

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF ADMINISTRATIVE LAW JUDGES
SAN FRANCISCO BRANCH OFFICE

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HACIENDA HOTEL, INC. GAMING CORPORATION
d/b/a HACIENDA RESORT HOTEL AND CASINO

and

Case 28-CA-13274 ✓

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
CULINARY WORKERS UNION, LOCAL 226, AND
BARTENDERS UNION, LOCAL 165 affiliated with
HOTEL EMPLOYEES INTERNATIONAL UNION, AFL-CIO

SAHARA NEVADA CORPORATION
d/b/a SAHARA HOTEL & CASINO

and

Case 28-CA-13275

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
CULINARY WORKERS UNION, LOCAL 226, AND
BARTENDERS UNION, LOCAL 165 affiliated with
HOTEL EMPLOYEES INTERNATIONAL UNION, AFL-CIO

To the Honorable James M. Kennedy
Administrative Law Judge
San Francisco, California

GENERAL COUNSEL'S BRIEF TO THE
ADMINISTRATIVE LAW JUDGE

Respectively submitted,

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GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

This post-hearing brief¹ is respectfully submitted to the Honorable James M. Kennedy, Administrative Law Judge, herein referred to as the Judge, by Nathan W. Albright, Counsel for the General Counsel in the above-captioned cases.² The hearing in these cases was held in Las Vegas, Nevada on May 13 and 14, 1996, and was based upon Complaints and Notices of Hearing which issued on October 26, 1995. These cases were consolidated for hearing by Order dated December 6, 1995.

I. ISSUES

- 1) Did Respondents violate Sections 8(a)(1) and (5) of the Act by their June 9, 1995 post-expiration unilateral cessation of dues check-off and further unilateral cessation of remitting those dues to the Union?
- 2) Did the Union waive its right to bargain over Respondents' June 9, 1995, unilateral actions because it received notice of those unilateral actions on June 8, 1995?

II. STATEMENT OF THE CASE

A. Facts

The facts in these cases are essentially not in dispute. The Union and Respondents have had a collective-bargaining relationship spanning approximately 30

¹ On the last day of the hearing, the Judge set June 19, 1996, as the due date for receipt of post-hearing briefs. (Tr. 148). June 18, 1996, would actually be 35 days from the close of the hearing on May 14, 1996. Therefore, Counsel for the General Counsel hereby moves that the due date for receipt of post-hearing briefs be extended to, and including, June 19, 1996. Counsel for the Respondents and counsel for the Charging Party have been notified of this motion and do not oppose this motion.

² In this brief, the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO, will be referred to as the Union. Hacienda Hotel, Inc. Gaming Corporation, d/b/a Hacienda Resort Hotel and Casino and Sahara Nevada Corporation d/b/a Sahara Hotel & Casino, will be referred to individually as Hacienda and Sahara, and collectively as Respondents. References to the transcripts will be designated as (Tr.). References to General Counsel and Respondent Exhibits will be designated as (G.C. Exh.) and (Resp. Exh.), respectively.

years. The most recent collective-bargaining agreements, herein CBA, between the Union and Respondents expired on May 31, 1994 (G.C. Exhs. 8 and 9, at page 47). Both CBA's were not extended beyond May 31, 1994, and each contained union dues "check-off" provisions. Section 3.03 of the expired agreements provides as follows:

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 HACIENDA HOTEL (hereinafter referred to as the "Employer") and the LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, representing the Culinary Workers Union, Local No. 226, and the Bartenders Union, Local No. 165 (hereinafter referred to as 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 in this Check-Off Agreement. Such membership dues shall be limited to 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. _____

3. Deductions shall be made only in accordance with the provisions of said Authorization for Check-Off of Dues, together with the provisions of this Check-Off Agreement.

4. A properly executed Authorization for Check-Off of Dues form for each employee for whom Union membership dues are to be deducted hereunder shall be delivered to the Employer before any payroll deductions are made. Deductions shall be made thereafter only under Authorization for Check-Off of Dues forms which have been properly executed and are in effect. Any Authorization for Check-Off of Dues which is incomplete or in error will be returned to the Union by the Employer.

