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–13274 and 28–CA–13275

September 29, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

On July 7, 2000, the National Labor Relations Board issued a Decision and Order in this proceeding,[1] in which it found that the Respondents, Hacienda Resort Hotel and Casino and Sahara Hotel and Casino, did not violate Section 8(a)(5) and (1) of the Act by unilaterally ceasing dues checkoff after the parties' collective-bargaining agreements expired. Subsequently, the Union petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board's Order. By its opinion dated October 28, 2002, the Ninth Circuit granted the petition for review, vacated the Board's Decision and Order, and remanded the case to the Board with instructions to "articulate a reasoned explanation for the rule it adopted, or adopt a different rule and present a reasoned explanation to support it."[2]

On April 2, 2003, the Board notified the parties in this proceeding that it had decided to accept the remand from the Ninth Circuit, and invited the parties to file statements of position with respect to the issues raised by the remand. The Respondents, the General Counsel, and the Charging Party each filed statements of position and supporting briefs, and amici AFL–CIO and Council on Labor Law Equality each filed statements of position and supporting briefs.

We accept the court's remand as the law of the case. As discussed below, we find 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, based 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.

[1] 331 NLRB 665.

[2] *Local Joint Executive Board of Las Vegas, Culinary Workers Local 226 v. NLRB*, 309 F.3d 578, 586 (9th Cir. 2002).

I. FACTS

The Respondents and the Union had separate, but substantially identical, collective-bargaining agreements, the most recent of which contained identical dues-checkoff provisions stating:

> 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, referenced in the checkoff provisions, states in relevant part:

> Pursuant to the Union Security provision[3] of the Agreement between [name of each hotel] and [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.

Both agreements expired on May 31, 1994, and the Respondents continued to checkoff dues until June 1995, when they stopped checking off dues after notifying the Union that they would no longer give effect to the dues-checkoff provisions.

The Union filed unfair labor practice charges, and the General Counsel issued consolidated complaints, alleging that the Respondents violated Section 8(a)(5) by unilaterally ceasing dues checkoff without bargaining to agreement or impasse. The matter was heard before an administrative law judge, who concluded that the Respondents did not violate the Act because the checkoff provisions' language, as clarified by the specific language in exhibit 2, makes clear that the Respondents' duty to checkoff dues continued only during the life of the collective-bargaining agreements. The Board affirmed the judge's decision but relied instead on "well-established precedent [in *Bethlehem Steel Co.*[4] and its progeny] that an employer's obligation to continue a dues-checkoff arrangement expires with the contract that created the obligation."[5]

[3] Because union-security provisions are prohibited in right-to-work states such as Nevada, where the Respondents are located, the agreements provided that the union-security clauses contained therein would only become effective if the State law were changed to allow union security.

[4] 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).

[5] *Hacienda Resort Hotel & Casino*, supra at 666.

As set forth above, the Union filed a petition for review in the Ninth Circuit, which granted the petition, vacated the Board's Decision and Order, and remanded the case to the Board with instructions to articulate a reasoned explanation for its decision, whether the Board decides to reaffirm its earlier decision or adopt a different rule. The court concluded 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," and, therefore, the court did "not reach the question whether such a rule would be 'rational and consistent' with the Act and therefore entitled to deference." *Local Joint Executive Board*, supra at 585. The court's findings and conclusions are the law of the case.

II. ANALYSIS

In its *Hacienda* decision, the Board acknowledged the above-quoted language in the dues-checkoff provisions and the attached exhibit 2 contained in the parties' collective-bargaining agreements, noting "that the provisions at issue clearly tie the checkoff agreement to the duration of the contracts." *Hacienda*, supra at 667. The Board also acknowledged the judge's decision, which relied heavily on this contract language. Id. Ultimately, the Board found it unnecessary to rely on the judge's rationale, relying instead on Board precedent in *Bethlehem Steel*, supra, and its progeny. Id. Contrary to the Ninth Circuit's view, which the dissent quotes, the judge's rationale was not "explicitly rejected" by the Board. Indeed, the Board made no assessment at all regarding the judge's rationale, stating simply that the Board "agree[d] with the judge's conclusion" but "base[d its] decision on" existing Board precedent. Id. at 666. Further, the Board noted that the contract language that the judge relied upon "reflects the established law [on which the Board relied] and also supports the conclusion that the precedent was known and understood by the parties to the agreements." Id. at 667. Thus, the Board merely decided to rely instead on what was a broader rationale. The Ninth Circuit found the Board's rationale insufficient to permit substantive review of its rule, and, as stated above, we accept the court's remand as the law of the case. Accordingly, in dismissing the complaint allegation, we do not rely on the rule articulated in the Board's original decision in *Hacienda*.[6]

