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The NLRB Reverses 50 Year-Old Precedent and Holds That Dues Checkoff Provisions Survive the Expiration of a Collective Bargaining Agreement

The National Labor Relations Board ("NLRB") recently re-examined the issue of whether an employer's obligation to check off union dues from employees' wages terminates upon the expiration of a collective bargaining agreement that contains a dues checkoff provision. This issue was seemingly resolved more than 50 years ago, in the NLRB's *Bethlehem Steel* decision. However, on December 12, 2012, in its *WKYC-TV, Inc.* decision, the NLRB reversed its 50 year-old precedent and held that an employer's obligation to check off union dues continues after the expiration of a collective bargaining agreement that establishes such an arrangement.

In its 1962 *Bethlehem Steel* decision, the NLRB considered the issue of whether the employer had violated its obligation to negotiate in good faith by unilaterally refusing to honor the union security clause and the union dues checkoff provisions contained in an expired collective bargaining agreement. Although the NLRB found that both union security and dues checkoff provisions are mandatory subjects of bargaining, the NLRB held in *Bethlehem Steel* that the employer did not violate the National Labor Relations Act ("NLRA") by unilaterally refusing to honor the union security clause and discontinuing union dues deductions from employees' pay checks. The NLRB determined that the language of Section 8(a)(3) of the NLRA, which permits employers and unions to make an "agreement" to require union membership as a condition of employment, means that parties cannot enforce a union security provision after the collective bargaining agreement containing such a provision has expired. The NLRB further reasoned that dues checkoff provisions are intended to implement union security clauses, and that an employer's obligation to continue deducting union dues from employees' pay checks ceases upon the expiration of the collective bargaining agreement.

According to the three NLRB members who comprised the majority in the *WKYC-TV* decision, the reasoning contained in the *Bethlehem Steel* decision is flawed. The three-member majority disagreed with the premise that dues checkoff provisions are intended to implement union security clauses, and stated that "union-security and dues-checkoff arrangements can, and often do, exist independently of one another." The three-member majority also found that employees cannot be required to authorize union dues deductions as a condition of employment even if the collective bargaining agreement contains a union security clause that requires them to be a member of the union. Although employees generally choose to sign authorizations allowing the dues deductions as a matter of convenience, employees

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retain the option of transmitting their union dues directly to the union instead of consenting to automatic deductions. The three-member majority observed that employees who sign dues checkoff authorizations are free to revoke those authorizations upon the expiration of the collective bargaining agreement if they no longer wish to continue those automatic deductions.

For these reasons, the three-member majority reversed the *Bethlehem Steel* decision and held that employers are required to honor dues checkoff provisions in an expired collective bargaining agreement until the parties have reached a new agreement or until a valid impasse has been reached that permits unilateral action by the employer. This new rule will only be applied prospectively, and will not be applied to any pending cases.

Not surprisingly, Member Hayes wrote a strong dissenting opinion. Member Hayes found no adequate justification for the NLRB to abandon more than 50 years of precedent. Member Hayes stated that a union security clause operates as a powerful inducement for employees to authorize union dues deductions, and "it is unreasonable to think that employees generally would wish to continue having dues deducted from their pay once their employment no longer depends on it." Member Hayes also responded to the majority's view that employees can simply revoke their authorizations, stating that "it is unlikely that employees will recall the revocation language in their authorizations, and less likely still that they will understand that their obligation to pay dues as a condition of employment terminated as a matter of law once the contract expired." Member Hayes also recognized that an employer's ability to cease collecting union dues from employees upon the expiration of a collective bargaining agreement is "a legitimate economic weapon in bargaining for a successor agreement" and accused the three-member majority of deliberately stripping employers of this weapon to provide more leverage to unions in negotiating for successor agreements.

It is not clear at this point whether the NLRB's recent *WKYC-TV* decision will be appealed.

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