Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino *and* Sahara Nevada Corp. d/b/a Sahara Hotel and Casino *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226, and Bartenders Union Local 165. Cases 28–CA–13274 and 28–CA–13275

August 27, 2010

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER PEARCE, AND HAYES

This case, which presents the issue of whether dues-checkoff is subject to the unilateral-change doctrine articulated in *NLRB v. Katz*, 369 U.S. 736 (1962), is on remand to the National Labor Relations Board, from the United States Court of Appeals for the Ninth Circuit, for the second time. As we will explain, the participating members of the Board are divided on the remanded issue, which would require the Board either to offer a new explanation for its existing rule or to overrule precedent. Our established decisionmaking practices prevent us from resolving this division in the current circumstances. Accordingly, we dismiss the complaint.

I.

On July 7, 2000, the National Labor Relations Board issued its original Decision and Order in this proceeding, finding that the Respondents, Hacienda Resort Hotel and Casino and Sahara Hotel and Casino, did not violate Section 8(a)(5) and (1) of the Act by unilaterally ceasing dues checkoff after the parties' collective-bargaining agreements expired.[1] This result was compelled by our decisions in *Bethlehem Steel Co.,* 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB,* 320 F.2d 615 (3d Cir. 1963), and *Tampa Sheet Metal Co.,* 288 NLRB 322 (1988).[2] Thereafter, the United States Court of Appeals for the Ninth Circuit vacated the Board's Decision and Order and remanded the case to the Board for further consideration consistent with the court's opinion.[3]

On September 29, 2007, the Board issued a Supplemental Decision and Order affirming, on different grounds, its finding that the Respondent did not violate Section 8(a)(5) and (1) of the Act.[4] The Union petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board's Supplemental Decision. On August 27, 2008, the Ninth Circuit granted the petition for review, vacated the Board's Supplemental Decision and Order, and again remanded the case to the Board for further proceedings consistent with the court's opinion.[5]

In remanding this case to the Board for a second time, the court framed the issues presented by the remand as follows: "[T]he question squarely in front of the Board is whether dues-checkoff is a mandatory subject of bargaining."[6] The court concluded with the following instruction: "We again instruct the Board to explain the rule it adopted in *Hacienda I*, or abandon *Hacienda I* to adopt a different rule and present a reasoned explanation to support it."[7]

On November 5, 2008, the Board notified the parties that it had decided to accept the remand from the Ninth Circuit and invited the parties to file statements of position with respect to the issues raised by the remand. Thereafter, the General Counsel, the Charging Party, and amicus curiae AFL–CIO each filed a statement of position.

II.

The four members of the Board eligible to participate in the decision of this case have carefully considered the court's remand and have reached opposing views, as reflected in their separate opinions.[8] In view of this deadlock, we have determined to follow existing precedent and affirm the administrative law judge's recommended Order dismissing the complaint.

ORDER

The complaint is dismissed.

CHAIRMAN LIEBMAN and MEMBER PEARCE, concurring.

We concur in the dismissal of the complaint. We write separately to express our substantial doubts about the validity of *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 621 (3d Cir. 1963), and its progeny, particularly as applied in right-to-work states, where the collective-bargaining agreement contains no union-security clause.

As explained more fully in the dissenting opinion in *Hacienda I*, the Board has never provided an adequate statutory or policy justification for the holding in *Bethlehem Steel* excluding dues-checkoff from the unilateral change doctrine articulated in *NLRB v. Katz*, 369 U.S.

[1] 331 NLRB 665 (2000) (*Hacienda I*).

[2] *Hacienda I,* 331 NLRB at 666–667. Members Fox and Liebman dissented on grounds that *Bethlehem Steel,* and by extension *Tampa Sheet Metal,* should be overruled. Id. at 668–671.

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

[4] 351 NLRB 504 (Members Liebman and Walsh dissenting) (*Hacienda II*).

[5] 540 F.3d 1072.

[6] Id. at 1082.

[7] Id.

[8] Member Becker has recused himself and took no part in the consideration of this case.

736, 743 (1962). Further, even assuming that *Bethlehem Steel* was correctly decided, the Board has never provided a reasoned analysis for applying the holding in *Bethlehem Steel* in a right-to-work context where dues checkoff could not lawfully be linked with union-security arrangements.

