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

DATE: August 30, 2013

TO: Mori P. Rubin, Regional Director
Region 31

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

SUBJECT: Centinela Hospital Medical Center - Prime
Case 31-CA-096597

501-8444
530-6050-5000
530-6050-5075
530-6067-4001-3300
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This case was submitted for advice as to whether the Employer unlawfully ceased deducting union dues given that: (1) it continued doing so for several years after the collective-bargaining agreement expired, and (2) it last remitted dues to the Union two days after the Board issued its decision in *WKYC-TV, Inc.*[1] We conclude that the Employer's decision to cease deducting dues was lawful because *WKYC-TV* only applies prospectively and the Employer effectively implemented the change over a week before that decision issued. We also conclude that the Employer did not forfeit its right under *Bethlehem Steel* to cease deducting dues merely by continuing to honor the dues-checkoff provision while the parties bargained for a successor agreement. Thus, the charge should be dismissed, absent withdrawal.

FACTS

Centinela Hospital Medical Center ("Employer") operates a hospital facility providing inpatient and outpatient care in California. SEIU United Healthcare Workers – West ("Union") represents a unit of service, maintenance, technical, and business office clerical employees at this facility. The parties' most recent collective-bargaining agreement expired on December 31, 2009.

[1] 359 NLRB No. 30 (Dec. 12, 2012).

After the contract expired, the Employer continued deducting union dues on a bi-weekly basis until the end of 2012. By letter dated December 3,[2] the Employer announced that, "effective immediately," it would "no longer deduct union dues from employees' pay." The last period for which the Employer collected dues was the pay period ending November 24. Those dues were remitted to the Union on December 14.

On December 12, the Board issued its decision in *WKYC-TV*, overruling longstanding precedent under *Bethelehem Steel*[3] and its progeny, and holding that an employer may not cease giving effect to a contractual dues deduction arrangement at the termination of a collective-bargaining agreement.[4]

ACTION

We conclude that the Employer lawfully availed itself of its right, under Board precedent applicable at the time, to unilaterally cease deducting dues subsequent to the expiration of the collective-bargaining agreement. We also conclude that in the absence of an express agreement to continue collecting dues during the contract hiatus, the Employer did not forfeit this right to cease dues-checkoff unilaterally by voluntarily continuing to deduct and remit dues after the contract expired.

1. *Bethlehem Steel* applies in this case

In *WKYC-TV*, the Board decided to apply its new rule—that dues-checkoff continues as part of the status quo after a labor agreement expires—only prospectively.[5] The Board noted, among other things, that *Bethlehem Steel* had been the law for 50 years, employers "have relied upon [*Bethlehem Steel*] when considering whether to cease honoring dues-checkoff arrangements following contract expiration," the new rule represents a change in substantive Board law

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[2] All dates hereafter are in 2012.

[3] 136 NLRB 500 (1962).

[4] 359 NLRB No. 30, slip op. at 1, 8.

[5] Although the Board in *WKYC-TV* stated that it would not apply the new holding in "pending cases," 359 NLRB No. 30, slip op. at 9, we view this as synonymous with subsequent statements that the new rule would be applied only prospectively. *See National Express Transit Service Corp.*, Case 06-CA-095781, Advice Memorandum dated May 30, 2013, at 1-2 & n.4. Thus, the fact that the Union filed the instant charge after December 12 is not dispositive of the issue here.

governing parties' conduct rather than a mere change to a remedial matter and, thus, retroactive application would have imposed a "manifest injustice."[6]

With respect to unilateral changes, the act that constitutes an unfair labor practice is the *implementation* of a proposal in the absence of impasse, assent, or waiver.[7] The mere announcement of an intent to implement changes at some future time does not establish a Section 8(a)(5) violation.[8] But the announcement of a new program or policy that is already "effectively implemented" can be a unilateral change, especially if it is ultimately carried out.[9]

In *Schmidt-Tiago Construction Co.*,[10] the Board rejected an ALJ's finding that implementation with respect to the cessation of benefit contributions occurred on the date payment was due to the benefit funds. The Board determined that an earlier announcement of temporary, strike-related measures had "acquired the earmarks of permanent changes" once the employer announced that it had replaced

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[6] 359 NLRB No. 30, slip op. at 9.

[7] *See A&L Underground*, 302 NLRB 467, 469 n.9 (1991) (stating that the act that is controlling with respect to a unilateral change is the implementation of a proposal) (citing *Howard Electrical & Mechanical*, 293 NLRB 472 (1989), *enforced*, 931 F.2d 63 (10th Cir. 1991) (table decision)).

[8] *Howard Electrical*, 293 NLRB at 475 (announcement of intent to unilaterally implement proposals at an unspecified time did not start statute of limitations period; actionable unfair labor practice occurred when proposals were actually implemented).

