

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, DC**

**HARGROVE ELECTRIC CO., INC.**

**Respondent**

and

**Case No. 16-CA-027812**

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL UNION 20,**

**Charging Party**

**ALMAN CONSTRUCTION SERVICES, LP**

**Respondent**

and

**Case No. 16-CA-027813**

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL UNION 20,**

**Charging Party**

**BOGGS ELECTRIC CO., INC.**

**Respondent**

and

**Case No. 16-CA-027814**

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL UNION 20,**

**Charging Party**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY BRIEF TO  
RESPONDENTS' ANSWERING BRIEF TO CHARGING PARTY IBEW LOCAL 20'S  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND  
ARGUMENTS IN SUPPORT THEREOF**

The Honorable Administrative Law Judge Margaret Brakebusch heard this case on October 11, 2011 and issued her recommended Decision and Order on January 13, 2012. The recommended Decision and Order requires each Respondent to post a Notice and to take certain "make whole" affirmative action, but failed to find Respondents cessation of dues deduction a violation of Section 8(a)(5) and (1) of the Act.

Counsel for the Acting General Counsel, pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board (Board), hereby files its Reply Brief to Respondents' Answering Brief. Counsel for the Acting General Counsel submits that the judge erred in not finding that Respondents' failure to continue dues deduction to violate Section 8(a)(5) and (1) of the Act and urges the Board to reverse the judge's dismissal of these allegations.

**1. FACTS**

**A. Respondents Announce Changes During the Term of an Section 8(f) Agreement**

All three Respondents enjoyed a lengthy Section 8(f) relationship with the International Brotherhood of Electrical Workers, Local Union 20, herein Union. (JD slip op. at 3; Tr. 45) In January 2008, the Respondents signed Letters of Assent – B, by which they agreed to comply with all provisions of the Inside Agreement including addenda between the North Texas Chapter NECA and the Union. (JD slip op. at 3; GC Exhs. 15, 16 and 17)

By letters dated February 6, 2008, the Respondents notified the Union they would abide by the terms of the current Inside Agreement until its expiration on November 30, 2010, but announced their intention not to be bound by any subsequent approved agreements or addenda between North Texas Chapter NECA and the Union. (JD slip op. at 3; GC Exhs. 19, 20 and 21) In addition, each Respondent announced that it would implement certain new terms and conditions of employment and explicitly stated that it “will not honor any terms from the expired Section 8(f) contract.” (JD slip op. at 3; GC Exhs. 19, 20 and 21)

**B. The Union Obtains Section 9(a) Status and Respondents Cease Dues Deductions**

Before expiration of the Inside Agreement, the Union was certified as the Section 9(a) representative of each Respondent's electrical employees. (JD slip op. at 4; Tr. 52-53; GC Exhs.

22, 23 and 24). At the initial negotiation session with the Union, each Respondent presented a written proposal, which contained more proposals than those listed in each Respondent's February 6, 2008 letter. (JD slip op. at 5; Tr. 37, 40, 76-77; GC Exhs. 5, 9 and 14). On November 30, 2010, each Respondent notified McAfee, in writing, that it was serving its ten-day notice to terminate the (Inside) Agreement and that the Agreement would no longer be in effect after December 10, 2010. (JD slip op. at 5; GC Exhs. 33, 35 and 37). In December 2010, each Respondent ceased deducting dues for employees who had previously executed dues deduction authorizations. (JD slip op. at 5; Tr. 35-37)

## 2. ARGUMENT

Contrary to the judge's decision and Respondents' assertions, the Board should reverse *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), enf. denied on other grounds, 320 F.2d 615 (3d. Cir. 1963), cert. denied 375 U.S. 984 (1964) and *Hacienda Resort Hotel and Casino (Hacienda III)*, 355 NLRB No. 154 (2010) and determine that the obligation to deduct dues for employees who signed valid dues authorization cards survives the expiration of a collective bargaining agreement.

