UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-71138

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 AND BARTENDERS UNION, LOCAL 165 AFFILIATED WITH HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

SANTA FE GAMING CORP.,
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165 Affiliated with Hotel Employees and Restaurant Employees, AFL-CIO ("the

Union") to review a Board decision and order dismissing an unfair labor practice complaint issued against 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 Companies"). The Board had subject matter jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices. The Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)); the Union conducts business in Las Vegas, Nevada.

The Decision and Order of the Board issued on July 7, 2000, and is reported at 331 NLRB No. 89. (ER 1.)[1] The Union's petition for review was filed on September 1, 2000. It was timely filed; the Act places no time limit on the filing of petitions for review. Santa Fe Gaming Corp., successor to the Companies, has intervened on behalf of the Board. AFL-CIO ("amicus") appears as amicus curiae urging reversal.

[1] "ER" references are to the Excerpts of Record filed by the Union with its brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably found that the Companies did not violate Section 8(a)(5) and (1) of the Act by unilaterally ceasing union dues checkoff after expiration of collective-bargaining agreements with the Union.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Companies violated the Act by changing the working conditions of their employees, specifically, by unilaterally ceasing deductions for union membership dues from its employees' paychecks after expiration of collective-bargaining agreements covering those employees. The Companies filed an answer denying the allegations. After a hearing, the administrative law judge issued a recommended decision and order dismissing the unfair labor practice complaint. (ER 8-11.) The General Counsel and the Union filed exceptions to the administrative law judge's decision. On July 7, 2000, the Board (Chairman Truesdale and Members Hurtgen and Brame, Members Fox and Liebman dissenting) affirmed the judge's dismissal of the complaint. (ER 1.)

I. THE BOARD'S FINDINGS OF FACT

The Companies, sister corporations, operated hotels and gambling casinos. The Companies were owned by Sahara Gaming Inc. ("Sahara") until they were sold in the fall of 1995. The Union and the Companies or their predecessors had

collective-bargaining relationships for over 30 years. Until May 31, 1994, the parties embodied their relationships in separate, but substantially identical, collective-bargaining agreements. On that date, each agreement expired. The parties negotiated unsuccessfully for successor agreements through the end of that year. (ER 1, 20.)

Each of the expired agreements contained an identical dues-checkoff provision that stated (ER 1, 53-54, 63-64):

> ARTICLE 3: UNION SECURITY
>
> * * *
>
> 3. 03. *Check-Off*
>
> The Check-off Agreement and system heretofore entered into and established by the Employer and the Union for the check-off of Union dues by voluntary authorization, as set forth in Exhibit 2, attached to and made part of this Agreement, shall be continued in effect for the term of this agreement.

"Exhibit 2" attached to the agreements provided:

> 1. Pursuant to the Union Security provision of the Agreement . . . [the Company], during the term of the agreement, agrees to deduct each month [u]nion membership dues . . . from the pay of those employees who have authorized such deductions in writing as provided in this Check-off Agreement.

Exhibit 2 also included a "Payroll Deduction Authorization" form, which stated in relevant part that the employee signing it agreed that the authorization would

remain in effect, automatically renew from year to year, and be irrevocable unless revoked in writing

> during a period of fifteen (15) days immediately succeeding any yearly period subsequent to the date of this authorization or subsequent to the date of termination of the applicable contract between [the Company] and the Union, whichever occurs sooner . . . .

The State of Nevada, where the casinos are located, is a "right-to-work" state, and under Section 14(b) of the Act (29 U.S.C. § 164(b)), the agreements therefore did not, and legally could not, include union security clauses requiring union membership as a condition of employment. The Companies abided by the checkoff provisions during the terms of the agreements and for a period thereafter. About a year after the agreements expired, the Companies notified the Union that they intended to cease checking off dues, and did so. The Companies redirected to the employees in the form of regular wages the money that had formerly been deducted from employees' pay and remitted to the Union. (ER 1, 42.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board dismissed the unfair labor practice complaint, finding, in agreement with the administrative law judge, that the Companies had not violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing union dues checkoff after expiration of their collective-bargaining agreements with the Union.

SUMMARY OF ARGUMENT

Under Section 8(a)(5) of the Act, an employer has the duty to recognize and bargain with the duly designated collective-bargaining representative of its employees. A corollary to that obligation requires employers to keep in effect mandatory terms and conditions of employment, even when the terms and conditions exist only because they were contained in an expired collective-bargaining agreement covering those employees. An exception to that general rule allows an employer to change certain working conditions, such as union-security and dues-checkoff provisions, upon expiration of the agreement. Although the application of the checkoff exception originally arose in the context of union-security agreements making membership mandatory for employees, the Board has for many years held that employers may terminate checkoff upon expiration of the collective-bargaining agreement even in right-to-work states, where membership cannot be compelled. The Board's interpretation of the Act is entitled to deference from the Court so long as that interpretation is rational and consistent with the Act, and this particular Board rule has been affirmed by every reviewing court to consider it.

