Hacienda Hotel, Inc. Gaming Corporation d/b/a Hacienda Resort Hotel and Casino *and* 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

Sahara Nevada Corporation 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, affiliated with Hotel Employees and Restaurant Employees, AFL–CIO. Cases 28–CA–13274 and 28–CA–13275

July 7, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On August 8, 1996, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, an answering brief, and a reply brief. The Charging Party filed exceptions and a supporting brief, and a combined reply brief and brief opposing cross-exceptions. The Respondents filed conditional cross-exceptions to be considered in the event the Board reverses the judge's decision, and a brief opposing exceptions. The AFL–CIO and Council on Labor Law Equality filed amici briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions, as modified, and to adopt the recommended Order.

The Respondents, Hacienda Resort Hotel and Sahara Hotel, are hotels and gambling casinos, which were owned by Sahara Gaming Inc. until they were sold in the fall of 1995. The Respondents and the Union 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. In January 1995, the Respondents' attorney requested further bargaining, but the Union did not respond.

Each of the expired agreements contained an identical dues-checkoff provision which stated:

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.

The referenced exhibit stated in pertinent part:

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

The exhibit also included a "Payroll Deduction Authorization" form which stated in relevant part that the employee agreed that the authorization shall remain in effect, and 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 Employer and the Union, whichever occurs sooner . . . .

The State of Nevada, where the Respondents are located, is a right-to-work jurisdiction,[2] and the agreements, therefore, did not, and legally could not, include union security clauses requiring union membership as a condition of employment. The Respondents abided by the checkoff provisions during the terms of the agreements and for a period thereafter. In June 1995 the Respondents notified the Union that they intended to cease checking off dues and did so, redirecting to the employees in the form of regular wages the money which was formerly deducted from employees' pay and remitted to the Union.[3] The complaint asserted that the Respondents' discontinuance of the checkoff procedure constituted an unlawful refusal to bargain because it represented a unilateral change in terms and conditions of employment, thus, violating Section 8(a)(5) and (1) of the Act.[4]

[1] In the Respondents' conditional cross-exceptions, they take issue with the judge's grant of the General Counsel's motion in limine to strike all of the Respondents' affirmative defenses except waiver, as well as his rejection of the Respondents' offers of proof and revocation of the portions of the Respondents' subpoena related to the rejected defenses. We agree with the judge's striking of these defenses for the reason stated by him at hearing, that is, because the defenses, if proven, would not affect the result.

[2] Sec. 14(b) of the Act entitles any state or territory to prohibit the "execution or application of agreements requiring membership in a labor organization as a condition of employment." States with laws barring union-security agreements are commonly known as "right-to-work" states or jurisdictions.

[3] As the judge noted, there were slight differences in the manners in which the Respondents implemented the decision to terminate checkoff.

[4] Sec. 8 provides, in relevant part:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . .

The judge dismissed the 8(a)(5) and (1) allegation based solely on his analysis of the language of the collective-bargaining agreements. The judge concluded that, after contract expiration, the Respondents were free to cease honoring the contractual dues-checkoff system at will without violating the agreements and, therefore, the Act. In so concluding, the judge discussed, but did not rely on, Board precedent, discussed infra, holding that an employer's obligation to continue a dues-checkoff arrangement terminates on expiration of the contract that created the obligation. We agree with the judge's conclusion that the Respondents did not violate Section 8(a)(5) and (1) when they unilaterally dishonored the dues-checkoff provisions of the expired agreements. But we base our decision on well-established precedent that an employer's obligation to continue a dues-checkoff arrangement expires with the contract that created the obligation.

It is beyond dispute that most contractually established terms and conditions of employment, like any other established terms and conditions of employment, are mandatory subjects of bargaining and cannot be changed unilaterally on contract expiration under *NLRB v. Katz*, 369 U.S. 736 (1962). Some contractually established terms and conditions of employment, however, have historically been treated as exceptions to this general rule. See, e.g., *Southwestern Steel & Supply v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986), enfg. 276 NLRB 1569 (1985) (union-shop, dues-checkoff, and no-strike provisions, except to the extent the correlative arbitration clause survives, are within the "narrow class of exceptional mandatory subjects . . . that do not survive expiration of the collective bargaining agreement"); and *Indiana & Michigan Electric Co.*, 284 NLRB 53, 54–55, 58–59 (1987) (union-security and dues-checkoff arrangements, and postexpiration arbitration do not survive contract expiration).

The Board first addressed the issue of the survivability of dues-checkoff provisions in *Bethlehem Steel*, 136 NLRB 1500, 1502 (1962), 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). In that case, the Board also addressed the issue of whether union-security clauses survive contract expiration. The Board held that both union-security and dues-checkoff provisions involve wages, hours, and other terms and conditions of employment, and, therefore, are mandatory subjects of bargaining. The Board in *Bethlehem Steel*, supra, however, held that special statutory considerations dictated that a contractual union-security provision expired on the expiration of the contract under which it legally came into being. In this regard, the Board stated that because the acquisition and maintenance of union membership cannot be a condition of employment except under a contract which conforms to the proviso to Section 8(a)(3) (setting forth the conditions under which such agreements are permitted),[5] the parties may require union membership as a condition of employment only so long as a contract with a union-security provision is in effect. Id. The Board then further held that the dues-checkoff provisions at issue were subject to "similar considerations," and "[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. The Board concluded that the employer was "free of its checkoff obligations to the Union" when its collective-bargaining agreement ended. Id. The Board also noted that the language of the provisions themselves linked the checkoff obligation with the duration of the contracts. Id.

