

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

ENTERPRISE LEASING COMPANY)		
OF FLORIDA, LLC, d/b/a ALAMO)	Case Nos.	12-CA-026588
RENT-A-CAR)		12-CA-026637
)		12-CA-026660
and)		12-CA-026706
)		12-CA-026723
TEAMSTERS LOCAL UNION NO. 769,)		12-CA-026820
AFFILIATED WITH INTERNATIONAL)		12-CA-027057
BROTHERHOOD OF TEAMSTERS)		

**RESPONDENT’S BRIEF IN OPPOSITION TO ACTING GENERAL COUNSEL’S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

COMES NOW Respondent, Enterprise Leasing Company of Florida, LLC d/b/a Alamo-Rent-A-Car (“Enterprise” or “Respondent”), pursuant to Section 102.46 of the Board’s Rules and Regulations, Series 8, as amended, and files its Brief in Opposition to Acting General Counsel’s Exceptions to the Decision of Administrative Law Judge (“ALJ”) Michael A. Marcionese in the above-referenced case, which issued on April 11, 2012

I. STATEMENT OF THE CASE

The above-referenced matter was heard by Administrative Law Judge (“ALJ”) Michael A. Marcionese on May 16-20, 2011, in Miami, Florida. On April 11, 2012, ALJ Marcionese issued a Decision (“ALJD”) concluding that Respondent had violated Section 8(a)(1), (3) and (5) of the Act. ALJ Marcionese also concluded that Respondent had not violated the Act in several respects. Specifically, ALJ Marcionese found that Respondent, by supervisor Louis Dieppa (“Dieppa”), did not coercively or unlawfully question Vanessa Gonzalez (“Gonzalez”) about whether she was in or out of the Union in violation of the Act. ALJ Marcionese also found that Respondent did not violate the Act by unilaterally ceasing the deduction and remittance of dues following the expiration of the parties’ collective bargaining agreement.

On June 6, 2012, the Acting General Counsel filed exceptions to the ALJD. First, the Acting General Counsel contends, albeit incorrectly, that ALJ Marcionese erred by finding that Respondent did not coercively or unlawfully question or interrogate Gonzalez in violation of Section 8(a)(1) of the Act. Second, the Acting General Counsel contends, albeit incorrectly and notwithstanding sixty (60) years of contrary and well-established precedent, that ALJ Marcionese erred by finding that Respondent did not violate the Act when it unilaterally ceased deducting and remitting dues to the Union *after* the parties' collective bargaining agreement expired. Finally, the Acting General Counsel contends that ALJ Marcionese erred by failing to recommend unnecessary make whole relief for any monetary loss employees' incurred as a result of Respondent's elimination of short-term disability benefits on January 1, 2010.

As clearly established herein, ALJ Marcionese did not err as contended by the Acting General Counsel. Rather, ALJ Marcionese's conclusions were proper and are amply supported by extant Board law. Respondent's brief in opposition to the Acting General Counsel's exceptions is being submitted in accordance with Section 102.46 of the Board's Rules and Regulations, Series 8, as amended.

II. ARGUMENT

A. ALJ Marcionese Did NOT Err By Finding That Respondent, Through Dieppa, Did NOT Coercively or Unlawfully Question or Interrogate Vanessa Gonzalez.

ALJ Marcionese correctly found that Dieppa's conversation with Gonzalez about the Union was not coercive. In so finding, ALJ Marcionese credited Gonzalez's testimony that Dieppa, in response to Gonzalez's question about severance pay for bargaining unit employees, asked Gonzalez whether she was "in or out" of the Union, and, when Gonzalez told him that she

was not comfortable responding to his question, Dieppa apologized, immediately changed the subject, and they continued walking to her car.

Under Section 8(a)(1) of the Act, it is unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in section 7.” The standard employed by the Board for determining whether a statement violates Section 8(a)(1) is an objective one that considers whether the statement has a reasonable tendency to coerce the employee or interfere with Section 7 rights, rather than the intent of the speaker. *Smithfield Packing Co.*, 344 NLRB 1 (2004). *See also Frontier Hotel & Casino*, 323 NLRB 815 (1997); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995).

As ALJ Marcionese correctly noted, in *Rossmore House*, 269 NLRB 1176 (1984), *aff’d sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), the Board **rejected** a *per se* approach to allegations of interrogation. Rather, in determining whether an interrogation of an employee violates Section 8(a)(1), the Board considers “whether under all of the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act.” *Bloomfield Health Care Center*, 352 NLRB 252 (2008), *quoting Rossmore House*, 269 NLRB 1176, 1178 n.30 (1984), *enfd. sub nom. HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). *See also Dayton Typographic Serv. v. NLRB*, 778 F.2d 1188, 1994 (6th Cir. 1985). Relevant factors to be considered include “whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation.”¹ *Bloomfield Health*, 352 NLRB at 253. *See also Intermet Stevensville*, 350 NLRB 1349, 1353 (2007).

