

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ADT, LLC

and

**COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO**

**Cases 16-CA-144548
16-CA-168863
16-CA-172713
16-CA-179506
16-CA-180805
16-CA-181198
16-CA-187497
16-CA-191963
16-CA-199947
16-CA-200961
16-CA-209070
16-CA-209995**

**COUNSEL FOR THE GENERAL COUNSEL’S LIMITED CROSS-EXCEPTION AND
BRIEF IN SUPPORT THEREOF, TO THE ADMINISTRATIVE JUDGE’S DECISION**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel files this Limited Cross Exception and Brief in Support of said exception to the Decision and Recommended order, issued by Administrative Law Judge Robert A. Ringler on November 16, 2018.

In his Decision, the ALJ correctly found that, under extant law, ADT, LLC (“Respondent”) violated the National Labor Relations Act (“the Act”) when it unilaterally ceased making authorized union-dues deductions from employees’ pay after the expiration of the most recent collective-bargaining agreement with the Charging Party, Communications Workers of America (“the Union”). However, the General Counsel urges the Board to adopt a new standard giving effect to the plain language of a dues checkoff agreement negotiated by the parties.

I. Statement of Exception

1. The ALJ did not apply the proper standard when analyzing whether the language in the collective bargaining agreement limited Respondent's dues-checkoff obligation to the duration of the agreement. JD slip op. at 12, 20, 23.
2. The Board should clarify the standard for enforcing the terms of dues checkoff agreements by adopting the General Counsel's position set forth herein.

II. Statement of the Case

The Sixth Consolidated Complaint and Notice of Hearing in this matter, issued February 23, 2018 by the Regional Director for Region 16 of the National Labor Relations Board, alleged that Respondent ceased deducting dues from bargaining unit member employees' paychecks without first negotiating with the Charging Party Union, in violation of Section 8(a)(5) of the Act.

III. Statement of Facts

The ALJ accurately summarized the relevant facts in his Decision based on the record testimony. The General Counsel respectfully directs the Board thereto. Relevant to this discussion, the Judge found that after deducting and remitting dues under provisions of an expired collective bargaining agreement (CBA), Respondent withdrew recognition from the Union, and ceased to make such deductions and remissions. (JD slip op. at 12).

Article 3 (Voluntary Checkoff) of the parties CBA address the dues deduction obligation.

GC Exh. 4. Article 3, Voluntary Checkoff states in relevant part at Section 1:

a) For the period of this Agreement, upon receipt of a written personally signed authorization on a form approved by the Employer from any employee subject to this Agreement, the Employer will deduct from such employees pay, the weekly membership dues, provided, however, that the Employer shall not be obligated to deduct any delinquent dues which became delinquent prior to the effective date of the authorization. The Employer will transmit to the Secretary Treasurer of the Union on or before the 15th day

after the last pay day of each month, the total deductions made by the Employer, together with a list of those employees for whom such deductions have been made.

b) When earnings are insufficient to cover the authorized deductions, Union dues shall be deducted in the next payroll period in which sufficient pay is available.

c) Termination of Authorization for Deduction of Dues will be recognized only during the ten (10) day period immediately preceding the anniversary date of this agreement with Certified Mail copies to both the Company and Union.

(GC Exh. 4).

IV. Argument

As described below, the General Counsel believes that the Board should adopt a standard for dues checkoff that enforces the common meaning of the terms of the bargained-for agreement. Such an analysis of the plain meaning of the terms of the dues checkoff agreement here will establish that Respondent did not violate Section 8(a)(5) of the Act when it ceased dues checkoff after expiration of the collective-bargaining agreement because the language of the agreement specifically linked Respondent's dues checkoff obligation to the duration of the agreement.

