UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

WKYC-TV, INC.

and Case No. 8-CA-39190

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, LOCAL 42 a/w COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Kelly Freeman, Esq.,
for the General Counsel.
William A. Behan, Esq.,
for the Respondent.
Charles M. DeGross, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case alleges that WKYC-TV (the Respondent) violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing dues checkoff in October 2010, some 16 months after the parties' contract terminated in June 2009.[1]

A hearing on the complaint allegations was originally scheduled in August 2011. However, on August 19, the parties filed a joint motion requesting a decision without a hearing based solely on a stipulated record. Consistent with Section 102.35(a)(9) of the Board's rules, the motion included the parties' stipulation of facts with attached exhibits, statement of the issues, and short statements of position.

By order dated August 19, I granted the joint motion and approved the stipulation of facts. The General Counsel, the Charging Party, and the Respondent subsequently filed briefs. Based on the briefs and the entire stipulated record,[2] for the reasons set forth below, I find that the Respondent did not violate the Act under extant law.

[1] The underlying charge was filed by the unit employees' designated representative (NABET Local 42) on October 18, 2010, and amended on March 28, 2011. The complaint issued on March 30, 2011, and was subsequently amended on April 5, 2011.

[2] No consideration has been given to any facts set forth in the briefs that are not supported by the stipulated record.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation that operates a television broadcasting station in Cleveland, Ohio. The Respondent admits, and I find, that its annual gross revenues and out-of-state purchases exceed $100,000 and $5000, respectively, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

NABET Local 42 is the designated exclusive bargaining representative of the Respondent's employees who install, operate, control, repair, and maintain the television broadcast equipment at the station. The Respondent admits, and I find, that NABET Local 42 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent and Local 42 have been party to successive collective-bargaining agreements, the most recent of which became effective June 1, 2006, and contained both a union-security clause and a dues-checkoff provision. The union-security clause (article I) required all unit employees to become and remain union members or pay initiation fees and weekly dues. The dues-checkoff provision (article II) required the Respondent, upon receipt of an employee's signed authorization, to deduct fees and dues from the employee's paycheck and remit them to NABET and Local 42 until such time as the authorization is timely and properly revoked by the employee.

By its terms, the 2006 contract was effective through June 1, 2011. However, pursuant to the reopener provisions of the agreement, the contract was terminated by the Respondent effective June 1, 2009. Accordingly, the parties began bargaining over new terms and conditions in April 2009, shortly after the Respondent provided notice of the termination.

Eventually, on October 20, 2009, the Respondent gave Local 42 its final offer. However, the offer was unanimously rejected by the unit membership. Thereafter, on January 4, 2010, the Respondent implemented portions of the final offer unilaterally.[3]

At no time prior to implementing portions of its final offer on January 4 did the Respondent cease deducting and remitting union dues. Nor did the Respondent ever propose any changes to the dues-checkoff provisions of the terminated agreement; the Respondent's final offer included the identical language.

[3] Local 42 filed unfair labor practice charges on January 5 and March 30 relating to the implementation. However, the Regional Director dismissed the charges on the ground that the parties had reached a lawful impasse, and the dismissal was upheld by the Office of Appeals. Thus, for purposes of this case, I have assumed that the January 4 implementation was lawful.

The Respondent also continued to deduct and remit dues after it implemented portions of its final offer on January 4. It continued to do so even though the dues-checkoff provisions in its final offer were not among the terms it advised Local 42 and the employees that it would be implementing unilaterally on January 4.

However, in late September 2010, the Respondent's general manager (Spectorsky) became aware of the situation and instructed that dues checkoff cease.[4] Accordingly, on October 5 and 6, the Respondent notified Local 42 and the affected employees, respectively, that dues checkoff would cease "effective immediately." The Respondent has not deducted fees and dues from unit employees' paychecks since that time.

B. Analysis

The General Counsel makes two alternative arguments why the Respondent's unilateral cessation of dues checkoff in October 2010 was unlawful. The General Counsel first argues that, as a matter of policy, employers should be required to continue dues checkoff after contract expiration to the same extent they are required to maintain wages, benefits, and other mandatory terms and conditions of employment until a new agreement or good-faith impasse. As the General Counsel concedes, however, this argument is contrary to longstanding Board precedent, specifically *Bethlehem Steel Co*., 136 NLRB 1500 (1962) and its progeny. Although the General Counsel offers various reasons why the precedent is unsound, the Board's most recent decision addressing the subject, on second remand from the Ninth Circuit, effectively reaffirmed the precedent in the absence of a three-member majority to overrule it. See *Hacienda Resort Hotel & Casino (Hacienda III)*, 355 NLRB No. 154 (2010).