Rather, we rely on the specific facts of this case in finding that the Respondent did not violate Section 8(a)(5) by unilaterally ceasing dues checkoff after the collective-bargaining agreements expired. Not only does the dues-checkoff provision state that it "shall be continued in effect for the term of this Agreement," but also exhibit 2, incorporated by reference in the checkoff provision, explicitly states that the Respondents agree to deduct monthly union dues "*during the term of the Agreement*." (Emphasis added.) Contrary to the dissent, we find that language limiting dues checkoff to the duration of the respective collective-bargaining agreements explicitly included in the dues-checkoff provision itself distinguishes that provision from other contract terms subject to the unilateral change doctrine articulated in *NLRB v. Katz*, 369 U.S. 736 (1962), pursuant to which most contractually established terms and conditions of employment are mandatory subjects of bargaining and cannot be changed unilaterally on contract expiration. Where, as here, the dues-checkoff provision itself contains clear language linking dues checkoff to the duration of the collective-bargaining agreement, as opposed to general durational language elsewhere in the agreement, we find that the parties intended that dues checkoff would not survive expiration of the agreement.[7] In agreeing to this language, we find that the Union thereby explicitly waived any right to the continuation of dues checkoff as a term and condition of employment after expiration of the collective-bargaining agreement. Contrary to the dissent, we find that the parties' language makes clear that dues checkoff terminates upon contract expiration. As the Board and courts have recognized, "[t]here is no 'prescribed formula' for determining when a provision survives the expiration of a collective-bargaining agreement."[8] Accordingly, we find that the Respondents did not violate the Act as alleged.

Conclusion

For the foregoing reasons, we find that the Respondents did not violate Section 8(a)(5) by unilaterally ceasing dues checkoff upon expiration of the collective-bargaining agreements, and, in doing so, we rely on the specific durational language in the dues-checkoff provisions themselves, which limited the Respondents' obligation to checkoff dues to the duration of the agreements.

[6] In its remand, the Ninth Circuit did not foreclose us from deciding this case on a rationale different from the analysis articulated in the Board's initial decision. Moreover, nothing in either the Board's initial decision or the Ninth Circuit's remand can reasonably be interpreted as finding fault with the judge's initial fact-based analysis.

[7] We thus disagree with the dissent that the specific language in the contract limiting checkoff to the contract term "adds nothing." In view of our reliance on that specific language, we find it unnecessary to address the dissent's discussion of the survivability of checkoff after contract expiration "as a general matter."

[8] *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1037 fn. 7 (2003) (citing *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607 (7th Cir. 1993) (en banc), cert. denied 510 U.S. 909 (1993)), review denied sub nom. *Des Moines Mailers Union, Teamsters Local 358 v. NLRB*, 381 F.3d 767 (8th Cir. 2004).

ORDER

The complaint is dismissed.

CHAIRMAN BATTISTA, concurring.

I agree with my colleagues and the judge that the language of the dues checkoff clause specifically made clear that its duration was coterminous with that of the collective-bargaining agreement. Although the Board majority in its original decision found it unnecessary to rely on this contract language because *Bethlehem Steel,* 136 NLRB 1500 (1962), specified that checkoff clauses, as a matter of law, automatically terminate upon contract termination, I note that the Third Circuit, in enforcing *Bethlehem Steel*, ascribed considerably more importance to contract language than was accorded here. Specifically, although agreeing with the Board that the checkoff provision ceased by operation of law upon contract termination, the court upheld the Board's decision on the alternative "moreover" ground that the "checkoff clause of the . . . contract expressly provided that it should remain in effect only so long as the agreement was extant." *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 619 (3d Cir. 1963).