5. Check-off deductions under all properly executed Authorization for Check-Off of Dues forms which have been delivered to the Employer on or before the fifteenth (15th) day of any particular month thereafter shall begin with the following calendar month.

6. Deductions shall be made in accordance with the provisions of this Check-Off of Union Membership Dues section, from the pay received on the first payday of each month regardless of the payroll period ending date represented on that payroll check. These provisions for dues deductions shall not apply to banquet workers or extra employees (extra employee, Section 10.03) as defined in the current Agreement.

7. The Employer agrees to make deductions as otherwise provided in this Check-Off of Union Membership Dues section in the case of employees who have returned to work after authorized leave of absence.

8. In cases where a deduction is made which duplicates a payment, already made to the Union by an employee, or where a deduction is not in

conformity with the provisions of the Union Constitution and By-Laws, refunds to the employee will be made by the Union.

9. The Employer shall remit each month to the designated financial officer of the Union, the amount of deductions made for that particular month, together with a list of employees and their social security numbers, for whom such deductions have been made. The remittance shall be forwarded to the above designated financial officer not later than the fifteenth (15th) of the month, for the deduction from the first paycheck received by the employees (prior to the fifteenth (15th) of the month) for the month the dues are being paid.³

10. Any employee whose seniority is broken by death, quit, discharge or layoff, or who is transferred to a position outside the scope of the bargaining unit, shall cease to be subject to check-off deductions beginning with the month immediately following that in which such death, quit, discharge, layoff, or transfer occurred.

11. In the event any employee shall register a complaint with the Employer alleging his/her dues are being improperly deducted, the Employer will make no further deductions of the employee's dues. Such dispute shall then be reviewed with the employee by a representative of the Union and a representative of the Employer.

12. The Employer shall not be liable to the Union by reasons of the requirements of this Check-Off Agreement for the remittance of payment of any sum other than that constituting deductions made from employee wages earned.

13. The Union shall indemnify, defend and save the Employer harmless against any and all claims, demands, suits or other forms of liability that shall arise out of or by reason of action taken by the Employer in reliance upon payroll deduction authorization cards submitted to the Employer.

(G.C. Exhs. 8 and 9)

G.C. Exh. 10 is a representative sample of dues check-off authorizations executed by Unit employees of Respondents. Dues check-off authorizations were

³ This section, requiring continued remittance of dues to the Union, appears to contemplate survival beyond contract expiration and is clearly linked to employees' dues check-off authorizations. Of course, those authorizations are still valid and effective, never having been revoked at any relevant time during these proceedings.

executed and effective for all of the employees listed in G.C. Exhs. 11 and 12. (Tr. 64 - 67 - testimony of Branton; Tr. 90 - testimony of Lillian Back). G.C. Exhs. 11 and 12 are the computer printouts from Respondents showing, *inter alia*, the names of employees having dues deducted, the amount of the dues deducted, and the remittance form and check showing the total amount of dues submitted to the Union. The employees listed and dues amounts deducted, as shown on G.C. Exhs. 11 and 12, represent the total employee complement of Respondents who executed dues check-off authorizations similar to the check-off authorization exemplars in G.C. Exh. 10 (Tr. 90 to 92 - testimony of Back). Those employees appearing on G.C. Exhs. 11 and 12 were on Respondents' payroll as of June 1995, and had not executed any withdrawal or revocation of their dues check-off authorization as of June 1995 (Tr. 87 - testimony of Back).

Even though Respondents' CBA's with the Union expired on May 31, 1994, Respondents continued to honor the dues check-off provisions of those CBA's and continued to honor employees' dues check-off authorizations until June 9, 1995 (Tr. 69 - testimony of Branton; Tr. 82 - testimony of Back; G.C. Exh. 7).

Gary Branton, Respondents' attorney and representative during contract negotiations, testified at the hearing. Branton was present during most of the contract negotiation sessions (Tr. 68 - testimony of Branton). During all negotiation sessions, up to and including the final session held on December 14, 1994, neither Respondents nor the Union raised any issue regarding dues check-off authorization or the remittance of dues to the Union (Tr. 68, testimony of Branton). There were no proposals or counter-proposals by Respondents or the Union, regarding any change in the existing

check-off language from that which appears in the expired CBA's (Tr. 69 - testimony of Branton; G.C. Exhs. 8 and 9 - Section 3.03).