It is the tradition of the Board that the power to overrule precedent will be exercised only by a three-member majority of the Board.[1] In the absence of a three-member Board majority to overrule established precedent, we reluctantly join our colleagues in affirming the judge's dismissal of the complaint allegations. In an appropriate case, we would consider overruling *Bethlehem Steel* and its progeny, including *Tampa Sheet Metal*, 288 NLRB 322, 326 fn. 15 (1988).

In their concurring opinion, our colleagues Member Schaumber and Member Hayes acknowledge that the Board has never adequately explained the basis for excepting dues checkoff from the postimpasse rule of *Katz*. They maintain, however, that there do exist reasons sufficient to justify the exception, albeit not previously articulated by the Board. The concurrence advances four arguments in support of the dues-checkoff exception: (1) dues checkoff is "uniquely of a contractual nature," unlike "wages, pension and welfare benefits," and other terms that may not be unilaterally changed upon contract expiration; (2) a presumption that dues checkoff be coterminous with union security "is supported by the language of [LMRA Section] 302(c)(4)"; (3) "an employer's ability to cease dues checkoff upon contract expiration has become a recognized weapon" in the statutory scheme; and (4) unlike terms covered by the unilateral change doctrine, "[d]ues-checkoff provisions do not mandate monetary payments by employees or otherwise affect the wages, hours, and conditions under which employees work." None of these arguments persuades us.

The principal argument of the concurrence rests on a supposed distinction between "wages, pension and welfare benefits [and] hours," on one hand, and "uniquely contractual" terms such as "the obligation to checkoff dues" on the other. The contract-based distinction that our colleagues attempt to draw is nonexistent. The economic terms of a collective-bargaining agreement, such as wage rates, are no less contractual requirements than is a dues-checkoff obligation. The agreement is the only source of the employer's obligation to provide those particular wages and benefits.

Our colleagues' example of pension and welfare benefits highlights the complete absence of any contract-based distinction that might justify treating dues checkoff differently from other terms that survive contract expiration. Employer contributions to a union-sponsored pension or welfare fund are commonly provided for in collective-bargaining agreements. Unlike wages, vacation pay, or dues checkoff, however, they may not lawfully be paid unless "the detailed basis on which such payments are to be made is specified in a written agreement [between the union and] the employer." Labor Management Relations Act, 1947 (LMRA) § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B). Dues checkoff is addressed in the same statutory provision, and the requirement of a written agreement is conspicuously absent from the otherwise parallel clause. LMRA § 302(c)(4), 29 U.S.C. § 186(c)(4). Ironically, this provision of the LMRA suggests that it is pension and welfare benefits, not dues checkoff, that are "uniquely of a contractual nature." Yet the obligation to remit contributions to pension and welfare funds is indisputably a term of employment that may not be unilaterally changed upon contract expiration. See *Laborers Health & Welfare Trust Funds for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988) (collecting cases).

The claim by the concurrence that the language of LMRA § 302(c)(4) supports a presumption that dues checkoff must terminate at the same time as union security—that is, upon contract expiration—is at odds with the plain language of the statute. Section 302 contains no reference to union security, whether in connection with dues checkoff or otherwise. To the contrary, the language of Section 302 demonstrates that the continuation of dues

[1] See *Chicago Truck Drivers Local 101 (Bake-Line Products)*, 329 NLRB 247, 254 (1999) ("it is not the Board's usual practice to overrule prior cases by the votes of two of a three-member panel"). See, e.g., *DaimlerChrysler Corp.*, 344 NLRB 1324 fn. 1 (2005) (two members of three-member Board declined to overrule precedent in the absence of a third vote); *Tradesmen International*, 338 NLRB 460 (2002) (same); *Temple Security*, 337 NLRB 372, 373 fn. 7 (2001) (on remand from the U.S. Court of Appeals for the Seventh Circuit, the Board declined to overrule precedent in the absence of a third vote); *G.H. Bass Caribbean, Inc.*, 306 NLRB 823, 833 fn. 2 (1992) (with one vacancy and one member recused from participating in the case, the Board declined to overrule precedent with only two votes); *Atlantic Interstate Messengers, Inc.,* 274 NLRB 1144 fn. 3 (1985) (two members of three-member Board declined to overrule precedent in the absence of a third vote); *Redway Carriers, Inc.*, 274 NLRB 1359 fn. 4 (1985) (two members of three-member Board stated that they considered themselves "institutionally bound to apply [existing] precedent" in the absence of three votes to overrule it).

