Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center *and* Local Joint Executive Board of Las Vegas. Case 28–CA–213783

December 16, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue in this case is whether the Respondent unlawfully ceased checking off and remitting employees' union dues after its contract with the Charging Party Union expired.[1] For over half a century, this unilateral action would have been lawful under Board precedent beginning with *Bethlehem Steel*, 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). The Board there held that an employer's statutory obligation to check off union dues ends when its collective-bargaining agreement containing a checkoff provision expires. Until recently that had been longstanding Board law, applicable both when contractual checkoff provisions appeared in conjunction with union-security clauses and in contracts that only contained checkoff provisions. However, a Board majority overruled *Bethlehem Steel* in *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015), holding that an employer's statutory obligation to check off union dues would continue to be enforceable through Section 8(a)(5) of the National Labor Relations Act after expiration of a collective-bargaining agreement that establishes the checkoff arrangement.[2]

Today, after carefully reexamining the issue whether an employer's statutory obligation to check off union dues terminates upon expiration of a collective-bargaining agreement, we have decided to overrule *Lincoln Lutheran* and to return to the longstanding precedent set by *Bethlehem Steel*. In sum, we find that a dues-checkoff provision properly belongs to the limited category of mandatory bargaining subjects that are exclusively created by the contract and are enforceable through Section 8(a)(5) of the Act only for the duration of the contractual obligation created by the parties. 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. This holding and rationale apply even in the absence of a union-security provision in the same contract. Because we find that it would not be unjust to follow our normal approach when overruling precedent, we will apply our holding retroactively in this case and in other pending cases. We therefore find that the Respondent had no obligation under the Act to continue dues checkoff after the contract expired. Accordingly, we adopt the judge's dismissal of the complaint, but we do so only for the reasons stated here.[3]

Facts

The facts of this case are undisputed, based on a stipulated record. In short, on February 1, 2018, about 13 months after the expiration of the parties' contract, the Respondent stopped deducting and remitting to the Union employees' dues. The Respondent took that action after 5 days' notice and admittedly without providing the Union an opportunity to bargain.[4]

The parties' 2013–2016 contract, which had been agreed to in mid-April 2014, applied (retroactively) by its terms from January 1, 2013, through December 31, 2016, and the parties were still operating under the expired contract's terms at the time of the events giving rise to this case. The contract's article 4, titled "Union Security," contained the relevant provisions.[5] Section 4.03, titled "Check-Off," stated:

[1] On September 19, 2018, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief (incorrectly identified as cross-exceptions). The Charging Party filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

[2] *Lincoln Lutheran* effectively reinstated the holding by a Board majority in *WKYC-TV, Inc.*, 359 NLRB 286 (2012), a decision invalidated because it was issued when the Board lacked a valid quorum, as defined in *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

[3] The judge recommended dismissal of the complaint, based on his interpretation of contract language addressing checkoff. We agree with the General Counsel and the Charging Party that *Lincoln Lutheran* was the applicable precedent when this case arose in 2018 and that under this precedent the Respondent's action would have been unlawful. As explained, however, we overrule that decision today, and we apply today's holding retroactively.

[4] The Respondent's January 26, 2018 notice to the Union cited *Lincoln Lutheran*, its holding that "the dues-checkoff obligation survives expiration of the collective bargaining agreement," and GC Memo 18-02 (Dec. 1, 2017), which included *Lincoln Lutheran* among "'significant issues' that are mandated for submission to the Division of Advice."

[5] Sec. 4.01, titled, "Union Shop," required employees to become and remain members of the Union. But sec. 4.02, titled, "Effect of State Laws," stated that the "Union Shop" provision does not apply if it conflicts with state law. Nevada, where the Respondent is located, has had a statewide right-to-work law at all material times, making the "Union Shop" provision void and inapplicable.

> 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 the Agreement.

Exhibit 2, referenced in section 4.03, is a checkoff agreement containing the text of the Payroll Deduction Authorization form to be used by employees in requesting dues checkoff. The checkoff agreement states that the Respondent agrees "during the term of the Agreement" to deduct union dues monthly from the pay of employees who have voluntarily submitted the Payroll Deduction Authorization form. In turn, the Payroll Deduction Authorization form states, inter alia, that the authorization will remain in effect and be irrevocable, regardless of whether the employee is a union member, unless the employee revokes it by sending written notice to the Respondent and the Union "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 contract between the [Respondent] and the Union, whichever occurs sooner."

Discussion

I. LEGAL BACKGROUND

Section 8(d) of the Act establishes the general statutory duty to "bargain collectively," defining the duty as the "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." In 1962, the Supreme Court expressly affirmed that this statutory duty includes the requirement that an employer refrain from unilaterally changing bargaining unit employees' terms and conditions of employment from the commencement of a bargaining relationship until the parties have first reached a lawful impasse in good-faith attempts to negotiate a collective-bargaining agreement. See *NLRB v. Katz,* 369 U.S. 736, 743 (1962). This has become known as the *Katz* unilateral change doctrine. In *Litton Financial Printing Division v. NLRB,* 501 U.S. 190, 199 (1991), the Supreme Court affirmed that the statutory obligation imposed by the *Katz* doctrine applies not only from the commencement of a bargaining relationship but also upon expiration of any subsequent collective-bargaining agreement.[6]

It is well established that an employer's unilateral change in contravention of the *Katz* doctrine violates Section 8(a)(5) of the Act. However, the Board has always recognized exceptions to the *Katz* unilateral change doctrine, permitting or requiring the cessation of certain contractual obligations upon contract expiration. These include contract provisions for no-strike/no-lockout pledges, arbitration, management rights, union security, and dues checkoff. Notably, the Supreme Court in *Katz* did "not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action," 369 U.S. at 747–748, and subsequently the *Litton* Court, while specifically affirming the application of the *Katz* doctrine to post-contractual unilateral changes, expressly noted each of the traditional exceptions in Board law, including dues checkoff, without questioning the legitimacy of any of them, 501 U.S. at 199.

The Board first expressly recognized the exception for dues checkoff in *Bethlehem Steel*, supra, a decision that issued a month before the Supreme Court decided *Katz.* In *Bethlehem Steel*, the Board addressed the legality of several unilateral changes made by the employer after expiration of a collective-bargaining agreement. Of relevance here is the Board's discussion of union-security and dues-checkoff provisions in the expired agreement. The Board held that unilateral termination of union-security requirements in that agreement was lawful; in fact, termination was mandatory pursuant to the terms of Section 8(a)(3). Id. at 1502. The Board further held that "[s]imilar considerations prevail with respect to the Respondent's refusal to continue to checkoff dues after the end of the contracts. The checkoff provisions in Respondent's contracts with the Union implemented the union-security provisions. The Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force." The Board also noted that "[t]he very language of the contracts links Respondent's checkoff obligation to the Union with the duration of the contracts." Id.

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.[7] The United States Court of Appeals for the Ninth Circuit has been the

[6] See also *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988).

[7] See, e.g., *Wilkes Telephone Membership Corp.*, 331 NLRB 823, 823 (2000); *Tampa Sheet Metal Co.*, 288 NLRB 322, 326 fn. 15 (1988); see also *Office Employees Local 95 v. Wood County Telephone Co.*, 408 F.3d 314, 317 (7th Cir. 2005) (citing *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869-870 (7th Cir. 1993)); *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); and *Microimage Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245, 254–255 (D.C. Cir. 1991) (citing *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986)).

only court to take issue with the aforementioned precedent. It has done so in the protracted litigation of a single case where the issue was whether, in the absence of a contractual union-security provision in the right-to-work state of Nevada, dues checkoff should be subject to the post-expiration unilateral change doctrine. In three successive decisions, the court found that the Board had failed to provide a reasoned explanation for holding that an employer's postexpiration dues-checkoff obligation in right-to-work states was not subject to that doctrine. In its first decision, the court was particularly troubled by the ambiguity created by the Board's finding in *Bethlehem Steel* that the dues-checkoff arrangement "implemented" the union-security provision, a finding that would have no applicability to the rationale for finding that an employer had no postexpiration obligation to continue checkoff in the absence of a union-security provision. *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578 (9th Cir. 2002) (*LJEB I*), vacating *Hacienda Hotel, Inc. Gaming Corp.*, 331 NLRB 665 (2000) (*Hacienda I*). Consequently, the court remanded the case to the Board for a reasoned explanation for its rule or for a different rule with a reasoned explanation to support it.

In a second decision, the court rejected the Board's new rationale in the decision on remand that the specific contract language at issue in the case waived the union's right to post-expiration continuation of dues checkoff. *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1075 (9th Cir. 2008) (*LJEB II*), vacating *Hacienda Hotel, Inc. Gaming Corp.*, 351 NLRB 504, 505 (2007) (*Hacienda II*). It once again remanded the case for a reasoned explanation from the Board in support of the rule adopted in *Hacienda I* or a reasoned explanation for an alternative rule.

