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Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino *and* Sahara Nevada Corp. d/b/a Sahara Hotel and Casino *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226, and Bartenders Union Local 165. Cases 28–CA–013274 and 28–CA–013275

September 10, 2015

THIRD SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

This case is on remand from the United States Court of Appeals for the Ninth Circuit for the third time. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Throughout this protracted proceeding, the sole question before the Board and the court has been whether the Respondents violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally ceasing dues checkoff after expiration of the parties' collective-bargaining agreements without first bargaining to an agreement or impasse. In its most recent decision, the Ninth Circuit decided this issue itself, found that the Respondents' unilateral action was unlawful and remanded the case to the Board to determine the appropriate remedy. As discussed below, we adopt as the law of this case the court's finding that the Respondents violated Section 8(a)(5) and (1) and fashion a remedy that we believe best effectuates the policies of the Act under the unique circumstances of this case.[1]

I. BACKGROUND

The relevant facts of this case are not in dispute and have been fully set forth in previous Board and court decisions.[2] On July 7, 2000, the Board issued its original Decision and Order in this proceeding, finding that the Respondents did not violate Section 8(a)(5) and (1) of the Act by unilaterally ceasing dues checkoff after the parties' collective-bargaining agreements expired.[3] The Board found that this result was compelled by *Bethlehem Steel Co*., 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), and *Tampa Sheet Metal Co*., 288 NLRB 322 (1988).[4]

The Charging Party Union petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board's decision. Thereafter, the court called into question the Board's precedent resting on *Bethlehem Steel* and found that it was "unable to discern the Board's rationale for excluding dues-checkoff from the unilateral change doctrine in the absence of union security[.]"[5] The court thus vacated the Board's Decision and Order and remanded the case to the Board to "either articulate a reasoned explanation for its rule or adopt a different rule with a reasoned explanation to support it."[6]

On September 29, 2007, the Board issued a supplemental Decision and Order affirming, on different grounds, its finding that the Respondents did not violate Section 8(a)(5) and (1) of the Act.[7] In doing so, the Board stated that it was not relying on the rule articulated in *Hacienda I*.[8] Instead, the Board relied on the "particular circumstances of this case, in which the dues-checkoff clauses in the parties' collective-bargaining agreements contained explicit language limiting the Respondents' dues-checkoff obligation to the duration of the agreements."[9] The Board found that, in agreeing to the contract wording, the Union "explicitly waived any right to the continuation of dues checkoff as a term and condition of employment" after expiration of the collective-bargaining agreements.[10]

The Union petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board's supplemental decision as well. On August 27, 2008, the court granted the Union's petition, vacated the Board's supplemental Decision and Order, and again remanded the case to the Board for further proceedings consistent with the court's opinion.[11] The court found, contrary to the Board, that the checkoff agreements' durational

[1] Subsequent to the Ninth Circuit's finding of a violation in this case, the Board (Members Miscimarra and Johnson dissenting) decided *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015), which overruled *Bethlehem Steel Co*., 136 NLRB 1500 (1962), discussed below, and held that an employer's obligation to check off union dues from employees' wages continues after expiration of a collective-bargaining agreement that establishes such an arrangement. The Board decided to apply this new rule only prospectively. Id., slip op. at 9.

[2] See, e.g., *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865, 868 (9th Cir. 2011); and *Hacienda Resort Hotel & Casino*, 331 NLRB 665, 665–666 (2000) (*Hacienda I*).

[3] *Hacienda I*, 331 NLRB at 665.

[4] Id. at 666–667. Members Fox and Liebman dissented, arguing that *Bethlehem Steel*, and by extension *Tampa Sheet Metal*, should be overruled. Id. at 667–672.

[5] *Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226 v. NLRB*, 309 F.3d 578, 582 (9th Cir. 2002).

[6] Id.

[7] *Hacienda Resort Hotel & Casino*, 351 NLRB 504 (2007) (*Hacienda II*). Members Liebman and Walsh dissented.

[8] Id. at 505.

[9] Id. at 504.

[10] Id. at 505.

[11] *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008).

clauses did not "amount to a clear and unmistakable waiver of the Union's statutory rights."[12] In remanding the case to the Board for a second time, the court stated: "[W]ith the 'clear and unmistakable' escape hatch closed, the question squarely in front of the Board is 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."[13] The court concluded with the following instruction: "We again instruct the Board to explain the rule it adopted in *Hacienda I*, or abandon *Hacienda I* to adopt a different rule and present a reasoned explanation to support it."[14]

On August 27, 2010, the Board issued a second supplemental Decision and Order.[15] The four participating Board Members[16] were equally divided on the remanded issue, which required the Board either to offer a new explanation for its existing rule or to overrule precedent. Lacking a three-member majority to do either, the Board unanimously agreed that its decisionmaking practices required it to apply existing precedent in *Bethlehem Steel* and *Tampa Sheet Metal*. Doing so, the Board again dismissed the complaint.

