

**Nebraskaland, Inc. and Local 342, United Food and Commercial Workers International Union.** Case 02–CA–039996

December 13, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On November 30, 2011, Administrative Law Judge Steven Davis issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in response, and the Acting General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions, and to adopt the recommended Order.<sup>1</sup>

Applying established law, the judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by unilaterally ending its compliance with the dues-checkoff provision of the parties’ collective-bargaining agreement following the expiration of the agreement. *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), aff’d. in relevant part sub nom. *Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

After the issuance of the judge’s decision, the Board in *WKYC-TV*, 359 NLRB 286 (2012), overruled *Bethlehem Steel* and its progeny “to the extent they stand for the proposition that dues checkoff does not survive contract expiration.” 359 NLRB 286, 293. We held in *WKYC-TV* that “an employer, following contract expiration, must continue to honor a dues-checkoff arrangement established in the contract until the parties have either reached agreement or a valid impasse permits unilateral action by the employer.” *Id.* We decided, however, to apply the new rule only prospectively. Therefore, we apply *Bethlehem Steel* in the present case. Accordingly, we adopt the judge’s finding that Respondent did not violate the Act. We shall dismiss the complaint.<sup>2</sup>

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

<sup>1</sup> We find it unnecessary to reach the Acting General Counsel’s several technical exceptions to the judge’s rulings and findings because doing so will not affect the outcome.

<sup>2</sup> For the reasons set forth in his partial dissent in *WKYC-TV*, supra, Member Hayes would adhere to the Board’s longstanding *Bethlehem Steel* precedent. Because the Board dismisses the complaint under *Bethlehem Steel*, Member Hayes concurs in the result in this case.

*Margit Reiner and Moriah Berger, Esqs.*, for the General Counsel.

*Michael F. McGahan and Victoria Sloan, Esqs. (Epstein Becker & Green, P.C.)*, of New York, New York, for the Respondent.

*Jonathan Friedman, Esq.*, of Mineola, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on charges filed in Cases 02–CA–039715 and 02–CA–039996 by Local 342, United Food and Commercial Workers International Union (the Union), a consolidated complaint was issued on May 31, 2011, against Nebraskaland, Inc. (the Respondent). At the hearing, Case 02–CA–039715 was settled, and the trial proceeded with respect to a discrete part of Case 02–CA–039996.<sup>1</sup>

The complaint alleges and the Respondent admits that following the expiration of the collective-bargaining agreement between the Respondent and the Union, the Respondent discontinued the dues checkoff provision of the contract.

The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by discontinuing the dues-checkoff provision, a mandatory subject of bargaining, without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent concerning this conduct. The Respondent’s answer states that it took such action in accordance with established Board precedent in effect at the time of its termination of the provision.

A hearing was held on September 21, 2011, in New York, New York.<sup>2</sup> Upon the evidence presented in this proceeding, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a New York corporation, having a place of business at Hunts Point Market Cooperative in the Bronx, New York, has been engaged in the business of wholesale sales and distribution of meat and other food products. Annually, the Respondent purchases and receives goods and services valued in excess of \$50,000 directly from suppliers located outside New York State. The Respondent admits and I find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent denies knowledge or information concerning the labor organization status of the Union. In *Agri Proces-*

<sup>1</sup> The charge in Case 02–CA–039996 was filed on June 30, 2010. The Respondent’s answer denies knowledge or information concerning the filing and service of the charge. The formal papers, GC Exh. 1, containing the original charge and its affidavit of service, establishes that the charge was filed and served as set forth in the complaint.

<sup>2</sup> After the hearing was closed, I issued an Order reopening the record to receive certain documents in evidence. Thereafter, I issued an Order closing the record, which has been received in evidence as GC Exh. 8.

*sor Co.*, 347 NLRB 1200, 1202 (2006), the Board noted that the union had been certified, and issued a bargaining order in its behalf. In addition, the Respondent's answer admits that since about November 14, 2004, the Union has been the exclusive collective-bargaining representative of its unit employees, and has had a collective-bargaining agreement with it which was effective from July 1, 2005, to October 31, 2009. I accordingly find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges, and the Respondent's answer admits that the following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and that, since November 14, 2004, the Union has been the designated exclusive collective-bargaining representative of the unit:

All full-time and regular part-time warehouse employees employed by Respondent at Respondent's facility, excluding drivers, drivers helpers, inventory clerks hired after November 15, 2004, night billing, front end employees, office personnel and sales representatives, and guards, professional employees, and supervisors as defined in the Act.

