Summary: This paper explores an employer’s duty to honor a dues check-off provision after the expiration of a collective bargaining agreement. Since the Board’s decision in *Bethlehem Steel* (1962), the Board and Federal Courts adhered to the principle that dues check-off provisions terminate when the collective bargaining agreement expires. However, the Ninth Circuit’s 2011 decision in *Local Joint Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III)* called into question the Board’s longstanding commitment to the rule originally articulated in *Bethlehem Steel* and developed in subsequent cases by the Board. Fourteen months later, the Board abrogated its adherence to *Bethlehem Steel* when it decided *WKYC-TV* (2012). Significantly, in *WKYC-TV* the Board emphasized that an employer’s obligation to check-off union dues continues after the collective bargaining expires. The purpose of this paper is to 1) examine the development of the Board’s treatment of dues-check off provisions after the collective bargaining agreement expires, and 2) explore the effects of the Board’s decision in *WKYC-TV* on not only dues check-off provisions, but also other mandatory subjects of bargaining excepted from the *Katz* rule. In addition, this paper provides practice pointers on wording dues check-off authorizations in light of the Board’s decision in *WKYC-TV*. 
Introduction

For the past fifty years, the National Labor Relations Board (“Board”) has consistently ruled that an employer’s obligation to check off union dues from employees’ wages ceased upon expiration of the collective bargaining agreement. Unlike other mandatory subjects of bargaining, the Board determined that dues check-off provisions did not survive the expiration of the collective bargaining agreement.¹ Thus, employers could cease to check off union dues from employees’ wages after a collective bargaining agreement expired without violating the National Labor Relations Act (“Act”).

Employers that terminated dues check-off provisions post-contract expiration relied on the Board’s 1962 decision in Bethlehem Steel.² In Bethlehem Steel, the Board concluded that the Act does not impose an obligation on an employer to continue to check-off dues after a collective bargaining agreement expires.³ Specifically, the Board held that an employer does not violate Section 8(a)(5) of the Act when it unilaterally ceases to abide by a dues check-off provision pursuant to a union-security agreement.⁴ Accordingly, absent contrary language in the agreement, the employer could unilaterally stop deducting union dues from an employee’s wages once the collective bargaining agreement expired.

In 2002, the Ninth Circuit first challenged the Board’s long-standing precedent established in Bethlehem Steel Co. Over the course of the next twelve years, the Ninth Circuit would unabashedly criticize the Board’s decision and reasoning in Bethlehem Steel Co. in a trio of cases known as Hacienda I, II, and III.⁵ The Hacienda saga

¹ See NLRB v. Katz, 369 U.S. 736, 742-743 (1962) (explaining that the National Labor Relations Act prohibits an employer from unilaterally changing mandatory subjects of bargaining post-contract expiration). For ease of reference, this paper refers to the obligation to honor terms and conditions of employment post-contract expiration as the Katz rule.
² Bethlehem Steel Co. (New York, N.Y.), 136 NLRB 1500, 1501 (1962), enf’d in pertinent part, Bethlehem Steel Co. v. NLRB, 320 F.2d 615 (3d Cir. 1963).
³ Id.
⁴ Id.
⁵ Hacienda I, 331 NLRB 665 (2000), vacated, Local Joint Executive Bd. of Las Vegas, Culinary Workers Union Local 226 v. N.L.R.B., 309 F.3d 578 (9th Cir. 2002); Hacienda II, 351 NLRB 504 (2007), vacated, Local Joint Executive Bd. of Las Vegas v. N.L.R.B., 540 F.3d 1072, (9th Cir. 2008); Hacienda III, 355 NLRB No. 154 (2010), vacated, Local Joint Executive Bd. of Las Vegas v. N.L.R.B., 657 F.3d 865 (9th Cir. 2011).
originated in 2000 when the Board affirmed an Administrative Law Judge’s (“ALJ”) decision to dismiss a union’s allegation that the employer violated Section 8(a)(5) and 8(a)(1) of the Act by unilaterally terminating the dues check-off provision from an expired collective bargaining agreement before bargaining a new agreement or bargaining to impasse.\(^6\) In 2002, the Ninth Circuit granted the union’s petition for review, vacated the Board’s decision, and remanded with instructions to the Board to explain its rationale, or adopt and explain a different rule.\(^7\)