The Board's application of that exception in right-to-work states has long been settled: it is well known by unions and employers. The Board reasonably

looks to the context in which checkoff was negotiated in determining that it need not be honored beyond the life of a contract.

In the instant case, the Board reasonably found that the Companies' termination of checkoff when the relevant contracts expired was lawful according to the foregoing principles. There is no merit to the Union's and amicus' contention that the Companies refused to bargain by canceling checkoff, by virtue of the fact that Nevada is a right-to-work state. Nor is there merit to the argument that Section 8(a)(5) creates an enforceable duty to continue to honor checkoff. Whatever contractual or statutory duty an employer might owe employees in that respect, the Union and amicus have failed to demonstrate that failure to honor checkoff constituted a refusal to bargain.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE COMPANY DID NOT VIOLATE SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CEASING UNION DUES CHECKOFF AFTER EXPIRATION OF COLLECTIVE-BARGAINING AGREEMENTS WITH THE UNIONS

A. Applicable Principles and Standard of Review

The issue presented is a narrow legal question--that is, whether the Board acted within its discretion in reaffirming the long-settled principle that an employer does not violate Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally discontinuing deduction of employees' union dues once the

collective-bargaining agreement authorizing such deduction, known as dues-checkoff, has expired. We submit that the Board acted within its discretion in declining to disturb that principle.

Section 8(a)(5) of the Act provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." Section 8(d) of the Act (29 U.S.C. § 158(d)) in turn defines the obligation "to bargain collectively" as meeting "at reasonable times and confer[ring] in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . ."[2]

It is a settled rule that employees' employment terms and conditions that are established exclusively by a collective-bargaining agreement are, like any other terms and conditions of employment, mandatory subjects of bargaining under the statutory scheme. Accordingly, under Section 8(a)(5) of the Act, an employer may not change them unilaterally upon contract expiration. *NLRB v. Katz*, 369 U.S.

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[2] Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) provides that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7" of the Act (29 U.S.C. § 157)). A Section 8(a)(5) violation results in a "derivative" violation of Section 8(a)(1). See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 698 n.4 (1983).

736, 737 (1962). It has long been recognized, however, that the Board has authority to determine that the general rule does not extend to some contractually established terms and conditions. *See The Hilton-Davis Chemical Co.,* 185 NLRB 241, 242-43 (1970) (contractual arbitration clause does not survive expiration). In particular, clauses providing for dues-checkoff (where the employer deducts union dues from employees' pay and remits them to the union), "union-security" (requiring union membership as a condition of employment), and "no-strike" provisions (except to the extent a correlative arbitration clause survives) are within the "narrow class of exceptional mandatory subjects . . . that do not survive expiration of the collective-bargaining agreement." *Southwestern Steel & Supply v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986), *enforcing* 276 NLRB 1569 (1985); *Indiana & Michigan Electric Co.*, 284 NLRB 53, 54-55, 58-59 (1987).

Almost 4 decades ago, the Board provided its rationale for finding that union-security and dues-checkoff are within that "narrow class." Thus, it pointed out that union membership cannot be required as a condition of employment except under a collective-bargaining agreement with a union-security provision that conforms to the first proviso to Section 8(a)(3) of the Act (29 U.S.C.

§ 158(a)(3)).[3] That statutory section sets forth the conditions under which union membership may be compelled as a condition of continuing employment. *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962) ("*Bethlehem Steel"*), remanded on other grounds, *sub nom*. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964); the contracting parties (that is, employer and union) may therefore require union membership as a condition of employment only so long as a contract with a union-security provision has not expired. *Bethlehem Steel*, 136 NLRB at 1502. With respect to contractual dues-checkoff, the Board observed, "[t]he Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force." *Id*. at 1502. It concluded that once the collective-bargaining agreement had expired, the employer is "free of its checkoff obligations to the Union," and noted that the language of the provisions themselves in that case linked the checkoff obligation to the duration of the contracts. *Id*.