The Union again petitioned for review of the Board's decision. On September 13, 2011, the Ninth Circuit granted the Union's petition and remanded the case to the Board. The court first concluded that, while the Board's traditions may require three votes to reverse or establish precedent, "[t]he question presented [in this case] is not whether the NLRB's chosen procedures are adequate, but rather whether the explication of its ruling is adequate."[17] The court found that the Board had not yet provided a reasoned explanation for its rule excluding dues checkoff from the unilateral change doctrine in right-to-work states.[18] In addition, although mindful of the Board's primary responsibility for developing national labor policy, the court stated that, "given the amount of time that this case has been pending before the Board and the Board's continued inability to provide a rational justification for the rule it proposes, we are convinced that a third remand [to the Board to explain its rule or adopt a new one] would be futile, or at least that the likelihood of continued deadlock outweighs the speculative benefit of providing the Board with one more opportunity to comply with our prior orders."[19]

Turning to the merits of the case, the court 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" and may not be unilaterally terminated after contract expiration.[20] The court thus found that the Respondents violated Section 8(a)(5) and (1) by ceasing dues checkoff without bargaining to impasse.[21] The court remanded the case to the Board "to determine what relief is warranted," and specifically noted that "the Board may adopt a different rule in the future provided . . . that such a rule is rational and consistent with the NLRA."[22]

On May 24, 2012, the Board notified the parties that it had decided to accept the court's remand and solicited statements of position from the parties with respect to the issues raised by the remand. The General Counsel, the Respondents, and the Charging Party Union each filed a statement of position.

II. DISCUSSION

Having accepted the court's third remand to the Board, we accept as the law of the case the court's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing dues checkoff without bargaining to impasse. We therefore turn to the court's direction to determine an appropriate remedy. Given the court's finding of the violation, we find it appropriate to order the Respondents to cease and desist the activity found unlawful by the court and to post a remedial notice. The remaining question is whether make-whole relief is warranted in the unusual circumstances of this case. For the reasons explained below, we have determined not to order such relief.

As the Supreme Court has explained, the Board has broad authority under Section 10(c) of the Act to devise remedies that "effectuate the policies of the Act." See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984). The Board has recognized its "duty and 'broad discretionary' authority under Section 10(c) to tailor its remedies to varying circumstances on a case by case basis, in order to ensure that its remedies are congruent with the facts of each case." *Diamond Walnut Growers, Inc*., 340 NLRB 1129, 1132 (2003). Thus, the Board has "broad discretion to fashion 'a just remedy' to fit the circumstances of each case it confronts." *Excel Case Ready*, 334 NLRB 4,

[12] Id. at 1082.
[13] Id.
[14] Id.
[15] *Hacienda Resort Hotel & Casino*, 355 NLRB 742 (2010) (*Hacienda III*).
[16] Member Becker recused himself and took no part in consideration of the case.
[17] *Local Joint Executive Board of Las Vegas v. NLRB*, above, 657 F.3d at 872.
[18] See id.
[19] Id. at 874.
[20] Id. at 876.
[21] See id.
[22] Id.

5 (2001) (quoting *Maramont Corp*., 317 NLRB 1035, 1037 (1995)); see also *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 3 (2014).

In cases involving a respondent's unlawful failure to honor a dues-checkoff arrangement, the Board has ordered the respondent to reimburse the union for any dues the respondent failed to check off.[23] In the present case, however, we find that imposing such a remedy is not necessary to effectuate the purposes of the Act. Properly rationalized or not, the rule in *Bethlehem Steel* had been in place for over 50 years until it was recently overruled in *Lincoln Lutheran of Racine*. Employers, like the Respondents here, have relied upon that rule when considering whether to cease honoring dues-checkoff arrangements following contract expiration. Although the validity of *Bethlehem Steel* had been called into question, the Respondents ceased checking off dues in 1995—approximately 16 years before the court's decision in this case. At that time, the Respondents could not have foreseen the protracted litigation of this issue before the Board and the Ninth Circuit, culminating in a decision by the court finding, contrary to *Bethlehem Steel* and its progeny, that the Respondents committed an unfair labor practice when they ceased dues checkoff upon contract expiration. In these circumstances, we find that it would not be appropriate to order make-whole relief, which would carry with it a requirement that compound interest be paid on all amounts due. In addition, we find that such relief is not necessary to effectuate the purposes of the Act; the Respondents believed, correctly, that they were following settled Board law at the time they acted, and there is no reason to believe that they will not continue to abide by Board law. For these reasons—which are consistent with the Board's recent decision in *Lincoln Lutheran of Racine* to apply the overruling of *Bethlehem Steel* only prospectively (see fn. 1, supra)[24]—we decline the General Counsel's and the Charging Party's requests for dues reimbursement, as well as the Charging Party's request that the Respondents reimburse the employees for any additional expenses they incurred by reason of the Respondents' repudiation of the dues-checkoff agreements.