During those relatively rare periods when it has had only three members, the Board has not hesitated to reverse prior decisions, where there was a unanimous vote to do so. See, e.g., *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 777 fn. 3 (1997); *Laborers Northern California Council (Baker Co.)*, 275 NLRB 278, 280 fn. 15 (1985); *Prudential Insurance Co.*, 275 NLRB 208, 210 (1985); *SDC Investment, Inc.*, 274 NLRB 556, 557 fn. 2 (1985); *Sears, Roebuck & Co.*, 274 NLRB 230 (1985); *United Artists Communications, Inc.*, 274 NLRB 75 (1985); *Lycee Francais de New York*, 273 NLRB 1538, 1539 fn. 3 (1985); *Ducane Heating Corp.*, 273 NLRB 1389, 1390 (1985).

checkoff after contract expiration was treated as the legal norm by the Taft-Hartley Congress. Section 302 generally prohibits employer payments to unions, but includes in a list of enumerated exceptions to the general rule an exception for dues checkoff:

> (c) The provisions of this section shall not be applicable . . . (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: 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[.]

29 U.S.C. § 186(c)(4). Section 302(c)(4) does not require that dues-checkoff arrangements be made pursuant to, or limited to the term of, a collective-bargaining agreement. Indeed, the provision addressing revocation of checkoff authorizations after expiration of a collective-bargaining agreement shows that Congress clearly contemplated that employees who did not choose to revoke their authorizations would continue to have their dues checked off after the contract has expired. Id.

The concurrence also contends that the ability to cease dues-checkoff upon contract expiration has become a recognized economic weapon, and asserts that "[t]o strip employers of that [weapon] would significantly alter the playing field that labor and management have come to know and expect." As the Board and courts have repeatedly recognized, however, the availability of economic weaponry is subject to one crucial qualification—the party utilizing it must at the same time be engaged in lawful bargaining. This point was emphasized in *Katz,* where the Supreme Court, while recognizing that the Board "may not pass judgment on the legitimacy of any particular economic weapon used in support of genuine negotiations," made clear that the Board "is authorized to order the cessation of behavior which is in effect a refusal to negotiate." 369 U.S. at 747 (internal quotations and citations omitted). Because the conduct at issue in this case falls within the category of conduct that the *Katz* Court found unlawful (and therefore not a legitimate economic weapon), our colleagues' argument necessarily fails. As the Board has emphasized in other contexts, "the Board's statutory mandate is to balance not economic weapons, but conflicting legitimate interests." *Charles D. Bonanno Linen Service,* 243 NLRB 1093, 1097 (1979), enfd. 630 F.2d 25 (1st Cir. 1980), affd. 454 U.S. 404 (1982) (internal quotations and citations omitted).

Finally, the concurrence asserts that, unlike terms covered by the unilateral change doctrine, "[d]ues-checkoff provisions do not mandate monetary payments by employees or otherwise affect the wages, hours, and conditions under which employees work." On this contention, too, we disagree with our colleagues. Whatever the accuracy of this characterization of dues checkoff, the distinction it seeks to draw is meaningless for purposes of the unilateral change rule. There are many mandatory subjects of bargaining—such as union bulletin boards,[2] parking spaces,[3] and check-cashing services[4]—in connection with which no money changes hands and which have no greater effect on wages, hours, and working conditions than dues checkoff, but which have not been carved out as exceptions to the unilateral change rule. Using such a distinction to create an exception to the unilateral change rule has no basis whatsoever in Board law.

In sum, because none of our colleagues' arguments in favor of a dues-checkoff exception to the unilateral change rule of *Katz* finds support in law or logic, we are unable to join in their position.

MEMBER SCHAUMBER and MEMBER HAYES, concurring.

This case, which has a lengthy history before the Board and the Ninth Circuit, concerns a surprisingly narrow issue: whether, consistent with well-established Board precedent, the Respondent was privileged to cease dues-checkoff following expiration of the contract that created that obligation. In the two prior appeals to the Ninth Circuit, the Board offered explanations as to why, in its view, the obligation ceased upon contract expiration.[1] In each instance, the court found the Board's explanation inadequate.[2]

In its most recent remand, the Ninth Circuit instructed us to articulate a different rationale to justify why, in the absence of a contractual union-security provision, dues-checkoff should not be subject to the unilateral change doctrine.[3] Under that doctrine, set forth in *NLRB v.*

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[2] See *Arizona Portland Cement Co*., 302 NLRB 36 (1991).

