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–013274 and 28–CA–013275

March 5, 2019

FOURTH SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

This case is on remand from the United States Court of Appeals for the Ninth Circuit for the fourth time.[1] Throughout this protracted proceeding, the sole question before the Board and the court has been whether the Respondents violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally ceasing dues checkoff after expiration of the parties' collective-bargaining agreements without first bargaining to an agreement or impasse. In a 2010 opinion, the Ninth Circuit decided this issue itself, found that the Respondents' unilateral action was unlawful, and remanded the case to the Board to determine the appropriate remedy.[2] In a subsequent decision, the Board adopted as the law of this case the court's finding that the Respondents violated Section 8(a)(5) and (1) and fashioned a remedy that the Board believed best effectuated the policies of the Act in the unique circumstances of this case. On review, the Ninth Circuit determined that the Board's remedy did not effectuate the policies of the Act and remanded the case to the Board to award standard make-whole relief. As discussed below, we adopt as the law of the case the court's remedial award and order make-whole relief to remedy the Respondents' unfair labor practice.

I. BACKGROUND

The relevant facts of this case are not in dispute and have been fully set forth in previous Board and court decisions.[3] On July 7, 2000, the Board issued its original Decision and Order in this proceeding, finding 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.[4] The Board found that this result was compelled by *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), and *Tampa Sheet Metal Co*., 288 NLRB 322 (1988).[5]

The Charging Party Union petitioned the Ninth Circuit for review of the Board's decision. Thereafter, the court called into question the Board's precedent resting on *Bethlehem Steel* and found 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[.]"[6] The court vacated the Board's Decision and Order and remanded the case to the Board to "either articulate a reasoned explanation for its rule or adopt a different rule with a reasoned explanation to support it."[7]

On September 29, 2007, the Board issued a supplemental Decision and Order affirming, on different grounds, its finding that the Respondents did not violate Section 8(a)(5) and (1) of the Act.[8] In doing so, the Board stated that it was not relying on the rule articulated in *Hacienda I*.[9] Instead, the Board relied 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."[10] The Board found that, in agreeing to the contract wording, the Union "explicitly waived any right to the continuation of dues checkoff as a term and condition of employment" after expiration of the collective-bargaining agreements.[11]

The Union petitioned the Ninth Circuit for review of the Board's supplemental decision as well. On August 27, 2008, the court granted the Union's petition, vacated the Board's supplemental Decision and Order, and again

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

[2] Subsequent to the Ninth Circuit's finding of a violation in this case, the Board (Members Miscimarra and Johnson dissenting) decided *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015), which overruled *Bethlehem Steel Co*., 136 NLRB 1500 (1962), discussed below, and held that an employer's obligation to check off union dues from employees' wages continues after expiration of a collective-bargaining agreement that establishes such an arrangement. The Board decided to apply this new rule only prospectively. Id., above, 362 NLRB No. 188, slip op. at 9.

[3] See, e.g., *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865, 868 (9th Cir. 2011); and *Hacienda Resort Hotel & Casino*, 331 NLRB 665, 665–666 (2000) (*Hacienda I*).

[4] *Hacienda I*, 331 NLRB at 665.

[5] Id. at 666–667. Members Fox and Liebman dissented, arguing that *Bethlehem Steel*, and by extension *Tampa Sheet Metal*, should be overruled. Id. at 667–672.

[6] *Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226 v. NLRB*, 309 F.3d 578, 582 (9th Cir. 2002).

[7] Id.

[8] *Hacienda Resort Hotel & Casino*, 351 NLRB 504 (2007) (*Hacienda II*). Members Liebman and Walsh dissented.

[9] Id. at 505.

[10] Id. at 504.