Like *Hacienda I* and *II*, *Hacienda III* was reviewed by the Ninth Circuit at the request of the union. And this time, instead of remanding the case yet again for a rational explanation of the precedent, the court rejected the precedent outright. However, the court did so only as applied to dues-checkoff provisions that "exist as a free-standing, independent convenience to willingly participating employees." *Local Joint Exec. Bd. of Las Vegas, Culinary Workers Local 226 v. NLRB*, --- F.3d --- (September 13, 2011), 2011 WL 4031208 at *8. The court expressed no opinion with respect to situations, such as that here, where the expired contract also contained a union-security clause that compelled employees to join or pay dues to the union as a condition of employment. In any event, I am bound by Board precedent unless and until it has been reversed by the Supreme Court. *Pathmark Stores, Inc*., 342 NLRB 378 fn. 1 (2004).

The General Counsel alternatively argues that, even if the Respondent had a right under *Bethlehem Steel* to cease dues checkoff upon contract expiration, it forfeited the right by continuing to deduct and remit dues for 16 months thereafter and failing to propose eliminating

[4] The parties stipulated that, at various times during the course of the negotiations and period of impasse, and continuing to date, the Union has engaged in activity directed at the general public, the viewing audience, and the station's advertisers, designed to influence the station's position on contract issues. However, the parties did not stipulate how General Manager Spectorsky became aware that the station was still deducting and remitting union dues or why Spectorsky directed that the station cease doing so.

dues checkoff in negotiations prior to making the change.[5] However, the employer in *Hacienda* likewise did not cease dues checkoff until over a year after the contract expired. Nor is there any indication that the employer had previously proposed eliminating dues checkoff during the parties' unsuccessful negotiations. See *Hacienda Resort Hotel & Casino* (*Hacienda I*), 331 NLRB 665, 665, 673 (2000). See also *West Co*., 333 NLRB 1314, 1315 fn. 6 and 1319–1320 (2001) (employer lawfully ceased dues checkoff 3 months after the contract expired and the employer unilaterally implemented its final offer, even though the final offer included the same dues checkoff provision); and *87-10 51st Ave. Owners Corp*., 320 NLRB 993 (1996) (employer lawfully ceased dues checkoff 7 months after the contract expired, even though no bargaining whatsoever had occurred up to that time).

Further, the case cited by the General Counsel—*Tribune Publishing Co*., 351 NLRB 196 (2007), enfd. 564 F.3d 1330 (D.C. Cir. 2009)—is clearly distinguishable. In that case, the Board found that the employer violated Section 8(a)(5) by discontinuing direct deposit of union dues after previously agreeing, during the hiatus between collective-bargaining agreements, to permit direct deposit of union dues. Although the General Counsel argues that the distinction is "immaterial," the Board emphasized the distinction in its decision:

> [T]he issue before us is not whether the Respondent had the right to unilaterally cease dues checkoff after the collective-bargaining agreement expired. Rather, the issue is whether the Respondent, after unilaterally ceasing dues checkoff but later reaching a new agreement with the Union to allow employees to use direct deposit for the deduction of their union dues, could unilaterally terminated the use of direct deposit for that purpose. (351 NLRB at 197.)

In sum, the General Counsel's second argument is just as contrary to Board precedent as the first. Accordingly, in agreement with the Respondent, I find that its unilateral decision to cease dues checkoff in October 2010 did not violate the Act.[6]

CONCLUSIONS OF LAW

The Respondent's unilateral cessation of dues checkoff in October 2010, following termination of the parties' collective-bargaining agreement in June 2009, did not violate Section 8(a)(5) and (1) of the Act.

[5] As a general rule, an employer's post-impasse changes in wages, benefits, and other mandatory terms of employment cannot be substantially different from the terms of its prior offers during negotiations. See *Church Square Supermarket*, 356 NLRB No. 170, slip op. at 6 (2011), and cases cited there.

[6] Given this finding, it is unnecessary to address the Respondent's affirmative defense that the complaint is barred by Section 10(b) because Local 42 failed to file the underlying charge within 6 months after it learned that the Respondent was unilaterally implementing other portions of its final offer on January 4, 2010.

On the foregoing findings of fact and conclusions of law and on the entire stipulated record, I issue the following recommended[7]

Order

The complaint is dismissed.

Dated, Washington, D.C. September 30, 2011

Jeffrey D. Wedekind
Administrative Law Judge

[7] 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.