Subsequently, the Board and the Ninth Circuit danced to the same tune in *Hacienda II* as in *Hacienda I*.\(^8\) On remand, the Board rejected the bright-line rule it relied on in *Hacienda I*.\(^9\) Instead, the Board examined the collective bargaining agreements and determined that the union waived its right to claim dues check-off in the agreements.\(^10\) Accordingly, the Board dismissed the Union’s complaint.\(^11\) On petition for review by the union, the Ninth Circuit again disagreed with the Board’s determination.\(^12\) The court explained that the Board’s decision improperly applied the rule from *Metro. Edison Co. v. NLRB*, 460 U.S. 692 (1983) that required the union to waive its right “clearly and unmistakably.”\(^13\) Consequently, the Ninth Circuit vacated the Board’s decision and remanded once again with instructions to explain its rationale for the rule adopted in *Hacienda I*, or adopt and explain a different rule.\(^14\)

To the Ninth Circuit’s dismay, the Board again affirmed the ALJ’s decision to dismiss the union’s complaint by a split 2-2 vote.\(^15\) Not surprisingly, the Ninth Circuit vacated the Board’s ruling a third and final time on September 13, 2011.\(^16\) Specifically, the court held that an employers’ unilateral termination of dues check-off in a right-to-

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\(^7\) *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union Local 226 v. N.L.R.B.*, 309 F.3d 578 (9th Cir. 2002).


\(^9\) *Id.*

\(^10\) *Id.*

\(^11\) *Id.*

\(^12\) *Local Joint Executive Bd. of Las Vegas v. N.L.R.B.*, 540 F.3d 1072, 9th Cir., Aug. 27, 2008.

\(^13\) *Id.*

\(^14\) *Id.*

\(^15\) *Hacienda III*, 355 NLRB No. 154 (2010), vacated, *Local Joint Executive Bd. of Las Vegas v. N.L.R.B.*, 657 F.3d 865 (9th Cir. 2011).

\(^16\) *Local Joint Executive Bd. of Las Vegas v. N.L.R.B.*, 657 F.3d 865 (9th Cir. 2011).
work state constituted a violation of Section 8(a)(5) for refusal to bargain.\textsuperscript{17} The Ninth Circuit refused to provide the Board with a third open remand to craft its own rule.\textsuperscript{18} Rather, the Ninth Circuit remanded to the Board to determine the appropriate relief in light of its decision.\textsuperscript{19}

Fourteen months after the Ninth Circuit’s decision in \textit{Local Joint Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III)}, the Board abandoned the \textit{Bethlehem Steel} rule entirely.\textsuperscript{20} Exactly fifty years after the Board’s decision in \textit{Bethlehem Steel}, the Board held that an employer’s obligation to check-off union dues continues after the collective bargaining agreement expires.\textsuperscript{21} As explained \textit{infra}, in overruling \textit{Bethlehem Steel}, the Board repudiated not only the conclusion, but also the reasoning relied on by the earlier Board’s decision. Consequently, the Board’s decision leaves many labor practitioners speculating potential concerning collateral effects of \textit{WKYC-TV}.

The purpose of this paper is to explore the history of the \textit{Bethlehem Steel} rule and potential effects of the Board’s decision \textit{WKYC-TV}. This paper is divided into four sections: 1) an explanation of dues check-off authorizations, 2) the development of the \textit{Bethlehem Steel} rule from 1962-2013, 3) \textit{WKYC-TV}’s effect on dues check-off provisions after a collective bargaining agreement expires, and 4) potential secondary effects of the Board’s decision \textit{WKYC-TV, Inc.}, on other mandatory subjects of bargaining excepted from \textit{Katz}. In Section 2, this paper also contains practice pointers on how to word dues check-off authorization provisions in collective bargaining agreements after the Board’s decision in \textit{WKYC-TV}.