¹ The truthfulness of the reply and the rank of the interrogator may also be considered. *Toma Metals, Inc.*, 342 NLRB 787 (2004); *Soltech Inc.*, 306 NLRB 269 n.3 (1992); *Facchina Construction Co.*, 343 NLRB 886 (2004).

The Acting General Counsel erroneously contends that ALJ Marcionese “committed reversible error by finding that the interrogation was not coercive because Dieppa did not further interrogate Gonzalez after she replied that she was uncomfortable answering his question” (Acting General Counsel’s Brief in Support of Exceptions (hereinafter “Acting G.C.’s Brf. in Support”), p. 3). The Acting General Counsel, however, bases its contention, in large part, on the fact that Gonzalez was not an open supporter of the Union. *Id.* Under extant Board law, this is but one factor considered in determining whether, in the totality of all of the circumstances, Dieppa’s interrogation of Gonzalez was coercive and, therefore, unlawful. Likewise, the Acting General Counsel notes that “Dieppa *pointedly* asked whether she [Gonzalez] was in or out the Union.” *Id.* at p. 4 (emphasis supplied). Pointed or not, the Board has found that an employer did not violate the Act by directly asking employees’ questions about their union sympathies on numerous occasions. *Rossmore House*, 269 NLRB 1176; *Volair Contractors, Inc.*, 341 NLRB 673, 676 (2004); *Keystone Lamp Mfg. Corp.*, 284 NLRB 626 (1987), *enfd. mem.* 849 F.2d 601 (3d Cir. 1988), *cert. denied* 488 U.S. 1041 (1989); *Springfield Hospital*, 281 NLRB 643 (1981). Instead of applying the factors outlined in *Rossmore House*, Acting General Counsel appears to be advocating for a *per se* rule regarding employers’ interrogation of employees about their union sentiments—an approach **rejected** by the Board more than sixty (60) years ago. *See Blue Flash Express, Inc.*, 109 NLRB 591, 593 (1954).

The Acting General Counsel ignores key facts in an effort to obtain a conclusion opposite to that of ALJ Marcionese. First, the Acting General Counsel fails to acknowledge that Dieppa’s conversation with Gonzalez regarding the Union was *in response to* her question about whether bus drivers would be offered severance pay because they were part of a union. Second, the Acting General Counsel greatly diminishes the significance of the fact that when Gonzalez told

Dieppa that she did not feel comfortable responding to his question, he affirmatively apologized and changed the subject. Third, the conversation in question occurred while Dieppa was walking Gonzalez to her car at the end of her shift, and, importantly, after the exchange in question, Dieppa and Gonzalez continued walking to her car. Fourth, the Acting General Counsel ignores the fact that Mr. Dieppa was walking Ms. Gonzalez to her car in a “rough” area as a courtesy, consistent with existing practice. Fifth, the Acting General Counsel ignores that Ms. Gonzalez and Mr. Dieppa had a good relationship both before and after the incident in question. As ALJ Marchionse remarked, “This [was] not a situation where Gonzalez was called to a supervisor’s office and subjected to questions regarding her and other employees union sympathies” (ALJD, p. 18, Lines 1-3).

Finding that the conversation between Dieppa and Gonzalez was “devoid of any coercive statements,” ALJ Marcionese properly found that Respondent did not violate the Act and recommended dismissal of this allegation.

B. ALJ Marcionese Did NOT Err by Finding That Respondent Did NOT Violate the Act by Unilaterally Ceasing the Deduction and Remittance of Dues After Expiration of the Parties’ Collective Bargaining Agreement.

Contrary to the Acting General Counsel’s assertion, ALJ Marcionese did not incorrectly hold that Respondent did not violate the Act by unilaterally ceasing the deduction and remittance of dues as required by the parties’ collective bargaining agreement following the expiration of that agreement. Rather, as the Acting General Counsel concedes, ALJ Marcionese applied sixty (60) years of Board precedent in finding that Respondent did not violate the Act by refusing to continue the dues checkoff provisions after the parties’ collective bargaining agreement expired.