Finally, in *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865 (9th Cir. 2011) (*LJEB III*), the court rejected the procedural rationale of a four-member Board in *Hacienda Hotel, Inc. Gaming Corp.*, 355 NLRB 742 (2010) (*Hacienda III*), to apply the rule in *Bethlehem Steel* in the absence of a majority opinion to explain or depart from that rule. Apart from this brief consensus opinion, the Board's *Hacienda III* decision included separate concurring opinions, each supported by two Board members. In one opinion, former Chairman Liebman and former Member Pearce expressed "substantial doubts about the validity of *Bethlehem Steel* . . . particularly as applied in right-to-work states." Id. at 742. In the other opinion, former Members Schaumber and Hayes asserted reasons supporting *Bethlehem Steel*, including its application in the absence of union security. Foremost among these reasons was the contention that the recognized exceptions to the *Katz* unilateral change doctrine, including dues checkoff, were all "uniquely of a contractual nature." Id. at 745. The Ninth Circuit did not address the merits of either of the concurring opinions. It expressly rejected the Board's argument that deference was warranted on procedural grounds. Rather than remand the case again, the court decided for itself that there was no justification for carving out an exception to the unilateral change doctrine for dues checkoff in the absence of union security, and it applied that doctrine to find a violation. *LJEB III*, 657 F.3d at 874–875. Notably, however, the court indicated that customary law of the circuit principles would not apply in a future case presenting the same issue: "We stress that, because the NLRA is ambiguous on this issue, 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.

In 2015, a new Board majority in *Lincoln Lutheran*, 362 NLRB 1655, followed through on the "substantial doubts" suggested by the Liebman-Pearce concurring opinion in *Hacienda III* and overruled *Bethlehem Steel* in its entirety, holding that the *Katz* unilateral change doctrine obligates an employer to continue dues checkoff after expiration of a contract.[8] The majority reasoned that "[u]nlike no-strike, arbitration, and management-rights clauses, a dues-checkoff provision in a collective-bargaining agreement does not involve the contractual surrender of any statutory or nonstatutory right by a party to the agreement." Id. at 1658. The majority described a contractual dues-checkoff provision as "similar to other voluntary checkoff agreements, such as employee savings accounts and charitable contributions, which the Board has recognized also create 'administrative convenience' and, notably, survive the contracts that establish them." Id. (citations omitted). Further, addressing the "contract creation" argument made by the respondent and an amicus, the *Lincoln Lutheran* majority opined that "the fact that dues checkoff normally is an arrangement created by contract simply does not compel the conclusion that checkoff expires with the contract that created it. Moreover, the purported distinction between checkoff and other terms and conditions of employment ignores the fact that virtually all, if not all, of employees' terms and conditions of employment are the result of collective bargaining between their union and employer." Id. at 1662 (footnote omitted).

[8] Former Members Miscimarra and Johnson dissented from overruling *Bethlehem Steel*. 362 NLRB at 1663–1667.

II. ANALYSIS

A. The Obligation to Check Off Dues Is Rooted in Contract

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.[9] We provide that explanation here. It begins with the undisputed principle that the *Katz* doctrine generally proscribing unilateral changes in mandatory bargaining subjects in the absence of a contract is an application of the *statutory obligation* to bargain imposed by Section 8(d) of the Act and enforced by Section 8(a)(5) and 8(b)(3) for employers and unions, respectively. This obligation attaches *immediately* once the Board certifies, or an employer voluntarily recognizes, a union as the exclusive representative of an appropriate unit of employees under Section 9(a) of the Act. At this point, a bargaining relationship between the employer and union has been formally established, and the employer must generally maintain the status quo by refraining from making unilateral changes to mandatory bargaining subjects unless the parties have first bargained in good faith to impasse. See *Katz*, 369 U.S. at 742–743 (equating an employer's unilateral changes to mandatory bargaining subjects during first-contract negotiations with a refusal to "negotiate *in fact*" contrary to Section 8(d) of the Act) (emphasis in original).

We readily agree that dues checkoff is a mandatory bargaining subject. However, there is a category of mandatory bargaining subjects that do not fit within the *Katz* paradigm. As accurately summarized in the Schaumber-Hayes concurring opinion in the Board's *Hacienda III* decision.

> Board and court precedent has never treated all terms and conditions of employment the same with respect to survivability after contract expiration. There is a major distinction to be made between terms and conditions subject to the *Katz* rule and the exceptions to that rule. The exceptions, including checkoff, are uniquely of a contractual nature. In other words, provisions relating to wages, pension and welfare benefits, hours, working conditions, and numerous other mandatory bargaining subjects typically appear in a collective-bargaining agreement, but those aspects of employment can exist from the commencement of a bargaining relationship. The obligation to maintain them does not arise with or depend on the existence of a contract. On the other hand, the obligation to checkoff [sic] dues, refrain from strikes or lockouts, and submit grievances to arbitration cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound. Furthermore, each of these obligations entails a change in the ordinary scheme of statutory rights and limitations. Consequently, it is reasonable to presume, absent express language to the contrary, that these obligations are coterminous with the contracts that give rise to them.[10]

We agree with this statement of the fundamental distinction between terms and conditions of employment that are subject to a statutory obligation in the absence of a contract under *Katz* and those terms and conditions of employment that are only subject to a statutory obligation for the duration of a contract establishing them.[11] This distinction is logical in view of the Supreme Court's legal framework in *Katz*. As the Court later explained:

> Under *Katz,* terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them. . . . [*T]he obligation not to make unilateral changes is rooted not in the contract but in preservation of existing terms and conditions of employment and applies before any contract has been negotiated. Katz* illustrates this point with utter clarity, for in *Katz* the employer was barred from imposing unilateral changes even though the parties had yet to execute their first collective-bargaining agreement.

Litton, 501 U.S. at 206–207 (emphasis added) (internal quotation marks omitted).

It is undisputed that upon commencement of a collective-bargaining relationship, there is no statutory obligation to refrain from strikes or lockouts, to submit employee grievances to arbitration, to cede unilateral control over a term of employment to one party, to require employees to become union members, or to check off dues and remit them to a union. That is the status quo before any contract is negotiated. The statutory obligation to do any of those things *is* "rooted in the contract" and does not

[9] We acknowledge, as did former Members Schaumber and Hayes in their concurring opinion in *Hacienda III*, 355 NLRB at 745, that the Board may have failed to adequately explain the rationale for the holding in *Bethlehem Steel*, particularly as to its application in cases where there is no companion union-security provision. We disagree, however, with our dissenting colleague's implication that a prior failure by the Board to adequately explain the rationale could somehow preclude us from providing an explanation now. The Ninth Circuit clearly did not think so when it declared in *LJEB III* that the law of the circuit doctrine would not apply to its holding there and 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." 657 F.3d at 876.

[10] 355 NLRB at 745.

[11] We are bemused by the dissent's summary dismissal of the Schaumber-Hayes rationale as "rebutted" by the Liebman-Pearce opinion in *Hacienda III*. She surely believes this; we just as surely do not.

exist until a contract provision imposing the obligation is in effect. And until that statutory obligation exists, there is no corollary statutory right to enforce compliance through Section 8(a)(5) or 8(b)(3) of the Act. When the contract expires, so do both the statutory obligation and the statutory right to enforce it. 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.[12] It is, of course, well settled that "where an employer's action does not change existing conditions—that is, where it does not alter the status quo—the employer does not violate Section 8(a)(5) and (1)." *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002) (citing *House of the Good Samaritan*, 268 NLRB 236, 237 (1983)).

The uniquely contractual basis for each of the subjects excepted from the *Katz* unilateral change doctrine has been repeatedly recognized. As previously noted, the Supreme Court in *Litton* expressly identified each of these traditional exceptions in Board law without questioning the legitimacy of any of them. 501 U.S. at 199.[13] *Bethlehem Steel* itself relied in part on the contractual nature of the dues-checkoff obligation, stating that "[t]he Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force." *Bethlehem Steel*, 136 NLRB at 1502. Admittedly, the Board's reference to implementation of union-security provisions and its reliance on the particular language of the checkoff provision made it unclear whether the "contract creation" rationale was an independent basis for terminating the statutory obligation of a stand-alone dues-checkoff provision upon contract expiration. However, subsequent cases have stated this rationale unequivocally. See *Indiana & Michigan Electric Co.*, 284 NLRB 53, 59 (1987) (observing that the *Katz* rule does not apply to dues-checkoff provisions "because they, like arbitration, are purely creatures of contract"); *Robbins Door & Sash Co.*, 260 NLRB 659, 659 (1982) ("It is well settled that an employer's duty to check off union dues is extinguished upon the expiration of the collective-bargaining agreement which created that duty.").[14]

Relevant judicial opinions other than those of the Ninth Circuit in the *Hacienda/LJEB* litigation have had no difficulty in defining the dues-checkoff statutory obligation as limited to the existence of a contract containing a checkoff provision.[15] Further, the court's holding in *LJEB III* does not foreclose the Board's reliance on this rationale. The court addressed only the question whether the dues-checkoff obligation survives contract expiration in right-to-work states, where "dues checkoff does not exist to implement union security." 657 F.3d at 876. Unlike the *Lincoln Lutheran* majority, the court did not take issue with *Bethlehem Steel* to the extent the holding in that case applied to dues-checkoff provisions that "implemented" union-security provisions. Rather, the court stated that "[w]ithout expressing an opinion on the wisdom of the rule of *Bethlehem Steel,* we see why the Board would treat dues-checkoff in the same manner as union security where both are present." Id. at 875. In addition, the *LJEB III* court did not address the merits of the Schaumber-Hayes "contract creation" rationale that we endorse today. To the contrary, the court expressly stated that "because the NLRA is ambiguous on this issue, the Board may adopt a different rule in the future provided, of course, that such a rule is rational and consistent with the NLRA." Accordingly, we find that the holding in *LJEB III* permits the rationale we now state for reinstituting the longstanding *Bethlehem Steel* rule.[16]

We reject the attempts by the *Lincoln Lutheran* majority and the dissent to distinguish dues checkoff from the uncontested exceptions to the *Katz* unilateral change doctrine. Contrary to their claims, correctly characterized in the *Lincoln Lutheran* dissent as "an after-the-fact recharacterization of Board precedent,"[17] those exceptions are not limited to waivers of statutory or nonstatutory rights. They are inclusive of mandatory bargaining subjects for which there is not, and cannot be, any obligation enforceable under the Act until that obligation is created by the parties in a collective-bargaining agreement. Moreover, even accepting the *Lincoln Lutheran* waiver-based

[12] Cf. *Tribune Publishing Co.*, 351 NLRB 196, 197 (2007) (mutual agreement of parties after contract expired to reinstate payroll deduction and remittance of union dues using employer's direct deposit system created a "new status quo" from which employer could not unilaterally depart), enfd. 564 F.3d 1330 (D.C. Cir. 2009).