1. The Board Should Adopt Standards That Give Effect to the Plain Meaning of Language that the Dues Checkoff Obligation Will Be in Effect Only During the Term of the Agreement

While not arguing to disturb the rule set forth in *Lincoln Lutheran* that a dues checkoff obligation may continue after contract expiration,¹ the General Counsel believes that the Board should only find that the dues checkoff obligation continues post contract expiration where the language of the parties' agreement demonstrates that was their intent. The Board in *Lincoln Lutheran* acknowledged that parties may agree that, following contract expiration, an employer

¹ Although the Board may decide to overturn *Lincoln Lutheran*, it is not necessary to do so if the Board establishes a contract interpretation standard for these kinds of provisions that allows employers to easily terminate checkoff at a contract's conclusion and enables employees to revoke their authorizations at any time after contract expiration.

may unilaterally discontinue honoring a dues-checkoff arrangement established in the expired contract, notwithstanding the employer's statutory duty to maintain the status quo. 362 NLRB No. 188, slip op. at 9 fn. 28. This case provides an opportunity, since *Lincoln Lutheran* went into effect removing dues checkoff from the list of exceptions to the unilateral change doctrine, for the Board to adopt a standard for analyzing the language of dues checkoff provisions to determine when the parties have so agreed. The General Counsel believes that the standard for analyzing such language must account for the unique aspects of dues checkoff, and that a "clear and unmistakable waiver" standard is not appropriate for this particular type of term and condition of employment. A standard that gives effect to the plain meaning of the language of a dues checkoff provision will protect parties' interests and ultimately promote collective bargaining.

Furthermore, the General Counsel believes that the Board should also reconsider current law that restricts to a specific window period an employee's ability to revoke his or her authorization post-contract expiration. Therefore, the General Counsel urges the Board to also adopt a standard that allows employees to revoke their authorizations at contract expiration and any time there is no contract in effect.

a. The standard for analyzing the language of a dues checkoff agreement should give effect to the words as written

The General Counsel respectfully urges the Board to analyze the language of dues checkoff provisions so as to give effect to the plain words chosen by the parties, rather than applying the clear and unmistakable waiver standard. The Board should look at the language of the parties' dues checkoff provision in the parties' CBA and determine whether they included language that in some way links the employer's obligation to checkoff dues to the term of the contract, e.g., "checkoff will be utilized during the term of [or for the duration of] this agreement if employees execute an

appropriate checkoff authorization.”² On the other hand, in the absence of language specific to dues checkoff, a general durational clause in the contract should be insufficient, and dues checkoff should be maintained as status quo under the unilateral change doctrine. *See Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 131-32 (D.C. Cir. 2001) (general durational clause, without more, does not defeat unilateral change doctrine).

The Board’s determination that Congress intended for the terms of a dues checkoff authorization to be enforced as written supports the adoption of a standard in which the contractual provision effectuating that authorization, i.e., the contractual dues checkoff provision, is also enforced as plainly written. In interpreting the employee’s intent in signing a checkoff authorization, the Board gives effect to the specific language of the authorization, such as language designating certain window periods in which the employee may revoke his or her assignment. *See Frito-Lay, Inc.*, 243 NLRB 137, 139 (1979).

Relying on the meaning of the plain language adopted by the parties is consistent with the Board’s view that disputes involving dues checkoff provisions and authorizations essentially involve contract interpretation. *See Kroger Co.*, 334 NLRB 847, 849 (2001). The language of a dues checkoff provision, and attendant dues authorization, should be enforced as written because

² The Board has found that this kind of language does not meet the “clear and unequivocal waiver” standard regarding other kinds of mandatory subjects. *See, e.g., KBMS, Inc.*, 278 NLRB 826, 849 (1986) (language requiring contributions to be made “as long as a Producer is so obligated pursuant to said collective bargaining agreements” insufficient because language did not “deal with the termination of the employer’s obligation to contribute to the funds”); *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 366 (1987) (language requiring that employer contributions to pension fund be “in accordance with” a pension agreement did not specifically state that employer’s obligation to contribute to pension fund ended at contract expiration); *Finley Hospital*, 362 NLRB No. 105 (contractual language stating that pay raises would apply “during the term” or “for the duration” of the agreement was not a waiver of the union’s right to bargain about cessation of the raises after the agreement expired).

the parties voluntarily agreed to it. And, because a contract's dues checkoff provision typically incorporates the language contained in the employee's dues authorization card, and often has similar language linking the employer's obligation to check off dues to the term of the contract, the Board should apply the same plain meaning standard to both checkoff agreements. Since the Board holds employees to the specific terms of their dues authorization window periods, the Board should similarly hold the employer and union to the terms they agreed to, including language that links the employer's checkoff obligation to the term of the contract.