On June 8, 1995, Respondents informed the Union that "effective immediately" dues were no longer going to be deducted and remitted pursuant to check-off (Tr. 72 - testimony of Branton; G.C. Exh. 6). This was the first notice to the Union regarding any change in Respondents' continued deduction and remittance of dues to the Union. There was no opportunity given to the Union to bargain over Respondents' discontinuance. Rather, Respondents unilaterally ceased dues deductions and remittance of dues to the Union, irrespective of whether any of its employees had executed a revocation of their dues deduction authorizations (Tr. 72 - testimony of Branton). On June 9, 1995, the day after giving notice to the Union, Respondents' owner Paul Lowden instructed Respondent's payroll departments as follows:

"Effective June 1, 1995, we will discontinue deducting culinary dues from all Sahara and Hacienda culinary employees. Therefore, those dues withheld from Sahara employees for the pay day of June 8, 1995, will be reimbursed on their pay day of June 22, 1995.

We will send a notice to the time office to be handed out with Sahara checks on June 22 and also to the Hacienda to be handed out with checks on June 15."

(G.C. Exh. 7)

Although dues for June 1995 had already been deducted from Sahara employees, those dues were not going to be remitted to the Union. Rather, the dues deducted from Sahara employees were to be returned to them as an additional item with their June 22, 1995 paycheck. (Tr. 75 - testimony of Branton; Tr. 85-testimony of Back). Back also testified, without contradiction, that dues were not deducted from

culinary employees of the Sahara or Hacienda unless those employees had, in fact, executed a dues check-off authorization form (Tr. 87 - testimony of Back). Had any of the employees listed in G.C. Exhs. 11 and 12 revoked their dues check-off authorizations, Lillian Back, as Payroll Manager for both Respondents, would have been aware of such. No employees of Respondents had revoked their dues deduction check-off authorizations in June 1995, when Respondents unilaterally ceased giving effect to employees' dues check-off authorizations and remitting those dues to the Union (Tr. 81, 87 - testimony of Back).

Prior to Respondents' June 8, 1995 decision to cease deducting dues and remitting dues to the Union, Respondents' counsel reviewed a variety of cases regarding cessation of dues check-off. Branton admitted that he did not review some cases which are arguably relevant to the issue of Respondents' unilateral action (Tr. 122-124 - testimony of Branton).

Finally, although Respondents ceased making dues deductions and dues remittance to the Union in June 1995, Respondents apparently did not cease making dues deductions and remitting dues to the Teamsters and Stagehands Unions whose collective-bargaining agreements had also expired on May 31, 1994 (Tr. 126 - testimony of Branton).⁴ Nevertheless, Respondents' counsel advised it that its action of unilaterally ceasing dues deductions from employees and ceasing remittance of

⁴ See also G. C. Exh. 7. In that memo, Lowden, references only the "culinary" union employees who are to be affected by Respondents' cessation of union dues check-off and remittance.

those dues to the Union, was " .absolutely, unequivocally no violation." of the Act (Tr. 131 - testimony of Branton).⁵

B. Argument

The Board has long held that most terms and conditions of employment established in a collective-bargaining agreement survive expiration of the agreement and cannot be changed by the employer without first bargaining to impasse with the union.⁶

There are a few well-noted exceptions to this rule. Among these, union security requirements and check-off arrangements that implement union security requirements, are considered to be solely creatures of contract that do not survive expiration of a collective-bargaining agreement.⁷ This is because "[t]he acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso to Section 8(a)(3)" and, thus, union security and a check-off arrangement that is incident thereto cannot lawfully exist apart from the mutual agreement of the parties.⁸

⁵ Although Respondents claim it could take such unilateral action as a matter of law, why then did they give notice to the Union and now claim that the Union has waived its right to bargain. This is obviously inconsistent. Respondents must have thought there was some risk accompanying their unilateral actions.

