

United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL  
Advice Memorandum

RELEASE

DATE: May 30, 2013

TO: Robert W. Chester, Regional Director  
Region 6

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: National Express Transit Service Corp.  
Case 06-CA-095781

530-6067-4033-8600  
596-0420-5050

This case was submitted for advice as to whether the Region should issue complaint alleging that the Employer unlawfully failed to resume checking off employees' Union dues, pursuant to *WKYC-TV Inc.*,<sup>1</sup> when the Employer unilaterally discontinued dues checkoff prior to the Board's decision in *WKYC-TV*. We conclude that the charge in the instant case should be dismissed, absent withdrawal, as the Board has determined to apply *WKYC-TV* only prospectively, and the Employer has not taken any unlawful action subsequent to *WKYC-TV*.

In *WKYC-TV*, the Board overruled *Bethlehem Steel*<sup>2</sup> and its progeny "to the extent they stand for the proposition that dues checkoff does not survive contract expiration . . ." Instead, the Board held that "an employer, following contract expiration, must continue to honor a dues-checkoff arrangement established in that contract until the parties have either reached agreement or a valid impasse permits unilateral action by the employer."<sup>3</sup> In *WKYC-TV*, however, the Board decided to apply the new rule only prospectively, and to apply *Bethlehem Steel* in all pending cases. Thus, the Board has dismissed complaints in all subsequent cases in which the employers unilaterally discontinued dues checkoff prior to *WKYC*, because the employers acted lawfully under *Bethlehem Steel*.<sup>4</sup>

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<sup>1</sup> 359 NLRB No. 30 (2012).

<sup>2</sup> *Bethlehem Steel Co.*, 136 NLRB 500 (1962).

<sup>3</sup> 359 NLRB No. 30, slip op. at 8.

<sup>4</sup> See *WHDH-TV*, 359 NLRB No. 8 (2013); *USIC Locating Services, Inc.*, 359 NLRB No. 33 (2012); *Nebraskaland, Inc.*, 359 NLRB No. 35 (2012); *Excelsior Golden Living Center*, 359 NLRB No. 47 (2013); *C & G Distributing Co., Inc.*, 359 NLRB No. 53

Here, in August 2012 (prior to the Board's December 12 decision in *WKYC-TV*), National Express Transit Service Corp. (the Employer) unilaterally discontinued employees' union dues checkoff, soon after the expiration of its collective-bargaining agreement with Amalgamated Transit Union, Local 1738 (the Union). The Union filed this charge in January 2013, after *WKYC-TV*, so it might be argued that this case was not "pending" when *WKYC-TV* issued and, therefore, that the Employer's failure to resume dues checkoff after December 12 was unlawful.

To establish a unilateral change in violation of Sec. 8(a)(5) of the Act, the Acting General Counsel bears the burden of showing that the employer made a material and substantial change in a term of employment without negotiating with the union.<sup>5</sup> Since the Board issued its decision in *WKYC-TV*, however, the Employer has made no further change or taken any new action regarding dues checkoff. Therefore, we conclude that the 8(a)(5) charge in the instant case should be dismissed.

It might be argued that while the Employer's initial unilateral change discontinuing dues checkoff was not unlawful under *Bethlehem Steel*, the Employer's subsequent failure to reinstate dues checkoff after *WKYC-TV* violated the Act. However, it is well established that, *after* a collective-bargaining agreement has expired and an employer has lawfully repudiated a contractual obligation, the employer has no independent obligation to continue the contractual obligation. Thus, in *Chemung Contracting Corp.*,<sup>6</sup> the Board dismissed the allegation that an employer violated the Act by failing to make fund payments to the union after the employer had earlier unequivocally repudiated its contractual obligation to make the payments. In contrast, *during* the term of a collective-bargaining agreement, an employer violates Section 8(a)(5) each and every time if fails to meet a contractual obligation, regardless of whether or not it has previously repudiated the obligation lawfully.<sup>7</sup>

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(2013). We note that, while the Board stated in *WKYC-TV* and *WHDH-TV* that its new rule was to be applied only prospectively, and that it would continue to apply *Bethlehem Steel* in pending cases, in all of the other cited cases the Board did not refer to "pending cases," instead merely stating that it had decided to apply its new rule only prospectively. We do not believe the Board indicated any different result by these different locutions.

<sup>5</sup> See, e.g., *Pan American Grain Co.*, 351 NLRB 1412, 1414 n.9 (2007), enfd. 558 F.3d 22 (1st Cir. 2009).

<sup>6</sup> 291 NLRB 773 (1988).

<sup>7</sup> See, e.g., *Farmingdale Ironworks*, 249 NLRB 98 (1990), enfd. 661 F.2d 910 (2d Cir. 1981). We note that the issue in *Chemung* and *Farmingdale* was whether a charge

Here, after the parties' collective-bargaining agreement had expired, the Employer unequivocally repudiated its contractual dues checkoff obligation. Because that unilateral change was prior to *WKYC-TV*, the Employer acted lawfully under *Bethlehem Steel*. Given the Employer's then-lawful repudiation of its contractual dues checkoff obligation, we conclude that the Employer had no continuing obligation to check off dues and that the Employer did not violate the Act by failing to resume dues checkoff.<sup>8</sup>

Accordingly, the charge in the instant case should be dismissed, absent withdrawal, as the Board has determined to apply *WKYC-TV* only prospectively, and the Employer has not taken any unlawful action subsequent to *WKYC-TV*.

/s/  
B.J.K.

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was timely under Section 10(b) of the Act. As the analysis of that issue relied entirely on the determination of the date on which the operative facts of the alleged violation was established, however, we conclude that these cases apply with equal force here, and their analysis is not distinguishable from the instant case.

<sup>8</sup> We note that the circumstances here are unlike those presented in cases arising after *Piedmont Gardens*, 359 NLRB No. 46 (2012), in which the Board prospectively adopted a new test for determining whether an employer has a duty to provide witness statements obtained during an investigation of employee misconduct. Because an employer has a continuing obligation to respond to a union's information requests, each failure to provide required information constitutes a separate unlawful act. See, e.g., *Greif Packaging, LLC*, Case 32-CA-096697, Advice Memorandum dated April 11, 2013, at 3 ("the Board's decision in *Piedmont Gardens* to apply its new test only prospectively does not bar application of that test to the Employer's failure to respond to an information request made after the decision issued); *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1189 (each request for information and refusal to comply therewith gives rise to a separate and distinct violation of the Act); *Rest Haven Nursing Home*, 293 NLRB 617, 618 (1989) (same).