[13] Our dissenting colleague observes that the issue in *Litton* concerned the employer's post-expiration obligation to arbitrate grievances. We would further observe that it was therefore unnecessary to make uncritical comparison to dues checkoff as one of the terms and conditions of employment that the Board has held do not survive contract expiration for purposes of *Katz*'s statutory policy. The Supreme Court is not prone to making casual mistaken references.

[14] This Board precedent, traceable back to *Bethlehem Steel*, belies the dissent's claim that the contract creation theory we explicate today is "novel." Rather, it is the *Lincoln Lutheran* theory she endorses that is the relative newcomer, particularly in its application to dues-checkoff provisions in non–right-to-work states.

[15] See fn. 7, above.

[16] Thus, although the present case also arises in a right-to-work state, the court's opinion in *LJEB III* is not clearly in conflict with our opinion here. Even if it were, we would adhere to our opinion in accord with the Board's longstanding nonacquiescence policy.

[17] 362 NLRB at 1666.

definition of *Katz* exceptions, an employer has a statutory right to refuse to check off dues and remit them to a union until it agrees in a contract to waive that right.

Lincoln Lutheran's attempt to liken dues checkoff to other voluntary deduction arrangements is also unavailing. Any of those arrangements, such as for employee savings accounts and charitable contributions, can exist at the beginning of a collective-bargaining relationship. If they do exist, *Katz* imposes an immediate obligation on an employer to maintain those deductions without change, even in the absence of a contract. None of those arrangements involve direct payments by an employer to a union, as does a dues-checkoff arrangement, which is subject to the limits of Section 302(c)(4) and cannot exist at the beginning of a collective-bargaining relationship.[18] Further, neither the Board nor any court has held that an employer has a statutory duty to process an employee's valid checkoff authorization unless the employer first agrees to do so in a collective-bargaining agreement.

For similar reasons, we reject the *Lincoln Lutheran* argument, shared by the dissent here, that dues checkoff cannot be distinguished on the basis of its contractual origin because "virtually all, if not all, of employees' terms and conditions of employment are the result of collective bargaining between their union and employer." 362 NLRB at 1662. That same argument would logically apply to any of the recognized exceptions to the *Katz* unilateral change doctrine. Once again, this argument fails to recognize that the *Katz* doctrine "is rooted not in the contract but in preservation of existing terms and conditions of employment and applies before any contract has been negotiated." *Litton*, 501 U.S. at 207. The parties may contract to change the terms and conditions that existed when their bargaining relationship commenced, and those changes reflect the status quo that must then be maintained upon the expiration of the contract. In contrast, the statutory obligation does not arise as to dues checkoff or any other mandatory bargaining subjects excepted from *Katz* until established in a bargaining agreement.[19] That statutory obligation is rooted in the contract and endures only for its term, unless the parties specifically agreed to extend it.[20]

B. Lincoln Lutheran, Not Bethlehem Steel, Conflicts with Statutory Bargaining Principles

For the entire time that the *Katz* unilateral change doctrine has been in effect, other than the few years since *Lincoln Lutheran* issued,[21] the *Bethlehem Steel* principle that an employer can lawfully cease dues checkoff upon expiration of a contract has been an established part of the collective-bargaining process and the settled expectations of parties negotiating in good faith under Section 8(d) of the Act. The *Lincoln Lutheran* majority and our dissenting colleague nevertheless maintain that this principle undermines the collective-bargaining process, allegedly because the cessation of dues checkoff "creates a new obstacle to employees who wish to maintain their union membership in good standing," "interferes with the union's ability to focus on bargaining," and sends a "powerful message to employees . . . that the employer is free to interfere with the financial lifeline between employees and the union they have chosen to represent them." 362 NLRB at 1657. We clearly disagree. It is the holding in *Lincoln Lutheran*, not the one in *Bethlehem Steel*, that undermines and conflicts with the statutory bargaining process.

Section 1 of the Act articulates a central policy of our statute, that is, "encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of

[18] Given our holding today, we need not decide whether Sec. 302 of the Labor Management Relations Act must be construed to prohibit dues checkoff upon expiration of a collective-bargaining agreement providing for checkoff, as some courts have held. Sec. 302 broadly prohibits employers from making payments to unions with certain exceptions, including an exception in Sec. 302(c)(4) that permits employers to deduct union dues from employees' pay and remit them to the union if the employee has executed a "written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective [bargaining] agreement, whichever occurs sooner." For present purposes, it suffices to reiterate that Sec. 302(c)(4) clearly means that an employer has no statutory dues-checkoff obligation unless it agrees to one in a collective-bargaining agreement. Like other mandatory bargaining subjects dependent on inclusion in a contract for their creation, dues checkoff is therefore an exception to the *Katz* rule, statutorily enforceable only for the duration of the contract creating it. Thus, employers may unilaterally discontinue dues checkoff at contract expiration.

[19] For these reasons, our dissenting colleague's suggestion that our holding today would somehow permit an employer, after contract expiration, to unilaterally discontinue paying contractual wage rates or any other contractual term that relates to mandatory bargaining subjects covered by the *Katz* doctrine from the beginning of a bargaining relationship is patently wrong.

[20] The General Counsel argues that we should adopt a new interpretation of dues-checkoff language referring to the term of the collective-bargaining agreement, like that contained in the Check-Off provision at issue here, as permitting employers to cease deducting dues after expiration of the collective-bargaining agreement. The General Counsel further argues that we should modify our interpretation of dues-checkoff authorization forms to permit employees to withdraw their authorizations upon termination of the collective-bargaining agreement and at any time that no collective-bargaining agreement is in effect. In light of our decision to overrule *Lincoln Lutheran* based on our conclusion that an employer has no statutory obligation to check off dues when no contract containing a dues-checkoff provision is in effect, it is unnecessary to reach those arguments.

Chairman Ring agrees with his colleagues that it is unnecessary to pass on whether the Respondent was privileged to cease dues checkoff based on durational language in the contract, but he notes that the analysis applied here, and its outcome, would be consistent with the parties' own intent, as reflected in the contract's durational language.

[21] 362 NLRB 1655 (2015).

differences as to wages, hours, or other working conditions." See also *Red Coats, Inc.*, 328 NLRB 205, 207 (1999) (recognizing "the long-established Board policy of promoting stability in labor relations"). A rule prohibiting employers from unilaterally discontinuing dues checkoff after contract expiration frustrates this essential policy by undermining established bargaining practices and relationships that ordinarily promote labor relations stability. Having negotiated under the *Bethlehem Steel* regime for over five decades, parties after *Lincoln Lutheran* were suddenly confronted with a paradigm shift in the established ground rules of the collective-bargaining relationship.

The reasons stated in *Lincoln Lutheran* for making such a change are largely based on unsupported assumptions. The majority made no reference to anecdotal or statistical evidence from a 50-year history of bargaining under *Bethlehem Steel* to support its claim of allegedly dire adverse consequences resulting from permitting employers to cease dues checkoff upon expiration of a bargaining agreement. Neither did the majority explain why it assumed those consequences would logically be the inevitable or routine result. In the first place, as previously noted, Board precedent under *Bethlehem Steel* permitted employers to continue dues checkoff postexpiration; it did not mandate cessation other than for employees who have lawfully revoked their checkoff authorizations upon contract expiration. Even if most employers have chosen to cease checkoff—we have no statistics on that—it is just as logical that employees who continue to support their union representative, or who wish to continue participation in internal union affairs, will affirmatively seek direct dues payment alternatives to checkoff.[22] It is equally logical to assume that unions will affirmatively work to identify and provide these alternatives. Why this should be a significant administrative inconvenience for employees or unions in the modern world of personal and electronic finance is beyond us.[23] It is even less obvious why any administrative inconvenience in making alternative dues-payment arrangements would significantly interfere with the union's focus on bargaining, unless a substantial number of employees take the opportunity provided by the employer's cessation of checkoff to withhold dues as an expression of dissatisfaction with their bargaining representative. In that case, the union has a much bigger problem than the loss of the administrative convenience of checkoff.

Moreover, the dissenting opinion in *Lincoln Lutheran* predicted adverse consequences from the overruling of *Bethlehem Steel* that seem to us just as logical, if not more so, than the speculative adverse consequences attributed to that case by the majority. For instance, it seems likely that under *Lincoln Lutheran* dues checkoff would become a considerably more divisive bargaining subject with the potential to frustrate efforts to reach collective-bargaining agreements in both the successor and initial contract bargaining situations. As explained in the *Lincoln Lutheran* dissent, "it is a near-certainty that more employers will routinely include in their *initial* proposals the proposed discontinuation of dues checkoff; and since dues checkoff is obviously important to the union, such a proposal will substantially impede bargaining over all other issues."[24] This seems particularly likely because, except in the rare event of a union's agreement to delete the checkoff requirement, only a good-faith impasse in bargaining would permit an employer to eliminate checkoff. Similarly, employers cognizant of the self-perpetuating nature of dues checkoff under *Lincoln Lutheran* could understandably be more resistant in initial contract bargaining to union proposals for dues checkoff.