⁶ NLRB v. Katz, 369 U.S. 736 (1962) (employer in negotiations for initial contract violated Section 8(a)(5) by unilaterally instituting changes not previously discussed to impasse); NLRB v. Compton-Highland Mills, Inc., 337 U.S. 217, 225 (1949) (post-expiration unilateral change was found violative); Hen House Market No. 3, 175 NLRB 596, enf'd 428 F.2d 133 (8th Cir. 1970) (same). See also CJC Holdings, Inc., 320 NLRB No. 122 (March 27, 1996) (dues check-off is a mandatory subject of bargaining).

⁷ Bethlehem Steel Company (Shipbuilding Division), 136 NLRB 1500, 1502 (1962), enf. denied on other grounds sub nom.; Industrial Union of Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963); Hassett Maintenance Corp., 260 NLRB 1211 (1982); Robbins Door & Sash Co., 260 NLRB 659 (1982); Peerless Roofing Co., 247 NLRB 500, 505-506 (1980).

⁸ Bethlehem Steel Company (Shipbuilding Division), 136 NLRB at 1502. The Board also noted that "the very language of the contracts [Company will check-off "so long as this Agreement remains in

Although the Board has on occasion stated the rule regarding non-survival of check-off requirements broadly, without any reference to the relationship between a check-off clause and a union security requirement,⁹ it appears that the Board has never directly confronted the question of whether a check-off obligation should be treated differently based on whether or not it "implemented" a union security requirement. In this regard, the Board has held that an employer does not violate Section 8(a)(3) by check-off of dues in the absence of a collective bargaining agreement.¹⁰ Nor does it violate Section 302 of the Act, which requires a written authorization by an employee before dues can be deducted but does not require an agreement between the employer and the union.¹¹

Moreover, the Board and courts have suggested in a variety of contexts that, although union security and check-off often go hand-in-hand, they are markedly different kinds of obligations that should not necessarily be treated as legally

effect"] links Respondent's check-off obligation to the Union with the duration of the contracts." However, this seems clearly to have been a subsidiary rationale for the Board's decision that the check-off clause did not survive expiration, and, CGC believes, is not a fully and carefully reasoned rationale. Thus, regardless of such limiting terminology in an agreement, an employer ordinarily has a statutory duty to bargain with the employees' representative before making changes in terms and conditions of employment. There is no quarrel here with the proposition that dues check-off and remittance of dues to the union is a mandatory subject of bargaining.

⁹ See, e.g., Sweet Kleen Laundry, 302 NLRB No. 121, slip op. at 4, n. 1 (1991); AMBAC International Limited, 299 NLRB 505, 507, n. 8 (1990); Hassett Maintenance Corp., 260 NLRB 1211 (1982).

¹⁰ See Lowell Corrugated Container Corp., 177 NLRB 169, 172-173 (1969) (employer did not violate Sections 8(a)(2) and (3) by continuing to honor unrevoked check-off after expiration of the collective-bargaining agreement); Sun Harbor Caribe, Inc., 237 NLRB 444, 446-447 (1978). See also International Chemical Workers Union Local 143 (Lederle Laboratories), 188 NLRB 705 (1971) (union did not violate Section 8(b)(1)(A) when it demanded that dues be checked off during a contractual hiatus period pursuant to unrevoked check-off authorizations).

¹¹ See Gulf-Wandes Corp., 236 NLRB 810, 816 (1978). See also Electrical Workers IBEW Local 2088 (Lockheed Space Operations), 302 NLRB 322, 325 n. 8 (it is appropriate to take account of the policies underlying Section 302 in deciding issues relating to check-off under Section 8 of the Act).

inseparable.¹² Unlike union security agreements, for example, check-off agreements give rise to independent wage assignment contracts between the employees and employer that have been held to survive expiration of the collective-bargaining agreement when the parties so intend.¹³ The parties to the check-off agreements here clearly intended they would survive expiration of the CBA's, since the check-off authorizations specifically provided for continued check-off, absent revocation, during specified window periods beyond the term of the CBA's.¹⁴ It has also been held that an employer's practice of honoring employees' dues deduction authorizations is a term and condition of employment and the unilateral cessation of check-off, even in the absence of a collective-bargaining agreement providing for such dues check-off,