The Ninth Circuit recently found that there was no comprehensible rationale stated for excluding dues checkoff from the unilateral change doctrine in a right-to-work state. It distinguished *Bethlehem Steel* from cases which, like the instant case, arise from right-to-work states and determined that "where dues checkoff does not exist to implement union security, dues checkoff is akin to any other term of employment that is a mandatory subject of bargaining" and found the employer violated Section 8(a)(5) by cessation of dues checkoff without bargaining to impasse. *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865, 876 (9<sup>th</sup> Cir. 2002),

reversing and remanding 331 NLRB 665 (2000); *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1082 (9<sup>th</sup> Cir. 2008), reversing and remanding 351 NLRB 407 (2007).

The Acting General Counsel urges reversal here because the judge relied on *Bethlehem Steel*. The view of dues deduction cessation in *Bethlehem Steel* is contrary to the unilateral change doctrine articulated in *NLRB v. Katz*, 369 U.S. 736 (1962), where the Court ruled that parties are not free to unilaterally change a term or condition of employment at contract expiration without bargaining to impasse. Once a contract expires, the terms contained therein become “terms imposed by law, at least so far as there is no unilateral right to change them.” *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 206-207 (1991).

The primary rationale in *Bethlehem Steel* was that checkoff merely implemented a union security agreement and that the proviso in Section 8(a)(3) “agreement” requirement applies with equal force to checkoff. This rationale disregards the plain language of Section 8(a)(3) and ignores the unilateral change doctrine articulated in *Katz*, supra. Notwithstanding the flawed rationale, the distinction between cases involving union security clauses, cases involving right-to-work states and the unilateral change doctrine, Respondents urge that the Board continue to apply *Bethlehem Steel* and *Hacienda Resort Hotel and Casino* to find that their unilateral cessation of dues checkoff, without bargaining to impasse, did not violate the Act. This argument should be soundly rejected.

In *Bethlehem Steel*, supra, the Board held that union security and dues checkoff arrangements do not survive expiration of a collective bargaining agreement. The Board reasoned that the unilateral cessation of union security after contract expiration was mandatory because union membership cannot be a condition of employment except under a “contract which conforms to the proviso to Section 8(a)(3)” and that “similar considerations” applied to dues

checkoff provisions because they “implemented the union security provisions.” The Board also determined that dues checkoff is exempt from the unilateral change doctrine in absence of an agreement because the collective bargaining agreement at issue contained language “so long as this Agreement remains in effect,” which linked the checkoff obligation with the duration of the contract. *Id.* Unlike *Bethlehem Steel*, the Inside Agreement has no union security clause and no limitation linking dues checkoff to the duration of the collective bargaining agreement. (GC Exh. 18 at 22) In addition, the Section 8(a)(3) proviso references only union security, but is silent about the transmission of dues.

Although dues checkoff and union security may occur in the same context, they are different types of obligations that should not be treated as inseparable. See, e.g., *Shen-Mar Food Products*, 221 NLRB 1329, 1330 (1976), *enfd.* as modified 557 F.2d 396 (4<sup>th</sup> Cir. 1977) (checkoff authorization could not properly be viewed as union security devices, which the state was permitted to prohibit under Section 14(b), because they did not “impose membership or support as a condition required for continued employment”); *NLRB v. Atlanta Printing Specialties & Paper Products Union 527 (Mead Corp.)*, 523 F.2d 783, 786 (5<sup>th</sup> Cir. 1975) (union security clauses are governed by a section of the Act totally removed from the section governing dues checkoff and which have a totally different purpose and rationale”); *American Nurses Assn.*, 250 NLRB 1324, 1324 fn. 1 (1980) (resignation from union ordinarily does not revoke checkoff authorization; “union security and dues checkoff are distinct and separate matters”).

A checkoff authorization, unlike union security arrangements, gives rise to an independent wage assignment contract between the employee and the employer where the employee assigns to a union part of his future wages. *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 327 (1991) (referencing Restatement (Second) of

Contracts, Sections 317, 321 and 326 (1981)). Such wage assignments survive contract expiration when the employee's authorization card shows such intent. See *Lowell Corrugated Container Corp.*, 177 NLRB 169, 172-173 (1969), *enfd.* 431 F.2d 1196 (1<sup>st</sup> Cir. 1970) (employer did not violate Section 8(a)(2) and (3) by continuing to honor unrevoked checkoff authorizations after contract expiration.)