The language of the checkoff clause in the instant case is indistinguishable from that in *Bethlehem Steel*. As such, I would rely upon the alternative holding of the Third Circuit in *Bethlehem Steel* that a checkoff clause will not survive contract expiration if, as in this case, that is the clear intention expressed by the parties.

But even if the parties, unlike here, fail to express this intention in their collective-bargaining agreement, I would further find that dues checkoff should be included among those provisions that come to an end at the expiration of the contract. That is, I conclude that dues checkoff should be considered among the very few exceptions to the *Katz* general rule that mandatory subjects of bargaining continue as terms and conditions of employment after the contract expires.[1] Among the class of mandatory subjects that are excluded from the unilateral change doctrine under *Katz*, i.e., which do not survive contract expiration, are no-strike clauses and correlative arbitration clauses. See *Goya Foods, Inc.*, 238 NLRB 1465, 1467 (1978) ("contractual commitment to submit disagreements to arbitration gives rise to an implied, rather than contractual, obligation not to strike over such disputes," and neither obligation extends beyond contract expiration absent explicit contractual expression to the contrary). See also *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986).

The rationale for excepting arbitration and no-strike clauses from the *Katz* doctrine rests on the principle that:

> an agreement to arbitrate is a product of the parties' mutual consent to relinquish economic weapons, such as strikes and lockouts, otherwise available under the Act to resolve disputes . . . [and] cannot be compared to the terms and conditions of employment routinely perpetuated by the constraints of *Katz*.

Indiana & Michigan Electric Co., 284 NLRB 53, 58 (1987).

I view a checkoff clause in the same way. A checkoff clause is a means by which an employer provides economic assistance to a union by deducting union dues from the paychecks of willing employees, and forwarding the money to the union. The question becomes whether the employer should be required to continue this assistance to the union at a time when it is engaged in a bargaining dispute with the union. I conclude that under the foregoing rationale of *Indiana & Michigan Electric*, the employer should not be required to do so.

The parties here were engaged in negotiations for a contract to succeed the one that had expired. During this period, both parties, as noted above, were free from the constraints of *Katz* to utilize a strike or lockout as economic weapons against each other in support of their respective bargaining positions. The Respondent chose, however, not to use a lockout; rather, in an effort to spur the Union to come to agreement on a new contract, the Respondent ceased deducting and transmitting dues to the Union. As the judge correctly noted, this is a form of economic weaponry, albeit milder than a lockout, whereby the Respondent cuts off this automatic flow of funds in order to persuade the Union to agree with the Respondent on outstanding contract issues.

In my view, since, as discussed above, a union is released from a no-strike pledge following contract expiration, and an employer is released from a no-lockout pledge, it would be anomalous to hold that an employer remains bound under *Katz* to refrain from using what is literally an economic weapon at its disposal—the elimination of dues checkoff.[2] Accordingly, on this basis, I would continue to include dues-checkoff clauses among the mandatory subjects of bargaining that are not required to be maintained following expiration of a collective-bargaining contract.[3]

[1] *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

[2] My dissenting colleagues fear that by including dues checkoff among the exceptions to the *Katz* doctrine, other contractual terms of employment could likewise become exceptions to the *Katz* doctrine as legitimate economic weapons, thereby "vitiat[ing] the policy altogether." That fear is unfounded. The rationale of *Indiana & Michigan Electric*, on which I rely to exclude dues checkoff from the *Katz* doctrine, would be applicable to very few other terms and conditions of employment.

[3] I do not pass on whether, under different circumstances, an employer can obligate itself to continue a dues-checkoff provision in an

MEMBER LIEBMAN and MEMBER WALSH, dissenting.