[11] Id. at 505.

remanded the case to the Board for further proceedings consistent with the court's opinion.[12] The court found, contrary to the Board, that the checkoff agreements' durational clauses did not "amount to a clear and unmistakable waiver of the Union's statutory rights."[13] In remanding the case to the Board for a second time, the court stated: "[W]ith the 'clear and unmistakable' escape hatch closed, the question squarely in front of the Board is whether dues-checkoff in right-to-work states is subject to unilateral change, or whether, under such circumstances, dues-checkoff is a mandatory subject of bargaining."[14] The court concluded with the following instruction: "We again instruct the Board to explain the rule it adopted in *Hacienda I*, or abandon *Hacienda I* to adopt a different rule and present a reasoned explanation to support it."[15]

On August 27, 2010, the Board issued a second supplemental Decision and Order.[16] The four participating Board Members[17] were equally divided on the remanded issue, which required the Board either to offer a new explanation for its existing rule or to overrule precedent. Lacking a three-member majority to do either, the Board unanimously agreed that its decisionmaking practices required it to apply existing precedent in *Bethlehem Steel* and *Tampa Sheet Metal*. Doing so, the Board again dismissed the complaint.

The Union again petitioned for review of the Board's decision. On September 13, 2011, the Ninth Circuit granted the Union's petition and remanded the case to the Board. The court first concluded that, while the Board's traditions may require three votes to reverse or establish precedent, "[t]he question presented [in this case] is not whether the NLRB's chosen procedures are adequate, but rather whether the explication of its ruling is adequate."[18] The court found that the Board had not yet provided a reasoned explanation for its rule excluding dues checkoff from the unilateral change doctrine in right-to-work states.[19] In addition, although mindful of the Board's primary responsibility for developing national labor policy, the court stated that, "given the amount of time that this case has been pending before the Board and the Board's continued inability to provide a rational justification for the rule it proposes, we are convinced that a third remand [to the Board to explain its rule or adopt a new one] would be futile, or at least that the likelihood of continued deadlock outweighs the speculative benefit of providing the Board with one more opportunity to comply with our prior orders."[20]

Turning to the merits of the case, the court held that "in a right-to-work state, where dues-checkoff does not exist to implement union security, dues-checkoff is akin to any other term of employment that is a mandatory subject of bargaining" and may not be unilaterally terminated after contract expiration.[21] The court thus found that the Respondents violated Section 8(a)(5) and (1) by ceasing dues checkoff without bargaining to impasse.[22] The court remanded the case to the Board "to determine what relief is warranted," and specifically noted that "the Board may adopt a different rule in the future provided…that such a rule is rational and consistent with the NLRA."[23]

On September 10, 2015, the Board issued a third supplemental Decision and Order.[24] The Board accepted as the law of the case the court's finding that the Respondents violated Section 8(a)(5). Turning to the remedy, the Board noted that in cases involving a respondent's unlawful failure to honor a dues-checkoff arrangement, it has ordered the respondent to reimburse the union for any dues the respondent failed to check off.[25] Exercising its broad remedial discretion under Section 10(c) of the Act, however, the Board decided, under the circumstances of the case, not to order that "make-whole relief."[26] The Board also declined the "Charging Party's request that the Respondents reimburse the employees for any additional expenses they incurred by reason of the Respondents' repudiation of the dues-checkoff agreements."[27] Instead, the Board ordered the Respondents to cease and desist unilaterally terminating dues checkoff upon the expiration of their agreement with the Union, to bargain with the Union before making unilateral changes to unit employees' terms and conditions of employment, to restore dues checkoff, and to post a remedial notice.

The Union again petitioned for review. On February 27, 2018, the Ninth Circuit granted the Union's petition,