The holding of *Bethlehem Steel*, that an employer's checkoff obligation is

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[3] The relevant proviso to Section 8(a)(3) provides, in pertinent part: "nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in [S]ection 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . ."

coextensive with the contract and terminates at contract expiration, has been upheld by every court of appeals to consider the question. See, e.g., *Sullivan Bros. Printers, Inc. v. NLRB*, 99 F.3d 1217, 1231 (1st Cir. 1996); *Xidex v. NLRB*, 924 F.2d 245, 254-255 (D.C. Cir. 1991). *See also Litton Business Systems v. NLRB*, 501 U.S. 190, 198-199 (1991). Moreover, *Bethlehem Steel* has cited broadly by the Board and courts for the proposition that dues-checkoff does not survive contract expiration, and is not tied to any discussion of union security. Indeed, in *Tampa Sheet Metal*, 288 NLRB 322, 326 n.15 (1988), the Board explicitly applied *Bethlehem Steel* in a context where the nonsurvival of dues checkoff could not even be linked to a union-security provision. That case involved an employee in Florida, a right-to-work state where the parties could not lawfully agree to union-security.[4] See Section 14(b) of the Act (29 U.S.C. § 164(b)).[5]

It is settled that "if the Board adopts a rule that is rational and consistent

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[4] Amicus asserts (Br 12) that it was "highly misleading" of the Board to rely here on *Tampa Sheet Metal* as support for the proposition that the Board has consciously applied *Bethlehem Steel* "in a right-to-work context," because the Board there purportedly "took no notice of the fact that it was doing so . . . ." To the contrary, although the Board did not engage in a discussion of the fact that *Tampa* arose in a right-to-work state, nothing in either that case or subsequent ones provides any reason to suspect that the Board was heedless of the relevant fact or its significance. In the circumstances, it is not appropriate to infer a mistake on the Board's part in *Tampa*.

[5] Section 14(b) provides, "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

with the Act . . . the rule is entitled to deference from the courts." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); see, e.g., *NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786-87 (1990).* Accord *NVE Constructors, Inc. v. NLRB*, 934 F.2d 1084, 1086 (9th Cir. 1991); *NLRB v. Carpenters Local Union No. 35*, 739 F.2d 479, 482 (9th Cir. 1984) Finally, the Board's application of a rational rule in a particular case should be upheld if it "squares with [the] line of cases" upon which the Board relied. *DIC Entertainment, LP v. NLRB*, ___ F.3d ___, ___, 2000 WL 27861 slip op 2 (D.C. Cir, decided Jan. 12, 2001). Indeed, requiring the Board to reconsider its own precedent would have precisely the destabilizing effect that it seeks to avoid by heeding precedent, absent a compelling reason not to do so.

B. The Instant case

The Board's decision here to affirm *Bethlehem Steel* is both rational and consistent with the Act and with the relevant line of Board and court case law. Thus, the checkoff provisions were negotiated in the context of settled precedent in existence at the time, and a contract provision clearly must be read in light of existing law. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956); and *NLRB v. Southern California Edison Co.*, 646 F.2d 1352, 1365 (9th Cir. 1981). The checkoff system on its face is coterminous with the agreements' expiration, reflecting the intent of the parties to be governed by the principles of Bethlehem

Steel in a right-to-work state. As the Board observed (ER 3), "[P]ractitioners have come to rely upon that principle. The bright-line rule thus established has been the law for 38 years and is both well settled and well understood." There is no persuasive reason compelling the Board to deviate from that settled principle, or for the Court to require it to do so.

The Union attacks (Br 18-27) the Board's dismissal on the ground that it is predicated on a "presumption" that the genesis of the checkoff clause here is the same as in *Bethlehem Steel*--that is, the contractual dues-checkoff clause resulted from a contractual union-security clause requiring union membership. The Union points out that because Nevada is a right-to-work state, there could not have been a lawful contractual clause compelling membership. Such a presumption, they assert, is therefore inapplicable, because the checkoff was entirely voluntary and not connected to compulsory union membership.

The Union misreads the Board's reasons for following its established precedent. It did not rely on a presumption that checkoff was merely an adjunct of compulsory membership. Nonsurvival of dues checkoff, as the Board made clear, is wholly consistent with longstanding precedent finding that checkoff clauses

expire with contract expiration, irrespective of their connection to union-security. (Above, p. 4).[6]

The Union next contends (Br 23) that dues checkoff cannot be unilaterally discontinued because the checkoff procedure represents a binding and enforceable bilateral compact between the employer and individual *employees,* one that survives termination of the collective-bargaining agreement. That argument is doubly flawed. First, the Union cites only *Bethlehem Steel* as authority for the proposition that the contract is binding on the employer, but that case--which holds that checkoff may be discontinued post-termination--hardly supports the contention urged. Second, the Union cites (Br 26-27) cases to argue that checkoff is equally binding on employees who voluntarily authorize dues deductions. Those cases, however, in no way contemplate that unilateral discontinuation of checkoff