¹² See, e.g., Shen-Mar Food Products, 221 NLRB 1329, 1330 (1976), *enfd* as modified 557 F.2d 396 (4th Cir. 1977) (dues check-off authorizations could not properly be viewed as union security devices, which the state was permitted to prohibit under Section 14(b), because they did not "impose union membership or support as a condition required for continued employment"); NLRB v. Atlanta Printing Specialties and Paper Products Union Local 527 (Mead Corp.), 90 LRRM 3121, 3124 (5th Cir. 1975) (in rejecting union's argument that "continuity of contracts" doctrine should apply to merge one dues check-off clause into another, and forbid employee revocation of check-off authorization, the court said "the cases cited by the union concern maintenance of membership clauses, which are governed by a section of the Act totally removed from the section governing dues check-off, and which have a totally different purpose and rationale"; dues check-off is designed for "administrative convenience in the collection of union dues" and is not a union security device); Electrical Workers IBEW, Local 2088(Lockheed Space Operations), 302 NLRB at 327-28 (1991) (check-off must be evaluated differently depending on whether they were executed pursuant to a union security requirement or otherwise).

¹³ See, e.g., Frito Lay Inc., 243 NLRB 137 (1979) (no 8(a)(3)/8(b)(1)(A) violation where union sought, and employer deducted, dues pursuant to authorizations that employees had not timely revoked, despite termination of collective-bargaining agreement; language of authorizations provided for continued check-off, absent revocation, beyond termination of the agreement); Associated Press, 199 NLRB 1110, 1112 (1972) (arbitrator, to whom Board deferred in 8(a)(3)/8(b)(1)(A) case, held that check-off was a "wage assignment" which existed apart from the collective-bargaining agreement and therefore "survived the expiration of the contract and the employees were bound by its terms as was the employer"). See also Electrical Workers IBEW Local 2088 (Lockheed Space Operations), 302 NLRB at 327-28 (1991), and cases cited therein. Section 302 requires only that written authorizations from employees be revocable at the end of a collective bargaining agreement, implying that, absent revocation, they survive, and the legislative history of Section 302 supports the view that check-off authorizations "may continue indefinitely until revoked." II Leg. Hist. 1304, 1311 (1947).

¹⁴ See also item No. 9 of Section 3.03 of the expired CBA's. Remittance of dues checked-off from employees' pay is to continue to be remitted to the Union pursuant to the unrevoked employee check-off authorizations.

violates the Act. Thus, in Baton Rouge Water Works, 170 NLRB 1183, 1184 (1968), enfd. at 417 F.2d 1065 (5th Cir. 1969), the Board found that an employer who discontinued dues check-off of certain employees, who had not revoked their check-off authorizations and who were not covered by a collective-bargaining agreement, violated Section 8(a)(5) of the Act. The unrevoked check-off authorizations of the employees provided the basis upon which to find a violation of Section 8(a)(5).

Here, the dues check-off provisions of the expired CBA's and provisions of the employees' dues check-off authorizations could not, as a matter of law, implement any union security provision.¹⁵ Unlike the union security/check-off provisions at issue in Bethlehem Steel Company, *supra*. (and cases cited therein), here the check-off provisions of the expired contracts and check-off authorizations could not serve to implement a union security provision. In these cases, the unrebutted evidence shows that unit employees of Respondents did not at any time, revoke their dues check-off authorizations. Thus, these "wage assignments" remained viable terms and conditions of employment. Frito-Lay, *supra.*, Associated Press, *supra.* It is also clear that the parties here specifically intended that the dues check-off provisions of the expired CBA's and the unrevoked dues check-off authorizations, were to survive the expiration of the CBA's. Thus, the language of the dues check-off authorizations provides that the check-off authorizations extend beyond the expired CBA's from year to year unless revoked (G.C. Exh. 10). Notwithstanding expiration of the CBA's,

¹⁵ Nevada's "right-to-work" law, NRS 613.230-290, prohibits the enforcement of any union-security clause. The dues check-off provision, Article 3.03 (G.C. Exhs. 8 and 9), operates independently of any union-shop provision and is enforceable so long as Nevada is a "right-to-work" state.