The Respondent and the Union were parties to a collective-bargaining agreement which was effective from July 1, 2005, to October 31, 2009. The contract contains a union-security clause which provides that employees must become and remain members of the Union after 30 days of employment. It also provides:

The Employer agrees to deduct dues and initiation fees and any other authorized amounts, from the wages of all employees who have on file with the Employer a proper deduction card and to remit the amount with a listing of names to the Union Office on or before the 27th day of each month. The Union will give to the Employer signed deduction cards from the employees authorizing the deduction of dues and initiation fees and any other authorized amounts. The Employer's obligation to remit to the Union shall be limited to the amounts which it actually does deduct from the employees' wages.

Two dues-checkoff authorization forms were received in evidence. They are from Narciso Felix, dated June 2, 2005, and Raymond Cardona, dated April 16, 2009. They both bear the same language:

### CHECKOFF AUTHORIZATION:

I hereby authorize and direct my Employer, Nebraskaland, to deduct from my wages an amount equivalent to dues, initiation fees, and authorized assessments as shall be certified by the Secretary-Treasurer of the U.F.C.W. Local Union 342 AFL-CIO, and remit same to said Secretary-Treasurer. This authorization and assignment is voluntarily made in consideration for the cost of representation and the collective bargaining and other activities undertaken by the Union and is not contingent upon my present or future membership in the Union. This authorization and assignment shall be irrevocable for a period of one year from date of execution or until the termination date of the agreement between the Employer and the

Local Union, whichever occurs sooner, and from year to year thereafter, unless not less than 10 days and not more than 20 days prior to the end of any subsequent yearly period I give the employer and Union written notice of the revocation bearing my signature thereto.

By letter to the Union dated April 1, 2010, Richard Romanoff, the owner and president of the Respondent, advised the Union that the collective-bargaining agreement between the Respondent and the Union "having expired October 31, 2009, Nebraskaland is discontinuing the dues check off and union security provisions that do not survive the contract expiration. The change in dues checkoff will be reflected in the first payroll period of April (checks issued April 8 and 9)."

The parties stipulated that the April 1 letter was the first notice the Respondent gave the Union that it would be discontinuing the dues-checkoff provision of the expired contract, and that there was no such prior notice.

### Analysis and Discussion

The General Counsel argues that by unilaterally discontinuing the dues-checkoff provisions of its expired contract, the Respondent violated Section 8(a)(5) and (1) of the Act. The Respondent's position is that no violation has been committed.

In *NLRB v. Katz*, 369 U.S. 736, 743 (1962), the Supreme Court held that a unilateral change in a term or condition of employment without bargaining violates the Act. Accordingly, an employer's unilateral cessation of the dues-checkoff provision should violate the Act as a unilateral change. However, in *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), although the Board stated that union security and checkoff are matters related to wages, hours, and other terms and conditions of employment within the meaning of Section 8(d) of the Act, and are mandatory subjects of bargaining about which the employer must bargain with the union, the Board held that certain terms of a contract, including union dues deduction agreements, may be terminated after the expiration of the contract.

The Board in *Bethlehem* reasoned that the checkoff provisions in the collective-bargaining agreement "implemented the union security provisions. The 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. Consequently, when the contracts terminated, the respondent was free of its checkoff obligations to the union."

The General Counsel concedes that *Bethlehem* represents the current law on this issue, but argues that that case should be overruled. The Board may do so, but I cannot. "It is a judge's duty to apply established Board precedent which the Supreme Court has not reversed." *Waco, Inc.*, 273 NLRB 746,749 fn. 14 (1984), citing *Iowa Beef Packers*, 144 NLRB 615, 616 (1963); *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004).

In *Hacienda Resort Hotel & Casino (Hacienda I)*, 331 NLRB 665, 666 (2000), the Board, citing numerous Board and court cases, emphasized that it is a "well-established precedent that an employer's obligation to continue a dues checkoff arrangement expires with the contract that created the obligation." The Board noted that, although certain mandatory subjects of bargaining cannot be changed unilaterally upon the

expiration of a contract, some, including union-shop and dues checkoff, “have historically been treated as exceptions to this general rule.”