Since 1962, the holding of *Bethlehem Steel* that an employer's checkoff obligation terminates with contract expiration has been cited numerous times in Board decisions. See *Teamsters Local 70 (Sea-Land of California)*, 197 NLRB 125, 128 (1972), enfd. per curiam 490 F.2d 87 (9th Cir. 1973); *Peerless Roofing Co.,* 247 NLRB 500, 505 (1980), enfd. 641 F.2d 734 (9th Cir. 1981); *Ortiz Funeral Home Corp.*, 250 NLRB 730, 731 fn. 6 (1980), enfd. on other grounds 651 F.2d 136 (2d Cir. 1981), cert. denied 455 U.S. 946 (1982); *Robbins Door & Sash Co.,* 260 NLRB 659, 659 (1982); *Petroleum Maintenance Co.*, 290 NLRB 462, 463 fn. 4 (1988); *R.E.C. Corp.*, 296 NLRB 1293, 1293 (1989); *Xidex Corp.,* 297 NLRB 110, 118 (1989), enfd. 924 F.2d 245, 254–255 (D.C. Cir. 1991); *AMBAC*, 299 NLRB 505, 507 fn. 8 (1990); *U.S. Can Co.*, 305 NLRB 1127, 1127 (1992), enfd. 984 F.2d 864, 869 (7th Cir. 1993); *J. R. Simplot Co.*, 311 NLRB 572, 572 (1993), enfd. mem. 33 F.3d 58 (1994), cert. denied 513 U.S. 1147 (1995); *Sonya Trucking, Inc.*, 312 NLRB 1159. 1160 (1993); *Katz's Deli*, 316 NLRB 318, 334 fn. 23 (1995), enfd. on other grounds 80 F.3d 755 (2d Cir. 1996); *Sullivan Bros. Printers,* 317 NLRB 561, 566 fn. 15 (1995), enfd. 99 F.3d 1217, 1231 (1st Cir. 1996); *Spentonbush/Red Star*

(5) to refuse to bargain collectively with the representatives of his employees.

[5] Sec. 8(a)(3) states in relevant part:

> . . . nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 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 later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such an agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement[.]

Cos., 319 NLRB 988, 990 (1995), enf. denied on other grounds 106 F.3d 484 (2d Cir. 1997); *87-10 51st Ave. Ownership Corp.*, 320 NLRB 993 (1996); *Talaco Communications, Inc.*, 321 NLRB 762, 763 (1996); *Able Aluminum Co.,* 321 NLRB 1071, 1072 (1996); *Valley Stream Aluminum, Inc.*, 321 NLRB 1076, 1077 (1996).

Various circuit court decisions have specifically endorsed the proposition that an employer's obligation to check off dues terminates at contract expiration. See, e.g., *Marine & Shipbuilding Workers*, supra, 320 F.2d at 619; *Southwestern Steel,* supra, 806 F.2d at 1114; *Xidex v. NLRB*, supra, 924 F.2d at 254–255; *U.S. Can Co. v. NLRB*, supra, 984 F.2d at 869; *Sullivan Bros. Printers, Inc. v. NLRB*, supra, 99 F.3d at 1231. This well-established holding has also been recognized by the Supreme Court in *Litton Business Systems v. NLRB*, 501 U.S. 190, 198–199 (1991). Most often, the holding is stated broadly by the Board and courts for the well-settled proposition that an employer's dues-checkoff obligation does not survive contract expiration, and is not tied to any discussion of union security. In *Tampa Sheet Metal*, 288 NLRB 322, 326 fn. 15 (1988), the Board explicitly applied this line of precedent in a right-to-work context where dues checkoff could not lawfully be linked with union-security arrangements to find that the checkoff obligation therein did not survive contract expiration.[6]

Although we do not base our decision on the language of the dues-checkoff provisions of the agreements in this case, we are compelled to note, as the judge did, that the provisions at issue clearly tie the checkoff agreement to the duration of the contracts. It is axiomatic that contract negotiations occur in the context of existing law, and, therefore, a contract provision must be read in light of the law in existence at the time the agreement was negotiated. *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). Thus, the language linking the checkoff system to the duration of the agreements here reflects the established law and also supports the conclusion that the precedent was known and understood by the parties to the agreements.

In sum, although the precedent that checkoff does not survive contract expiration initially developed in the context of a contract containing both union security and dues checkoff, it has clearly come to stand for the general rule that an employer's dues-checkoff obligation terminates at contract expiration. This well-established rule has been cited and relied on in numerous Board and court decisions. Further, practitioners have come to rely on that principle, as the judge recognized in this case. Thus, this bright-line rule has been the law for 38 years and is both well settled and well understood. Absent compelling reasons to do so, which are not present here, we see no reason to deviate from it. We therefore conclude, in agreement with the judge and existing precedent, that the Respondents did not violate the Act when they unilaterally ceased checkoff after the contracts here expired, and that the complaint should be dismissed. [7]

ORDER

The complaint is dismissed.

MEMBERS FOX AND LIEBMAN, dissenting.

Contrary to our colleagues, we would find that the Respondents violated Section 8(a)(5) and (1) when, after their collective-bargaining agreement with the Union had expired but while negotiations for a new agreement were still underway, they unilaterally ceased checking off dues for employees who, so far as the record shows, had valid checkoff authorizations on file. In our view, there is no statutory or policy justification for excepting dues checkoff from the general rule that following the expiration of a collective-bargaining agreement, an employer is obliged to maintain the status quo with regard to employees' terms and conditions of employment until the parties agree on changes or bargain to impasse. We

[6] We note and take issue with the judge's characterization of this area of the law as "very confusing." Other cases involving different legal issues are consistent with the principle that an employer's obligation to continue dues checkoff ends with the contract term. E.g., *Frito-Lay, Inc.,* 243 NLRB 137 (1979) (the Board held that a union did not violate Sec. 8(b)(1)(A) and (2) when it requested that an employer continue to deduct dues during a contractual hiatus and an employer did not violate Sec. 8(a)(3) and (1) by aquiescing to that request when employees attempted to untimely revoke their checkoff authorizations); *Chemical Workers Local 143 (Lederle Laboratories),* 188 NLRB 705 (1971) (the Board held that a union's claiming right to checkoff after contract expiration did not violate Sec. 8 (b)(1)(A)); and *Lowell Corrugated Container Corp.,* 177 NLRB 169, 173 (1969), enfd. on other grounds 431 F.2d 1196 (1st Cir. 1970) (the Board adopted judge's finding that an employer's continuing to honor an unrevoked dues-checkoff authorization after contract expiration did not contravene Sec. 8(a)(3), and (1)). Cases cited by the judge as standing for the proposition that it has been held a violation of Sec. 8(a)(2) to continue checkoff after contract expiration are clearly distinguishable. In *Stainless Steel Products,* 157 NLRB 232, 233 (1966), the Board found under the circumstances that continuing checkoff after contract expiration was part of a pattern of "numerous and various activities" assisting an incumbent union in violation of Sec. 8(a)(2). In *Guy's Foods, Inc*., 158 NLRB 936, 947(1966), affd. on other grounds sub nom. *Bakery & Confectionery Workers Local 245 v. NLRB*, 379 F.2d 160 (D.C. Cir. 1969), the Board adopted the finding that an employer's checkoff and other actions violated Sec. 8(a)(2) where no binding contract had ever come into effect.