Respondents here continued to deduct dues and remit dues to the Union for 12 months beyond contract expiration. Additionally, the subject of a change in dues check-off was never proposed or discussed during the numerous negotiation sessions between Respondents and the Union. Thus, Respondents, the Union and employees intended and expected that dues deductions and dues remittance would continue and survive the expiration of the CBA's. Frito-Lay, supra; Baton Rouge Water Works, supra.

Respondents seem to place primary emphasis on the Board's decision in Tampa Sheet Metal Company, Inc., 288 NLRB 322, 326 n. 15 (1988). In a perfunctory footnote, the Board simply cited Robbins Door & Sash Co., 260 NLRB 659 (1982) as standing for the proposition that the employer's discontinuance of dues check-off at the time of contract expiration was not unlawful. Besides questioning the continuing vitality of footnote 15 in Tampa Sheet Metal, CGC believes the facts in these cases are more like the straight-forward analysis of the discontinuance of fund payments found to be unlawful in Tampa Sheet Metal, Id. at 326.¹⁶ Furthermore, the employer in Tampa Sheet Metal, unlike Respondents here, apparently ceased dues deductions immediately upon expiration of the collective-bargaining agreement. As set forth above, employees and the Union had a clear expectation of continued compliance with

¹⁶ In BEW, Local 2088 (Lockheed Space Operations), 302 NLRB 322, 328 (1991), the Board distinguished Machinists Local 2045 (Eagle Signal), 268 NLRB 635, 637 (1984), and held that dues check-off authorizations are not necessarily a "quid pro quo" for union security devices. Thus, ". . .there is no reasonable basis for precluding an employee from individually agreeing that he will pay dues to a union whether or not he is a member of it and that he will pay such dues through a partial assignment of his wages, i.e., a check-off. Neither is there a reasonable basis for precluding enforcement of such a voluntary agreement." Id. at 328. Thus, the perfunctory analysis of cessation of dues check-off found in footnote 15 of Tampa Sheet Metal, supra., and its continuing vitality, appears questionable in light of the Board's decision in Lockheed.

the check-off provisions of the expired CBA's and the unrevoked dues check-off authorizations of employees.

Like the employer in Tampa Sheet Metal, Respondents made unilateral changes in employees' terms and conditions of employment, i.e., complete cessation of dues check-off and remittance of those dues, which were not contemplated or even reasonably comprehended within the Respondent's previous proposals to the Union during contract negotiations. Rather, Respondents continued to deduct dues in accordance with the provisions of the expired CBA's and unrevoked check-off authorizations and continued to remit those dues to the Union on a monthly basis for twelve months after contract expiration. Respondents' June 1995 unilateral cessation of dues check-off and remittance went far beyond any proposal or expectation of the Union and employees. The rule of Bethlehem Steel is based on the assumption that check-off authorizations are merely implementations of union security arrangements. Bethlehem Steel is thus inapplicable in Nevada - a State prohibiting union security agreements. In these circumstances, Respondents' June 9, 1995 unilateral cessation of dues check-off and remittance to the Union, violated Sections 8(a)(1) and (5) of the Act. Baton Rouge Water Works, supra., Frito-Lay, supra. See also FKW, Incorporated, 321 NLRB No. 19, slip op. at p. 2 (April 30, 1996).

III. ANY NOTICE TO THE UNION ON JUNE 8, 1995 WAS PRESENTED AS A FAIT ACCOMPLI

Respondents' only affirmative defense relates to their June 8, 1996 notice to the Union regarding the immediate cessation of dues check-off and remittance (G.C. Exh. 6). As set forth above, that letter to the Union announced the unilateral change "effective immediately" and on the next day, June 9, 1995, the change was implemented.

A union must have timely notice and a meaningful opportunity to bargain over a change in terms and conditions of employment for unit employees. See S & I Transportation, Inc., 311 NLRB 1388, n. 1 (1993). where the Board held, "To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*."

Respondents' defense of notice and waiver is without merit. The uncontested facts, as set forth above, definitively establish that the Union here was presented with a *fait accompli*. The notice to the Union informed it of a unilateral change which was to be made "effective immediately."¹⁷ The cessation of dues check-off and remittance of those dues was implemented on June 9, 1995. These facts establish that there was no meaningful notice to the Union in sufficient time to allow for meaningful bargaining. Similarly, by informing the Union that the change was to be made "effective immediately," Respondents had no intention of bargaining with the

¹⁷ The actual change implemented was made even sooner than immediately. Lowden's memo dated June 9, 1995 mandated that the cessation of dues check-off and remittance be made retroactive to June 1, 1995.