1. ALJ Marcionese Applied Extant Board Law in Finding That Respondent Did NOT Violate the Act.

In *Bethlehem Steel Company*, 136 NLRB 1500 (1962), *enf. denied on other grounds*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964),), the Board held that union security and dues checkoff arrangements, unlike most terms and conditions of employment contained in a CBA, do not survive expiration of a CBA. As the Board explained, union security and dues checkoff provisions are contractually created and exist only so long as the contracts giving rise to such obligations remain in force. *Id.* at 1502.

Recently, in *Hacienda Resort Hotel and Casino*, 331 NLRB 665 (2000) (*Hacienda I*), the Board reaffirmed the principle established in *Bethlehem Steel* that an employer's obligation to continue as dues checkoff arrangement expires with the contract giving rise to that obligation. *Id.* at 666. As the Board noted in *Hacienda I*, this principle has been cited numerous times in other Board decisions and has been endorsed by various circuit courts. *Id.* Even more importantly, the Board's holding that an employer's dues checkoff obligation does not survive contract expiration is broad **and** is not tied to union security. *Id.* See also *Tampa Sheet Metal*, 288 NLRB 322, 326 n.15 (1998). In so holding, the Board did not base its decision on the language of the dues checkoff provisions in the parties' CBA. The Board's decision was based on well-settled, well-understood precedent that as a general rule an employer's dues checkoff obligation terminates at contract expiration. *Id.* at 667.

The Ninth Circuit, despite the fact that other circuits had endorsed or approved the Board's rule, vacated the Board's decision in *Hacienda I* and remanded the case with a directive that the Board articulate a reasoned explanation for its rule excluding dues checkoff from the *Katz* doctrine in the absence of union security or adopt a different rule supported by reasoned explanation. *Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226 v.*

NLRB, 309 F.3d 578 (9th Cir. 2002). On remand, the Board, adopting the reasoning of the ALJ, held that Hacienda Resort Hotel and Casino did not violate the Act by unilaterally ceasing dues checkoff after the parties' CBA expired because the CBA contained explicit language limiting the employer's dues checkoff obligation to the duration of the agreement. *Hacienda Resort Hotel and Casino*, 351 NLRB 504 (2007) (*Hacidenda II*).

Specifically, the dues checkoff provision in the parties' CBA provided that dues checkoff "shall be continued in effect for the term of this Agreement." *Id.* at 505. Similarly, the checkoff authorization clarified that the employer's obligation with respect to dues checkoff continued only "during the term of the [CBA]." *Id.* In this light, the Board held that "where . . . the dues-checkoff provision itself contains clear language linking dues checkoff to the duration of the collective-bargaining agreement, as opposed to general durational language elsewhere in the agreement, . . . dues checkoff [does] not survive expiration of the agreement." *Id.* at 505. The Board also held that by agreeing to such language, the Union "explicitly waived any right to the continuation of dues checkoff as a term and condition of employment after the expiration of the collective-bargaining agreement."

The Union appealed the Board's decision in *Hacidenda II*. The Ninth Circuit disagreed with the Board's position that the Union explicitly bargained away its rights because the parties' CBA contained clear language linking the employer's checkoff obligation to the duration of the CBA. *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1080 (9th Cir. 2008). In so doing, the Ninth Circuit based its decision on the fact that the parties' CBA did not state that the employer's dues checkoff obligation would "terminate" on expiration of the agreement. Rather, it provided that the employer's obligation "shall be continued" "during" the term of the parties' agreement. *Id.* The Ninth Circuit again vacated the Board's decision and remanded the

case to the Board to “squarely [address] whether dues-checkoff in right-to-work states is subject to unilateral change, or whether, under such circumstances, dues-checkoff is a mandatory subject of bargaining.” *Id.* at 1082.

The Board, on remand for a second time, deadlocked. *Hacidenda Resort Hotel and Casino*, 355 NLRB No. 154 (2010) (*Hacienda III*). Because the divided Board was unable to resolve the issue, the Board followed existing precedent, affirmed the ALJ’s decision, and dismissed the complaint. *Id.*

The Union appealed the Board’s decision in *Hacienda III*. The Ninth Circuit found that the Board’s ruling in *Hacienda III* was arbitrary and capricious because it rested on the same reasoning the court rejected in *Hacienda I*. *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865, 871 (9th Cir. 2011). Because the Board failed to provide a reasoned disposition, notwithstanding the Board’s deadlock on the issues, the Ninth Circuit decided that a third remand would be inappropriate and improperly proceeded to address the merits of the case. The Ninth Circuit subsequently concluded that the employer violated the Act by unilaterally ceasing dues checkoff because the provision in question did not implement union security. The Ninth Circuit held that “in a right-to-work state, 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. *Id.* at 876.