\textbf{Section 1. Understanding Dues Check-Off Authorization.}

A common misconception about dues check-off authorization has misled many employers, unions, labor law practitioners, and occasionally, even Board members. Despite assertions to the contrary, dues check-off authorization is \textit{not} fundamentally linked to a union-security clause. Rather, dues check-off authorization is an independent, contractual clause in a collective bargaining agreement that allows

\begin{quote}
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{WKYC-TV, Inc.} \& Nat'\textquotesingle{}l Ass'n of Broad. Employees & Technicians, Local 42 a/w Communications Workers of Am., AFL-CIO, 359 NLRB No. 30 (2012).
\textsuperscript{21} \textit{Id.}
\end{quote}
employees to elect to deduct monies from their paycheck to cover the cost of union dues. This is a matter of administrative convenience for unions and employees alike. In addition, it removes the inefficiency inherent in shop stewards collecting union dues on company property or even on company time. Dues check-off authorization is also 1) voluntary, 2) irrevocable, and 3) preempted by state law.

The Act requires that parties that agree to dues check-off authorization ensure that it is completely voluntary. Specifically, the Act prohibits a union from requiring an employee to authorize dues check-off as an employment condition. Section 7 of the Act guarantees employees the right to refuse to sign a dues check-off authorization. Accordingly, a union violates Section 8(b)(1)(A) of the Act by requiring an employee to sign a dues check-off authorization.

Significantly, once an employee voluntarily authorizes dues check-off, his or her authorization may be irrevocable for a maximum of one year assuming the contractual language is unambiguous. The Labor Management Relations Act ("LMRA") Section 302(c)(4) permits parties to make dues check-off authorization irrevocable for one year from the execution date or until contract expiration, whichever period is shorter. After the one-year period or contract expires, authorization is revocable during an "escape period," which is usually a ten to twenty day window immediately after the irrevocability period expires. Unless a party revokes their dues check-off authorization, dues deduction automatically continues for another one-year period or until the contract expires, whichever occurs first, and the renewal period will commence once a successor contract is negotiated.

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22 Local 74, Serv. Employees Int'l Union (Parkside Lodge of Connecticut, Inc.), 323 NLRB 289, 293 (1997) ("[I]t is well settled that the dues-checkoff authorization must be voluntarily made and that an employee has a right under Section 7 to refuse to sign a checkoff authorization.")
23 Id.
24 Id.
25 Id.
28 Machinists Monroe Lodge 770, supra note 27.
Notably, the irrevocability period applies to members, non-members, and members that authorize dues deduction but resign during the applicable time period. In Electrical Workers IBEW Local 2088 (Lockheed Space Operations), the Board emphasized that dues "may properly continue to be deducted from the employee's earnings and turned over to the union during the entire agreed-upon period of irrevocability, even if the employee states he or she has had a change of heart and wants to revoke the authorization." The check-off authorization must contain explicit language obligating an employee to pay dues even in the absence of union membership. Thus, where an authorization contains language clearly authorizing dues deduction irrespective of union membership, dues check-off is irrevocable for the period described in LMRA Section 302(c)(4).

In addition, the LMRA exclusively governs dues check-off authorization and preempts state law prohibiting dues check-off. LMRA Section 302(c)(4) explicitly authorizes dues check-off provisions. As noted supra, dues check-off provisions are entirely independent of union-security provisions, which are governed by NLRA Section 8(a)(3) and LMRA Section 14(b). LMRA Section 14(b) only permits States to prohibit "agreements requiring membership in a labor organization as a condition of employment." Unlike union-security provisions, dues check-off provisions are entirely voluntary and cannot be required as an employment condition. Thus, LMRA Section 14(b) does not apply to dues check off-provisions. Consequently, LMRA Section 302(c)(4) preempts state law attempts to prescribe dues check-off authorization through "right to work" laws.