[7] In addition to the above rationale, Member Hurtgen notes that a checkoff clause, although a mandatory subject, is a unique one. It is simply a mechanism for employees to pay dues to the union. And, in this case, these dues are not even a condition of employment. Thus, the clause, while a mandatory subject, does not really set the wages, hours, and conditions under which employees work. In Member Hurtgen's view, some rather unique mandatory matters are subject to rules that differ from those pertaining to more common mandatory subjects. For example, a *McClatchy Newspapers* clause, 321 NLRB 1386 (1996), is mandatory, but it is not subject to the "implementation upon impasse" rule. Similarly, the instant clause, while mandatory, is not necessarily subject to the "survive the contract" rule. For this reason, and those stated by the majority, Member Hurtgen concurs with the longstanding principle that a checkoff clause ordinarily does not survive the expiration of the contract.

would therefore overrule as contrary to the Act those Board cases that hold that an employer's obligation to checkoff dues terminates as a matter of law when the collective-bargaining agreement containing the dues-checkoff provision expires.

It is well established that an employer violates its obligation to bargain under Section 8(a)(5) and (d) of the Act if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). The obligation to refrain from unilateral changes applies not only in situations where, as in *Katz*, the union is newly certified and the parties have not yet reached an initial agreement, but also in cases where, as here, an existing agreement has expired and negotiations on a new one have not been completed. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). Thus, as a general rule, contractually established terms and conditions that are mandatory subjects of bargaining must be continued in effect after the contract has expired until the parties negotiate a new agreement or bargain to impasse. Id. This rule plays an essential role in giving effect to the statutory right of employees to bargain with their employers through their chosen representatives, for as the Supreme Court has stated, "[A]n employer's unilateral change in conditions of employment under negotiation . . . is a circumvention of the duty to negotiate which frustrates the objectives of 8(a)(5) much as does a flat refusal" to bargain. *Katz*, supra, 369 U.S. at 743.

In a line of Board cases beginning with *Bethlehem Steel*, 136 NLRB 1500 (1962), 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 Board has treated contractually established dues-checkoff arrangements as one of a small number of terms and conditions of employment that are excepted from the *Katz* rule and therefore are not required to be continued in effect after the contract has expired, even though they are mandatory subjects of bargaining.[1] The Board has never, however, advanced a defensible rationale for this exception.[2]

In *Bethlehem Steel*, supra, the Board had before it allegations regarding unilateral changes on a number of different subjects,[3] and it singled out two—union security and dues checkoff—as exceptions to the general rule of postexpiration survivability. Preliminarily, the Board acknowledged that both were mandatory subjects of bargaining, in that they related to terms and conditions of employment covered by Section 8(d). With regard to union security, the Board next observed that the proviso in Section 8(a)(3) which permits employers and unions to enter into union-security agreements also restricts their application; specifically, that "the acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso." Id.[4] The Board then reasoned that because the statute made union-security requirements dependent on the existence of a contract conforming to the proviso, unions and employers can lawfully impose such requirements only so long as such a contract is in force. Once the contract expires, the union-security provisions become inoperative and there is no longer a lawful basis on which union membership can be required as a condition of employment. Thus, the Board concluded, when the employer, following expiration of its contracts with the union, refused to continue to require employees to comply with the union-security requirements, it was "acting in accordance with the mandate of the Act" and therefore did not violate Section 8(a)(5).

Dues-checkoff arrangements, whereby an employer, pursuant to voluntary authorizations executed by individual employees, deducts union dues from the employees' wages and remits them to the union, are not covered by the proviso to Section 8(a)(3) because they do not compel union membership or financial support as a condition of employment,[5] and, as we discuss below, nothing in the statute or Board decisional law requires that they be specified in a contract in order to be lawful. Nevertheless, the Board went on to conclude—without ac-

[1] The others are union-security clauses, no-strike clauses (except to the extent other dispute resolution methods survive expiration of the agreement), and arbitration clauses. See *Litton Financial Printing Division,* supra at 198.

[2] For a critique of explanations that have been offered for this exception, see Weeks, *Continuing Liability Under Expired Collective Bargaining Agreements:* Part 1, 15 Okla. City U. L. Rev. 1, 38–39 & fn. 108 (1990).

[3] The complaint had alleged that following the expiration of its contracts with the union covering various different groups of employees, the employer had made unilateral changes in preferential seniority, grievance procedures, union security, and dues checkoff.

[4] Sec. 8(a)(3) make it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. " The proviso to that section provides in pertinent part (emphasis added):

> [N]othing in this Act . . . shall preclude an employer from *making an agreement* with a labor organization . . . 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 later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such an agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement[.]

[5] "The dues checkoff section of the Act, far from being a union security provision, seems designed as a provision for administrative convenience in the collection of union dues . . . . The Supreme Court has made it clear that union security devices and checkoff arrangements are separate entities, and that the latter are a matter of 'individual freedom of decision' for the employee. *Felter v. Southern Pacific Co*., 359 U.S. 326 (1959)." *NLRB v. Atlanta Printing Specialties*, 523 F.2d 783, 786 (5th Cir. 1975).

knowledging these fundamental distinctions—that "similar considerations prevail" with respect to the employer's refusal to continue to check off dues after the end of the contracts, and that this also was not a violation of the Act. The only explanation it gave for this conclusion was that the checkoff provisions in the expired agreements "implemented the union-security provisions" and that the union's right to the checkoffs, like the right to union security, was "created by the contracts." Id.