We need not rely, however, on these potential adverse consequences to justify overruling *Lincoln Lutheran.* The paramount and clearly intended purpose of the holding in that case is to exclude the cessation of dues checkoff from the arsenal of economic weapons that an employer may legitimately use as leverage in support of its bargaining position. This represents impermissible interference with the statutory bargaining process. The Supreme Court has unequivocally held that "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized,"[25] and that it is improper for the Board to function "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."[26] The Court has also stated that the Board lacks "general authority to assess the relative economic power of the adversaries in the bargaining process and to deny

[22] Of course, employees who no longer support the union upon contract expiration may also still be required to pursue dues-payment alternatives if obligated to do so pursuant to a valid continuing checkoff obligation. As noted above, the General Counsel argues that we should modify our interpretation of dues-checkoff authorization forms to permit employees to withdraw their authorizations upon termination of the collective-bargaining agreement and at any time that no collective-bargaining agreement is in effect. We believe that argument should be addressed in a future case where the dues-checkoff authorization issue is directly presented.

[23] The dissent in *Lincoln Lutheran* made a similar observation. See 362 NLRB at 1668.

[24] 362 NLRB at 1667.

[25] *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 489 (1960).

[26] Id. at 497.

weapons to one party or the other because of its assessment of that party's bargaining power."[27]

The *Lincoln Lutheran* majority declared that discontinuing dues checkoff postexpiration is not a valid economic weapon because it is an unlawful unilateral change under *Katz*. We understand why the majority wanted to reach this result. An employer's use of dues-checkoff cessation in support of its legitimate bargaining proposals does not entail the same financial risks and disruption to its production as would a lockout. On the other hand, the impact of dues-checkoff cessation on a union and those employees who support it is less extreme than the impact of a lockout. Ultimately, none of this matters under the Supreme Court precedent just discussed. If there is no postexpiration statutory obligation under *Katz* to continue dues checkoff, then an employer may lawfully choose to cease checkoff to exert economic pressure in a bargaining dispute.

Lincoln Lutheran represented an attempt to avoid that inevitable conclusion by rebranding postexpiration cessation of dues checkoff as an unlawful unilateral change under *Katz*.[28] For the reasons previously stated, we reject that attempt. As a mandatory bargaining subject rooted in contract and enforceable under the Act only for the duration of the contract, dues checkoff is excepted from the *Katz* unilateral change doctrine. Accordingly, as with similarly excepted contractual no-strike and no-lockout provisions, an employer is free upon contract expiration to use dues-checkoff cessation as an economic weapon in bargaining without interference from the Board.[29]

C. Retroactive Application of the New Standard

In determining whether to apply a change in law retroactively, the Board must balance any ill effects of retroactivity against "'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" *SNE Enterprises*, 329 NLRB 673, 673 (2005) (quoting *Securities & Exchange Commission v. Chenery Corp*., 332 U.S. 194, 203 (1947)). In other words, the Board will 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.'" Id. In determining whether retroactive application will work a manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. Id.

We find that any ill effects resulting from retroactive application of the legal standard we reinstate today do not outweigh the important policy considerations we rely on in reinstating the *Bethlehem Steel* standard that has defined statutory obligations and shaped collective-bargaining practices for all but a few recent years since 1962. Most importantly, we note that although *Lincoln Lutheran* was Board law when the Respondent ceased dues checkoff, doubts about the legal effects of the preceding statement of that law by a "recess Board" in *WKYC,* 359 NLRB 286 (2012), had already been raised by the D.C. Circuit's opinion in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted June 24, 2013, and by the ongoing Supreme Court proceedings when the parties entered into their contract in 2014 and applied it retroactively to 2013. Accordingly, it cannot be said that either the Respondent or the Union entered into that contract with any certainty that the Respondent would have a statutory obligation to continue dues checkoff when the contract expired if no successor contract was in place. Moreover, when the Respondent did cease dues checkoff several months after that contract's expiration, it notified the Union that it did so based on uncertainty about the continuing validity of *Lincoln Lutheran* created by the General Counsel's 18-02 memo.[30] Finally, apart from the reliance factor, we find no particular injustice, as opposed to inconvenience, to the Union or the employees by retroactive application of this decision. The Union would still have the right to secure dues payments directly from those employees who chose to continue their financial support or who were obligated to do so by checkoff authorizations that remained in effect after the bargaining agreement expired. Accordingly, we find that application of our new standard

[27] *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965).

[28] On this point, we share the dissent's view in *Lincoln Lutheran* that the majority's rationale "begs the question by taking as its premise the conclusion it reaches—namely, that dues checkoff is to be subjected to the rule of *Katz*. Obviously, if dues checkoff is held exempt from that rule—as, until today, it has been for more than 50 years—its unilateral cessation is a lawful economic weapon." 362 NLRB at 1668.

[29] Objecting to the concept of unilateral cessation of dues checkoff as an economic weapon, our dissenting colleague relies on *Daily News of Los Angeles* for the proposition that "unilateral action is not a lawful economic weapon." 315 NLRB 1236, 1242 (1994). We agree with this legal proposition as applied to unilateral changes subject to the *Katz* statutory bargaining obligation; however, it is inapposite here. As our colleague acknowledges, *Daily News* involved the unilateral decrease of wage rates after contract expiration. As previously explained, wages are among the terms and conditions of employment that can—and in the case of wages invariably do—exist in some amount and manner of payment at the commencement of a bargaining relationship. They are therefore covered by the *Katz* doctrine at that point, even in the absence of any contract, and, per *Litton*, are also controlled by that doctrine as well upon expiration of any contract. But as we have fully explained, dues-checkoff arrangements are contractual creations that are not controlled by *Katz*.

[30] We recognize that the Board is not bound by the General Counsel's statement of position on an issue of law. However, we find that such a statement can be relevant to an assessment of the parties' reliance factor in a determination of whether the Board should retroactively apply its own decision to change the law.

in this and all pending cases will not work a "manifest injustice." *SNE Enterprises*, 344 NLRB at 673.

Conclusion

Based on the foregoing, we find that the rule of *Bethlehem Steel* represents the more appropriate view of an employer's statutory dues-checkoff obligation as interpreted in Supreme Court precedent. Accordingly, we overrule *Lincoln Lutheran* and return to the longstanding, straightforward, and correct standard established in *Bethlehem Steel*. We dismiss the complaint on that basis.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 16, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan Member

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

The policy of the National Labor Relations Act, as Section 1 recites, is to "encourag[e] the practice and procedure of collective bargaining."[1] But today's decision—and a string of recent decisions that permit employers to dispense with bargaining and to make unilateral changes in employees' terms and conditions of employment[2]—seems to have little regard for this central statutory goal. In this case, without being asked by any party, the majority overrules *Lincoln Lutheran of Racine*[3] and allows employers to unilaterally stop checking off and remitting employees' union dues after a collective-bargaining agreement expires. This was the Board's position for many years, but the majority admits that the Board had never adequately explained it[4] and so offers its own, belated explanation for the *Bethlehem Steel* rule.[5]

The majority's so-called "contract creation" rationale is contrary to the policy of the Act, which (as the Supreme Court has made clear) strongly disfavors unilateral employer action.[6] Dues checkoff, as the majority concedes, is a mandatory subject of bargaining under Board doctrine,[7] and an employer may not make unilateral changes to employment terms established by a collective-bargaining agreement after the agreement expires, as Supreme Court precedent recognizes.[8] The majority purports to distinguish among an employer's unilateral changes to employment terms, depending on whether they involve (1) terms that can only be initially established by a collective-bargaining agreement (which the employer is then free to change when the agreement expires) or (2) terms that could be established initially by the employer alone (which the employer may not change on contract expiration). This novel distinction, as I will explain, is irrational. It serves no legitimate statutory purpose.

What the majority's distinction does do, as the majority candidly admits, is allow employers to use the cessation of dues checkoff as part of their "arsenal of economic weapons" in bargaining. Before today, however, the Board had held (with the agreement of the District of Columbia Circuit) that "unilateral action is *not* a lawful economic weapon."[9] "Agencies are free to change their

[1] 29 U.S.C. §151.

[2] See, e.g., *MV Transportation, Inc.*, 368 NLRB No. 66 (2019) (overruling Board's longstanding "clear and unmistakable" waiver doctrine in determining whether collective-bargaining agreement authorizes unilateral employer action); *Oberthur Technologies of America Corp.*, 368 NLRB No. 5 (2019) (requiring union to demand bargaining over particular subject in order to trigger employer's duty to bargain, despite employer's unlawful refusal to recognize union and Board's longstanding "futility" doctrine); *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110 (2019) (overruling precedent and permitting successor employer to unilaterally set initial employment terms, despite discriminatory refusal to hire predecessor employees in order to evade bargaining obligation); *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) (overruling precedent and permitting employer to continue to make unilateral changes authorized by contractual management-rights clause, even after expiration of collective-bargaining agreement). I dissented in each of the cited cases.

[3] 362 NLRB 1655 (2015).

[4] As the Ninth Circuit has observed, addressing the Board's traditional approach to the issue presented here, "[w]here the Board breaches its duty to provide any rational and logical explanation for its rules, 'the consistent repetition of that breach can hardly mend it.'" *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865, 872 (9th Cir. 2011), quoting *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 374 (1998).