Indeed, allowing contracting parties to rely on language evincing their intent to limit dues checkoff to contract duration will lead to greater industrial peace. An employer bargaining with a union will be incentivized to reach a final agreement, including on dues checkoff, without fear that it will have an indefinite obligation to finance the union's potential post-expiration labor dispute. *See Lincoln Lutheran*. 362 NLRB No. 188, slip op. 13-14 (Members Miscimarra and Johnson, dissenting) (noting that subjecting dues checkoff to the unilateral change doctrine would result in increased difficulties for parties trying to reach an agreement). In turn, there will be less incentive for employers to avoid all obligations to checkoff dues, and more employees and unions could therefore benefit from the administrative convenience of dues checkoff during the term of the contract.

b. Special concerns distinguish dues checkoff from other mandatory subjects of bargaining

There are certain elements of dues checkoff that make it unique among mandatory subjects of bargaining subject to the Board's unilateral change doctrine. The General Counsel submits that these distinctions provide the basis for the Board to utilize a different analysis when determining whether the parties have agreed that an employer's obligation to continue dues checkoff ends upon expiration of the contract.

Dues checkoff is exclusively a product of contract, unlike wages, hours, and other working conditions, and cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound. *See Hacienda Resort Hotel & Casino*, 355 NLRB 742, 745 (2010) (Chairman Liebman and Member Pearce, concurring) (discussing the fact that wages, hours, and other mandatory subjects of bargaining can exist from the commencement of a bargaining relationship, but dues checkoff only begins with a contract). Dues checkoff also requires a second layer of contract between the employer and employee, in the form of a dues checkoff authorization signed by individual employees, to be lawful. 29 U.S.C. § 186(c)(4) (proviso in the Labor Management Relations Act that an employee must make a written assignment subject to certain restrictions on irrevocability before an employer is permitted to deduct dues); *Industrial Towel & Uniform Service*, 195 NLRB 1121 (1977), *enf. denied on other grounds* 473 F.2d 1258 (6th Cir. 1973).

Moreover, although dues checkoff is considered a “term and condition of employment,” it is not the kind of term that directly affects employees’ wages, benefits, and working conditions, but rather it has a more derivative effect on employment by facilitating employees’ financial support of their bargaining representative. Thus, a waiver standard that insures that employees’ direct terms and conditions of employment are generally continued in effect after contract expiration is not necessary with regard to dues checkoff.

Because of its implication of Section 7 rights, dues checkoff is also different from other deductions from employees’ pay such as savings accounts, charitable contributions, or health insurance. Dues checkoff authorizations may be irrevocable for certain periods pursuant to their terms and the restrictions found in Section 302(c)(4) of the LMRA, and during those periods of irrevocability, an employee is limited in his or her right to refrain from financially supporting any labor organization. Dues checkoff is therefore similar to the exclusions to the unilateral change

doctrine that also implicate statutory rights, such as a no-strike provision, which waives employees' rights to engage in certain collective actions during the term of the contract, rather than to the other mandatory subjects of bargaining that are subject to the unilateral change doctrine, such as deductions from pay for other purposes.

In addition, because checkoff implements an employee's free choice to support or refrain from supporting a union, individual employees must consent to the arrangement, in addition to the employer and union, before checkoff takes effect. Principles of voluntariness are therefore uniquely important to dues checkoff, since individual employee consent is not similarly required to make other mandatory subjects of bargaining operational.