Over the years, the *Bethelehem Steel* holding has been converted to a broad rule, now well established in Board case law, that dues-checkoff provisions, like union-security provisions, do not survive the expiration of the contract. Ironically, although the primary rationale given by the Board for the holding in *Bethlehem Steel* itself was that the dues-checkoff clauses merely "implemented" the union-security provisions, the Board has since held that an employer may unilaterally cease checking off dues after contract expiration even where the contract contained *no* union-security provisions and indeed even where, as here, union-security provisions are affirmatively prohibited by State law.[6] See, e.g., *Tampa Sheet Metal*, 288 NLRB 322, 326 fn. 15 (1988). The Board has never acknowledged that the result in these cases cannot be justified under the original *Bethlehem Steel* rationale, nor has it ever attempted to articulate a substitute rationale that would justify the broader rule the majority reaffirms today.[7] In our view, however, even where a contract contains both a union-security provision and a dues-checkoff provision, there is no valid basis for excepting dues checkoff from the prohibition against unilateral changes.

Dues-checkoff arrangements, as we have noted, are essentially different in nature from union-security arrangements. When a union and an employer enter into a union-security agreement, they agree that all employees in the bargaining unit will be required to pay dues to the union, and that any employee who fails to do so will be discharged. In contrast, when an employer and a union agree to a dues-checkoff provision, no obligations are imposed on employees. The employer merely agrees, as a matter of administrative convenience to the union and individual employees, that it will establish a mechanism through which employees who choose to do so may pay their union dues through payroll deductions. Although the dues that an individual employee authorizes to be "checked off" during the term of a collective-bargaining agreement may be dues that the employee is required to pay pursuant to the terms of a union-security clause, the existence of a dues-checkoff provision in an agreement is not dependent on the existence of a union-security provision. Indeed, dues-checkoff provisions can and frequently do exist in collective-bargaining agreements where union-security provisions are absent.[8] Dues-checkoff provisions, like automatic payroll deduction systems for paying insurance premiums, purchasing savings bonds or making charitable contributions, provide employees with a convenient method for making a recurring payment, while at the same time providing practical advantages for the recipients of such payments, whether they be unions, insurance providers, the U.S. Treasury, or the local United Way Campaign, because the recipients are spared the time and effort that would otherwise have to be expended collecting payments directly from the employee on a periodic basis. Thus, even where there is also a union-security provision in the contract, a dues-checkoff provision does not merely "implement" the union-security clause, but serves separate and distinct functions.

For purposes of application of the *Katz* rule against unilateral changes, the most significant difference between union-security clauses and dues checkoff is that there is no provision in the statute that makes dues-checkoff arrangements dependent on an extant collective-bargaining agreement for their legality or enforceability. The language of the 8(a)(3) proviso which was interpreted by the Board in *Bethlehem Steel* to prohibit adherence to a union-security agreement absent an existing agreement simply has no analogue in the provisions of the statute pertaining to dues checkoff.

Dues checkoff is regulated under Section 302 of the Act, which prohibits, and creates criminal penalties for, unauthorized employer payments to unions. Exceptions from this general prohibition are carved out for certain specified types of payments, including dues checkoff. Section 302(c)(4), the exception for dues checkoff, reads in pertinent part as follows:

> The provisions of this section shall not be applicable . . . 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 account such deductions are made, a written assignment

[6] The State of Nevada, where the employees covered by the expired agreement are employed, has a "right-to-work" law, authorized under Sec. 14(b) of the Act, prohibiting the enforcement of any union-security clause in the State.

[7] In *Hudson Chemical Co.*, 258 NLRB 152, 157 (1981), the administrative law judge justified an employer's refusal to continue checking off dues following contract expiration partly on grounds that because Sec. 302(c)(4) provides that checkoff authorizations shall not be irrevocable beyond the termination date of the applicable collective bargaining, the checkoff authorization expired when the agreement expired. Although the Board adopted the judge's decision on this point without comment, it has never otherwise suggested that it meant to adopt his reasoning, which is, in any event, a non sequitur. That a checkoff authorization must be revocable when the contract terminates simply means that the employee must be able to revoke it. It does not mean that it is automatically revoked.

[8] In a 1995 review of collective-bargaining agreements, 95 percent were found to contain dues-checkoff provisions while only 82 percent contained union-security provisions. Bureau of National Affairs, Basic Patterns in Union Contracts 97 (14th ed. 1995).

> which shall not be irrevocable for a period of more than a year, or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner[.]

Both Section 302(c)(4) and the 8(a)(3) proviso were enacted in 1947 as part of the Taft-Hartley amendments to the Act. However, in contrast to the 8(a)(3) proviso, Section 302(c)(4) does not in any manner state or indicate that dues-checkoff arrangements must be embodied in collective-bargaining agreements in order to conform to statutory requirements.[9] It does contain a requirement that deductions of union dues be made only pursuant to a "written assignment" from the employee to the employer authorizing the deductions, but such authorizations are independent of any contract made between a union and an employer.[10]

Not only does Section 302(c)(4) contain no language making dues-checkoff arrangements dependent on the existence of a contract, its provisions indicate that Congress fully expected that dues-checkoff arrangements would survive beyond the life of a collective-bargaining agreement. By requiring that employees be given the opportunity to revoke their checkoff authorizations on the termination of the applicable collective-bargaining agreement, Congress clearly contemplated that employees who did not choose to revoke their authorizations would continue to have their dues checked off *after* the contract has expired. If it had been Congress' intent to have dues checkoff expire automatically at contract expiration, there would have been no reason to require that employees be given the option at that time whether to revoke their authorizations or continue to have dues checked off.

The legislative history of Section 302(c)(4) supports this interpretation of Congress' intent. This section of the Taft-Hartley amendments was added as a floor amendment to the Senate bill. Senator Taft, Chairman of the Labor Committee, spoke in support of the amendment,[11] explaining its intent as it related to then-prevailing industry practice concerning checkoff, as follows:

> If [an employee] once signs such an assignment [authorizing checkoff] under the collective-bargaining agreement, it may continue indefinitely until revoked, and it may be irrevocable during the life of the particular contract, or for a period of 12 months. That, I think, is substantially in accord with nine-tenths of all check-off agreements, and simply prohibits a check-off made without any consent whatever by the employees.[12]

Clearly, Senator Taft was of the view that what was eventually enacted as Section 302(c)(4) permitted checkoff to continue indefinitely until revoked by the individual employee. Further, he believed that this provision was substantially in accord with the vast majority of checkoff arrangements then in existence.

