litton Financial Printing v. NLRB*, 501 U.S. 190 (1991) ("The Board has taken the position that it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations. The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment").

While negotiations for a collective-bargaining agreement are ongoing "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (footnote omitted), *enfd. mem.* 15 F.3d 1087 (9th Cir. 1994).

Dues Checkoff and Unilateral Changes

As noted, the duty to refrain from unilaterally implementing changes in terms and conditions of employment applies to mandatory subjects of bargaining. Clearly, and it is not disputed by any party to this case, the employer's remittance of union dues is a mandatory subject of bargaining. *Stevens & Associates Construction*, 307 NLRB 1403 (1992); *International Distribution Centers*, 281 NLRB 742, 743 (1986); *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), *enft. denied* on other grounds 320 F.2d 615 (3d Cir. 1963), *cert. denied* 375 U.S. 984 (1963).

However, at least since the Board's ruling in *Bethlehem Steel Co.*, the Board has refused to find a violation where an employer unilaterally ceases dues checkoff at the termination of the contract that provided for it. 136 NLRB at 1502. See also, *Tampa Sheet Metal Co.*, 288 NLRB 322, 326 fn. 15 (1988) ("An employer's duty to check off union dues is extinguished upon the expiration of the collective-bargaining agreement"); *Robbins Door & Sash Co.*, 260 NLRB 659 (1982) ("It is well settled that an employer's duty to check off union dues is extinguished upon the expiration of the collective-bargaining agreement which created that duty"); *Ortiz Funeral Home Corp.*, 250 NLRB 730, 731 fn. 6 (1980) ("it is well established that after the expiration of such an agreement an employer may not unilaterally change the terms and conditions of employment established pursuant to that agreement until a new contract is negotiated or the parties reach an impasse in bargaining. This, of course, does not apply to a union's right to dues checkoff, which is extinguished on expiration of the collective-bargaining agreement creating that right"), enfd. 651 F.2d 136 (2d Cir. 1981), cert. denied 455 U.S. 946 (1982).

The problem the General Counsel points to with this line of cases is that the Board "has never adequately explained the basis for excepting dues checkoff from the postimpasse rule of *Katz*." *Hacienda Resort Hotel*, 355 NLRB No. 154, slip op. at 2 (2010) (Chairman Liebman and Member Pearce, concurring and expressing opposition to rule) & id. at 4 (Members Schaumber and Hayes concurring, supporting rule for "reasons that we may have failed to adequately explain previously"), petition for review granted, 657 F.3d 865 (9th Cir. 2011). Many of the cases simply assert that the rule is "well-settled" or "well-established." But, as the General Counsel suggests, there is little in the way of reasoning by a Board majority that justifies this departure from the Board's *Katz* doctrine.

The most explicit rationale adopted by a Board majority is set forth in *Bethlehem Steel*, supra. It ties, and in some manner equates, dues checkoff with union security provisions.

The first proviso of Section 8(a)(3) of the Act exempts from prohibition under the Act an employer "making an agreement" with a union for a union security requirement under specified circumstances. In *Bethlehem Steel*, the Board reasoned that, based on this statutory language,

[s]o long as such a contract is in force, the parties may, consistent with its union-security provisions, require union membership as a condition of employment. However, upon the termination of a union-security contract, the union-security provisions become inoperative and no justification remains for either party to the contract thereafter to impose union-security requirements.

Bethlehem Steel, supra at 1502.

Accordingly, the Board in *Bethlehem Steel* found no violation in the employer ceasing to enforce union security once the contract on which it was founded expired. The General Counsel's complaint in this case does not challenge *Bethlehem's Steel's* conclusion regarding union security.

However, based on its ruling with regard to union security, the Board in *Bethlehem Steel* went on to hold that the dues-checkoff provision of the expired contract also was not within the *Katz* unilateral change rule and, therefore, that the employer did not violate the Act by failing to honor this term and condition of employment upon the labor agreement's expiration. After finding no violation for failing to continue in effect union security, the Board reasoned:

Similar considerations prevail with respect to Respondent's refusal to continue to check off dues after the end of the contracts. The checkoff provisions in Respondent's contracts with the Union implemented the union-security provisions. The Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force. The very language of the contracts links Respondent's checkoff obligation to the Union with the duration of the contracts. Thus, they read: ". . . the Company will, beginning the month in which this Agreement is signed and so long as this Agreement shall remain in effect, deduct from the pay of such Employee each month . . . his periodic Union dues for that month." Consequently, when the contracts terminated, the Respondent was free of its checkoff obligations to the Union.

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15 Id at 1502.