[12] *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008).
[13] Id. at 1082.
[14] Id.
[15] Id.
[16] *Hacienda Resort Hotel & Casino*, 355 NLRB 742 (2010) (*Hacienda III*).
[17] Member Becker recused himself and took no part in consideration of the case.
[18] *Local Joint Executive Board of Las Vegas v. NLRB*, above, 657 F.3d at 872.
[19] See id.
[20] Id. at 874.
[21] Id. at 876.
[22] See id.
[23] Id.
[24] *Hacienda Resort Hotel and Casino*, 363 NLRB No. 7 (2015) (*Hacienda IV*) (Member Hirozawa, concurring in part and dissenting in part), motion for reconsideration denied 2016 WL 4036087 (2016).
[25] Id., slip op. at 3. See id., fn. 23 (collecting cases)
[26] Id.
[27] Id

vacated the Board's September 10, 2015 Order, and remanded the case to the Board with instructions for imposition of a remedy.[28] The court stated that the "standard remedy that the Board awards when an employer violates the NLRB by unilaterally ceasing dues-checkoff is make-whole relief."[29] The court observed that the Board had "recognized that make-whole relief is the standard remedy in dues-checkoff cases, but declined to award such relief…."[30] Rejecting the "Board's explanations for declining to award the standard remedy of make-whole relief," the court concluded that the "Board's decision not to award the standard remedy of make-whole relief … was a clear abuse of discretion."[31] The court accordingly remanded the case to the Board "to award the standard remedy of make-whole relief."[32] In so doing, the court noted that it left the "specific contours of make-whole relief for the Board to determine on remand" and that "[a]ny disputes that arise concerning the calculation or amount of relief should be resolved promptly in compliance proceedings."[33]

On May 11, 2018, the Board notified the parties that it had decided to accept the court's remand and solicited statements of position from the parties with respect to the issues raised by the remand. The Charging Party and Respondent-Intervenor Archon Corporation, on behalf of the Respondents, each filed a statement of position.

II. DISCUSSION

Having accepted the court's fourth remand to the Board, we accept as the law of the case the court's finding that the "standard remedy of make-whole relief" is required to remedy the Respondent's unfair labor practice of ceasing dues checkoff without bargaining to impasse. We thus order the Respondent to make the Union whole for any dues it would have received but for the Respondents' failure to comply with the dues-checkoff arrangement.[34]

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondents violated Section 8(a)(5) by unilaterally ceasing dues checkoff after the expiration of the parties' collective-bargaining agreement, we shall order the Respondents to make the Union whole for any dues it would have received but for the Respondents' failure to comply with the collective-bargaining agreement.[35] See, e.g., *W.J. Holloway & Son*, 307 NLRB 487 (1992); *West Coast Cintas Corp*., 291 NLRB at 156; and *Creutz Plating Corp*., 172 NLRB 1 (1968). This order requires only that the Respondents make the Union whole for dues it would have received from employees who have individually signed dues-checkoff authorizations.[36] See, e.g., *W.J. Holloway*, 307

[28] *Local Joint Executive Board of Las Vegas v. NLRB*, 883 F.3d 1129 (9th Cir. 2018).

[29] Id. at 1134–1135 (footnote omitted). The court observed that "the remedial order under review here appears to be the only instance in which the Board has declined to award make-whole relief for an employer's cessation of dues-checkoff." Id. at fn. 4.

[30] Id. at 1134.

[31] Id. at 1135, 1137.

[32] Id. at 1140.

[33] Id. at 1140 fn.8.

[34] Where, as here, an employer violates Sec. 8(a)(5) by changing its employees' terms and conditions of employment without first bargaining with the employees' representative, the standard affirmative remedy is to order the employer to rescind its unlawful unilateral changes on the union's request and to bargain with the union. See, e.g., *UPS Supply Chain Solutions, Inc*., 364 NLRB No. 8, slip op. at 2 (2016) (and cases cited therein). In *Hacienda IV*, the Board ordered such a remedy, but the court, in vacating the Board's order, ultimately found the remedy to be ineffective given the unique circumstances of this case. *Local Joint Executive Board of Las Vegas v. NLRB*, above, 883 F.3d at 1138-1139. Having accepted the court's finding as the law of the case, we do not award that remedy here.