One of the many anomalous consequences of the Board's *Bethlehem Steel* rule as applied to dues checkoff is that it effectively transfers the right to decide whether to continue to have dues checked off when the contract expires from the employee—to whom Congress expressly gave that right in Section 302(c)(4)—to the employer. As we have noted, the Board's rationale in *Bethlehem Steel* for holding that union security provisions do not survive contract expiration was that the proviso to Section 8(a)(3) *prohibits* their enforcement when there is no agreement in effect, and an employer was therefore simply "acting in accordance with the mandate of the Act" when it ceased to require compliance with the provisions as a condition of employment. But the Board has

[9] In contrast, Sec. 302(c)(5), which provides a separate exception from the general prohibition for employer payments to certain employee benefit trust funds, specifically provides that that exception is applicable only if "the detailed basis on which such payments are made is specified in a written agreement with the employer." The fact that Congress included that language in Sec. 302(c)(5) but said nothing about an agreement with the employer in Sec. 302(c)(4) is further compelling evidence that it did not intend any such requirement to apply to dues-checkoff arrangements.

We note, moreover, that it is well established that an employer's obligation to make payments into benefit funds covered by Sec. 302(c)(5) does not terminate on the expiration of the collective-bargaining agreement providing for such payments, but rather continues during the contract hiatus as part of the employer's obligation pursuant to the *Katz* rule to maintain the status quo. See *Laborers Health & Welfare Trust Funds for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988) (citing cases). Arguments that because of the requirement of a "written agreement," Sec. 302(c)(5) precludes an employer from making contributions to a trust fund after the collective-bargaining agreement has expired have been routinely rejected by the Board and the courts. See, e.g., *Producers Dairy Delivery Co. v. Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625 (9th Cir. 1981); *Peerless Roofing Co. v. NLRB*, 641 F2d. 734 (9th Cir. 1981); *Hinson v. NLRB*, 428 F.2d 133, 138–139 (8th Cir. 1970); *Wayne's Olive Knoll Farms*, 223 NLRB 260, 264 (1976); *SAC Construction Co.*, 235 NLRB 1211, 1219 (1978); *Starco Farmers Market*, 237 NLRB 373, 374 fn. 5 (1978); *Turnbull Enterprises*, 259 NLRB 934, 940 (1982). Indeed the Board, with court approval, has consistently held that the expired contract is itself sufficient to meet the "written agreement" requirement of Sec. 302(c)(5). *Concord Metal*, 298 NLRB 1096 (1990); *Imperial House Condominium*, 279 NLRB 1225, 1239 (1986), enfd. 831 F.2d 999 (11th Cir. 1987); *Turnbull Enterprises*, supra at 940; *Wayne's Dairy*, supra at 264. Accord: *Cuyamaca Meats, Inc. v. San Diego Butchers Pension Fund*, 827 F.2d 491, 498 (9th Cir. 1987), cert. denied 485 U.S. 1008 (1988).

[10] A checkoff authorization is a contract between an individual employee and his employer by which the employee assigns to the union a portion of his future wages and authorizes the employer to deduct those amounts from his pay and remit them to the union. *Electrical Workers IBEW Local 2088 (Lockheed Space Operations),* 302 NLRB 322, 327–328 (1991). Accord: *NLRB v. Atlanta Printing Specialties*, 523 F.2d 783, 785 (5th Cir. 1975); *Cameron Iron Works,* 235 NLRB 287, 289 (1978). Checkoff authorizations are separate and legally distinct from dues-checkoff *clauses*, which are provisions in contracts between union and employers setting forth the employer's agreement to honor checkoff authorizations executed by employees.

[11] This section was enacted as a part of the Taft-Hartley amendments and was added as a floor amendment to the Senate bill.

[12] II Leg. Hist.1311 (LMRA 1948).

never suggested that the Act prohibits employers from continuing to checkoff dues when the contract expires. To the contrary, Board law is clear that an employer may, if it chooses, continue to honor dues-checkoff authorizations after contract expiration without committing an unfair labor practice. *Frito-Lay, Inc.,* 243 NLRB 137 (1979); *Lowell Corrugated Container Corp.,* 177 NLRB 169, 173 (1969). Thus, when an employer takes advantage of the expiration of the contract to cease honoring its employees' valid, unrevoked checkoff authorizations, it is not "acting in accordance with the mandate of the Act," nor is it in any sense freeing employees from a "compulsion" imposed by the bargaining agreement. It is simply making a discretionary decision to unilaterally eliminate an established term and condition of employment that is subject to negotiation as a mandatory subject of bargaining. This is precisely the kind of conduct that the Supreme Court condemned in *Katz*, and there is no reason to excuse it.

Finally, we disagree with the judge's finding, endorsed by the majority, that even if the Respondents' obligation to checkoff dues did not expire as a matter of law when the contract expired, the language of the dues-checkoff provisions in the contract at issue—in particular the language stating that the dues-checkoff system "shall be continued in effect for the term of this agreement"—mandates a conclusion that the Respondents' obligations terminated at contract expiration, leaving them free to cease honoring the parties' checkoff arrangements. As a usual matter, all terms and conditions of employment set forth in a collective-bargaining agreement are specifically limited to the contract term by the agreement's duration clause, which normally establishes a fixed date on which the agreement will expire and the parties' obligations under the agreement will end. If such provisions operated to leave the parties free on contract expiration to unilaterally change the terms and conditions established under the agreement, there would be no *Katz* rule. The issue here is not whether an employer has a continuing *contractual* obligation after contract expiration to honor its employees' dues-checkoff authorizations. Clearly it does not. The issue is whether the employer has a *statutory* obligation to continue the dues checkoff pursuant to its obligation to bargain under Section 8(d) and Section (a)(5). The fact that the checkoff provision includes standard language limiting the employer's contractual obligations to "the term of the agreement" does not determine that question.

In *King Radio Corp.,* 166 NLRB 649, 653 (1967), enfd. 398 F.2d 14 (10th Cir. 1968), the Board held, with court approval, that an employer who had had a practice of allowing employees to purchase U.S. Savings bonds through payroll deductions, but canceled that practice after employees voted for union representation without first bargaining with the union, had made a unilateral change in working conditions in violation of Section 8(a)(5). We see no reason why an employer's unilateral termination of a dues-checkoff arrangement after contract expiration should not also be considered a violation of Section 8(a)(5). Indeed it seems to us that a rule under which an otherwise indistinguishable voluntary payroll deduction arrangement is treated differently merely because the moneys being deducted are for the employee's union dues is contrary to the basic purposes of the Act.

