UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HACIENDA HOTEL, INC. GAMING CORPORATION D/B/A HACIENDA RESORT HOTEL AND CASINO, Respondent, AND SAHARA NEVADA CORPORATION SAHARA HOTEL AND CASINO Respondent, AND LOCAL JOINT EXECUTIVE BOARD LOCAL 226, AND BARTENDERS UNION, LOCAL 165, AFFILIATED WITH HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES, AFL-CIO Union.	)	No. 28-CA-13274 & -13275 MOTION FOR RECONSIDERATION ARCHON CORPORATION, D/B/A INTERVENOR ON BEHALF OF RESPONDENTS

RESPONDENTS' MOTION FOR RECONSIDERATION

Pursuant to Sections 102.48(c) and 102.24(a) of the National Labor Relations Board ("NLRB" or the "Board") Rules and Regulations, Respondents Hacienda Hotel, Inc. Gaming Corporation d/b/a Hacienda Resort Hotel and Casino (the "Hacienda") and Sahara Nevada Corporation d/b/a Sahara Hotel and Casino (the "Sahara") (collectively, the Hacienda and the Sahara will be referred to herein as the "Hotels" or "Respondents") move the Board to reconsider its Decision and Order entered in this case on March 5, 2019 in light of the Board's recent decision in *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (2019), finding that an employer's

obligation to check off union dues terminates upon expiration of a collective-bargaining agreement.

I. INTRODUCTION

This case arises from the Hotels' decision to terminate union dues checkoff following the expiration of the collective-bargaining agreements between the Hotels and Local Joint Executive Board Local 226 and Bartenders Union, Local 165 (the "Union"). Despite the fact that the Hotels' decision was consistent with 50 years precedent, the Ninth Circuit Court of Appeals rejected the Board's decision and determined that the Board failed to provide a reasoned explanation to support its ruling. *See Local Joint Exec. Board of Las Vegas v. NLRB*, 657 F.3d 865, 876 (9th Cir. 2011) (*"LJEB III"*). Rather than remand the matter back to the Board, the Ninth Circuit addressed the merits of the issue itself and found that in the absence of a union security clause, a dues checkoff provision, standing alone, is akin to any other term of employment that is a mandatory subject of bargaining and that ceasing dues checkoff without bargaining to impasse is thus a violation of Section 8(a)(5) of the National Labor Relations Act ("NLRA" or the "Act"). *Id.*

Since then, the Board reaffirmed its past precedent and confirmed that an employer has no obligation under the Act to continue dues checkoff after the contract expired. *See Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *4 ("There is no independent statutory obligation to check off and remit dues after expiration of a collective-bargaining agreement containing a checkoff provision, just as no such statutory obligation exists before parties enter into such an agreement."). The opinion addresses the Ninth Circuit's concern that there was no reasonable justification for the past precedent by explaining the rationale behind the Board's long-standing

precedent. Additionally, the Board held that its return to the past standard was to be applied retroactively to all pending cases.[1]

Accordingly, Respondents respectfully request that the Board reconsider its decision finding that Respondents violated Sections 8(a)(5) and (1) of the Act and, pursuant to the rationale set forth in *Valley Hospital*, hold that the Hotels were permitted to cease deducting and remitting to the Union employees' dues upon the expiration of the contract.

II. HISTORY OF THE CASE

A. Factual Background

The Hotels and the Union had collective-bargaining relationships for over thirty years prior to the events leading up to this case. The latest agreements between the Union and the Hotels expired May 31, 1994. After the expiration of the agreements, the parties bargained for several months, but were unsuccessful in reaching successor agreements. Beginning June 7, 1995, the Hotels unilaterally ceased deducting employees' union dues from their paychecks pursuant to Article 3.03 of the collective-bargaining agreements.[2] The Union asserted that such action constituted an unlawful refusal to bargain in violation of Sections 8(a) (5) and (1) of the Act because it was a unilateral change in the terms and conditions of employment, and the parties had not bargained to impasse. The Respondents asserted, and still take the position, that an employer's dues checkoff obligation terminates at the expiration of the contract containing the provision.

[1] The instant cases remain pending with the Board's Region 28 Compliance office.