Finally, unlike other mandatory subjects of bargaining, discontinuation of dues checkoff is a legitimate economic weapon. Requiring an employer to continue checkoff post contract expiration would compel the employer to continue deducting dues, and thereby provide economic assistance to the union, at a time the employer is engaged in a bargaining dispute with that union. *See Hacienda II*, 351 NLRB at 506 (Chairman Battista, concurring) (noting that ceasing dues checkoff is a milder economic weapon than a lockout). Congress intended parties to have wide latitude in their negotiations and the Board is not the arbiter of the economic weapons that parties can use when seeking to gain acceptance of their bargaining demands, which ultimately lead to agreements and the furtherance of industrial peace. *NLRB v. Insurance Agents*, 361 U.S. 477, 488-89 (1970). The availability or discontinuance of checkoff as a potential economic weapon during a bargaining dispute should be left to the contracting parties, as demonstrated by contractual language establishing their intent to continue or discontinue checkoff after contract expiration.

c. The Board should also reconsider employee revocation of checkoff authority post contract expiration

Although not specifically at issue in this case, the Board should also reconsider current law regarding employee revocation of checkoff authorization after contract expiration. The General Counsel believes that, in accordance with the language of Section 302(c)(4) of the LMRA requiring that dues checkoff authorizations must be revocable at least once per year or “beyond the termination of the applicable collective agreement,” the Board should revise its policy with respect to checkoff authorizations that restrict an employee’s ability to revoke his or her authorization post-contract expiration to a specific window period. Therefore, the General Counsel urges the Board to find unlawful any dues checkoff authorization language that restricts the statutory right of employees to revoke their authorizations at expiration of a current contract or during a period in which no collective-bargaining agreement is in effect. *See Frito-Lay, Inc.*, 243 NLRB at 139-41 (Member Murphy, dissenting); *Stewart v. NLRB*, 851 F.3d 21, 32-35 (D.C. Cir. 2017) (J. Silberman, concurring/dissenting) (noting that “[t]he difference between a right to revoke during a limited pre-termination window and a right to revoke at will upon termination of an agreement is not an insignificant difference . . . Employees might well decide to revoke their authorizations . . . only after termination of an applicable agreement because of the then-existing unsatisfactory status of relations between the union and employer”).

2. The Board Should Find that Respondent Lawfully Ceased Dues Checkoff Pursuant to the Terms of the Agreement

Applying a standard that appropriately analyzes the plain language of the dues checkoff agreement here, the General Counsel urges the Board to find that Respondent did not violate the Act when it terminated dues checkoff after the agreement with the Union expired. The language of the parties’ collective-bargaining agreement stated that “[f]or the period of this Agreement . . .” dues Check-Off shall be in effect.

The language in the CBA specifically links Respondent's obligation to deduct union dues to the term of the agreement. This is not a general statement regarding the duration of Respondent's obligations under the contract, but one that specifically applies to Respondent's actions with respect to dues checkoff. The language was a product of negotiations between the parties, and the Board should give effect to that language and find that the agreement only obligated Respondent to maintain dues checkoff during the term of the agreement. Since the language of the agreement absolved Respondent of the requirement to maintain dues checkoff after the contract's expiration, the General Counsel respectfully recommends that the Board find that Respondent did not violate Section 8(a)(5) of the Act when it ceased dues deductions after its collective-bargaining agreement with the Union expired.

IV. Conclusion

The General Counsel urges the Board to take this opportunity to adopt a standard for analyzing the terms of a dues checkoff agreement that allows the parties' plain language limiting the dues checkoff obligation to be respected. The General Counsel requests that the Board apply that standard and dismiss this Complaint allegation.

DATED at Fort Worth, Texas this 4th day of April 2019.

/s/ Art Laurel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of General Counsel's Limited Cross Exception to the Administrative law Judge's Decision was e-filed with the National Labor Relations Board and served via electronic mail on this 4th day of April 2019, on the following parties:

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