In defense of the rule, the majority offers little more than the observation that the Board has adhered to the rule for many years, and that it has been accepted by the courts. As to the latter point, it is true that no court has challenged the Board's treatment of dues-checkoff clauses as an exception to the *Katz* rule prohibiting unilateral changes. However, an examination of the court decisions cited by the majority shows that those courts which have endorsed the Board's view either agreed with the Board that the dues-checkoff clause "merely implemented" the union-security clause[13]—which could not explain the result reached by the majority in this case—or acted under the mistaken assumption that the statute *permits* dues-checkoff arrangements only if they are included in a valid agreement.[14] This assumption, as we have shown, has no basis in the statute and the Board has never endorsed it. As to the first point, with due respect for the importance of stability in the law, we can only say that in light of the central importance of the *Katz* rule to the enforcement of the duty to bargain, the burden is on those who would make exceptions to that rule to justify those exceptions on grounds consistent with the language and policies of the statute. This, we believe, the Board has never done.

In our view, the ability of the Respondents' employees who wish to do so to pay their dues by the convenient mechanism of checkoff is a term and condition of their employment which they are entitled to retain following contract expiration, at least until the Respondents and their collective-bargaining representative have agreed to discontinue it or the Respondents have proposed discontinuing it and have reached a valid impasse that permits

[13] *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 619 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

[14] See, e.g., *Southwestern Steel & Supply, Inc. v. NLRB,* 806 F.2d 1111, 1114 (D.C. Cir. 1986) (stating that "[t]he well established exceptions for union-shop and dues-checkoff provisions are rooted in [Secs. 8(a)(3) and 302(c)(4) of the Act], which are understood to prohibit such practices unless they are codified in an existing collective bargaining agreement," and citing *Bethlehem Steel*); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869 (7th Cir. 1993) (citing *Bethlehem Steel* and *Southwestern Steel & Supply*, supra, for the proposition that "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. . . . Otherwise the payment of money [violates Sections 8(a)(2) and 8(a)(3).])" See also *Litton Business Systems v. NLRB*, supra, 501 U.S. at 199 (noting "the Board's view that union security and dues check-off provisions are excluded from the unilateral change doctrine because of statutory provisions which permit these obligations only when specified by the express terms of a collective-bargaining agreement").

unilateral action. We would thus find that the Respondents violated Section 8(a)(5) and (d) of the Act by terminating checkoff unilaterally simply because the collective-bargaining agreements had expired.

Nathan W. Albright, Esq., for the General Counsel.
Norman H. Kirshman & Gary G. Branton (Kirshman, Harris & Cooper), of Las Vegas, Nevada, for Respondents.
Barry S. Jellison, Esq. (Davis, Cowell & Bowe), with *Michael T. Anderson, Esq.,* on brief of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on May 13–14, 1996, on consolidated complaints issued by the Regional Director for Region 28 of the National Labor Relations Board on October 26, 1995. They are based on unfair labor practice charges filed by 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 Charging Party or the Union) on August 22, 1995. The complaint alleges that Hacienda Hotel, Inc. Gaming Corporation d/b/a Hacienda Resort Hotel and Casino and Sahara Nevada Corporation d/b/a Sahara Hotel and Casino (the Respondents) have engaged in certain violations of Section 8(a)(5) of the National Labor Relations Act (the Act).

Issue

The principal issue in this case is whether Respondents committed an unlawful unilateral change of working conditions when, during a hiatus period between collective contracts, it dishonored the union dues-checkoff provision of the expired agreement and thereby committed an act violative of the good-faith bargaining obligation as set forth in Section 8(a)(5).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondents are, or were, until they were sold in September and October 1995 sister companies owned by Sahara Gaming, Inc., a Nevada corporation.[1] They were hotels and gambling casinos located in Las Vegas. Respondents admit to meeting the Board's retail standard for the assertion of jurisdiction and admit they were, during material times, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. They further admit the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The facts are largely undisputed. Respondents and the Union have had a collective-bargaining relationship for at least 30 years. In recent times each hotel had a separate, but nearly identical, collective-bargaining contract with the Union. The most recent contracts had an identical duration, beginning June 2, 1989, and ending May 31, 1994. Furthermore, each contract contained identical union dues-checkoff provisions, section 3.03 together with Exhibit 2 attached to each contract. Conjointly they consist of 14 paragraphs and in essence permit bargaining unit employees who wish to sign a specified wage assignment to authorize Respondent to make payments of union dues directly to the Union. Section 3.03 and the first two paragraphs of Exhibit 2 are significant to the case and I quote them here:[2]

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 a part of this Agreement, *shall be continued in effect for the term of this agreement*.

EXHIBIT 2—CHECK-OFF AGREEMENT

1. Pursuant to the Union Security provision of the Agreement between SAHARA RESORT CORPORATION dba [name of each hotel] and the [the Union], *the Employer, during the term of the Agreement*, agrees to deduct each month Union membership dues (excluding initiation fees, fines and assessments) from the pay of those employees who have authorized such deductions in writing as provided by this Check-Off Agreement. Such membership dues shall be limited to the amounts levied by the Unions in accordance with their Constitutions and Bylaws. Deductions shall be made only for those employees who voluntarily submit to the hotel employing them a written authorization in accordance with the "Authorization for Check-Off of Dues" form set forth below. It is the Union's responsibility to provide the employees with this form.

2. The required authorization shall be in the following form:

PAYROLL DEDUCTION AUTHORIZATION

DATE _____

I, the undersigned, a member of _____, hereby request and voluntarily authorize the Employer to deduct from any wages or compensation due me, the regular monthly Union dues uniformly applicable to the members in accordance with the Constitution and Bylaws of the Union.

This authorization shall remain in effect and shall be irrevocable unless I revoke it by sending written notice to both the Employer and _____ by registered mail 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 Employer and the Union, whichever occurs sooner, and shall be automatically renewed as an irrevocable check-off from year to year unless revoked as herein-above provided.