[2] The collective-bargaining agreements between the Union and the Hotels were identical. Article 3.03 provided: 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. Of particular note, the Hacienda Resort Hotel and Casino was sold in an arm's length transaction on or about August 31, 1995; the Sahara Hotel and Casino was sold in an arm's length transaction on or about October 2, 1995; both were sold in asset sales. It is our understanding that both Hotels' then-existing collective bargaining agreements were assumed by and applied respectively to each successor purchaser entity.

B. Procedural Background

On three separate occasions, the Board ruled that the Hotels did not violate Sections 8(a)(5) and (1) of the Act by terminating union dues checkoff upon expiration of the collective bargaining agreements with the Union. *See Hacienda Hotel Inc. Gaming Corp.*, 331 NLRB 665 (2000) ("*Hacienda I*"); *Hacienda Hotel, Inc. Gaming Corp.*, 351 NLRB 504 (2007) ("*Hacienda II*"); *Hacienda Resort Hotel & Casino,* 355 NLRB No. 154 (2010) ("*Hacienda III*").

Each time, the Ninth Circuit reversed the Board's decision and remanded the case for further proceedings consistent with the Court's opinion. *Local Jt. Ex. Bd. of Las Vegas v. NLRB ("LJEB I"),* 309 F.3d 578, 580, 586 (2001); *Local Jt. Ex. Bd. of Las Vegas v. NLRB ("LJEB II"),* 540 F.3d 1072, 1082 (2008); *LJEB III*, 657 F.3d at 876.

Following the Ninth Circuit's remand order in *LJEB III*, the Board accepted the Ninth Circuit's decision on the merits as the law of the case and ordered relief based on the finding that the Hotels had violated Section 8(a)(5) and (1). *See Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino*, 363 NLRB No. 7 (2015). However, due to the unique facts of the case, the Board did not issue the standard make-whole relief. *Id.* The Union petitioned the Board's order for review by the Ninth Circuit, and the Ninth Circuit rejected the Board's explanations and ordered the Board to award make-whole relief to the Union. *See Local Joint Executive Board of Las Vegas v. NLRB*, 883 F.3d 1129, 1138-40 (9th Cir. 2018). The Board accepted the remand and ordered the Hotels to make the Union whole for dues it would have received but for the Respondent's failure to comply with the collective-bargaining agreements. *See Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino*, 367 NLRB No. 7 (2019).

III. BRIEF HISTORY OF DUES CHECKOFF OBLIGATIONS

Other than the instant case, the issue of dues-checkoff obligations has been decided three

times by the Board. In *Bethlehem Steel*, 133 NLRB 1347 (1961), the NLRB unanimously held that an employer may lawfully cease dues deductions upon the expiration of the collective-bargaining agreement. In a Supplemental Decision and Order, the popularly-cited *Bethlehem Steel*, 136 NLRB 1500 (1962), affirmed this decision.

In *WKYC-TV*, 359 NLRB 286 (2012), a split Board reversed *Bethlehem Steel* and held an employer's cessation of dues deductions constituted a unilateral change and violated the Act. The *WKYC* decision was rendered void when the Supreme Court issued its decision in *Noel Canning*, 573 U.S. 513 (2014), finding certain Board appointments constitutionally invalid.

The issue was more recently considered in *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015). In *Lincoln Lutheran*, a majority of the Board overruled *Bethlehem Steel* and held that an employer's dues check off cessation after expiration of a collective-bargaining agreement constituted a unilateral change and violated the Act. The majority was made up of Chairman Pearce, and Members Hirozawa and McFerran. Members Miscimarra and Johnson dissented. However, the *Lincoln Lutheran* Board further ordered that its ruling be applied only prospectively.

Thereafter, on December 1, 2017, the General Counsel (GC) issued Memorandum GC 18-02, which identified a number of cases where the Office of the General Counsel noted that it would potentially provide the Board with alternative analyses of the identified decisions. The Memo specifically mentioned cases that had overturned precedent and listed *Lincoln Lutheran*. *See* Memorandum GC-02 at page 4.