In the years since *Bethlehem Steel*, this reasoning has been read by the Board, without further explanation, to stand for the proposition that the cessation of dues checkoff at the expiration of a contract does not violate the Act, without reference or regard to a "link" to union security, and even in the absence of a union security clause. *Tampa Sheet Metal Co.*, supra, citing *Robbins Door & Sash Co.*, supra; *Ortiz Funeral Home Corp.*, supra, citing *Bethlehem Steel*, supra.

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In this case, as in *Bethlehem Steel*, the expired contract contains a union security clause (actually an "agency" shop clause). Unlike the checkoff provision in *Bethlehem Steel*, in this case dues checkoff is referenced only indirectly in the union security clause. Unlike in *Bethlehem Steel*, arguably, here there is no specific contractual language limiting checkoff to the period when the contract is in effect. Yet, indisputably, the holding of *Bethlehem Steel*, and its progeny sweep broader than a parsing of the contractual intent: the General Counsel does not even attempt to distinguish *Bethlehem Steel* from the instant case on such grounds. See, GC Br. at 4 fn. 13.

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Rather than attempt to distinguish *Bethlehem Steel*, the General Counsel contends that "the Board should overrule *Bethlehem Steel* to the extent it holds that dues-checkoff arrangements do not survive contract expiration." (GC Br. at 6.)

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The General Counsel's arguments in support of this proposition are substantial. Whatever the force of the contention that the proviso in Section 8(a)(3) requires an extant contract in order to protect a union security clause from prosecution, the proviso makes no reference to checkoff provisions. Dues-checkoff arrangements between employers and unions, premised in every case, as here, on voluntary authorizations executed by individual employees, do not compel union membership or financial support as do union security provisions. And it is clear that a lawful checkoff arrangement can exist independent of and in the absence of union security and, unlike union security, may remain in effect after expiration of the labor agreement should the employer permit it.

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While the proviso of Section 8(a)(3) has been read to require that a collective-bargaining agreement be in effect in order to immunize a union security clause from prosecution under Section 8(a)(3), no such requirement exists in the statutory text permitting dues checkoff. As the General Counsel points out (and contrary to one of the contentions raised by the Respondent here) the plain wording of Sec. 302 of the Taft-Hartley Act, which prohibits

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employer payments to unions, expressly exempts dues checkoff from this prohibition in section 302(c)(4) and *does not* limit the exemption to periods of time when the dues-checkoff arrangement is embodied in an extant collective-bargaining agreement. To the contrary, the language anticipates the possibility that the dues checkoff may continue beyond the term of the collective-bargaining agreement for an employee who chooses not to revoke his or her individual authorization. Section 302(c)(4) states in relevant part:

The provisions of this section [prohibiting employer payments to unions] shall not be applicable . . . with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than a year, or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner[.]

The proviso of Section 302(c)(4) limits the dues-checkoff exemption to situations where the employer has received an executed written authorization from each employee whose dues are to be deducted. The proviso further provides that the individual authorization may be—but is not required to be—revoked by an employee at the expiration of the applicable collective-bargaining agreement. The permissive nature of this revocation inescapably leads to the conclusion that the statute anticipates and approves of the lawfulness of continuing dues checkoff after expiration of the applicable labor agreement, for any employee who does not choose to revoke his or her individual authorization

The collapse of the two very different concepts of union security and dues checkoff into one, as articulated by the Board in *Bethlehem Steel*, is not compelling. They are different provisions, different concepts, grounded in different portions of the Act, and with different purposes. If these concepts are to be excepted from the general *Katz* rule, each exception should stand on its own grounds.

All of these, and other problems with exempting dues checkoff from the *Katz* unilateral change rule have been recognized by Board members, and courts, and many parties, in a number of cases. And arguments in favor of retaining the current Board precedent have been advanced as well.

At bottom, I am still left with the fact—which the General Counsel acknowledges—that extant Board precedent continues to hold that dues checkoff is an obligation that does not fall within the *Katz* unilateral change rule. As the Respondent points out, it is and has been for many years the case that employers may cease dues checkoff at the expiration of a contract, even while they are required to maintain other terms and conditions of employment as a matter of statutory policy. Given that, my course is clear, as the application of established Board precedent is my charge.⁵ Accordingly, in light of the Board precedent on this issue, I will recommend dismissal of the complaint in this matter.⁶

⁵*Waco Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (“We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied”) (citation omitted).

⁶Given my decision, I do not reach the Respondent's contention that the case should be dismissed on statute of limitations grounds, and I do not reach any of its other specific arguments, even those I have commented on in passing. In dismissing the complaint, I merely adhere to my reading of precedent on the issue presented.

CONCLUSIONS OF LAW

Respondent did not violate the Act as alleged in the complaint.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

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ORDER

The complaint is dismissed.

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Dated, Washington, D.C. January 10, 2012

David I. Goldman
U.S. Administrative Law Judge

⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.