[9] *Compare ABC Automotive Products Corp.*, 307 NLRB 248, 249-50 (1992) (rejecting argument that new health and welfare plan was never implemented; new plan was "effectively implemented when it was announced" because strikers could only return to work under this new condition, even if no further steps taken to institute the plan), *enforced*, 986 F.2d 500 (2d Cir. 1992) (table decision), *with Eagle Transport Corp.*, 338 NLRB 489, 489 (2002) (finding shift change not implemented where employees would not have understood employer's solicitation of employee schedule preferences as the "announcement of a change that was effectively implemented," especially where the employer discontinued its planned changes after the union objected). *See also Page Litho, Inc.*, 311 NLRB 881, 881-82 & n.5 (1993) (rejecting argument that final offer was never implemented where employer announced that it would implement the offer on a date certain and thereafter followed through on its threat by applying new terms to employees; declining to address whether announced intent to implement itself amounted to unilateral implementation), *enforced in relevant part*, 65 F.3d 169 (6th Cir. 1995) (table decision).

[10] 286 NLRB 342, 343 (1987).

the health and welfare plan.[11] In particular, the Board stated that the determination of the employer's bargaining obligation depended not on the date the employer would have been in default, but rather on the "position it presented to the [u]nion."[12] Thus, the cessation of payments was implemented upon the employer's notice to the union of a permanent change, and the Board found that announcement to be a *fait accompli*.[13]

In the 10(b) context, the Board has reached similar conclusions. In *Allied Production Workers Local 12 (Northern Engraving Corp.)*,[14] for example, the Board determined that a potential violation occurred for 10(b) purposes when a union informed an employee by letter that service fees would continue to be deducted because the employee's resignation request did not timely revoke checkoff. Specifically, the Board found that a dispute was "clearly drawn" as of that moment, where thereafter the employer and union acted accordingly by continuing to deduct and receive service fees from the employee.[15] Thus, the employee had clear and unequivocal notice of a violation upon receipt of that letter, rather than as of the date the union actually deducted the next service fee.[16]

In the instant matter, we conclude that the Employer was entitled to cease dues-checkoff unilaterally pursuant to *Bethlehem Steel* because it effectively

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[11] *Id.*

[12] *Id. See also and Century Wine & Spirits*, 304 NLRB 338, 346-47 (1991) (stock purchase program implemented when employer announced it to employees and expressly gave them the immediate opportunity to enroll in the program, rather than on the date the employer sent a check to buy stock), *vacated on other grounds*, 317 NLRB 1139 (1995).

[13] 286 NLRB at 344. We note that in *Bakersfield*, 337 NLRB 296, 296-98 (2001), the Board determined that a wholly discretionary merit wage and bonus program was not implemented until those increases were granted, rather than when the employer posted its new policy. However, that decision was based solely on the Board's interpretation of *McClatchy Newspapers* and its progeny, wherein the Board suggested that a wholly discretionary merit wage policy does not itself establish terms and conditions of employment prior to the actual exercise of that discretion in setting discrete wage rates. 321 NLRB 1386, 1391 n.24 (1996), *enforced*, 131 F.3d 1026 (D.C. Cir. 1997).

[14] 337 NLRB 16, 18 (2001).

[15] *Id.*

[16] *Id.*

implemented that decision on December 3, before *WKYC-TV* overruled that precedent. As in *Schmidt-Tiago*, we do not focus on the date of default (i.e. the first date the Employer failed to pay the dues), which occurred after *WKYC-TV* issued. Rather, we focus on the Employer's letter, which set forth its immediately effective and permanent position on dues-checkoff. We construe the statement that it would "no longer deduct union dues from employees' pay" as meaning that deductions would not be made for pay periods covering December 3 or later. The Employer's subsequent actions were consistent with that position because it did not deduct dues for the pay period ending December 8, or thereafter. Thus, we do not view the post-December 3 remittance of dues for the pay period ending November 24 as inconsistent with an implementation date of December 3.

2. The Employer did not forfeit its right to unilaterally cease deducting dues by merely continuing deductions after the contract expired

The Board has squarely rejected the argument that continuing to honor a dues-checkoff provision after the expiration of the collective-bargaining prevents an employer from thereafter discontinuing that practice.[17] Thus, an employer does not forfeit its right under *Bethlehem Steel* to cease deducting dues under these circumstances.[18] In contrast, if an employer expressly agrees to transmit employee dues to the union during a contract hiatus, it violates its bargaining duty by reneging on that agreement.[19]

In the instant case, there is no evidence that the Employer came to any explicit understanding with the Union that it would continue to deduct and remit dues during the period the parties were negotiating a successor agreement. The Employer merely decided unilaterally to continue honoring the checkoff arrangement for several years. In these circumstances, the Employer had no obligation to refrain from utilizing the *Bethlehem Steel* privilege during the contract hiatus, and therefore it did not violate Section 8(a)(5) by exercising its right to halt dues payments during this period.

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[17] *WHDH-TV*, 359 NLRB No. 81, slip op. at 1 n.1 (Mar. 19, 2013); *WKYC-TV*, 359 NLRB No. 30, slip op. at 9 n.33.

[18] *WHDH-TV*, 359 NLRB No. 81, slip op. at 1 n.1.

[19] *Id*. (distinguishing *Tribune Publishing Co.*, 351 NLRB 196 (2007), *enforced*, 564 F.3d 1330 (D.C. Cir. 2009), where there was an express agreement during the hiatus period to allow employees to use direct deposit to pay union dues); *WKYC-TV*, 359 NLRB No. 30, slip op. at 9 n.33 (same).

Accordingly, the Region should dismiss, absent withdrawal, the allegation that the Employer unilaterally ceased dues-checkoff.

/s/
B.J.K.