The purpose of a dues checkoff authorization is distinct from that of union security. While a union security clause is used to stabilize the collective bargaining relationship by securing the union's ability to fund its representational activities, a dues checkoff authorization is for "administrative convenience in the collection of union dues." *Atlanta Printing Specialties & Paper Products Union 527 (Mead Corp.)*, *supra* at 786. As in the instant case, dues checkoff language will frequently appear in a collective bargaining agreement that does not contain a union security clause. (GC Exh. 18).

Recognizing unilateral cessation of dues checkoff as a violation is consistent with other provisions in the Act. Section 302(c)(4) of the Act does not limit dues checkoff to instances where a contract is in effect. Section 302(c)(4) permits dues checkoff payments as long as the employee's authorization "shall not be irrevocable for a period of more than one year or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner." The fact that Section 302(c)(4) mandates that a checkoff authorization be revocable by the employee when the contract terminates indicates that it is not automatically revoked and, accordingly, it contemplates dues checkoff continuing after contract expiration. *Tribune Publishing Co. v. NLRB*, 564 F.3d 1330, 1335 (D.C. Cir. 2009) ("Section 302 does not require a written collective bargaining agreement. In order for payroll deduction of union dues to be

lawful, Section 302 merely requires that employees give written consent that is revocable after a year.”)

Unlike Section 302(c)(4), Section 302(c)(5) contains an exception for employer contributions to union trust funds and allows such contributions only if the “detailed basis on which such payments are to be made is specified in a written agreement with the employer.” Congress included a requirement under Section 302(c)(5) requiring an agreement, but made no such requirement in Section 302(c)(4). Payments to union benefit funds survive contract expiration. *Concord Metal*, 298 NLRB 1096, 1096 (1990) (expired contract is sufficient to satisfy the “written agreement” requirement of Section 302(c)(5)); *Hinson v. NLRB*, 428 F.2d 133, 138-139 (8<sup>th</sup> Cir. 1970) (trust fund agreements satisfy “written agreement” requirement); *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9<sup>th</sup> Cir. 1981) (trust fund agreements and expired contract satisfy “written agreement” requirement). Therefore, a determination that Section 302(c)(4) precludes the continuation dues deduction after contract expiration would be anomalous, considering that it contains no “agreement” requirement, when Section 302(c)(5) explicitly requires a “written agreement” for employers to contribute to union benefit funds for such contributions survive contract expiration.

Furthermore, the recognized exceptions to the unilateral change rule are “statutorily dependent upon an existing collective bargaining agreement” or are derived from the surrender, in a collective bargaining agreement of a “statutorily guaranteed right.” *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1113-1114 (1986). One such exception is union security, which statutorily requires an “agreement.” Another exception is arbitration, which involves the surrender of a statutory right of the parties to make a final determination regarding terms and conditions of employment and how to interpret contractual terms. *Indiana & Michigan Electric*

*Co.*, 284 NLRB 53, 57-58 (1987). Also, arbitration agreements frequently display the parties' agreement to relinquish economic weapons, such as strikes and lockouts, to resolve disputes, which are "otherwise available under the Act." *Id.* at 58. A no-strike provision, which is another recognized exception, involves the surrender of the right to strike and the parties to a bargaining relationship are not required to abandon that right when there is no agreement to waive that right. *Southwestern Steel*, *supra* at 1114. Similarly, a union's waiver of a statutory right to bargain over mandatory subjects of bargaining does not survive contract expiration. *Ironton Publications*, 321 NLRB 1048, 1048 (1996).

Dues checkoff provisions, unlike the exceptions discussed above, involve no such contractual surrender of a statutory right. Rather, these provisions merely reflect the parties' agreement to honor individual employees' voluntary checkoff authorizations. An executed dues checkoff authorization is a contract between the employee and the employer: It has no bearing on whether the separate and legally distinct checkoff arrangement between the union and employer is subject to the statutory bargaining obligation after the contract expired. Moreover, to the extent that periodic irrevocability of dues checkoff implicates the Section 7 right to refrain from assisting a union, Section 302(c)(4) already ensures an employee's right to revoke checkoff authorizations after contract expiration.