Nevertheless, the court's decision, which directs the Board "to determine *what* relief is warranted,"[25] makes it necessary to fashion a remedy. Accordingly, we shall order the Respondents to cease and desist unilaterally terminating dues checkoff upon the expiration of their agreement with the Union, to bargain with the Union before making unilateral changes to unit employees' terms and conditions of employment, to restore dues checkoff, and to post a remedial notice.[26]

ORDER

The National Labor Relations Board orders that the Respondents, Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino and Sahara Nevada Corp. d/b/a Sahara Hotel and Casino, Las Vegas, Nevada, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally ceasing dues checkoff without first bargaining to impasse.

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[23] See *W. J. Holloway & Son*, 307 NLRB 487 (1992), and *West Coast Cintas Corp*., 291 NLRB 152 (1988) (remedying respondent's failure to adhere to a dues-checkoff provision in a collective-bargaining agreement); *Creutz Plating Corp*., 172 NLRB 1 (1968) (remedying respondent's unilateral cessation of its practice of dues checkoff); *YWCA of Western Massachusetts*, 349 NLRB 762 (2007), and *Gadsden Tool, Inc*., 327 NLRB 164 (1998), enfd. 233 F.3d 577 (11th Cir. 2000), supplemental decision after compliance proceeding 340 NLRB 29 (2003) (remedying respondent's refusal to execute a collective-bargaining agreement including a dues-checkoff provision); and *Bebley Enterprises*, 356 NLRB No. 64 (2010), *Sommerville Construction Co*., 327 NLRB 514 (1999), enfd. 206 F.3d 752 (7th Cir. 2000), and *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971) (remedying respondent's repudiation of a collective-bargaining agreement including a dues-checkoff provision).

Member Miscimarra agrees that a standard remedy for an unlawful failure to honor a dues-checkoff arrangement is an order requiring the employer to reimburse the union for dues it failed to deduct and remit to the union, and he also agrees that this remedy is not appropriate here for the reasons stated in the text. Although some cases may preclude the employer from recouping back dues amounts from the employees who owed the dues, Member Miscimarra disagrees for the reasons stated in his separate opinion in *Alamo Rent-A-Car*, 362 NLRB No. 135, slip op. at 7–8 & fn. 15 (2015) (Member Miscimarra, concurring in part and dissenting in part).

[24] Although Member Miscimarra dissented in *Lincoln Lutheran of Racine* and would have adhered to *Bethlehem Steel*, he agreed with the majority that any overruling of *Bethlehem Steel* should be applied prospectively only. 362 NLRB No. 188, slip op. at 10 fn. 2.

[25] *Local Joint Executive Board of Las Vegas v. NLRB*, above, 657 F.3d at 876 (emphasis added).

[26] We respectfully disagree with our dissenting colleague that our decision fails to answer the remedial question remanded by the court. The court directed us "to determine what relief is *warranted*" (emphasis added). In making that determination, we have applied certain well-established principles, grounded in Sec. 10(c) of the Act. As set forth above, those principles provide the Board with "broad discretion" to tailor a remedy to the unfair labor practice found. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 900. And, in so doing, the Board is permitted to consider the particular circumstances of the case presented. See, e.g., *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938) ("[T]he relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress.").

As a result, contrary to our colleague's argument, there is nothing inappropriate in our considering the unusual circumstances of this case in fashioning an appropriate remedy for the violation found by the court. Moreover, our colleague's further argument, that certain of those circumstances may also be relevant to determining whether to apply a new rule of law retroactively, is irrelevant and certainly does not mean we are substituting our judgment for that of the court.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

Employees of the Respondent who are employed in the classifications set forth in Exhibit 1 (Exhibits 1(A) and 1(B)) of the collective-bargaining agreement effective by its terms for the period of June 2, 1989, to and including May 31, 1994, but excluding supervisors as defined in the Act.