Union regarding these changes in employees' terms and conditions of employment. There is no waiver here. The Union was presented with a *fait accompli* and had no further duty to request bargaining over the then-implemented unilateral change. Intersystem Design Corporation, 278 NLRB 759 (1986).

IV. REMEDY

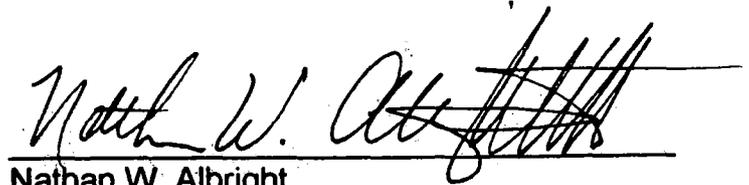
CGC does not believe the Judge must announce a new principle of law or reverse long-standing law in these cases. Rather, for the reasons as set forth above, a violation of the Act may be grounded in a straight-forward Section 8(a)(5) analysis and the distinguishing features of these cases from those in cases such as Bethlehem Steel and Tampa Sheet Metal. Respondents should be ordered to pay to the Union the amounts of dues they would have and should have deducted from employees and remitted to the Union until the day Respondents were actually sold. There is no inequity advanced by retroactive application of a remedy in these cases. Respondents continued dues deductions and remittance to the Union for 12 months after contract expiration. After their unilateral cessation of dues check-off and remittance, Respondents continued such dues deductions and remittances to the Teamsters and Stagehands Unions, even though those CBA's had expired. Thus, there is no inequity or inherent unfairness in ordering Respondents to make the payments to the Union for their unlawful unilateral actions.

V. CONCLUSION

There is an adequate basis under extant Board law upon which to find that Respondents here violated Section 8(a)(1) and (5) of the Act by their unilateral cessation of dues check-off and remittance of dues to the Union on and after June 9,

1995. Even if the Judge does not find a violation under extant law, the Board should reexamine its holdings in Bethlehem Steel and its progeny, and find that, especially in "right-to work" states, unrevoked check-off authorizations and CBA clauses relating to check-off, do survive contract expiration and, as such, promotes the positive policy of voluntary unionism. By finding violations of Sections 8(a)(1) and (5), the Board would give full force and effect to the voluntary "wage assignments," understandings and contract between the employer, Union and the employees.

Dated at Las Vegas this 18th day of June 1996.

A handwritten signature in black ink, appearing to read "Nathan W. Albright", written over a horizontal line.

Nathan W. Albright
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CERTIFICATION OF SERVICE

I hereby certify that an original and two copies of the General Counsel's Brief to the Administrative Law Judge in Hacienda Hotel, Inc. Gaming Corporation d/b/a Hacienda Resort Hotel and Casino, Case 28-CA-13274 and Sahara Nevada Corporation d/b/a Sahara Hotel & Casino, Case 28-CA-13275, were served by overnight express on the 18th day of June, 1996, on:

The Honorable James M. Kennedy
National Labor Relations Board
Division of Administrative Law Judges
901 Market Street, Suite 300
San Francisco, CA 94103

And a copy by certified mail, return receipt requested, on the following parties:

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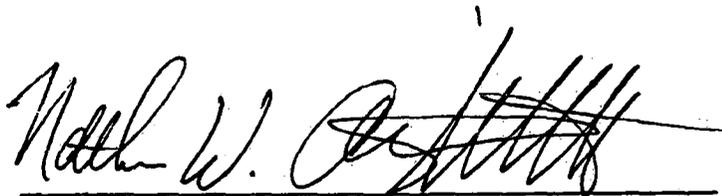
Barry Jellison, Esq.
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And a copy by regular mail on the following parties:

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Las Vegas, NV 89119

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Local Joint Executive Board of Las Vegas,
Culinary Workers Union, Local 226, and
Bartenders Union, Local 165 affiliated with
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