[3] See *Dynatron/Bondo Corp.,* 324 NLRB 572, 578 (1997), enf. denied, 176 F.3d 1310 (11th Cir. 1999).

[4] See *AT&T Corp.,* 325 NLRB 150 (1997).

[1] *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000) (*Hacienda I*); and *Hacienda Resort Hotel & Casino*, 351 NLRB 504 (2007) (*Hacienda II*).

[2] *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578 (9th Cir. 2002); and *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008).

[3] 540 F.3d at 1082. In remanding this case to the Board, the court did not question the validity of the Board's *Bethlehem Steel* rule in the context of a contract that also contains a union-security clause. See *Bethlehem Steel*, 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963). As discussed below, we agree with Board and circuit court precedent that reads *Bethlehem Steel* to apply regardless of the presence

Katz,[4] most contractual terms and conditions of employment must be maintained, as a matter of law, after contract expiration as part of the status quo. As stated in the above decision and as discussed below, with one Board member recused and the others deadlocked, we are unable to offer a majority rationale that would respond to the court in the manner it directed. We thus agree with our colleagues that we are constrained by Board tradition to apply extant precedent and dismiss the complaint. Unlike our colleagues, however, we respectfully maintain that application of the Board's rule regarding post-contract expiration of the dues-checkoff obligation is warranted for important legal, policy, and equitable reasons, albeit reasons that we may have failed to adequately explain previously.

Turning first to the legal justifications, our colleagues fail to acknowledge that 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.[5] On the other hand, the obligation to checkoff 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.

Significantly, other circuit courts, in analyzing the Act, have recognized the contractual nature of dues-checkoff and that such provisions are inextricably tied to the contract itself. Both the D.C. and Seventh Circuits have held that checkoff arises under a contract and, when the contract expires, so too does the employer's obligation to adhere to the checkoff provision.[6] As those Circuits have explained, Section 8(a)(3) and Section 302(c)(4),[7] read together, limit an employer's obligation under a checkoff clause to the terms of a valid, existing agreement. See, e.g., *McClatchy Newspapers, Inc.*, supra, 131 F.3d at 1030 ("Insofar as dues check-off and union security clauses are exceptions to the post-impasse rule, however, it is not because the Board has authority to treat them as such; rather the NLRA requires that these clauses be exceptions, because they are legal only if authorized by a collective bargaining agreement"); *U.S. Can Co.*, supra, 984 F.2d at 869–870 ("Checkoff of dues and other payments from the employer to the union, like the enforcement of a union-security clause, depend on the existence

or absence of a union-security clause. See infra at fn. 5; and *Tampa Sheet Metal Co*., 288 NLRB 322, 326 fn. 15 (1988) (Board specifically applied *Bethlehem Steel* in the absence of a contractual union-security provision).

[4] See *NLRB v. Katz*, 369 U.S. 736 (1962).

[5] Relying on 29 U.S.C. Sec. 302(c)(5), our colleagues assert that employer contributions to a union-sponsored pension and welfare benefit fund, which may only be made pursuant to a written agreement specifying the detailed basis on which such payments are to be made, are no less contractual than dues-checkoff provisions, yet have been found to be terms and conditions of employment that survive the expiration of a collective-bargaining agreement under *Katz*. As an initial matter, although Sec. 302(c)(5) specifies that employer contributions to certain union trusts funds are permissible only if, inter alia, made pursuant to a detailed written agreement, the section does not prohibit employers from providing pension or welfare benefits in a different form, as through a standard company package, from the outset of the parties' bargaining relationship.

Moreover, Sec. 302(c)(5), unlike Sec. 302(c)(4), makes no reference to collective-bargaining agreements or revocation upon termination thereof. And while we agree with our colleagues that the Board has not questioned the survivability of pension and welfare benefits established under qualifying written trusts, and that employer payments to such trusts appear—as do dues-checkoff agreements—among the exceptions to prohibited employer payments to unions in Sec. 302(c), that does not mean that dues checkoff is similarly situated to pension and welfare trust payments in terms of postexpiration survivability. In our view, the difference in the two types of payments more than justifies their different treatment under *Katz*. With dues checkoff, an employer acts as a collection agent and facilitates payment of union dues from employees to the union *for the direct benefit of the union*. In contrast, an employer's contribution to a union's pension and welfare benefit fund is a monetary contribution to the employees "*for the sole and exclusive benefit of the employees*[.]" 29 U.S.C. Sec. 302(c)(5) (emphasis added).