[6] The cases relied upon (Br 15-19) by amicus to prove that dues deduction "is not a form of union-security" furnish no basis to reject the Board's decision here, inasmuch as it was not predicated on the existence of union-security, but on the precept that even voluntary checkoff may be discontinued post-termination. Equally wide of the mark are the cases cited by amicus (Br 16) for the proposition that it is not unlawful for an employer to continue checkoff deductions after contract expiration; the fact that an employer may continue checkoff does not mean that it must do so.

post-termination violates Section 8(a)(5) of the Act.[7]

Nor is there merit to the Union's related argument (Br 35-43) that employees have a statutory right to compel dues checkoff after termination of a collective-bargaining agreement, under Section 302(c)(4) of the Labor management Relations Act (29 U.S.C. § 186(c)(4)).[8] That subsection represents a limited exception to the

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[7] There is no merit to the Union's (Br __) and amicus' contention (Br 13-14) that by applying *Bethlehem Steel* in a right-to-work state, the Board unfairly gives dues checkoff less status post-termination than agreements to deduct payments for any other purpose. The only Board case they cite fails to support the argument. Thus, in *King Radio*, 166 NLRB 649, 653 (1967), the Board found a refusal to bargain in the employer's discontinuance of a payroll savings deduction after union certification but before an initial contract was negotiated. The deduction had been a voluntary program instituted by the employer as a benefit to its employees when they were not represented by a union. The Board found that abolishing that benefit once employees chose union representation was "an obvious reprisal." That case therefore does not involve unilateral termination of contract terms. Rather, the decision rests on the principle that an employer is generally not free to change *any* employment benefits while negotiations are pending for an initial contract, and surely not in reprisal for union activity. See, e.g., *Van Vlerah Mech., Inc. v. NLRB*, 130 F.3d 1258, 1262 (7th Cir. 1997).

[8] Section 302 of the Act provides, in pertinent part:

> It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . (2) to any labor organization . . . which represents . . . any of the employees of such employer . . . . (c) [exceptions] [t]he provisions of this section shall not be applicable . . . (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose accounts such deductions are made, a written assignment which shall not be irrevocable for a period of more than one

"anti-kickback" provisions of the Act. Thus, under Section 302(c)(4), employers, who are generally prohibited from making payments to unions or their representatives, may remit to the union, dues deducted from employee paychecks, but only pursuant to written employee authorizations. The Union's argument seems to be that the Companies are bound by legally valid checkoff authorizations and may not refuse to deduct dues if authorized, or conversely, may not continue to deduct dues once an employee timely revokes his or her authorization. Nowhere in any of the cases cited by the Union, however, is there even the suggestion that an employer commits a refusal to bargain under Section 8(a)(5) of the Act if it disregards employee wishes in those two respects. Assuming that either the Union or employees have recourse against the Companies, so far as the cited authority shows, that recourse is not under Section 8(a)(5) of the Act. In the circumstances, the authority cited fails to support a refusal to bargain.[9]

Finally, there is no merit to the argument (Br 45-48) that Section 8(a)(5) of the Act should provide some relief to the Union for unilateral post-expiration

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> year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner . . . ."

[9] Equally unmeritorious is the assertion (Br 18) of amicus that "employers may lawfully honor [checkoff] authorizations post-expiration . . ." That assertion is clearly not inconsistent with the principle that, even assuming an employer is free to continue deductions, it does not violate Section 8(a)(5) of the Act if it elects not to.

discontinuation of checkoff, because otherwise an employer may elect to cease deductions, but, under Section 302(c)(4), the employee may not revoke except according to strict timetables. Whatever the implications of the Union' implicit complaint that it is unfair to employees to deny them power to withhold dues to the Union, the fact remains that the Union is simply unable to point to any legal authority supporting the notion that Section 8(a)(5) is intended to establish parity between employer and employee by prohibiting post-expiration termination of checkoff.[10]

10 There is no merit to The Union's contention (Br 50-52) that under the "common law of contracts," the Companies waived any right to unilaterally terminate checkoff, because they continued to honor the provision for a period after the contracts' expiration. It is well settled that waiver of a right under the Act must be "clear and unmistakable." *See, e.g.*, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, and cases cited n.12 (1983). The Union points to nothing in the instant case that represents any such clear and unequivocal waiver. In the circumstances, the Union has failed to show waiver of the right to unilateral discontinuation of checkoff.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter judgment denying the Company's petition for review.

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