[5] *Bethlehem Steel*, 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

[6] *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

[7] See, e.g., *Tribune Publishing Co.*, 351 NLRB 196, 197 (2007), enfd. 564 F.3d 1330 (D.C. Cir. 2009).

[8] *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co*., 484 U.S. 539, 544 fn. 6 (1988).

[9] *Daily News of Los Angeles*, 315 NLRB 1236, 1242 (1994) (emphasis added) (rejecting argument that, where employer's lockout would have been lawful under Sec. 8(a)(3), employer's unilateral decrease in

existing policies as long as they provide a reasoned explanation for the change."[10] But the majority fails to plausibly explain how adopting a rule that permits employers to act *without* bargaining actually serves to *encourage* bargaining. The majority offers no tenable reason for discarding *Lincoln Lutheran*, a comprehensive and carefully-analyzed decision that has already rebutted the arguments made by the majority here.[11]

I.

In dismissing the complaint allegation, the judge incorrectly relied on precedent predating *Lincoln Lutheran*. The majority acknowledges that *Lincoln Lutheran* was the applicable precedent when this case arose and that under that precedent, the Respondent's action was unlawful. As the *Lincoln Lutheran* Board explained, prohibiting employers from unilaterally eliminating dues checkoff when a collective-bargaining agreement expires serves the Act's goal of encouraging collective bargaining, has a firm foundation in Supreme Court and Board precedent proscribing postcontract-expiration unilateral changes, and is fully consistent with Section 302 of the Taft-Hartley Act, the only statutory provision addressing dues checkoff, which demonstrates that Congress contemplated that dues checkoff would continue after contract expiration.[12]

To begin, requiring employers to continue to check off union dues after contract expiration effectuates the declared policy of the Act, as set forth in Section 1, to "encourage[e] the practice and procedure of collective bargaining" and to protect the "full freedom" of employees in the selection of their bargaining representatives.[13] It is well established that dues checkoff is a matter related to wages, hours, and other terms and conditions of employment within the meaning of Section 8(a)(5) and (d) of the Act and is therefore a mandatory subject of bargaining.[14] As the Supreme Court has explained, unilateral changes to employment terms violate the Act because they "amount to a refusal to negotiate" and "obstruct bargaining, contrary to the congressional policy."[15] This principle applies to unilateral changes made after a collective-bargaining agreement expires.[16] Thus, permitting employers to unilaterally cease dues checkoff at contract expiration undermines the collective-bargaining process and the status of the union that employees have chosen to represent them.[17]

"Because unilateral changes in dues checkoff undermine collective bargaining no less than other unilateral changes," the *Lincoln Lutheran* Board rightly concluded, "the status quo rule should apply, unless there is some overriding ground for an exception."[18] It found none. The Board noted that a "few contractually established terms and conditions of employment—arbitration provisions, no-strike clauses, and management-rights clauses—do *not* survive contract expiration, even though they are mandatory subjects of bargaining," but explained that "[i]n agreeing to each of these terms, . . . parties have waived rights that they otherwise would enjoy in the interest of concluding a collective-bargaining agreement, and such waivers are presumed not to survive the contract."[19] A dues-checkoff provision in a collective-bargaining agreement is not a waiver, but rather "reflects the employer's agreement to establish a system for employees who elect to pay their union dues through automatic payroll deductions. . . ."[20]

II.

The question presented now is whether the majority has finally succeeded in identifying some overriding reason why an employer's cessation of dues checkoff should be an exception to the prohibition against unilateral employer changes—despite the pro-bargaining policy of the National Labor Relations Act, the established principle that dues checkoff is a mandatory subject of bargaining, and the absence of any imperative in either the Act or the Taft-Hartley Act to treat dues checkoff differently. For more than 50 years, the *Bethlehem Steel* rule has been a result in

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wages should be permitted under Sec. 8(a)(5)), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

[10] *Encino Motorcars, LLC v. Navarro*, 579 U.S. __, 136 S.Ct. 2117, 2125–2126 (2016).

[11] Notably, my colleagues do not adopt several, meritless arguments made by the dissenting Board members in *Lincoln Lutheran*, including that only Congress could alter the *Bethlehem Steel* rule. Nor do my colleagues advance equally unpersuasive arguments made in *Lincoln Lutheran* by the respondent employer and an amicus there.

[12] *Lincoln Lutheran*, 362 NLRB at 1658–1659. The Board explained:

> Section 302(c)(4), an exception to the prohibition on employer payments to unions in Section 302(a) of the Act, specifically permits dues checkoff and further states, "Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment *which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner*" (emphasis added). The plain terms of this provision indicate that Congress contemplated that a dues-checkoff arrangement could continue beyond the life of the collective-bargaining agreement establishing it, as it contains no language making dues-checkoff arrangements dependent on the existence of a collective-bargaining agreement.

Id. (internal footnote omitted).

[13] Id. at 1656.

[14] Id. & fn. 3, citing, inter alia, *Tribune Publishing Co.*, 351 NLRB at 197

[15] *Katz*, 369 U.S. at 747.

[16] *Litton Financial*, 501 U.S. at 198.

[17] *Lincoln Lutheran*, 362 NLRB at 1656.

[18] Id. at 1657.

[19] Id. (emphasis in original).

[20] Id. at 1658.

search of a rationale. That remains true today, despite the majority's attempt to supply the required explanation.[21]

To be sure, the Act itself does not compel the Board to treat an employer's unilateral cessation of dues checkoff as a violation of the statutory duty to bargain. The Board presumably has the option of adopting the *Bethlehem Steel* rule, *if* the Board could demonstrate that the rule was rational and consistent with the National Labor Relations Act[22] and if the Board engaged in the reasoned decisionmaking required by the Administrative Procedure Act. As the Supreme Court has observed, "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."[23] Today's decision fails this test. The "contract creation" rationale for the *Bethlehem Steel* rule is arbitrary. The majority's conclusion here does not follow from its purported premises, including the statutory policies and labor-law principles that the majority says it adheres to.

The majority seeks to justify the *Bethlehem Steel* rule by equating dues checkoff with the handful of other employment terms that the Board has held are *not* subject to an employer's duty to maintain the status quo after a collective-bargaining agreement expires: arbitration provisions, no-strike clauses, and management-rights clauses. The *Lincoln Lutheran* Board, of course, explained what these terms had in common: "In agreeing to each of these terms, . . . parties have waived rights that they otherwise would enjoy in the interest of concluding a collective-bargaining agreement, and such waivers are presumed not to survive the contract."[24] A dues-checkoff provision, in contrast, "does not involve the contractual surrender of any statutory or nonstatutory right by a party to the agreement."[25] The majority, however, argues that a dues-checkoff provision *does* have a crucial common characteristic with arbitration provisions, no-strike clauses, and management-rights clauses, which makes all of those terms different from those terms and conditions of employment that are subject to an employer's duty to maintain the status quo after a contract expires. The excepted terms "are uniquely of a contractual nature," because they "cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound," while other employment terms "can exist from the commencement of a bargaining relationship."[26] The majority goes on, at length, to insist on this supposed "fundamental distinction" and the "uniquely contractual basis for each of the subjects excepted from the *Katz* unilateral change doctrine." The majority's "fundamental distinction," however, is artificial, and its premise is contrary to well-established principles of Board law.

The key points here are indisputable. An employer's statutory duty to maintain the status quo applies after a collective-bargaining agreement expires, and the status quo is defined *by the terms of the expired agreement* that address mandatory subjects of bargaining.[27] Thus, as the Supreme Court has observed, "an employer's failure to honor the terms and conditions of an expired collective-bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of . . . the National Labor Relations Act."[28] This rule, the Court explained, is derived from the reality that "[f]reezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a noncoercive atmosphere that is conducive to serious negotiations on a new contract."[29] In short—unless the Board has recognized an exception for particular terms in the expired agreement—those terms must be honored by the employer. All those terms are "contractual" in the sense that they were established by the agreement, but all are subject to the statutory duty to maintain the status quo. There is nothing "uniquely of a contractual nature" (as the majority

[21] My colleagues are not the first to recognize that the Board failed to provide a coherent explanation for its *Bethlehem Steel* rule for decades. See, e.g., *Hacienda Resort Hotel & Casino*, 355 NLRB 742, 745 (2010) (Members Schaumber and Hayes, concurring). Indeed, the Ninth Circuit has flatly rejected the Board's application of *Bethlehem Steel* in one case, finding that the Board failed to engage in reasoned decisionmaking and that therefore *Bethlehem Steel* was an arbitrary rule. *Local Joint Executive Board*, 657 F.3d at 872. There is no federal appellate court decision upholding the Board's application of the *Bethlehem Steel* rule in the face of a challenge to the rule itself. Nor has any court had occasion to address the *Lincoln Lutheran* rule.

[22] See *Litton Financial*, 501 U.S. at 200 (Board is entitled to judicial deference in applying unilateral change doctrine and exclusions from scope of doctrine).

[23] *Allentown Mack*, 522 U.S. at 374.

[24] 362 NLRB at 1657.

[25] Id. at 1658.

[26] The majority here quotes with approval from the concurring opinion of Member Schaumber and Member Hayes in *Hacienda Resort Hotel & Casino*, 355 NLRB at 745. The Schaumber-Hayes position was rebutted by the concurring opinion of Chairman Liebman and Member Pearce, who correctly described the asserted "contract-based distinction" as "nonexistent," pointing out that the "economic terms of a collective-bargaining agreement, such as wage rates, are no less contractual requirements than is a dues-checkoff obligation" and that the "agreement is the only source of the employer's obligation to provide those particular wages . . . ." Id. at 743.