IV. ARGUMENT

A. *Valley Hospital* Returns the Board to the *Bethlehem Steel* Standard.

The Board first expressly recognized that *Bethlehem Steel* set forth that an employer's statutory obligation to check off union dues ends when its collective-bargaining agreement

containing a checkoff provision expires. *See Bethlehem Steel*, 136 NLRB at 1502. As discussed above, this precedent had been in place for decades until a Board majority overruled *Bethlehem Steel* in *Lincoln Lutheran of Racine*. *See Lincoln Lutheran*, 362 NLRB No. 188, at *5-7. However, *Lincoln Lutheran* was short-lived, as the Board recently returned to its long-standing precedent established in *Bethlehem Steel* in *Valley Hospital*.

Notably, Valley Hospital is located in Nevada (as were Respondents). As a "right to work" state, Nevada law prohibits the inclusion of union security clauses in collective bargaining agreements. *See Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *3; 9-11. In *Valley Hospital*, the Board held that an employer's obligation to continue deducting and remitting dues from employees' wages ends when a contract requiring such conduct expires. *Id.*

B. The Board's Decision in *Valley Hospital* Provides a Reasoned Analysis the Return to *Bethlehem Steel* Standard.

In *LJEB III*, the Ninth Circuit rejected the Board's reliance on *Bethlehem Steel* because that case involved a dues checkoff provision where a union security clause was present in the parties' collective bargaining agreement. *LJEB III*, 657 F.3d at 875 ("Where the dues checkoff provisions do not implement union security . . . but instead exist as a free-standing, independent convenience to willingly participating employees, the reasoning of *Bethlehem Steel* loses its force."). Due to this, the Ninth Circuit held that "nothing in the NLRA . . . limits the duration of a dues checkoff to the duration of a CBA in the absence of union security." *Id.* However, the Ninth Circuit's ruling was never meant to be a definitive interpretation of the law; rather, the Court explicitly stated that "the Board may adopt a different rule in the future provided, of course, that such a rule is rational and consistent with the NLRA." *Id.* at 876. And the Board has now done just that.

In *Valley Hospital*, the Board addressed the Ninth Circuit's dissatisfaction with the precedent established in *Bethlehem Steel* and the Board's rationale for such rule. *See Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *9-11 ("In the ensuing decades, the Board and courts applied the *Bethlehem Steel* rule without regard to whether a union-security agreement was either present in the contract at issue or lawful in the applicable jurisdiction. The United States Court of Appeals for the Ninth Circuit has been the only court to take issue with the aforementioned precedent."). Accordingly, the Board provided a reasoned explanation. *Id.* at *14 ("The primary policy justification for adherence to the holding in *Bethlehem Steel* for over 50 years has been frequently suggested, but admittedly without full explanation by a Board majority. We provide that explanation here.").

The Board began its explanation for its holding by addressing the *Katz* unilateral change doctrine. *See Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *7-8. In *Katz*, the Board established the rule that an employer violates Section 8(a)(5) of the Act by unilaterally changing terms and conditions of employment without first reaching a lawful impasse. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962). However, the Board has recognized that not all terms and conditions of employment are subject to this rule. *See Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *15-18. Among the exceptions to the *Katz* doctrine, included are: (1) refraining from strikes or lockouts; (2) submitting employee grievances to arbitration; (3) ceding unilateral control over a term of employment to one party; and (4) requiring employees to become union members. *Id.* at *18. Checking off and remitting union dues has historically been included on this list of exceptions. *Id.*

The reason these obligations, and the dues checkoff obligation, have been excluded from the *Katz* doctrine is because they are "rooted in the contract." *Id.* "The uniquely contractual basis