(b) Rescind the change in the terms and conditions of employment for its unit employees that was unilaterally implemented in June 1995.

(c) Within 14 days after service by the Region, Respondents shall post at their respective facilities in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, or sold the business or facilities involved herein, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current and former employees employed by the Respondents at any time since June 1995.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. September 10, 2015

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HIROZAWA, concurring in part and dissenting in part.

I join my colleagues in finding that the Respondents violated Section 8(a)(5) and (1) of the Act by ceasing to honor the employees' dues-checkoff authorizations without first bargaining to an agreement or impasse. I respectfully dissent, however, from their decision not to order the standard make-whole remedy for this violation.

As the majority acknowledges, make-whole relief is part of the standard remedy where an employer has violated Section 8(a)(5) and (1) by unilaterally ceasing dues checkoff. In particular, the Board has uniformly required the employer to reimburse the union, with interest, for dues-checkoff payments that it failed to make where employees have executed dues-checkoff authorizations. See, e.g., *Plymouth Court*, 341 NLRB 363, 363 (2004); *W. J. Holloway & Son*, 307 NLRB 487, 487 fn. 3 (1992); *Sommerville Construction Co.*, 327 NLRB 514, 514 fn. 2 (1999), enfd. 206 F.3d 752 (7th Cir. 2000); *Gadsden Tool, Inc.*, 327 NLRB 164, 165 (1988), enfd. 233 F.3d 577 (11th Cir. 2000); *Creutz Plating Corp.*, 172 NLRB 1 (1968).[1]

The majority, however, concludes that, in the circumstances of this case, it would not effectuate the purposes of the Act to order make-whole relief. The remedy ordered by the majority requires the Respondents only to

[1] The standard remedy also requires the employer to reimburse employees, with interest, for any additional expenses they incurred by reason of the employer's repudiation of the dues-checkoff agreements. See *Mitchell & Slavens, Inc.*, 310 NLRB No. 100 (1993) (ordering employer to make whole unit employees for "any expenses" they may have incurred as a result of employer's failure to continue in effect all the terms of its agreement with the union, with interest) citing *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980) enfd. mem. 661 F.2d 940 (9th Cir. 1981). The remedy includes a provision prohibiting recoupment from employees of any dues amounts the employer is required to reimburse the union. See *Alamo Rent-a-Car*, 362 NLRB No. 135, slip op. at 1 fn. 1 (2015); *West Coast Cintas Corp.*, 291 NLRB 152, 156 fn. 6 (1988) ("financial responsibility for making the [u]nion whole for dues it would have received but for the [employer's] unlawful conduct rests entirely on the [employer] and not the employees").

cease and desist from unilaterally terminating dues checkoff upon expiration of the parties' agreement, to bargain with the Union before making unilateral changes to employees' terms and conditions of employment, and to post a remedial notice. I respectfully disagree that this remedy effectuates the purposes of the Act.

Having concluded that the Respondents violated Section 8(a)(5) and (1) by unilaterally ceasing dues checkoff, the court of appeals remanded the case to the Board for the sole purpose of determining the appropriate relief. *Local Joint Executive Board of Las Vegas v. NLRB,* 657 F.3d 865, 876 (9th Cir. 2011). As shown, the majority's failure to order make-whole relief departs from well-settled precedent. Indeed, the majority points to no case, and I am aware of none, in which the Board has failed to provide for make-whole relief to remedy the unilateral cessation of dues checkoff.

The majority emphasizes the "unusual circumstances of this case," reasoning that the Respondents could not have foreseen the protracted litigation or the end result. This premise is questionable, given that both the Board and, especially, the court of appeals had, during the lengthy course of the litigation, called into question the rationale underlying *Bethlehem Steel*, supra, and its application in right-to-work states.[2] But a more fundamental flaw of the majority's decision is that it fails to answer the court's question. The court, having found the unilateral change violation, asked the Board to "determine what relief is warranted." *Local Joint Executive Board of Las Vegas v. NLRB,* supra, 657 F.3d at 876. This direction was entirely appropriate, since the Board, as the expert agency charged with enforcement of the Act, is in the best position to identify the relief needed to remedy a violation that it has addressed many times in its 80 years of administering the Act. The majority, however, has chosen to disregard the Board's decades of unbroken precedent concerning the remedy for a violation of this nature, which deliver a clear answer to the court's question, and to focus on a different question: What would the Board do if it were given yet another opportunity in this case to decide whether unilateral cessation of dues checkoff upon contract expiration in a right-to-work state is lawful, and found that it was unlawful? The majority's answer is that it would apply its rejection of *Bethlehem Steel* and *Tampa Sheet Metal* prospectively only, with the result that the Respondents would have no liability for the dues they had refused to check off and remit.