[27] See, e.g., *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3 (2019) ("Contractual obligations generally end once the agreement expires, . . . but an employer still has a statutory duty to maintain the status quo on mandatory subjects of bargaining . . . .").

[28] *Laborers Health & Welfare Trust Fund*, 484 U.S. at 544 fn. 6, quoting *Laborers Health & Welfare Trust Fund of Northern California v. Advanced Lightweight Concrete Co.*, 779 F.2d 497, 500 (9th Cir. 1985).

[29] Id.

puts it) about a dues-checkoff provision that distinguishes it from the other contractual terms that the employer must honor.

The majority argues that a dues-checkoff obligation "cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound."[30] However, nothing in Section 8(a)(3) of the National Labor Relations Act, and nothing in Section 302 of the Taft-Hartley Act, requires that dues checkoff (in contrast to a union-security provision) ever be embodied in a collective-bargaining agreement to be lawful.[31] An employer and a certified union could lawfully agree to set up voluntary dues checkoff prior to the negotiation of a collective-bargaining agreement.[32] And even if a dues-checkoff obligation necessarily *originates* with a collective-bargaining agreement, that fact does not meaningfully distinguish it from other terms and conditions that are embodied in the contract and that must be honored even after the agreement expires (absent a Board-recognized exception).[33]

The majority asserts that the "uniquely contractual basis for each of the subjects excepted from the *Katz* unilateral change doctrine has been repeatedly recognized," but its assertion is a truism. Where the Board has held that the employer's obligation to honor a term embodied in the contract expires with the contract, it necessarily holds that there is no statutory obligation to maintain the status quo. Meanwhile, the Supreme Court's decision in *Litton Financial*, supra, cited by the majority, did not involve the duty to honor an expired dues-checkoff provision, but rather an arbitration provision.[34] The Court noted the Board's *Bethlehem Steel* rule but never suggested either that all exceptions to the *Katz* doctrine were based on a common rationale—much less the "contract creation" rationale offered by the majority here—or that all exceptions *must* be based on a common rationale.[35] That is not surprising, because the Board—as the majority concedes—had never explained the *Bethlehem Steel* rule. The majority insists that the *Lincoln Lutheran* Board was required to distinguish dues checkoff from the handful of other exceptions to the *Katz* doctrine, but that claim has it backwards: It is the majority's duty to explain why dues checkoff should be treated differently from the many other mandatory subjects of bargaining that are *subject* to the *Katz* doctrine. The majority has failed to do so.

Just like other unilateral changes in mandatory subjects of bargaining, an employer's unilateral cessation of dues checkoff undermines the collective-bargaining process, and the status of the union as the bargaining representative of employees, as the *Lincoln Lutheran* Board carefully explained.[36] Citing *Katz*, the *Lincoln Lutheran* Board observed that "an employer's *unilateral* action regarding its employees' terms and conditions of employment, by definition, frustrates the statutory objective of establishing terms and conditions of employment through *collective* bargaining and interferes with employees' Section 7 rights by emphasizing to employees that there is no need for a bargaining agent."[37] Moreover, "[c]ancellation of dues checkoff eliminates the employees' existing, voluntarily-

[30] Quoting *Hacienda Resort Hotel & Casino*, 355 NLRB at 745 (Members Schaumber and Hayes, concurring).

[31] See *Lincoln Lutheran*, 362 NLRB at 1662 & fn. 26; *Hacienda Resort Hotel & Casino*, 331 NLRB 665, 670 (2010) (Members Fox and Liebman, dissenting); *Tribune Publishing Co.*, 351 NLRB 196, 197 (2007), enfd. 564 F.3d 1330, 1335 (D.C. Cir. 2009). Sec. 8(a)(3) of the Act prohibits an employer from discriminating against employees on the basis of union membership, but explicitly permits employers to "mak[e] an agreement with a labor organization . . . to require as a condition of employment membership therein . . . ." 29 U.S.C. §158(a)(3). Sec. 302(c)(4) of the Taft-Hartley Act permits employers to deduct union dues from an employee's wages if the employer "has received from [the] employee . . . a written assignment . . . ." 29 U.S.C. §186(c)(4). The Board long has held that an employer lawfully may continue dues checkoff after the expiration of a collective-bargaining agreement, even if not required to do so. See, e.g., *Lowell Corrugated Container Corp.*, 177 NLRB 169, 173 (1969), enfd. 431 F.2d 1196 (1st Cir. 1970). As the Fifth Circuit has explained, union-security arrangements "are governed by a section of the Act totally removed from the section governing dues checkoff, and . . . have a totally different purpose and rationale." *NLRB v. Atlanta Printing Specialties & Paper Products Union*, 523 F.2d 783, 786 (5th Cir. 1975).

[32] Dues-checkoff arrangements need not be embodied in collective-bargaining agreements to be valid under Sec. 302(c)(4). See, e.g., *Tribune Publishing Co.*, 564 F.3d at 1335.

[33] The logical consequences of the majority's position are untenable. For example, it is well settled that if an employer and a union agree to a wage rate during collective bargaining and they incorporate that rate in their contract, the contractual rate defines the status quo for purposes of the *Katz* doctrine after the contract expires. However, under the majority's "contract creation" rationale, the employer seemingly would be permitted to unilaterally cease paying the contractual rate once the contract expires and could instead revert to paying its precontract, unilaterally-set rate. Thus, the majority's position would gut the postexpiration *Katz* doctrine.

[34] *Litton Financial*, 501 U.S. at 199–201.

[35] Id. at 199. The Court observed that "it [was] the Board's view that union security and dues check-off provisions are excluded from the unilateral change doctrine because of statutory provisions which permit these obligations only when specified by the express terms of a collective-bargaining agreement." Id., citing Sec. 8(a)(3) and Taft-Hartley Sec. 302(c)(4). To be clear, however, the Board's position at the time (1991) was that while an employer was not required to maintain dues checkoff after contract expiration, the employer was permitted to do, i.e., there was no statutory prohibition. See, e.g., *Lowell Corrugated Container Corp.*, 177 NLRB at 173. In upholding the Board's position with respect to arbitration provisions, meanwhile, the *Litton Financial* Court explained that the rule that such provisions do not survive contract expiration for purposes of the *Katz* doctrine "is grounded in the strong statutory principle . . . of consensual rather than compulsory arbitration." 501 U.S. at 200.

[36] 362 NLRB at 1656–1657.

[37] Id. at 1656 (emphasis in original).

chosen mechanism for providing financial support to the union," making it more difficult for employees to maintain their union membership (and with it, the right to participate in the union's decisionmaking) and interfering with the union's ability to focus on bargaining, rather than on shoring up its financial support.[38]

According to the majority, however, "[i]t is the holding in *Lincoln Lutheran*, not the one in *Bethlehem Steel*, that undermines and conflicts with the statutory bargaining process." This is a remarkable claim: that a rule that permits an employer to act *without* bargaining (*Bethlehem Steel*) is somehow better for the "statutory bargaining process" than a rule that *requires* the employer to bargain (*Lincoln Lutheran*). The majority's explanation is simply that the *Bethlehem Steel* rule was long established (if never explained) and that *Lincoln Lutheran* made a "paradigm shift in the established ground rules of the collective-bargaining relationship."[39] But, of course, the *Lincoln Lutheran* Board carefully chose to apply its new rule only prospectively.[40] And the majority's argument is doubly ironic in the wake of its recent decision in *MV Transportation*, supra. There, the majority discarded the Board's "clear and unmistakable" waiver doctrine after 70 years and retroactively applied a new rule that upended existing bargaining relationships and made it far easier for an employer to unilaterally change employees' terms and conditions of employment.[41]

It is the majority's decision here that, as in *MV Transportation*, reflects a "paradigm shift" away from the fundamental, pro-bargaining policy of the National Labor Relations Act. That should be clear from the majority's insistence that an employer's unilateral cessation of dues checkoff is a "valid economic weapon." Certainly *Bethlehem Steel* never characterized the employer's action this way. Indeed, as noted earlier, the Board has observed that "unilateral action is not a lawful economic weapon."[42] Nothing in Supreme Court precedent, the District of Columbia Circuit has observed, "allows an employer to refuse to bargain over a mandatory subject by simply declaring the refusal to be an 'economic weapon' or tactic to gain leverage in negotiations," and "[t]o condone such a proposition would make a mockery of the bargaining process."[43] To the contrary, the *Katz* Court explained that while the Board is not "empowered . . . to pass judgment on the legitimacy of any particular economic weapon used in support of *genuine* negotiations," the Board "*is* authorized to order the cessation of behavior which is in effect a refusal to negotiate," such as an employer's unilateral change in employees' terms and conditions of employment.[44]

III.

The majority unfortunately compounds the damage done by today's decision by deciding to retroactively apply the newly-revived *Bethlehem Steel* standard to this and all pending cases—in sharp contrast to the approach of the *Lincoln Lutheran* Board. In deciding whether to apply a new standard retroactively, the Board must consider "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application."[45] In a series of decisions reversing precedent, however, the majority has retroactively applied new rules even where the unfairness of doing so is clear,[46] and this case is no exception. For more than 4 years, parties have entered collective-bargaining agreements with the expectation that dues-checkoff provisions would continue after contract expiration, unless the agreement itself specified otherwise.[47] "[A] principal purpose of the Act is to promote collective bargaining, which necessarily involves giving effect to the bargains the parties have struck in

[38] Id. at 1657. The majority asserts that eliminating dues checkoff following contract expiration does not present "a significant administrative inconvenience for employees or unions in the modern world of personal and electronic finance." If this were true, then it would also follow that—contrary to the majority's position—the *Lincoln Lutheran* rule could not complicate collective bargaining and that depriving employers of the supposedly "legitimate economic weapon" of ceasing dues checkoff would be of little consequence.

