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NATIONAL LABOR RELATIONS BOARD PLACES NEW OBLIGATION ON EMPLOYERS UPON EXPIRATION OF COLLECTIVE BARGAINING AGREEMENT

By Phillip C. Bauknight

On August 27, 2015, in the case *Lincoln Lutheran of Racine*, Case No. 30-CA-111099, the National Labor Relations Board (the "Board") ruled that an employer's obligation to "check off" union dues from employees' wages continues upon the expiration of a collective bargaining agreement. In rendering this decision, the Board overruled the 53-year-old standard set forth in *Bethlehem Steel*, 136 NLRB 1500 (1962), which previously held that an employer's obligation to "check off" - that is, collect -- union dues ended upon the expiration or termination of a collective bargaining agreement.

THE FACTS

Respondent employer Lincoln Lutheran ("Lincoln") had collectively bargained with Service Employees International Union Healthcare Wisconsin, SEIU-HCWI (the "Union") since 2007, and previously entered into successive collective bargaining agreements, which included a dues checkoff provision that permitted Lincoln to deduct union initiation fees and membership dues from paychecks of participating employees and transmit those funds directly to the Union. During negotiations for the next collective bargaining agreement, Lincoln advised the Union that it intended to terminate the dues-checkoff and union security provisions when the agreement expired on February 19, 2013, and subsequently discontinued dues checkoffs on March 19, 2013.

A complaint was subsequently filed alleging that Lincoln unlawfully violated the National Labor Relations Act (the "Act") when it unilaterally stopped checking off union dues after its collective bargaining agreement with the Union expired. The Administrative Law Judge below, relying on *Bethlehem Steel*, ruled in favor of Lincoln, holding that the decision to

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unilaterally stop dues checkoff after expiration of the collective bargaining agreement did not violate the Act, and dismissed the complaint.

THE BOARD'S RULINGS

In a 3-2 decision, the Board reversed the Administrative Law Judge's dismissal of the complaint. Significantly, while the Administrative Law Judge relied on *Bethlehem Steel*, the Board noted that it had previously overruled *Bethlehem Steel* in the 2012 case, *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012). Nonetheless, as the Supreme Court's *Noel Canning* decision¹ vacated the WKYC decision, the Board revisited this issue in *Lincoln Lutheran*.

The Board majority first overruled *Bethlehem Steel*, finding that although the rule in *Bethlehem Steel* was longstanding, the Board "never provided a coherent explanation" for such a rule and referenced the Ninth Circuit's decision, *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F. 3d 865 (9th Cir. 2011), which noted the Board's lack of justification for the Bethlehem Steel standard.

Next, the Board noted that an employer's decision to stop unilaterally honoring a dues checkoff arrangement established in an expired collective bargaining agreement "obstructs collective bargaining just as other, prohibited unilateral changes do." Specifically, the Board found that "[a]n employer's unilateral cancellation of dues checkoff when a collective bargaining agreement expires both undermines the union's status as the employees' collective bargaining representative and creates administrative hurdles that can undermine employee participation in the collective-bargaining process" and that "[c]ancellation of dues checkoff eliminates the employees' existing voluntarily-chosen mechanism for providing financial support to the union." The Board also noted a distinction between an employee's voluntary choice to checkoff union dues from their paychecks -- which the Board deemed analogous to other voluntary checkoff agreements, such as employee savings accounts and charitable contributions -- and a union-security agreement, which contractually requires an employee to pay union dues or face termination.

Against this background, the Board determined that "requiring employers to honor dues checkoff arrangements after contract expiration serves the Act's goal of promoting collective bargaining, consistent with longstanding Board precedent proscribing post contract unilateral changes in terms and conditions of employment." The Board further stated that "in short, there is no reason why employees who wish to support their union financially should be denied the administrative convenience of voluntary dues checkoff, simply because the collective-bargaining agreement has expired." Thus, the Board held that "an employer, following contract expiration, must continue to honor a dues checkoff arrangement established in that contract until the parties had either reached a successor collective-bargaining agreement or a valid overall bargaining impasse permits unilateral action by the employer." Importantly, however, the court noted that its holding did not preclude parties from expressly agreeing that, as part of the terms of a collective bargaining agreement, a union could choose to waive its statutory right to benefit from a dues checkoff upon the expiration of a collective bargaining agreement.