In addition, the Board's rationale in *Bethlehem Steel* that contract language linked the checkoff obligation only during the term of the contract is inconsistent with recent Board law. Regardless of such limiting language in a contract, an employer ordinarily has a statutory duty to bargain with the union before making changes to terms and conditions of employment. All terms and conditions of employment contained in an expired contract survive the contract's termination. *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 131-132 (D.C. Cir. 2001) (general

durational clause, without more, does not defeat unilateral change doctrine). The dues checkoff language contained in the contract at issue in *Bethlehem Steel* (“so long as this Agreement remains in effect”) would not satisfy current Board law that any waiver of the right to bargain over a mandatory subject after contract expiration must be “clear and unmistakable.” *Natico, Inc.*, 302 NLRB 668, 685 (1991) (language stating that pension fund provision will “remain in effect for the term of this agreement” not clear and unmistakable waiver); *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 366 (1987) (language requiring that employer contributions to pension fund be “in accordance with” a pension agreement did not specifically state that employer’s obligation to contribute to pension fund ended at contract expiration); *KMBS, Inc.*, 278 NLRB 826, 849 (1986) (language requiring contributions to be made “as long as a Producer is so obligated pursuant to said collective bargaining agreements” insufficient because language did not “deal with the termination of the employer’s obligation to contribute to the funds”).

Unlike the situation in *Bethlehem Steel* where both the dues-checkoff mechanism and union security were required by the collective bargaining agreement, the instant case arises in a right-to-work state and the collective bargaining agreement has no union security requirement. Therefore, the Board should adopt the reasoning of *Local Joint Executive Board* and find Respondents’ cessation of dues checkoff without bargaining to impasse as a violation of Section 8(a)(5) of the Act.

Respondents should be ordered to reimburse the union for outstanding dues deduction because the Board customarily applies new policies and standards retroactively “to all pending cases in whatever stage.” See *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005) (quoting *Aramark School Services*, 337 NLRB 1063, n. 1 (2002); *Deluxe Metal Furniture Company*, 121 NLRB 995, 1006–1007 (1958)). Respondents also should not be permitted to deduct the dues

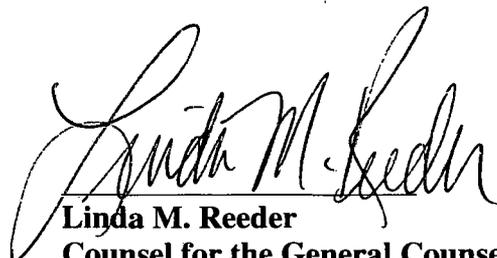
owed from future employee pay because such a result would exasperate the harmful effects of the violation. See *NLRB v. Hardesty Co.*, 308 F.3d 859, 865 (8<sup>th</sup> Cir. 2002) (unilateral changes undermine unions by signaling to employees that their union is “ineffectual, impotent and unable to effectively represent them.”). As the rescission and make whole remedy are traditional for unilateral changes, no manifest injustice will occur.

**3. CONCLUSION**

Based upon the foregoing, Counsel for the Acting General Counsel respectfully requests that the Board reverse the judge’s decision to dismiss the allegation Respondents violated the Act by ceasing dues deduction in violation Section 8(a)(5) and (1) of the Act. In addition to the relief requested above, Counsel for the Acting General Counsel requests the Board issue an Order requiring Respondents to post an appropriate notice and requests any additional relief deemed appropriate.

**DATED** at Fort Worth, Texas, this 9<sup>th</sup> day of March 2012.

Respectfully submitted,



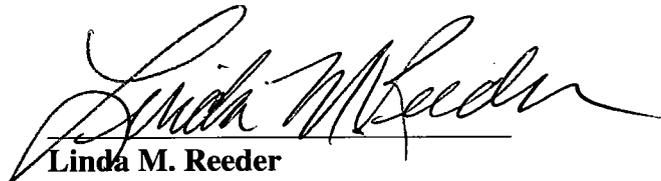
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Counsel For The Acting General Counsel's Reply Brief To Respondents' Answering Brief to Charging Party IBEW Local 20's Exceptions To The Decision Of The Administrative Law Judge And Arguments In Support Thereof has been served this 9<sup>th</sup> day of March 2012, by electronic mail on:

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