Ultimately, it's essential to appreciate the voluntary nature of dues check-off authorization to understand how it fundamentally differs from union-security provisions. In contrast to union-security provisions, employees must voluntarily agree to dues check-off authorization. Employees that voluntarily authorize dues check-off elect to

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29 N.L.R.B. v. U.S. Postal Serv., 833 F.2d 1195, 1197 (6th Cir. 1987), decision supplemented, 837 F.2d 476 (6th Cir. 1988)
30 Id. at 328.
31 Id.
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deduct monies from their paycheck to cover the cost of union dues. Once an employee authorizes dues check-off pursuant to a clearly-articulated authorization form, it may become irrevocable for up to one year. Additionally, unlike union-security provisions, federal law preempts state law attempting to govern dues check-off authorization. As explained infra, confounding dues check-off authorization with union-security provisions can lead to unnecessary confusion, and, seemingly fifty years of reliance on flawed precedent.

Section 2. The Development of the Bethlehem Steel Rule from 1962-2013.

In the beginning, the Board created the heavens, the earth, and Bethlehem Steel. In 1962, the Board emphasized that an employer does not violate the Act when it ceases to honor a dues check-off provision after the collective bargaining agreement expires.34 Following expiration of the collective bargaining agreement between Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO (“Union”) and Bethlehem Steel Company (Shipbuilding Division) and Bethlehem-Sparrows Point Shipyard, Inc. (“Employer”) in the summer of 1959, the parties began negotiating a new contract.35 During negotiations, the Employer refused to honor the prior agreement’s union-security clause, the dues check-off provision, super-seniority provision, and the grievance procedure provision.36 In addition, the Employer implemented multiple changes in the employees’ work conditions, including seniority rules, work assignments, and special employee benefits.37 Subsequently, the Unionized employees went on strike to protest the Employer’s unilateral changes to their employment terms and conditions.38

The Union also filed a complaint with the Board, alleging that the Employer failed to bargain in good faith.39 Thereafter, the General Counsel issued an unfair labor practice complaint asserting that the Employer violated Section 8(a)(5) and 8(a)(1) by

34 Bethlehem Steel Co. (New York, N.Y.), supra note 2.  
36 Id.  
37 Id.  
38 Id.  
39 Id.
refusing to bargain in good faith with the Union.\textsuperscript{40} The General Counsel contended that the totality of the Employer’s conduct indicated that it failed to bargain in good faith.\textsuperscript{41} Specifically, the General Counsel pointed to the Employer’s unilateral decisions 1) to terminate the union-security clause, dues check-off provision, super-seniority provision, and the grievance procedure provision; and 2) to change the unionized members’ working conditions.\textsuperscript{42}

Ultimately, the Board determined that the Employer violated Section 8(a)(5) of the Act by failing to bargain in good faith.\textsuperscript{43} The Board agreed that the Employer violated the Act “when it deprived union representatives of certain seniority rights and declined to process grievances as before.”\textsuperscript{44} However, the Board reached the opposite conclusion with respect to the Employer’s termination of the union-security agreement and dues check-off provision.\textsuperscript{45} The Board noted that dues check-off, similar to preferential seniority and union-security clauses, relates to “wages, hours, and other terms and conditions of employment.”\textsuperscript{46} Correctly, the Board determined that dues-check off is a mandatory subject of collective bargaining.\textsuperscript{47} Nevertheless, the Board reasoned that the employer’s obligation to check-off dues expired with the collective bargaining agreement.\textsuperscript{48} The Board explained that the union obtained the right to check-off dues through its contractual agreement with the employer.\textsuperscript{49} Under the Board’s analysis, it follows that the contractual right to dues check-off ceases to exist when the contract expires.\textsuperscript{50}

Consistent with the Board’s decision in \textit{Bethlehem Steel}, for fifty years the Board and United States’ Federal Courts subscribed to the idea that dues-check off provisions when linked to union-security clauses left such clauses vulnerable to lawful, unilateral