The union appealed that decision to the Ninth Circuit Court of Appeals which 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.” *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578, 586 (9th Cir. 2002). On remand, the Board again found that the dues-checkoff provisions ended upon the expiration of the contract, but this time relied on the language in the checkoff provisions which specifically limited the dues-checkoff obligation to the term of the collective-bargaining agreement. *Hacienda Resort Hotel & Casino (Hacienda II)*, 351 NLRB 504 (2007).

The union again appealed, and the Ninth Circuit again asked the Board to articulate a reasoned explanation for its ruling in *Hacienda I* or adopt a different rule and present a reasoned explanation to support it. 540 F.3d 1072 (9th Cir. 2008). The court posed the question: “Whether dues checkoff is a mandatory subject of bargaining.” The Board’s decision on remand stated that its four members had reached opposing views, set forth in two separate concurring opinions, and that, accordingly, had decided to follow existing precedent, and dismissed the complaint. It should be noted that Chairman Liebman and Member Pearce expressed “substantial doubts about the validity of *Bethlehem*.” *Hacienda III*, 355 NLRB 742, 743 (2010). In again considering the union’s appeal, the Ninth Circuit stated that a third remand to the Board would be inappropriate, but decided that the employer violated the Act by unilaterally ceasing dues checkoff before bargaining to impasse on the issue. The court remanded the matter to the Board to determine what relief was appropriate in light of its opinion.

The General Counsel, consistent with the dissenting opinion in *Hacienda I*, argues that there is no statutory or policy justification for excepting dues checkoff from the general rule that following the expiration of a contract, an employer is obliged to maintain the status quo regarding employees’ terms and conditions of employment until the parties agree on changes or bargain to impasse.<sup>3</sup>

It is important to note that the General Counsel’s arguments regarding *Hacienda* must be considered in relation to the fact that those cases were decided in a “right-to-work” State where union-security clauses conditioning employment upon membership in a union are prohibited, and therefore, dues checkoff could not lawfully be linked with union-security arrangements in those States. Indeed, the Ninth Circuit did not express its opinion of the validity of *Bethlehem* in a nonright-to work State 657 F.3d 865 (9th Cir. 2011). In the instant case, New York is not a right-to-work State, and therefore, the union-security

clause here may be considered, consistent with *Bethlehem*, to have been properly linked with the dues-checkoff provisions.

Counsel for the General Counsel further cites a variety of reasons why *Bethlehem* should be overruled. She argues that *Bethlehem*’s justification for finding that dues checkoff could be stopped upon the contract’s expiration because the checkoff provisions “implemented the union security provisions” is not sound. She cites cases in which the Board has held that the dues-checkoff provisions could be stopped postcontract expiration where the contract contained no union-security provisions, and where such provisions were prohibited by State law. *Tampa Sheet Metal*, 288 NLRB 322, 326 fn. 15 (1988).

The General Counsel also argues that here, there is no language in the dues-checkoff provisions of the contract limiting the authority to deduct dues to the duration of the contract, as was the case in *Bethlehem*, supra at 1502. Therefore, according to the General Counsel, the Respondent’s authority to make dues deductions continues even after the contract’s expiration. However, inasmuch as that argument was not explicitly relied on by the Board in making its decision, I cannot find that such an argument should change the result here.

The General Counsel also contends that, assuming that the Respondent was permitted to cease dues checkoff upon the contract’s expiration, it forfeited that right by continuing to deduct dues for 5 months thereafter, from November 1, 2009, to April 1, 2010. However, the employer in *Hacienda* did not cease dues checkoff until more than 1 year after the contract expired. See also *87-10 51st Ave. Owners Corp.*, 320 NLRB 993 (1996), where the employer lawfully ceased dues checkoff 7 months after the contract expired.

Inasmuch as the Board’s most recent decision on the issue, *Hacienda III*, in the absence of a three-member majority to overrule it, essentially reaffirmed *Bethlehem*, that case remains the outstanding current Board law on the subject.

#### CONCLUSION OF LAW

The Respondent’s unilateral cessation of dues checkoff in April 2010, following the expiration of the collective-bargaining agreement between the Respondent and the Union on October 31, 2009, did not violate Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

#### ORDER

The complaint is dismissed.

<sup>4</sup> 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.

<sup>3</sup> There is no evidence that the parties have engaged in bargaining after their contract expired.