The court's decision did not mention the Charging Party's prior request (rejected by the Board in its September 10, 2015 decision) that in addition to being required to make the Union whole, the Respondents be ordered to reimburse the employees for any additional expenses they incurred by reason of the Respondents' repudiation of the dues-checkoff agreements. We do not interpret the court's decision as requiring the Board to grant this particular relief (as opposed to the undisputedly "standard remedy of make-whole relief" running to the Union), nor is such a remedy standard under Board precedent. See, e.g., *Alamo Rent-A*-Car, 362 NLRB No. 135 (2015), *Space Needle, LLC*, 362 NLRB No. 11 (2015); *West Coast Cintas*, 291 NLRB 152 (1988). Accordingly, we do not order the Respondents to reimburse employees.

[35] To prevent double recovery by the Union, payment by the Respondents to the Union shall be offset by any dues the Union collected during the relevant period on behalf of employees covered by the dues payment order. See *A.W. Farrell & Sons, Inc*., 361 NLRB 1487, 1487 fn.3 (2014).

In addition, in ordering this remedy, we make clear that the Respondents are prohibited from seeking to recoup from the employees any dues amounts the Respondents are required to reimburse to the Union. See *Alamo Rent-A-Car*, 362 NLRB No. 135, slip op. at 1 fn.1 (2015), enfd. 831 F.3d 534 (D.C. Cir. 2016), quoting *West Coast Cintas Corp*., 291 NLRB 152, 156 fn.6 (1988) ("the financial liability for making the Union whole for dues it would have received but for [r]espondent's unlawful conduct rests entirely on the [r]espondent and not the employees."). Members Kaplan and Emanuel express no view whether the prohibition of recoupment is required, or even permitted, but they agree to apply it as the extant law covered by the court's make-whole directive.

[36] The parent corporation of the hotels involved in this proceeding, Respondent-Archon, sold the hotels on different dates in 1995. In the brief to the Board on remand, the Respondents assert that their make-whole liability should be "cut off" as of the respective sale date of the hotels. Relatedly, the Respondents assert that the entities that purchased the hotels from the Respondents constitute *Golden State* successors. See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). We find that these matters are best suited for resolution during the

NLRB at 487 fn.3; and *Creutz Plating Corp*., 172 NLRB at 1. The make-whole remedy shall be remitted to the Union with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Space Needle, LLC*, 362 NLRB No. 11, slip. op. at 5 (2015), enf. on other grounds 692 Fed.Appx. 462 (9th Cir. 2017); and *W.J. Holloway*, 307 NLRB at 491.

ORDER

The National Labor Relations Board orders that the Respondents, Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino and Sahara Nevada Corp. d/b/a Sahara Hotel and Casino, Las Vegas, Nevada, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally ceasing dues checkoff without first bargaining to impasse.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remit to the Union, at no cost to employees, dues payments required by the parties' collective-bargaining agreement for employees who executed checkoff authorizations prior to and during the period of the Respondents' unlawful conduct, as described in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts due under the terms of this Order.

(c) Within 14 days after service by the Region, Respondents shall post at their respective facilities in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, or sold the business or facilities involved herein, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current and former employees employed by the Respondents at any time since June 1995.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. March 5, 2019

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Lauren McFerran, Member

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

compliance stage of this proceeding. See *National Transit*, 299 NLRB 453 (1990) (questions regarding the existence of successor employers and their possible liability for remedying an unfair labor practice are appropriate for resolution in compliance proceedings); and *West Coast Cintas Corp*., 291 NLRB at 156 (date on which employee checkoff authorizations are no longer effective for lawful reasons can best be determined during compliance).

[37] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally cease dues checkoff without first bargaining to impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL remit to the Union, at no cost to employees, dues payments required by the parties' collective-bargaining agreement for employees who executed checkoff authorizations prior to and during the period of the Respondents' unlawful conduct, plus interest.

HACIENDA HOTEL, INC., GAMING CORP. D/B/A HACIENDA RESORT HOTEL AND CASINO AND SAHARA NEVADA, INC. GAMING CORP. D/B/A SAHARA HOTEL AND CASINO

The Board's decision can be found at www.nlrb.gov/case/28-CA-013274 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.