\textsuperscript{40} Id. at 1347; all references hereafter to Section 8(a)(5) and Section 8(a)(1) refer to NLRA Sections 8(a)(5) and 8(a)(1).
\textsuperscript{41} Id. at 1349.
\textsuperscript{42} Id.
\textsuperscript{43} Bethlehem Steel Co. (New York, N.Y.), supra note 2, at 1500.
\textsuperscript{44} Id. at 1501.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 1502.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
termination by an employer when a contract expires. For instance, the D.C. Circuit Court explained that “the well established exceptions for union-shop and dues-checkoff provisions are rooted in § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), and § 302(c)(4) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(4), which are understood to prohibit such practices unless they are codified in an existing collective-bargaining agreement.” In addition, the Supreme Court acknowledged that “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.”

The Board also clarified that its decision in *Bethlehem Steel* is not limited to dues check-off provisions linked to union-security agreements. In *Tampa Sheet Metal*, the Board concluded that the *Bethlehem Steel* rule also applies in right-to-work states. In right-to-work states, state law prohibits collective bargaining agreements that contain union-security clauses. Thus, the Board had to determine if its decision in *Bethlehem Steel* applied to an isolated dues check-off provision in a collective bargaining agreement that was not associated with a union security clause. The Board concluded, “An employer's duty to check off union dues is extinguished upon the expiration of the collective-bargaining agreement.”

Given the Board’s continued devotion to the *Bethlehem Steel* rule, it came as no surprise when the Board agreed to dismiss a union’s complaint in 2000 that alleged the

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52 Sw. Steel & Supply, Inc. v. N.L.R.B., 806 F.2d 1111, 1114 (D.C. Cir. 1986).


54 Tampa Sheet Metal, 288 NLRB 322 (1988).

55 Id.

56 Id. at fn 15.
employer violated Section 8(a)(5) and 8(a)(1) by ceasing to deduct union dues. The Hacienda Resort Hotel and Sahara Hotel ("Employer") and Culinary Workers Local 226 and Bartenders Local 165, Hotel and Restaurant Employees ("Union") were parties to collective bargaining agreements that expired on May 31, 1994. After the parties unsuccessfully negotiated for a successor agreement from May 31, 1994 through June 1995, the Employer notified the union that it planned to cease honoring the dues check-off provision in the expired agreements. Subsequently, the Union filed a Complaint with the Board against the Employer alleging Section 8(a)(5) and 8(a)(1) violations. Following a hearing, the ALJ dismissed the Union’s Complaint based solely on the collective bargaining agreements’ language.

The Board affirmed the ALJ’s decision to dismiss the Union’s Complaint, however, it based its decision on the Bethlehem Steel rule. Specifically, the Board based its decision on “well-established precedent that an employer’s obligation to continue a dues-checkoff arrangement expires with the contract that created the obligation.” The Board acknowledged that the Supreme Court’s decision in NLRB v. Katz prohibits a party from unilaterally changing most mandatory subjects of bargaining after a contract expires. However, the Board stressed that the NLRA excepts various contractually-established employment terms and conditions from the general prohibition established in Katz, including dues-checkoff arrangements. Accordingly, the Court applied the 38 year old “bright-line rule” from Bethlehem Steel and dismissed the Union’s Complaint.

Notably, Board members Fox and Liebman dissented from the 3-2 majority opinion. In contrast to the majority, Fox and Liebman asserted that the Employer

57 Hacienda I, supra note 5.
58 Id. at 665.
59 Id.
60 Id. at 666.
61 Id
62 Id.
65 Id. at 667.
66 Id.
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violated 8(a)(5) and (1) when it unilaterally ceased to check off dues after the collective bargaining agreement expired.67 Fox and Liebman explained:

In our view, there is no statutory or policy justification for excepting dues checkoff from the general rule that following the expiration of a collective-bargaining agreement, an employer is obliged to maintain the status quo with regard to employees' terms and conditions of employment until the parties agree on changes or bargain to impasse.68