The United States Court of Appeals for the Ninth Circuit vacated the Board's original decision[1] in this case and remanded it to the Board with instructions to "articulate a reasoned explanation for the rule it adopted or adopt a different rule and present a reasoned explanation to support it."[2] In doing so, the court agreed with the original dissent, that the rule that dues checkoff expires with the contract cannot be justified under the rationale of *Bethlehem Steel*[3] or any other rationale that the Board has articulated.[4] Five years later, rather than attempt a reasoned explanation for excluding dues checkoff from the unilateral-change doctrine, the current majority reverts to the analysis first proffered by the administrative law judge—an approach "explicitly rejected" by the original Board majority, in the Ninth Circuit view[5]—and dismisses the complaint based on the language of the collective-bargaining agreements here. For the reasons set forth in the original dissent, we reject the majority's position. Instead, we would hold that, as a general matter, dues checkoff survives contract expiration, and we would find that the Respondent violated Section 8(a)(5) and (1) by unilaterally ceasing to honor employees' dues-checkoff authorizations following expiration of the collective-bargaining agreements, notwithstanding the contract language relied on by the majority.

Of overriding importance here is the fundamental principle that an employer violates its duty to bargain under Section 8(a)(5) and (d) of the Act if, without bargaining to impasse, it unilaterally changes an existing term or condition of employment. *NLRB v. Katz*, 369 U.S. 736 (1962).[6] The original dissent explained that:

> The issue here is not whether an employer has a c*ontractual* obligation after contract expiration to honor its employees' checkoff authorizations. Clearly it does not. The issue is whether the employer has a *statutory* duty to continue the dues checkoff pursuant to its obligation under Section 8(d) and (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." [Emphasis in original.]

Hacienda Resort Hotel & Casino, supra at 671.

In the majority's view, because the collective-bargaining agreements' checkoff provisions state that they "shall be continued in effect for the term of this Agreement," the Respondent was free to discontinue honoring its checkoff obligations after the contracts ended. But *all* terms set forth in a collective-bargaining agreement are linked to the contract term by the agreement's duration clause, so language that states simply that a particular provision applies during the contract term adds nothing.[7] As stated in the original dissent, "[i]f such provisions operated to leave the parties free upon contract expiration to unilaterally change the terms and conditions established under the agreement, there would be no *Katz* rule." Id. The majority's approach, under which standard language limiting the employer's contractual obligations to the term of the agreement removes the employer's statutory obligation to maintain existing terms and conditions of employment post contract expiration, would effectively drain the *Katz* doctrine of any force. We reject that approach.[8]

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altered form. See *Tribune Co*., 351 NLRB 197 (2007) (An explicit agreement between an employer and a union, entered into after both the collective-bargaining agreement had expired and the employer had unilaterally terminated dues checkoff, and which permitted employees to remit dues to the Union through the employer's direct deposit system, does not permit the employer to subsequently unilaterally discontinue the direct deposit of dues without bargaining to impasse or agreement.). I did not participate in that decision, and I do not express any view on its correctness.

[1] *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000).

[2] *Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226 v. NLRB*, 309 F.3d 578, 586 (9th Cir. 2002).

[3] *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), cert. denied 375 U.S. 984 (1964).

[4] *Local Joint Executive Board*, supra at 581–582.

[5] 309 F.3d at 581.

[6] See *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991) (explaining that the *Katz* doctrine has been extended to cases where an existing agreement has expired and negotiations on a new one have yet to be completed).

[7] While a union may waive its statutory protection against unilateral changes in mandatory subjects of bargaining, any such waiver must be clear and unmistakable. *Metropolitan Edison v. NLRB*, 460 U.S. 693 (1983). In order for parties to terminate the employer's obligation to maintain the status quo postcontract expiration, the contract would have to clearly and unmistakably refer to the *statutory* duty to maintain the status quo or otherwise make explicit that the provision would terminate upon the contract's expiration. There is no such explicit statement in this case.

[8] In his concurrence, the Chairman characterizes an employer's post-contract discontinuance of dues checkoff as a legitimate economic weapon. The Board has never held that to be the case, and we reject it. Any unilateral change in contract terms that disfavors the union would, under the Chairman's approach, be deemed a legitimate economic weapon. Thus, rather than justifying a principled exception to *Katz*, his logic would vitiate the policy altogether.