Signed_____
Social Security No. _____

[1] The parent corporation, after the sales, continued to own another property, the Santa Fe Hotel, located outside Las Vegas, but renamed itself, consistent with the sale, Santa Fe Gaming, Inc.

[2] Additional paragraphs in Exh. 2 describe the mechanics of handling and transmitting the dues to the Union. They are not germane to any issue in the complaint and are therefore not quoted here.

[Emphasis added.]

During the term of the contract, both Respondents honored and complied with the terms of the checkoff agreement. Negotiations for a new contract in 1994 were unsuccessful and did not result in a new agreement. The parties allowed the contract to expire on May 31, 1994, although bargaining continued through December 14, 1994. Even though the contract lapsed on its expiration date, Respondents continued to deduct union dues from its employees' pay (if they had authorized it) and transmitted the funds to the Union as it had during the contract's term.

On January 4, 1995, one of Respondents' attorneys and negotiators, Gary G. Branton, wrote the Union a letter seeking to resume negotiations. The Union did not respond. Six months later, on June 8, 1995, Branton notified the Union by letter that Respondents intended to cease checking off dues and would cease transmitting them to the Union. This, of course, was more than a year after the contract had ended. Respondents did in fact stop checking off the dues and thereafter redirected that money to the employee in the form of regular wages.[3] The Union's only response was to file the instant charges.

III. ANALYSIS AND CONCLUSIONS

Both the General Counsel and the Charging Party have made thoughtful and rather elaborate arguments about the law as it relates to checkoff clauses which expire with the contract and why the law should not be applied in Nevada, a right-to-work State. Respondent counters with both factual and legal arguments. First, it asserts that the contract language itself permitted it to do what it did. Second, it asserts that the law permitted it to do what it did and should not be changed. I make my conclusions based on the contract and find that it is unnecessary to examine the state of the law on checkoff clauses, whether in right-to-work States or otherwise, with an eye to changing it.

This contract and its checkoff provisions are quite clear. Section 3.03 constitutes a general directive which governs the subsequent clauses including those in the attached exhibit. The language found in the exhibit is quite clearly subordinate to it, but nonetheless specific. Thus, section 3.03 recognized the previous existence of a checkoff procedure, but imposed a specific limitation on it, duration. It specifically says the checkoff system in effect "shall be continued in effect for the term of this agreement." The most reasonable interpretation of that clause is that the system would continue through the duration of the contract but would not survive thereafter.

I recognize that there may be a latent ambiguity in the quoted language to the extent that it may also be interpreted to mean that it shall continue through the life of the contract, but that it need not end with the contract. To the extent that such an interpretation may be reasonable, I think that reading is obviated by the language found in section 1 of Exhibit 2. It states: "Pursuant to the Union Security provision of the Agreement between SAHARA RESORT CORPORATION d/b/a [name of each hotel] and the [the Union], *the Employer, during the term of the Agreement, agrees to deduct each month Union membership dues* (excluding initiation fees, fines, and assessments) from the pay of those employees who have authorized such deductions in writing as provided by this Check-Off Agreement . . . ." The pertinent language (emphasis added) is even more specific than section 3.03. It says that the "Employer" has agreed, during the life of the agreement to deduct union dues from those employees who have authorized such deductions. It omits the reference to the Union seen in section 3.03, suggesting that the decision regarding what to do about the system during a contract hiatus, is left solely to the Employer. Furthermore, it specifically omits any reference to what the Employer's duty would be on the expiration of the contract. It is omitted, clearly, because there was no duty to continue to deduct. If there were, the parties would have said so.[4]

That contract negotiations left hiatus matters entirely in the hands of the Employer is no real surprise, particularly given the legal atmosphere surrounding dues-checkoff authorizations. It is a very confusing area and has contributed to legal consternation for many years. Traditionally, the Board has said that checkoff clauses expire with the contract which created the obligation. Specifically, see *Bethlehem Steel*, 136 NLRB 1500, 1502 (1962), remanded on other grounds 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964), and *Robbins Door & Sash Co.*, 260 NLRB 659 (1980) ("It is well settled that an employer's duty to check off union dues is extinguished on the expiration of the collective bargaining contract which created that duty").[5] In fact, it has even been held that it is an unfair labor practice under Section 8(a)(2) to continue to check off dues after the collective-bargaining contract has expired. *Stainless Steel Products*, 157 NLRB 232, 233 (1966), and *Guy's Foods,* 158 NLRB 936, 947 (1966), affd. sub nom. *American Bakery & Confectionery Workers v. NLRB*, 379 F.2d 160 (D.C. Cir. 1969) (specific legal point not appealed). Also, see *Boyle's Corned Beef v. NLRB*, 400 F.2d 154, 171 (8th Cir. 1968), which cites the holdings of those cases approvingly in another context.

I therefore have no difficulty in concluding that parties bargaining over dues-checkoff clauses would specifically negotiate a clause which would expire with the contract or at the very least leave the deductions in the hands of the Employer during hiatus periods. Leaving it in the hands of the Employer has the advantage for the Union, taken here for over a year, that the Employer would continue to check off dues during the hiatus, at least so long as the negotiations for a new contract avoided bitterness. As most contracts are amicably renegotiated, even with a hiatus, such an approach is entirely normal. Moreover, in the event of a negotiation breakdown resulting in a strike or other self-help to obtain a new agreement, the parties do not truly expect the dues-checkoff clause to operate during such

[3] Due to the timing of payroll periods, the employees at the two hotels were treated a little differently. Sahara employees had been distributed checks on June 8, showing the deduction had been taken. On June 22, the payroll department issued each of them paychecks for their regular hours in the following pay period, plus an amount equal to the deduction taken on June 8. The Hacienda employees pay periods were a little different and no reimbursement procedure was necessary. Explanation slips accompanied the paychecks.

[4] The authorization signed by each individual employee really has no impact on an 8(a)(5) analysis. Although it uses language suggesting it is irrevocable except for an annual escape period (consistent with Sec. 302(c)(4) of the Act) the form is clearly subject to the efficacy of the enabling clauses. It would appear that if not revoked according to its terms, it would simply become dormant during a hiatus and be revived on a new contract containing identical terms.