[6] See *Office & Professional Employees Local 95 v. Wood County Telephone Co.*, 408 F.3d 314 (7th Cir. 2005); *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1030 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869–870 (7th Cir. 1993); *Microimage Display Division v. NLRB*, 924 F.2d 245, 254–255 (D.C. Cir. 1991); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986).

The Supreme Court has likewise acknowledged the special status of dues-checkoff provisions as an exception to the *Katz* rule. See *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991).

[7] Sec. 302(c)(4) generally proscribes the payment of money or other things of value to a union by an employer, but exempts union dues withheld from employee wages: "Provided, That the employer has received from each employee . . . 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[.]"

of a real agreement with the union"); and *Microimage Display Division*, supra, 924 F.2d at 254–255 ("Section 8(a)(3) of the NLRA and Sections 302(a)(2) and 302(C)(4) of the [LMRA] . . . permit an employer to make payments to a union only under a dues check-off provision contained in an effective collective bargaining agreement").[8] Thus, contrary to our colleagues' assertion, our view that dues checkoff is coterminous with the collective-bargaining agreement is not at odds with statutory wording and, in fact, is consistent with the views held by other reviewing courts addressing the Act's interpretation.

We believe that these principles, among others, underpinned the Board's decision in *Bethlehem Steel*, which we would not read as narrowly as our colleagues. There, the Board noted that the union's right to dues checkoff "*like* its right to the imposition of union security was created by the contracts" and continued to exist only as long as the contracts remained in force.[9] However, the Board did not expressly tie the contractual nature of dues checkoff to the existence of a union-security provision. Of course, in light of 8(a)(3)'s specific language limiting union security to the life of a contract, it is reasonable to presume that where parties have union security and checkoff, their intent is for the provisions to be coterminous—i.e., only for the duration of the contract. However, even where there is no union-security provision, a similar presumption regarding dues checkoff is supported by the language of Section 302(c)(4).[10]

Further, like strikes and lockouts, an employer's ability to cease dues checkoff upon contract expiration has become a recognized economic weapon in the context of bargaining for a successor agreement. The ability of parties to wield such weapons is "part and parcel" of the system that the Wagner and Taft-Hartley Acts envisioned.[11] To strip employers of that opportunity would significantly alter the playing field that labor and management have come to know and expect.[12]

There is yet another aspect of dues-checkoff provisions distinguishing them from terms and conditions of employment that automatically survive contract expiration under *Katz*. Dues-checkoff provisions do not mandate monetary payments by employees or otherwise affect the wages, hours, and conditions under which employees work.[13] Instead, they merely memorialize an administrative process pursuant to which the parties agree that an employer will act as the union's collection agent during the term of a collective-bargaining agreement. The provisions are thus rooted in the employer-union relationship, function as a negotiated employer accommodation to a union, and do not substantially affect employees' terms and conditions of employment. At all times, the union is free to collect dues owed directly from employees and the employee-union and union-employer relationships remain unchanged.

In sum, the aforementioned legal characteristics of dues-checkoff provisions support adhering to the precedent that counts them among recognized exceptions to the *Katz* rule. There are as well policy and equitable considerations that supplement our legal argument. The general rule that an employer's dues-checkoff obligation terminates at contract expiration is a well-established tenet of Board jurisprudence and has become part of the fabric of our national labor policy. Established nearly 50 years ago, this bright-line rule has been uniformly applied by the Board, even in right-to-work states, where parties cannot legally negotiate union-security provi-

[8] To the extent the D.C. and Seventh Circuit decisions suggest that it would be unlawful for an employer to continue honoring a dues-checkoff provision after contract expiration, the Board has held, and we agree, that an employer may do so without violating the Act. See *Frito-Lay*, 243 NLRB 137 (1979); and *Lowell Corrugated Container Corp*., 177 NLRB 169 (1969), enfd. 431 F.2d 1196 (1st Cir. 1970).

[9] *Bethlehem Steel*, supra, 136 NLRB at 1502 (emphasis added).