Fox & Liebman were prepared to overrule 38 years of Board policy established in Bethlehem Steel. Fox & Liebman also disagreed with the ALJ’s determination that the language in the collective bargaining agreement permitted the Employer to terminate the dues check-off system after the contract expired.69 They underscored that Section 8(d) and Section 8(a)(5) impose a statutory obligation to continue to check-off dues after a contract expires until the parties bargain to impasse or agree on changes.70 Thus, the contractual language confining the employer's obligation to check-off dues “to the term of the agreement” was inoperable.71 Consequently, Fox & Liebman would have held that the Employer violated Section 8(a)(5), 8(a)(1), and 8(d).72

Fox & Liebman’s dissent in Hacienda I would end up carrying the day roughly a decade later. As discussed infra, the Ninth Circuit ultimately reached the same conclusion as Fox & Liebman in 2011 in Local Joint Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III).

In 2001, the Union petitioned the Ninth Circuit for review of the Board’s order in Hacienda I.73 After oral argument and briefing, the Ninth Circuit granted the petition for review, vacated the Board’s decision, and remanded to the Board to convey an explanation for its rule, or adopt and explain a separate rule.74 In reaching its conclusion, the court emphasized that it was “unable to discern the Board’s rationale for excluding dues-checkoff from the unilateral change doctrine in the absence of union

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67 Id.
68 Id.
69 Id. at 671.
70 Id.
71 Id.
72 Id. at 672.
73 Local Joint Executive Bd. of Las Vegas, Culinary Workers Union Local 226 v. N.L.R.B., 309 F.3d 578 (9th Cir. 2002).
74 Id. at 580.
security.”\textsuperscript{75} Specifically, the court highlighted the Third Circuit’s explanation in enforcing \textit{Bethlehem Steel:}

> The right to require union membership as a condition of employment is dependent upon a contract which meets the standards prescribed in §8(a)(3). The checkoff is merely a means of implementing union security. Since there was no contract in existence when the company discontinued these practices, its action was in conformity with the law.\textsuperscript{76}

The court stressed that the collective bargaining agreements at issue did not contain a union security clause.\textsuperscript{77} Therefore, the court concluded that the Board’s decision and reasoning in \textit{Bethlehem Steel} failed to support the rule the Board adopted in \textit{Hacienda I}.

Five years later, the Board “accepted the remand of the U.S. Court of Appeals for Ninth Circuit” and affirmed its initial decision.\textsuperscript{78} Pursuant to the Ninth Circuit’s Order, the Board adopted a separate rule in reaching its conclusion.\textsuperscript{79} Coincidentally, the Board adopted the ALJ’s initial reason for dismissing the Union’s Complaint – that the “dues-checkoff clauses in the parties’ collective-bargaining agreements contained explicit language limiting the Respondents’ dues-checkoff obligation to the duration of the agreements.”\textsuperscript{80} The Board noted that the language in the agreement “clearly” linked dues check-off to the agreements’ duration.\textsuperscript{81} Thus, the Union waived its right to dues check-off as an employment term and condition after the contract expired.\textsuperscript{82} Member Liebman again dissented, this time joined by Member Walsh.\textsuperscript{83} The dissenting opinion underlined the same flaws in the majority’s decision as in \textit{Hacienda I}, including the inexplicable exclusion of dues check-off from the \textit{Katz} doctrine.\textsuperscript{84} Accordingly, Member Liebman reiterated her earlier opinion that the Employer violated Section 8(a)(5) and 8(a)(1).