[39] The majority also speculates that the *Lincoln Lutheran* rule might make dues checkoff "a considerably more divisive bargaining subject," because unions will seek to win and keep checkoff provisions, while employers will be reluctant to agree to and to perpetuate them. This speculation proves too much, for at bottom it suggests that bargaining would be easier if the number of mandatory subjects were reduced (to begin, by eliminating dues checkoff from the list) and if the postexpiration *Katz* doctrine were repudiated. Bargaining might well be less divisive if it involved fewer subjects, and if employers were free to make unilateral changes as soon as the contract expired. But narrowing the scope and minimizing the effect of collective bargaining is the antithesis of federal labor policy.

[40] 362 NLRB at 1663. Here, in sharp contrast, the majority applies its decision retroactively, a mistake, as I will explain.

[41] See *MV Transportation*, 368 NLRB No. 66, slip op. at 37–38 (dissenting opinion).

[42] *Daily News of Los Angeles*, 315 NLRB at 1242.

[43] *Daily News of Los Angeles*, 73 F.3d at 414.

[44] *Katz*, 369 U.S. at 747 (emphasis added).

[45] *SNE Enterprises*, 329 NLRB 673, 673 (2005).

[46] See, e.g., *MV Transportation*, 368 NLRB No. 66, slip op. at 37–38 (dissenting opinion); *Johnson Controls, Inc.*, 368 NLRB No. 20, slip op. at 21–22 (2019) (dissenting opinion); *United Nurses & Allied Professionals (Kent Hospital)*, 367 NLRB No. 94, slip op. at 8–9 (2019) (dissenting opinion).

[47] The Board previously overruled *Bethlehem Steel* in relevant part in *WKYC-TV, Inc.*, 359 NLRB 286 (2012), a decision that was later invalidated by *NLRB v. Noel Canning*, 573 U.S. 513 (2014), because the Board lacked a valid quorum. Here, the parties entered their collective-bargaining agreement in mid-April 2014, when the *Bethlehem Steel* rule was not in effect.

concluding their collective-bargaining agreements."[48] Thus, retroactive application of today's decision will cause manifest injustice to unions that relied on *Lincoln Lutheran* in negotiating their collective-bargaining agreements.

IV.

For more than 50 years, the Board followed a rule that it did not explain—and that cannot be explained in any way that makes sense, given the declared policy of the National Labor Relations Act, which champions collective bargaining and which aims to check employers' power in the workplace, if employees freely choose a union to represent them. Just 4 years ago, the Board finally discarded the arbitrary *Bethlehem Steel* rule. In its place, the *Lincoln Lutheran* Board offered a clear, careful, and coherent explanation for taking a different approach, which actually furthered statutory policy and which eliminated an anomaly in Board doctrine. Now, the majority again has overruled precedent to diminish the scope of collective bargaining, undermine the role of unions in the American workplace, and empower employers. Its reasoning is both ironic and completely irrational—to save collective bargaining, the Board must undermine it—this seems to be the majority's view. But while the Board has discretion to interpret the National Labor Relations Act, it does not have the authority to substitute its own labor policy for the one chosen by Congress in 1935. Accordingly, I dissent.

Dated, Washington, D.C. December 16, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

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DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case alleges that Valley Hospital Medical Center unilaterally stopped making authorized union-dues deductions from employees' pay after its most recent, 2013–2016 collective-bargaining agreement with the Local Joint Executive Board of Las Vegas expired, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA).[1]

I. THE RELEVANT FACTS

Valley Hospital's 2013–2016 agreement with the Local Joint Executive Board (Culinary Workers Local 226 and Bartenders Local 165) contained numerous articles addressing various terms and conditions of employment, including "Union Security" (art. 4). The union-security article contained several sections, including one titled "Check-Off" (4.03), which stated as follows:

> 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.

The referenced Exhibit 2 contained both a "Check-off Agreement" and a "Payroll Deduction Authorization" form. The checkoff agreement provided that, pursuant to the above union-security provision, Valley Hospital agreed, "during the term of the Agreement," to deduct union membership dues (excluding initiation fees, fines and assessments) each month from the pay of those employees who had voluntarily submitted a written deduction authorization form. The deduction authorization form stated that the authorization would remain in effect and be irrevocable from year to year, regardless of whether the employee is a union member, unless the employee revoked it by sending written notice to the Company and the Union by registered mail during a period of 15 days immediately succeeding any yearly period subsequent to the date of the authorization or subsequent to the date of termination of the applicable contract between the Company and the Union, whichever occurs sooner. The form also contained numerous other provisions regarding how the monthly dues deductions would be made.

The union-security article also contained a section titled "Union Shop" (4.01). The section stated that, "subject to the provisions of the Labor Management Relations Act, 1947, as amended," all employees were required, as "a condition of their employment," to become and remain members of the Union "throughout the period of their employment" with the Company.[2] However, the following section (4.02), titled, "Effect of State Laws," stated that the union shop provision would not be applicable if it conflicted with applicable law. Nevada is a so-called "right to work" state and outlaws such provisions (Nev. Rev. Stat. 613.230–613.300). Thus, the union shop provision was void and inapplicable to the bargaining unit employees.

[48] *Babcock & Wilcox*, 361 NLRB 1127, 1140 (2014).

[1] The Union filed the underlying charge on January 26, 2018, and the NLRB Regional Director issued the complaint and notice of hearing on May 10. Thereafter, on August 3, the General Counsel and the Company filed an unopposed motion under Sec. 102.35(a)(9) of the Board's Rules requesting that the case be decided by an administrative law judge based on an attached stipulation of facts and supporting exhibits. Associate Chief Administrative Law Judge Gerald Etchingham granted the motion on August 6, and the General Counsel, the Company, and the Union thereafter filed briefs on September 10. The Board's jurisdiction is uncontested and established by the Company's admissions and stipulations of fact.

[2] Under the LMRA, employment may be conditioned on union membership, but union membership may be conditioned only on the payment of fees and dues; thus "membership" as a condition of employment "is whittled down to its financial core." *NLRB v. General Motors Corp*., 373 U.S. 734, 742 (1963).

The 2013–2016 agreement expired on December 31, 2016.[3] Nevertheless, the parties continued operating under its terms thereafter, including the dues-checkoff provision, in the absence of any new agreement. However, on February 1, 2018, approximately 13 months after the agreement expired, Valley Hospital stopped deducting and remitting union dues. It did so unilaterally, without affording the Union an opportunity to bargain over the matter.[4]

II. ANALYSIS

In *Bethlehem Steel*, 136 NLRB 1500 (1962),[5] the Board held that, like union-shop or similar union-security provisions, dues-checkoff provisions that implement such union-security provisions generally terminate upon contract expiration. The Board also noted that the particular language of the checkoff provision in that case expressly linked the employer's checkoff obligation with the duration of the contract, stating that the employer would deduct union dues "so long as this Agreement shall remain in effect." Accordingly, the Board held that the employer did not violate Section 8(a)(5) of the Act by unilaterally ceasing such dues deductions after the agreement expired.

Thereafter, in *Tampa Sheet Metal*, 288 NLRB 322, 326 fn. 15 (1988), the Board reached the same conclusion—that the employer there lawfully ceased deducting union dues after the contract expired—even though the subject facility was in a right-to-work state (Florida) and the dues-checkoff provision in the expired contract therefore did not implement any such union-security provision. Further, unlike in *Bethlehem Steel*, the Board did so without referring to or relying on the particular language of the dues-checkoff provision.

The Board subsequently reaffirmed this precedent in *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000) (*Hacienda I*), a case involving the very same union and dues-checkoff provisions as here.[6] Like here, the employer in that case had ceased deducting union dues about a year after the parties' agreement expired. The Board held that *Bethlehem Steel* and its progeny, including *Tampa Sheet Metal*, established a "bright line rule" that an employer's dues-checkoff obligation terminates at contract expiration, and that Hacienda's unilateral action was therefore lawful. The Board also noted that, like in *Bethlehem Steel*, the dues-checkoff provision "clearly tie[d] the checkoff agreement to the duration of the contracts," but the Board did not base its decision on that language. Id. at 667.

The Union subsequently appealed, however, and the Ninth Circuit remanded on the ground that the Board had failed to provide any rationale for applying the *Bethlehem Steel* rule in a right to work state. The court instructed the Board on remand to "articulate a reasoned explanation for the rule it adopted, or adopt a different rule and present a reasoned explanation to support it." *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578, 586 (2002).

On remand, the Board reached the same result, but did so for the language-specific reason it had disclaimed reliance on in *Hacienda I*. That is, the Board found that the employer lawfully ceased deducting dues after the contract expired because the dues-checkoff provision and exhibit 2 contained "clear language linking dues-checkoff to the duration of the agreement," and that the Union "thereby explicitly waived any right to the continuation of dues checkoff as a term and condition of employment" after expiration of the agreement. The Board therefore found it unnecessary to address the issue that had engendered the court's remand, i.e., whether or why dues-checkoff provisions should terminate as a general rule. 351 NLRB 504, 505 (2007) (*Hacienda II*).