TAKEAWAYS

This decision will impact employers and employees during both the initial collective bargaining agreement negotiations and during negotiations for subsequent agreements. For example, employers can no longer use the potential cancellation of dues checkoffs as a

point of leverage when negotiating. Additionally, this decision may create other hurdles during negotiations as more employers will likely request that the parties agree that dues checkoffs are discontinued upon the expiration of a collective bargaining agreement. As dues checkoffs are important to participating union members, more time may be spent bargaining over this issue.

This decision is a dramatic shift from previous Board precedent. Employers and their attorneys should be aware of this new development in an effort to reduce any potential liability under the Act.

¹ *NLRB v. Noel Canning*, 134 S. Ct 2550 (2014) held that two members of the Board who were on the Board during the WKYC decision were invalidly appointed.

NATIONAL LABOR RELATIONS BOARD RE-EXAMINES THE APPLICATION OF THE SUCCESSORSHIP DOCTRINE

By Phillip C. Bauknight

On August 27, 2015, in the case *GVS Properties, LLC*, Case No. 29-CA-077359, the National Labor Relations Board (the "Board") addressed the proper application of the Board's successorship doctrine in circumstances where a new employer is required to retain its predecessor's employees for a specific period of time, pursuant to a state or local worker retention statute. When addressing this issue, the Board also had to resolve whether the appropriate time to determine successorship status, in these circumstances, is when the new employer assumes control over the business and hires the predecessor's employees pursuant to the retention statute, or after the mandatory retention period ends.

FACTS

GVS Properties, LLC ("GVS") purchased several real estate properties in New York City and decided to self-manage the properties, which eliminated the need for the unionized employees who performed those services. GVS sent letters to these employees advising that the terms and conditions of employment contained within the prior collective bargaining agreement were "revoked and nullified." Nonetheless, as the City's Displaced Building Service Workers Protection Act ("DBSWPA") required GVS to retain its predecessor's employees for at least 90 days, GVS hired seven of its predecessor's eight employees to perform the same jobs under the same working conditions, and advised that the employees would continue to be employed on a trial basis for 90 days, after which time GVS would determine its staffing needs.

During the 90-day transition period, the union which represented the employees and negotiated the prior collective bargaining agreement (the "Union") requested that GVS recognize and bargain with it as the exclusive collective bargaining representative of the employees. GVS refused and asserted that the request was premature because it would not employ a substantial and representative complement of employees until after expiration of the 90-day transition period mandated by the DBSWPA, when it would then determine whether the employees would be offered permanent employment. At the end of the transition period, GVS kept four of the previous eight workers and hired four new workers.

A complaint was filed against GVS, and the Administrative Law Judge below found that GVS violated Section 8(a)(5) and (1) of the National Labor Relations Act (the "Act") by failing and

refusing to bargain with the Union. When rendering its decision, the Administrative Law Judge found that under the Supreme Court's decisions in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972) and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), a new employer that continues its predecessor's business in substantially unchanged form and hires the predecessor's employees as a majority of its work force is a successor, with an obligation to bargain with the union that represented those employees when they were employed by the predecessor employer.

THE BOARD'S RULING

In a 3-2 decision, the Board affirmed the Administrative Law Judge's ruling that the appropriate time to determine successorship status in these circumstances is when the new employer assumes control over the predecessor's business and hires the new employees, not at the expiration of the transition period required by a state or local worker retention statute.

The Board rejected GVS's argument that (i) it was not a successor because it did not voluntarily choose to hire the employees, but was forced to do so by the DBSWPA, and (ii) a successorship determination should not be made until after the 90 day DBSWPA-mandated transition period ended.

Relying on *Burns* and *Fall River*, the Board held that GVS was a "successor" with an obligation to bargain with the Union because (i) GVS made a "conscious decision" to purchase and maintain its predecessor's business in substantially unchanged form and hire employees of the predecessor as a majority of the work force, and (ii) GVS had actual or constructive notice of the retention requirements of the DBSWPA when it made the "conscious decision" to purchase the predecessor's business.

Thus, the NLRB found that GVS violated the Act when it refused to recognize and bargain with the Union.

BOTTOM LINE

GVS Properties, LLC, reaffirms the Board's longstanding rule that an employer's successorship determination is not impacted by the temporary status of its newly acquired workforce. This decision also clarifies, and perhaps extends, the rule, by holding that worker retention statutes do not provide a basis to delay bargaining. Importantly, this case also calls into question whether there is a distinction under the Act between a decision to purchase a business and a decision to compose a work force when a local worker retention statute is applicable. The bottom line is that employers and their attorneys should be aware of this determination that successorship status will not delay or diminish the rights of workers to bargain collectively, even during the phase of temporary retention.

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