\textsuperscript{75} Id.
\textsuperscript{76} Id. citing \textit{Industrial Union of Marine & Shipbuilding Workers v. NLRB}, 320 F.2d 615, 619 (3d Cir. 1963).
\textsuperscript{77} Id.
\textsuperscript{78} \textit{Hacienda II}, 351 NLRB 504 (2007), vacated, \textit{Local Joint Executive Bd. of Las Vegas v. N.L.R.B.}, 540 F.3d 1072, (9th Cir. 2008).
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 505.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 507.
\textsuperscript{84} Id.
On petition to the Ninth Circuit, the court again vacated the Board’s decision and remanded with instructions to the Board. The court examined the Board’s argument that the contractual language implied that the Union waived its right to dues check-off after expiration of the agreement. Recognizing the standard articulated by the Supreme Court in *Metro. Edison Co. v. N.L.R.B.*, the court explained that the employer bears the burden of proving that waiver of a statutory right - such as dues check-off - must be “clear and unmistakable.” Moreover, where the Board relies solely on language in a collective bargaining agreement in determining a party clearly and unmistakably waived a statutory right, Board precedent requires the agreement to explicitly state the provision will terminate. Notably, in the agreement at issue, the provision merely stated that it applied during the term of the Agreement. Accordingly, the court held that the Union did not “clearly and unmistakably” waive its right to protection from the Employer’s unilateral change to dues check-off. The court remanded with “instruct[ions to] 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.”

For the second time, the Board accepted the Ninth Circuit’s remand. In *Hacienda III*, with a decisive fifth vote impossible after Member Becker recused himself, Chairman Liebman and Members Schaumber, Pierce, and Hayes deadlocked. Members Schaumber and Hayes voted to uphold the ALJ’s decision and dismiss the Union’s complaints, while Chairman Liebman and Member Pierce unsurprisingly voted to overturn the Board’s rule in *Bethlehem Steel*. Significantly, the Board’s established precedent prohibited an equally divided four-member board from offering a new

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86 Id.
88 Id. at 1080.
89 Id. at 1076.
90 Id. at 1082.
91 Id.
93 Id.
explanation for its existing rule or overruling precedent. Thus, the Board decided to follow its existing precedent and affirm the ALJ’s dismissal of the Union’s Complaint.95

Less than two months after the Board’s decision in Hacienda III, the Ninth Circuit predictably granted the Union’s petition for review a third and final time.96 The court was clearly out of patience with the Board, explaining in the introduction to its opinion that:

[T]he Board's decision in Hacienda III is arbitrary and capricious because the Board provides no explanation for the rule it follows in dismissing the Union's complaint. We further conclude that, although we must show deference to the Board in its promulgation of labor policy, a third open remand is inappropriate in this case because the Board, after more than fifteen years, has reached a deadlock on the merits and continues to be unable to form a reasoned analysis in support of its ruling.97

Furthermore, the court determined, “upon consideration of the merits,” that the employers’ unilateral termination of dues check-off prior to bargaining to impasse violated Section 8(a)(5). Accordingly, the Ninth Circuit remanded to the Board to determine the appropriate relief in light of its decision.99

The court’s decision in Local Joint Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III) rested substantially on its conclusion that the Board lacked justification “for carving out an exception to the unilateral change doctrine for dues-checkoff in the absence of union security.”100 The court’s based its conclusion on the “crucial distinction” between the Board’s seemingly defensible reasoning in Bethlehem Steel and ostensibly flawed reasoning in Hacienda III.101 In Bethlehem Steel, the court pointed out, the collective bargaining agreement required dues check-off pursuant to the union security agreement.102 Conversely, in Hacienda III, the agreement lacked a

94 Id. (explaining “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. 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)”).
95 Id.
96 Local Joint Executive Bd. of Las Vegas v. N.L.R.B., 657 F.3d 865 (9th Cir. 2011).
97 Id. at 867.
98 Id.
99 Id.
100 Id. at 875.
101 Id.
102 Id.
union-security provision and each employee signed a request permitting the Employer to deduct union dues from their paycheck. The court emphasized the consequence of this pivotal difference:

[U]nlike in Bethlehem Steel, where the unilateral cessation of dues-checkoff merely terminated a contractual arrangement that individual employees and employers alike were compelled to accept, the unilateral cessation of check-off by the Employers in this case stripped employees of a contractual right that they had expressly exercised by requesting dues-checkoff.

In light of this difference, the court underscored that dues check-off authorization – unrelated to a union security clause - was a mandatory subject of bargaining; thus, it survived the expiration of the collective bargaining agreement. More broadly, the court held that an employer cannot unilaterally eliminate a dues check-off provision after the collective bargaining agreement expires in right to work states which prohibit union security agreements.