[10] Member Schaumber notes that dues checkoff is closely tied to the Sec. 7 right of employees to refrain from assisting a labor organization, a right reinforced in 302(c)(4)'s requirements for a specific written authorization which shall not be irrevocable beyond the termination date of the applicable collective-bargaining agreement. Given the importance of this right, the Board should not infer that employees intended to continue to support a union through dues deduction after a collective-bargaining agreement expires, particularly where, as here, the contract ties checkoff to the duration of the agreement and the Board has consistently interpreted similar contract language as permitting discontinuation of checkoff at contract expiration. Member Schaumber recognizes that the Ninth Circuit applied a "clear and unmistakable waiver" analysis in assessing whether the contract language in this case waived the *union's* right to continuation of checkoff post-expiration, and that counsel for the Board apparently, and regrettably, conceded that was the appropriate analysis at oral argument. However, the Board itself applied no such analysis in *Bethlehem Steel* or any of its progeny, including the underlying Board decision below. Member Schaumber respectfully adheres to that precedent, which focuses on the extent of the *employee's* waiver of Sec. 7 rights.

[11] See *NLRB v. Insurance Agents*, 361 U.S. 477, 489 (1960).

[12] Our colleagues assert that the Respondents' conduct cannot be viewed as a legitimate economic weapon because the unilateral cessation of dues is the type of conduct the *Katz* Court found unlawful. That ignores the fact that the Board, with the approval of reviewing courts, has long sanctioned exactly the conduct in which the Respondent engaged.

[13] Contrary to our colleagues' assertion, it is not the mere fact that "no money changes hands" that leads to our conclusion that dues checkoff provisions are among the exceptions to the *Katz* unilateral change rule. Instead, we rely on the statutory text, the unique contractual nature of the provisions, the fact that they merely memorialize an agreed-upon administrative process, and that the presence or absence of such provisions does not otherwise affect employees' terms and conditions of employment.

sions.[14] While we agree with the Ninth Circuit that mere repetition in application may not justify a rule, considerations of industrial stability, clarity, and the settled expectations of our constituents certainly may. Indeed, the specific context of collective bargaining presents important reliance issues not necessarily present in other areas of the law.

In our view, adherence to the *Bethlehem Steel/Tampa Sheet Metal* rule[15] effectuates an important policy undergirding the Act—stability in labor relationships.[16] *Bethlehem Steel* and its progeny established the scope of an employer's obligation regarding postcontract dues withholding. The rule is well-known, well-understood, and practitioners have relied upon it in doing business on behalf of their clients. Indeed, it is safe to assume that every, or nearly every, extant collective-bargaining agreement was negotiated and drafted against the backdrop of the rule. Abandoning that policy after-the-fact would have a destabilizing impact on bargaining relationships, with the likely result that negotiations for checkoff provisions would become far more fractious.

Finally, even if a majority existed to overrule the Board's longstanding precedent in this case, which it does not, we would decline, for equitable reasons, to apply a new rule retroactively to impose an affirmative remedy in this case. The Respondent's conduct was lawful under our clearly articulated precedent and imposing sanctions at this point would work a manifest injustice.[17]

In short, we agree with our colleagues that the Board is unable in this case to provide a majority rationale as requested by the Ninth Circuit. We also agree with our colleagues that Board tradition precludes reversing precedent in the absence of three affirmative votes to do so. Thus, we adhere to extant precedent, which privileged the Respondent's postcontract cessation of dues checkoff, and dismiss the complaint on that basis. However, in our view, there are sound legal and policy reasons for adhering to the Board's existing exclusion of dues-checkoff from the *Katz* rule. And even if there were not, to impose a remedy on these facts would work a manifest injustice. We therefore join our colleagues in affirming the judge's recommended Order and dismissing the complaint.

[14] See, e.g., *Teamsters Local 70 (Sea-Land of California)*, 197 NLRB 125, 128 (1972), enfd. per curiam 490 F.2d 87 (9th Cir. 1973); *Robbins Door & Sash Co*., 260 NLRB 659 (1982); *Tampa Sheet Metal Co*., supra; and *Able Aluminum Co*., 321 NLRB 1071, 1072 (1996).

[15] See supra fn.3.

[16] See *Auciello Iron Works Inc. v. NLRB*, 517 U.S. 781, 784 (1996) (object of the NLRA is industrial peace and stability).

[17] See *Wal-Mart Stores, Inc*., 351 NLRB 130, 134–136 (2007) (Board found retroactive application of new precedent would work a manifest injustice as parties had comported their actions to preexisting law).