Of course, that is not how the majority frames its ruling, but the basis of its decision is obvious from the factors that it considers and those it fails to consider. In determining the "affirmative action" to be required of a respondent pursuant to Section 10(c), the Board's task is "to undo the effects of violations of the Act, . . . draw[ing] on enlightenment gained from experience," *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953), including by "restoring the economic status quo that would have obtained but for the company's wrongful [conduct]." *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). Here, the majority gives no consideration whatsoever to the effects of the Respondents' unlawful conduct on the employees and the Union, much less what affirmative action by the Respondents would most effectively undo those effects and restore the economic status quo. Instead, the majority considers exclusively whether the Respondents relied on preexisting law and might reasonably have anticipated the outcome in this case. That circumstance has never, as far as I can ascertain, been considered by the Board in fashioning a remedy. It is, however, a principal consideration for the Board and the courts in deciding whether the Board should apply a change in law or policy retroactively, to the conduct of the respondent in the case before it, or prospectively only, in future cases. See, e.g., *Piedmont Gardens*, 362 NLRB No. 139, slip op. at 6 (2015); *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 5 (2010), enfd. 656 F.3d 860 (9th Cir. 2011); *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 729 (2001); *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102–1103 (D.C. Cir. 2001).

Indeed, in *WKYC-TV, Inc.*, supra, in which the Board first overruled *Bethlehem Steel* and held dues checkoff to be subject to the same unilateral change rule as most other terms and conditions of employment, the Board considered the same factors as today's majority and decided not to apply its legal ruling to the employer in that case:

> Mistaken or not, *Bethlehem Steel* has been the law for 50 years. Employers, like the Respondent, have relied upon it when considering whether to cease honoring dues-checkoff arrangements following contract expiration. Although the validity of *Bethlehem Steel* had been called into question on several recent occasions, the Respondent and other similarly situated employers did not have adequate warning that the Board was about to change the law at the time of the events in any currently

[2] *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578 (9th Cir. 2002); *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008); *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012) (overruling *Bethlehem Steel* and finding that an employer's obligation to check off dues continues after contract expiration). *WKYC-TV* was rendered invalid because the recess appointments of two participating Board members were determined to be constitutionally infirm. *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

> pending cases. Moreover, today's ruling represents a change in longstanding substantive Board law governing parties' conduct, rather than a mere change to a remedial matter. . . . We therefore shall decide all pending cases involving unilateral cessation of contractually established dues-checkoff arrangements, following contract expiration, under *Bethlehem Steel*.

359 NLRB No. 30, slip op at 9. Accordingly, the Board found that the employer's unilateral cessation of dues checkoff was still lawful, and dismissed the complaint. Under *Noel Canning*, supra, the *WKYC* decision is a nullity.[3] But the substance of its retroactivity discussion, in its striking similarity to the majority's rationale, lays bare the true nature of today's decision.

It is one thing to fashion relief designed to remedy the effects of a violation. It is another to substitute our judgment for the court's as to whether the violation should have been found in the first place. In my view, the Board should just answer the question that the court of appeals has posed and order the standard remedy for the violation found first by the court, and now by the Board.

Dated, Washington, D.C. September 10, 2015

Kent Y. Hirozawa, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

Federal Law Gives You the Right To

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally cease dues checkoff without first bargaining to impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

Employees of the Respondent who are employed in the classifications set forth in Exhibit 1 (Exhibits 1(A) and 1(B)) of the collective-bargaining agreement effective by its terms for the period of June 2, 1989, to and including May 31, 1994, but excluding supervisors as defined in the Act.

WE WILL rescind the change in the terms and conditions of employment for our unit employees that was unilaterally implemented in June 1995.

HACIENDA HOTEL, INC. GAMING CORP. D/B/A HACIENDA RESORT HOTEL AND CASINO AND SAHARA NEVADA CORP. D/B/A SAHARA HOTEL AND CASINO

The Board's decision can be found at www.nlrb.gov/case/28-CA-013274 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[3] Just over a week ago, in *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015), the Board again reconsidered and overruled *Bethlehem Steel*, supra, holding that an employer's obligation to check off union dues from employees' wages continues after expiration of a collective-bargaining agreement. As in *WKYC*, the Board applied its ruling prospectively, and therefore not to the employer in the case before it, for the same reasons as in *WKYC*. 362 NLRB No. 188, slip op. at 9.