The Union again appealed, however, and the Ninth Circuit rejected the Board's alternative, language-specific ground for finding that the employer's dues-checkoff obligation terminated. The court held that the Board's decision was clearly inconsistent with prior Board decisions finding that similar contractual language failed to satisfy the "clear and unmistakable waiver" test set forth in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).[7] The court therefore again remanded the case to the Board, repeating its original instruction to "explain the rule it adopted in *Hacienda I*, or abandon *Hacienda I* to adopt a different rule and present a reasoned explanation for it." 540 F.3d 1072, 1083 (2008).

Unfortunately, on remand, one of the Board members was recused and the remaining four deadlocked 2–2 and could not reach a majority view regarding the appropriate general rule. Accordingly, as the court's decision had "closed" the "'clear and unmistakable' escape hatch" (540 F.3d at 1082), the Board simply reaffirmed its original decision in *Hacienda I* applying the general rule of *Bethlehem Steel* and its progeny, without providing any additional reasoning or explanation. 355 NLRB 742 (2010) (*Hacienda III*).

Not surprisingly, the Union again appealed, and the Ninth Circuit again found the Board's response to its remand inadequate. Further, instead of issuing another remand, which the court concluded would be "futile," the court considered and addressed the issue de novo. The court found that there was no justification for applying *Bethlehem Steel* in a right-to-work state where dues

[3] The 2013–2016 agreement provided (art. 31) that it would continue "in full force and effect" from "year to year thereafter" absent 90 days written notice to change, modify or terminate it, and there is no dispute that the parties were still operating under the agreement's terms at the time of the relevant events here. However, the parties all agree that the agreement expired on December 31, 2016. See the Company's brief at 2; the Union's brief at 3; and the General Counsel's brief at 14.

[4] See Valley Hospital's January 26, 2018 notice of its decision. Valley Hospital admits that it did not provide the Union an opportunity to bargain before subsequently implementing its decision on February 1.

[5] Remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

[6] Although not entirely clear, it appears that the union security clause in *Hacienda* also contained a union shop provision, which was likewise nullified by a provision regarding the effect of State laws. See *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1076 (9th Cir. 2008).

[7] The Board did not dispute before the court that the *Metropolitan Edison* "clear and unmistakable waiver" standard applied. 540 F.3d at 1075. Rather, consistent with its decision, the Board argued that the waiver was in fact clear. Id. at 1080. It also argued that the prior Board decisions cited by the court were factually distinguishable. Id. at 1081 fn. 13 and 14.

checkoff did not exist to implement union security. The court therefore held that, in such situations, "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 657 F.3d 865, 876 (2011).

This was the state of Board and Ninth Circuit law at the time Valley Hospital and the Union executed their 2013–2016 agreement.[8] However, Board law with respect to the appropriate general rule subsequently changed significantly in 2015, during the term of the parties' agreement. The Board at that time went even farther than the Ninth Circuit, rejecting the general rule of *Bethlehem Steel* and its progeny even where the expired agreement also contained a valid union shop or similar union-security provision.[9] *Lincoln Lutheran of Racine*, 362 NLRB 1635 2015). Accordingly, the Board overruled those decisions and held that "like most other terms and conditions of employment, an employer's obligation to check off union dues continues after expiration of a collective bargaining agreement that establishes such an arrangement." Supra at 1635–1636.

Citing the foregoing Board and Ninth Circuit precedent—both the Board's 2015 *Lincoln Lutheran* decision and the Ninth Circuit's 2011 decision in *Local Joint Executive Board*—the General Counsel and the Union argue that Valley Hospital's February 2018 postexpiration refusal to continue making authorized dues deductions was clearly unlawful. However, as indicated by Valley Hospital (Br. 4), in doing so the General Counsel and the Union ignore the language of the dues-checkoff provision and exhibit 2. As indicated above, the Board in *Hacienda II* held that the identical language clearly limited the employer's dues-checkoff obligation to the duration of the agreement. Although the Ninth Circuit in 2008 rejected the Board's decision in *Hacienda II*, the Board itself has never expressly overruled it.[10] In *Lincoln Lutheran*, the dues-checkoff provision did not contain any limiting language. See slip op. at 1 fn. 2. Thus, there was no need in that case to revisit the Board's holding in *Hacienda II*, and the Board did not do so.[11] Rather, the Board in a footnote simply acknowledged that, notwithstanding its new general rule, parties could "expressly and unequivocally" agree otherwise, i.e., that a union could choose to waive its right to bargain over an employer's postexpiration unilateral changes to dues checkoff, and that such a waiver would be valid if it was "clear and unmistakable." Slip op. at 9 fn. 28.

It could be argued that other Board decisions have implicitly overruled *Hacienda II*. See *Finley Hospital*, 362 NLRB 915 (2015) (employer's unilateral postexpiration discontinuation of pay raises was unlawful notwithstanding that the relevant contract provision thrice stated that the rate increases would apply "during the term" or "for the duration" of the agreement), enf. denied 827 F.3d 720 (8th Cir. 2016); and *Wilkes-Barre General Hospital*, 362 NLRB 1212 (2015) (same, notwithstanding that the agreement stated that the negotiated wage scale and increases would apply "during the term" of the agreement), enfd. 857 F.3d 364 (D.C. Cir. 2017). However, as indicated by the Ninth Circuit, the Board had issued similar decisions regarding virtually identical language even before *Hacienda II*. Further, the Board in *Finley Hospital* specifically distinguished *Hacienda II* on the ground that, under then-current Board law, dues checkoff was an exception to the general rule requiring employers to maintain contractual terms postexpiration. 918 fn. 7. As indicated above, that was likewise still the Board law at the time Valley Hospital and the Union executed the 2013–2016 agreement containing the same language.[12] Finally, neither the General Counsel nor the Union argue that *Hacienda II* has been implicitly overruled; as indicated above, they both ignore the issue altogether.

It might also be argued that, even assuming the contract language clearly permitted Valley Hospital to cease deducting dues upon contract expiration, the Company's continued deduction of dues for over a year after the agreement expired created a past practice preventing it from unilaterally discontinuing such deductions without bargaining. Cf. *Encino Hospital Medical Center*, 364 NLRB No. 128, slip op. at 10 (2016) (finding that the hospital's unilateral postexpiration cessation of anniversary step wage increases was unlawful in part because the hospital had continued granting such increases for 7 months after the contract expired), enfd. 890 F.3d 286 (D.C. Cir. 2018).[13] However, as indicated above, the employer in *Hacienda* likewise did not

[8] The parties executed the agreement in April 2014, retroactive to January 1, 2013.

[9] The Ninth Circuit in *Local Joint Executive Board* did not "express[ ] an opinion on the wisdom of the rule of *Bethlehem Steel,*" but stated that it could "see why the Board would treat duescheckoff in the same manner as union security where both are present." 657 F.3d at 875. See also the court's subsequent decision on appeal of the Board's decision on remand regarding the appropriate remedy, 883 F.3d 1129, 1136 (2018) ("As for *Bethlehem Steel*, we explicitly declined to 'express[ ] an opinion on the wisdom of the rule' in that case. Rather, we merely held that the rule in *Bethlehem Steel* did not apply when, as here, there is no union security clause for dues-checkoff to implement."), vacating and remanding 363 NLRB No. 7 (2015).

[10] The Board does not acquiesce in contrary circuit court precedent, but will instead regard such court rulings as the law of the case only. See *D.L. Baker, Inc*., 351 NLRB 515, 529 fn. 42 (2007) (summarizing the reasons for the Board's nonacquiescence policy). Accordingly, administrative law judges must follow and apply extant Board precedent unless and until it is overruled by the Supreme Court or the Board itself. Ibid. See also *Western Cab Co*., 365 NLRB No. 78, slip op. at 1f n. 4 (2017).

[11] There was also no need to address the particular language of the dues-checkoff provision because the Board declined to apply its new general rule retroactively, and therefore dismissed the complaint based on the old general rule.

[12] See *Hacienda I*, 331 NLRB at 667 ("It is axiomatic that contract negotiations occur in the context of existing law, and, therefore, a contract provision must be read in light of the law in existence at the time the agreement was negotiated. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956); and *NLRB v. Southern California Edison Co*., 646 F.2d 1352, 1365 (9th Cir. 1981)."). Although the Ninth Circuit in 2008 and 2011 had rejected the Board's positions regarding both the general rule and the particular duration language, the General Counsel and the Union do not argue that the duration language of the dues-checkoff provision in the 2013–2016 agreement should be interpreted or evaluated differently as a result.

[13] The Board has held that it is not unlawful for an employer to continue deducting dues after the contract expires pursuant to valid and unrevoked employee checkoff authorizations. See *Tribune Publishing Co*., 351 NLRB 196, 197 fn. 8 (2007), enfd. 564 F.3d 1330 (D.C. Cir. 2009); *Frito-Lay*, 243 NLRB 137, 138 (1979); and *Lowell Corrugated*

discontinue dues deductions until a year after the contract expired. Yet, the General Counsel did not allege, and the Board did not find, a violation on that basis in *Hacienda II*. See also *West Co*., 333 NLRB 1314, 1315 fn. 6, 1320 (2001) (finding no violation even though the employer did not discontinue dues checkoff until several months after the contract expired). And, again, neither the General Counsel nor the Union has argued that a violation should be found on that basis here.

Accordingly, contrary to the complaint, Valley Hospital did not violate Section 8(a)(5) and (1) of the Act by failing to continue deducting and remitting union dues in February 2018.

On these findings of fact and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., September 19, 201

Container Corp., 177 NLRB 169, 173 (1969), enfd. 431 F.2d 1196 (1st Cir. 1970). See also *Lincoln Lutheran*, slip op. at 7.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.