for each of the subjects excepted from the *Katz* unilateral change doctrine has been repeatedly recognized," and "[r]elevant judicial opinions . . . have had no difficulty in defining the dues-checkoff statutory obligation as limited to the existence of a contract containing a checkoff provision." *Id.* (citing *Wilkes Telephone Membership Corp.*, 331 NLRB 823, 823 (2000); *Tampa Sheet Metal Co.*, 288 NLRB 322, 326 fn. 15 (1988); *Office Employees Local 95 v. Wood County Telephone Co.*, 408 F.3d 314, 317 (7th Cir. 2005); *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1030 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998); *Sullivan Bros. Printers v. NLRB*, 99 F.3d 1217, 1231 (1st Cir. 1996); *Microimage Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245, 254-255 (D.C. Cir. 1991)). And because these obligations are rooted in the contract, "[w]hen the contract expires, so do both the statutory obligation and the statutory right to enforce it." *Id.* at *18-19. "The status quo reverts to what it was prior to the contract. It is a change de jure, not one effected by a party's unilateral action." *Id.* at *19. The Board held that the employer's action of ceasing dues checkoff did not alter the status quo, and thus did not violate Sections 8(a)(5) and (1) of the Act. *Id.*

Accordingly, the Board reestablished the *Bethlehem Steel* principle that an employer may lawfully cease dues checkoff upon expiration of a contract. *Id.*

C. The Board's Decision in *Valley Hospital* Applies Retroactively to Pending Cases

The Board in *Valley Hospital* specifically held that the reinstatement of the *Bethlehem Steel* standard is to be applied retroactively. The Board will typically apply a new rule "to the parties in the case in which the new rule is announced and in other cases pending at the time so long as [retroactivity] does not work a 'manifest injustice.'" *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *38 (quoting *SNE Enterprises*, 344 NLRB 673, 673 (2005)). After balancing

any possible ill effects resulting from retroactive application with important policy considerations, the Board found that the application of the new standard "in this *and all pending cases* will not work a 'manifest injustice.'" *Id.* [Emphasis added] Accordingly, the Board held that its holding in *Valley Hospital* shall be applied retroactively to any pending cases, which would plainly include the instant matters.[3]

Here, the Board should apply the *Bethlehem Steel* principle that was reestablished in *Valley Hospital* and find that the Hotels did not violate Sections 8(a)(5) and (1) of the Act. Although the Ninth Circuit rejected the Board's then-reliance on *Bethlehem Steel* and ultimately found that Respondents violated Sections 8(a)(5) and (1) of the Act when they ceased dues checkoff, the Board has now adopted a different rule that "…is rational and consistent with the NLRA", in full accord with the Ninth's Circuit's decision in *LJEB III*. Moreover, to the extent that the Board accepted the Ninth Circuit's decision in *LJEB III* as the law of the case, it need not follow that decision now that "controlling authority has since made a contrary decision of law applicable to the issue." *NLRB v. Pepsi Cola Bottling Co. of Fayetteville, Inc.*, 24 F. App'x 104, 111 (4th Cir. 2011); *see also EEOC v. International Longshoremen's Assoc.*, 622 F.2d 1054, 1058 (5th Cir. 1980); *Toussaint v. McCarthy*, 801 F.2d 1080, 1092 n. 11 (9th Cir. 1986).

The Board has since ruled on the exact issue in this case. *See Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, at *38. In doing so, it set forth its rationale for reestablishing the *Bethlehem Steel* principle and stated that its decision should be applied retroactively. *Id.* at *14-38. Accordingly, the Board should reconsider its previous decision in the instant matters and apply the longstanding precedent that was reestablished in *Valley Hospital*.

[3] Indeed, given the decades-old alleged violations as well as the similar passage of time following sale of the Hotels, it is respectfully submitted that imposition of the Ninth Circuit's ruling in *LJEB III* would in fact work a "manifest injustice".

V. CONCLUSION

For the reasons set forth above, the Board should reconsider its Order entered March 5, 2019 and find that Respondents did not violate Sections 8(a)(5) and (1) Act when they ceased dues checkoffs after the expiration of collective-bargaining agreements, or in the alternative, issue an Order to Show Cause as to why this Motion should not be granted.

Dated: March 11, 2020

Respectfully submitted,

FORD & HARRISON LLP

By:/s/Stephen R. Lueke____
Stephen R. Lueke
Stefan H. Black
Courtney E. Majors

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Archon Corporation, Intervenor on behalf of Respondents Motion for Reconsideration was filed or served on the following persons:

via electronic filing:

The Hon. Roxanne Rothschild
Executive Secretary
National Labor Relations Board
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Dated: March 11, 2020

Esperansa Reinold

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