It is, however, the Board that “has the primary responsibility for developing and applying national labor policy,” not the courts. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786, 110 S. Ct. 1542 (1990). As the Ninth Circuit recognized, the Supreme Court has cautioned:

If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, *except in rare circumstances*, is to remand to the agency to the

agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being review and to reach its own conclusions based on such an inquiry.

Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744, 105 S. Ct. 1598 (1985) (emphasis supplied).

Here, the Board attempted to resolve the issue on remand but deadlocked. This is not a case where the Board failed to consider all relevant factors or take any action whatsoever. Simply stated, the circumstances presented in this case are not the “rare circumstances” that would justify the intervention of the courts in developing and setting national labor policy—something that Congress has empowered the Board to do. Moreover, the precedent established by the Board in *Bethlehem Steel* finding that an employer’s duty to check-off union dues is extinguished upon expiration of the collective-bargaining agreement that created the duty has continually been affirmed by both the Board and the Courts of Appeal. See *Sullivan Bros. Printers, Inc. v. NLRB*, 99 F.3d 1217, 1232 (1st Cir. 1996); *Southwestern Steel & Supply, Inc.*, 860 F.2d 1111, 1114 (D.C. Cir. 1986); *Ortiz Funeral Home Corp.*, 250 NLRB 730 (1980), *enfd.*, 651 F.2d 136 (2d Cir. 1981); *Peerless Roofing Co., Ltd.*, 247 NLRB 500 (1980). Thus, notwithstanding the Ninth Circuit’s opinion, the rule first announced in *Bethlehem Steel* that an employer does not violate the Act by unilaterally ceasing dues checkoff after expiration of the parties’ CBA is still valid law and applies in the instant case.

In the instant case, the parties’ CBA expired in March 2010. As explained more fully above, following the expiration of the CBA, the Employer was, under *Bethlehem Steel* and its progeny, free to unilaterally cease collecting and remitting dues to the Union pursuant to the dues checkoff clause. As the Board has made clear, the Union’s right to dues checkoff is a contractual right that continues to exist so long as the contract giving rise to the obligation remains in force.

Upon expiration of the contract, the Employer was free, consistent with extant law, to unilaterally cease dues checkoff. ALJ Marcionese properly found, in accordance with established Board precedent, that Respondent did not violate the Act by unilaterally ceasing to comply with the dues check-off provisions contained in the parties' collective bargaining agreement once that agreement expired.

2. Dues Checkoff Is an Exception to the *Katz* Doctrine.

Although the question of whether an employer may unilaterally cease abiding by a dues checkoff provision contained in a collective bargaining agreement once that contract has expired has not been directly addressed by the Supreme Court, the Court, at least in dicta, has implicitly approved the Board's determination in *Bethlehem Steel* that union security and dues checkoff provisions are excluded from the unilateral change doctrine. In *Litton Financial Printing v. NLRB*, 501 U.S. 190, 111 S. Ct. 2215 (1991), the Court noted that while most mandatory subjects of bargaining fall within the *Katz* prohibition on unilateral changes, the Board had identified some terms and conditions of employment that do not survive the expiration of an agreement. Citing the Board's decisions in *Bethlehem Steel* and *Indiana & Michigan Electric Co.*, 284 NLRB 53, 55 (1987), the Court observed that union security and dues checkoff provisions were two such subjects.

3. Section 302(c)(4) of the Labor Management Relations Act (LMRA) Compels the Conclusion That a Dues Checkoff Provision Is Extinguished upon the Expiration of a Collective Bargaining Agreement.

In finding that an employer did not violate the Act by unilaterally ceasing to check off dues, the Administrative Law Judge in *Hudson Chemical Co.*, 258 NLRB 152 (1981), noted:

In any event, Section 302(c)(4) of the Labor Management Relations Act provides that the life of a checkoff authorization "shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective

agreement, whichever occurs sooner.” Because the agreement expired, so did the checkoff authorization.

The Board affirmed the findings, rulings, and conclusions of the Administrative Law Judge in *Hudson Chemical Co. Id.*

As the Seventh Circuit explained in *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869 (7th Cir. 1993): “Checkoffs of dues and other payments from the employer to the union, like the enforcement of a union-security clause, ***depend on the existence of a real agreement with the union.*** [Citations omitted.] Otherwise the payment of money is a subvention barred by 29 U.S.C. § 186(a)(2)[.]” (Emphasis supplied.) Logically, following the expiration of the parties’ collective bargaining agreement, there was no “real agreement with the union” to collect and remit dues. Therefore, the checkoff authorization expired and Respondent did not violate the Act by unilaterally ceasing to collect and remit dues to the Union.