[5] See also *Tampa Sheet Metal*, 288 NLRB 322, 326 fn. 15 (1988) (which occurred in Florida, a right-to-work State). Accord: *Ortiz Funeral Home*, 250 NLRB 730, 731 fn. 6 (1980), affd. 651 F.2d 136 (2d Cir. 1981); *Peerless Roofing Co.*, 247 NLRB 500 (1980), affd. 641 F.2d 734 (9th Cir. 1981).

strife. Indeed, the expectation is quite the opposite. During a strike or a lawful lockout, they choose the acts of economic warfare which the Act permits, knowing full well that will include cessation of dues transmittal as part of that clash. Thus not only does a clause like the instant one authorize the employer to cease deduction/transmittal of dues at the end of the contract, it allows for a permissive system during a contract hiatus, yet one which is expected to collapse on the development of a significant dispute.

I should note here that when a union strikes or is locked out during a contract dispute, unions are always free to collect the dues their constitutional members may owe. That usually must be done by mail or in-person collection. They may even lawfully resort to a lawsuit. The Charging Party here is in a position no different from any union which finds itself in a dispute where the parties must rely on (lawful) self-help for resolution of their differences.

In this case, the contract ended on May 31, 1994. It was not until a year later, and 6 months after the Union declined to resume negotiations, that Respondent decided to exercise its right to cease deducting and transmitting the dues. It was obviously an effort to use one of the economic tools, already contemplated by the parties, available to participants in a labor dispute. In fact, it was a fairly tempered response to the Union's perceived intransigence. Respondent's request of 6 months earlier to resume bargaining had not even brought a response. Stopping the checkoff was less than a lockout and therefore was aimed not at triggering a loss of employment-related remuneration, but was principally designed to get the Union's attention, to induce it to face contract issues. It did not succeed, for the Union only filed the instant charge.

In a fact pattern such as this, the General Counsel's argument that cessation of the checkoff procedure constitutes an unlawful unilateral change within the meaning of the *Katz*[6] doctrine really begs the question. I certainly do not take issue with the question of whether or not a dues-checkoff system is a mandatory subject of bargaining. For the purpose of insertion into the contract, it certainly is. *U.S. Gypsum Co.*, 94 NLRB 112, 113 (1951), 97 NLRB 889 (1951), modified 206 F.2d 410 (5th Cir. 1953), cert. denied 347 U.S. 912 (1954). However, because its operation is governed by laws other than Section 8(d), it is not fully subject to *Katz* concerns in the postcontract term. I have already mentioned the 8(a)(2) limitations which the Board has imposed. Moreover, the first proviso to Section 8(a)(3) certainly has an impact when checkoff is in support of a union-security clause, as does Section 302(c)(4) which governs the nature of the authorization. In a nonright-to-work State, a union-security clause expires with the contract.[7] It followed, symmetrically, that the dues checkoff system set forth in contracts and which assisted the union-security clause, likewise expired with the contract. See *Bethlehem,* supra, *Robbins*, supra and the cases cited in fn. 5. (As a result, there are no cases directly holding that hiatus cancellations of the system violate the *Katz* precepts.) Combined with Board case law, it is apparent that at least during contract hiatus periods, a checkoff system set up by the expired contract is rendered only permissive for purpose of its enforcement under Section 8(a)(5).[8] (Obviously this analysis does not pertain during the life of such a contract; there, normal *Katz* analysis would apply).[9]

However, my discussion of the status of the law set forth above is not intended as the rationale for this decision. It is intended mainly to explore the difficulties one has when analyzing checkoff issues and to point out that practitioners have uniformly come to the conclusion that dues-checkoff clauses expire with the contract and have, therefore, allowed for contract clauses, such as this, which leave hiatus dues transmission to the Employer. This sort of language is no accident and is itself the rationale for the conclusion that no violation has occurred. It has benefits which the Union wants (transmission of dues where no obligation exists) and has little downside except that which one sees in every contract dispute which goes bad.

I therefore conclude that Respondent had the right, based on the language of the expired collective-bargaining contract, to cease honoring the dues-checkoff system when the contract expired on May 31, 1994. Having that right, Respondent was free to exercise it whenever it wanted to without violating the contract, nor did the cessation change the terms and conditions established by that contract through the operation of Section 8(d) when it stopped deducting dues from its employees in June 1995. The complaint should be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not committed the unfair labor practices of which it is accused in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

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[6] *NLRB v. Katz*, 369 U.S. 736 (1961).

[7] That doctrine began with the passage of the Taft-Hartley Act in 1947. The first case which held that union shop clauses do not survive the expiration of the contract was *Colonie Fibre Co.*, 69 NLRB 589 (1947), 71 NLRB 354 (1947), enfd. 163 F.2d 65 (2d Cir. 1947). There have been a myriad of cases since.

[8] This analysis is quite similar to that of the Supreme Court in *Nolde Bros. v. Bakery Workers Local 358,* 430 U.S. 243 (1977), with respect to arbitration clauses. There the Court observed that arbitration is a creature of the collective-bargaining contract which normally expires with the contract. In that event arbitration of a postcontract event becomes a permissive matter, even though all would agree that the arbitration clause is a mandatory subject for the new collective-bargaining contract. (*Nolde*, of course, went on to add that an employer continues to be obligated to arbitrate, under the expired clause, events which occurred during the life of the expired contract.)

[9] I should observe that the analysis undertaken here in no way interferes with the Board's analysis under Sec. 8(a)(3) or Sec. 8(b)(1)(A) involving attempts by individuals to revoke their checkoff authorization forms. The 8(a)(5) concerns are entirely discrete from those seen under *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991), and similar cases. I do note, however, that at least one case in the line which *Lockheed* reconsidered, held that it was a violation of Sec. 8(b)(1)(A) for a union to receive checked off dues on behalf of resignees for the hiatus period where the checkoff authorization had not been revoked and did not even rely on the previous contract because that contract did not contain a checkoff clause. See *Carpenters (Campbell Industries)*, 243 NLRB 147, 149, 152 (1979). *Lockheed*'s modification did not clearly affect this issue. Query: Would it have been an unlawful unilateral change under *Katz* had the employer there discontinued checking off those dues? Under the General Counsel's theory here it would. Such theories, it seems to me, fly in the face of one another. Because the statute cannot be interpreted as being internally inconsistent, I do not believe an 8(a)(5) violation can be justified here.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed in its entirety.