The cases cited by the Acting General Counsel regarding payments to trust funds, which require a detailed written agreement to require an employer to make contributions, are inapposite. *See* Acting G.C. Brf. in Support, p. 14. Unlike the remittance of dues, payments made to a trust fund are not made directly to a union and may only be made for certain limited purposes, *i.e.*, “such payments are held in trust for the purpose of paying, . . . for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance[.]” *See* 29 U.S.C. § 186(c)(5).

4. **Dues Checkoff is a Creature of Contract and Following Expiration of the Contract, a Party Can Unilaterally Cease Complying with a Dues Checkoff Provision.**

Interestingly, the Acting General Counsel contends that all exceptions to the unilateral change doctrine announced in *Katz* with the exception of dues checkoff are creatures of contract due to a statutory mandate or the contractual surrender of a statutory right. *See* Acting G.C. Brf. in Support, pp. 15-18. Among other examples, the Acting General Counsel cites arbitration as a surrender of the parties' statutory right to make their own final determination regarding which terms they will accept or how to interpret already agreed upon terms. *Id.* at 16. The Acting General Counsel also relies heavily on the fact that arbitration agreements are typically tied to a mutual consent to relinquish economic weapons. The Act, however, does not require the parties to so agree. Grievance arbitration can, and does, exist in the absence of a no-strike, no-lockout provision.

Moreover, as the Acting General Counsel concedes, "arbitration is a creature of contract, and parties can unilaterally refuse to arbitrate a dispute arising after the expiration of a contract containing an arbitration provision." *Id.* at 16, *citing Litton Financial Printing Div. v. NLRB*, 501 U.S. at 206. Like arbitration, dues checkoff is also a creature of contract, notwithstanding the Acting General Counsel's "oppos[ition] to any argument that checkoff is a 'creature of contract[.]'" It follows that, as with arbitration, absent a contractual obligation, an employer can lawfully unilaterally cease collecting and remitting dues to a union in accordance with a dues checkoff provision following the expiration of the parties' collective bargaining agreement. This is in accord with extant and well-established law. *See Bethlehem Steel*, 136 NLRB 1500, and its progeny.

5. The Parties' Clear and Unequivocal Agreement Compels the Conclusion That Respondent's Actions Were Lawful.

The language of the parties' CBA clearly indicates that the dues checkoff obligation applies only to employees "covered by this Agreement." Logically, once employees cease to be "covered by" the parties' CBA, the Employer's obligation to collect and tender dues to the Union is extinguished. This fact is further underscored by Check-Off Authorization and Assignment forms completed by employees. *See* General Counsel Exhibit No. 16. Specifically, the Check-Off Authorization and Assignment form provides:

This authorization and assignment shall be irrevocable for the term of the applicable contract between the Union and the Company, or for one year, *whichever is the lesser*, and shall automatically renew itself for successive yearly or applicable contract periods thereafter, *whichever is the lesser*

Id.

As illustrated above, and consistent with well-settled extant Board law, the Employer did not violate the Act by ceasing to collect and remit dues to the Union following the expiration of the parties' CBA. Therefore, ALJ Marcionese did not err in concluding that Respondent did not violate the Act.

C. ALJ Marcionese Did NOT Err by Failing to Recommend a Make Whole Order Regarding the Elimination of Short-Term Disability Benefits.

Notwithstanding Respondent's position that ALJ Marcionese failed to properly apply existing Board and court precedent in concluding that the termination of the short-term disability violated Section 8(a)(1), (3) and (5) of the Act, a make whole remedy is entirely unnecessary under the unconverted record evidence. The Acting General Counsel has the burden to establish harm and there is simply no evidence to suggest that any employees were harmed by the elimination of short-term disability benefits. *Crittendon Hospital*, 342 NLRB 686 (2004)

(General Counsel failed to adduce any evidence as to how change affected or would affect employees; no violation because change in dress code was not material, substantial, or significant). Thus, requiring a make whole remedy under the circumstances is not only unnecessary, it would be an exercise in futility.

III. CONCLUSION

WHEREFORE, Respondent respectfully request that the Board deny all of the Acting General Counsel's Exceptions and for such other relief as it deems just and proper.

Respectfully submitted,

THE LOWENBAUM PARTNERSHIP, LLC

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CERTIFICATE OF SERVICE

I hereby certify that I have on June 29, 2012, served a true and correct copy via e-mail upon the following addressed as follows:

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I hereby certify that I have on June 29, 2012, served a true and correct copy of the foregoing via electronic filing upon the following:

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