Despite the Ninth Circuit’s decision in Hacienda III, over the next fourteen months the Board refused to overturn its long-standing precedent established in Bethlehem Steel. In Hargrove Electric Co., Inc., the Board affirmed an ALJ’s findings that, inter alia, the employers did not violate Section 8(a)(5) and 8(a)(1) by ceasing to deduct union dues when the contract expired. The employers notified the union prior to contract expiration that it intended to terminate the agreement. Eleven days after the contract expired and ten days after the employer sent a ten-day termination notification, the employers terminated the agreement and unilaterally implemented changes to the employees working conditions and terms. Amongst other changes, the employers

103 Id.
104 Id.
105 Id. at 876.
106 Id.
108 Id.
109 Id. at **11.
110 Id.
stopped deducting union dues from employees’ paychecks. In the ALJ’s decision, she acknowledged 1) the Ninth Circuit’s holding in *Local Joint Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III)*, and 2) that Texas is a right-to-work state. However, the ALJ explained that the Ninth Circuit’s decision did not require her to overrule fifty years of Board precedent. Rather, the ALJ found, and the Board agreed, that the Board’s decision in *Hacienda III* remained “the outstanding current Board law with respect to the lawfulness of an employer’s cessation of dues deductions after the expiration of a contract.”

Yet, less than three months after the Board’s decision in *Hargrove Electric Co., Inc.*, the Board renounced its commitment to *Bethlehem Steel* and determined that an employer must continue to check-off union dues after a contract expires unless the parties reach an agreement or bargain to impasse. In *WKYC-TV*, the union filed a complaint alleging the employer violated Sections 8(a)(5) and 8(a)(1) after the employer ceased honoring the dues-checkoff arrangement without providing notice to the Union. The ALJ appropriately applied the Board’s longstanding rule from *Bethlehem Steel*, finding that the Employer’s conduct did not violate the Act. However, the Union and General Counsel excepted to the ALJ’s findings and asked the Board to reject the ALJ’s determination - and, in the process, abandon fifty years of Board precedent. Remarkably, the Board agreed with the Union and General Counsel, holding that “requiring employers to honor dues-checkoff arrangements postcontract expiration is consistent with the language of the Act, its relevant legislative history, and the general rule against unilateral changes in terms and conditions of employment.” As discussed infra, the Board’s decision in *WKYC-TV* resulted in several foreseeable, immediate effects.

111 *Id.* at **12.
112 *Id.* at **18.
113 *Id.*
114 *WKYC-TV, Inc. & Nat’l Ass’n of Broad. Employees & Technicians, Local 42 a/w Communications Workers of Am., AFL-CIO, supra* note 20.
115 *Id.* at **2.
116 *Id.*
Section 3. WKYC-TV’s immediate effects on dues check-off provisions after a collective bargaining agreement expires.

To understand the immediate effects of the Board’s decision in WKYC-TV, labor practitioners need only read several key paragraphs littered in Parts IV, V, and VI in the majority’s opinion. Specifically, readers should focus on where the Board discusses 1) the independent relationship between union-security agreements and dues check-off provisions, and 2) the prospective effect of its decision.

Significantly, the Board’s decision in WKYC-TV went a step further in protecting a union’s right to receive post-contract dues than the Ninth Circuit’s decision in Local Joint Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III). Unlike the Ninth Circuit, the Board did not limit its decision to collective bargaining agreements between parties in right-to-work states. The union and employer’s collective bargaining agreement in WKYC-TV covered work in Ohio, a non-right-to-work state, and the collective bargaining agreement contained a union-security agreement. Throughout its opinion, the Board stressed a fundamental flaw in the Bethlehem Steel Board’s reasoning; namely, the dues check-off provision terminated with the union-security provision because “the dues-checkoff arrangement ‘implemented the union-security provisions.’” In contrast to the Bethlehem Steel Board, the Board in WKYC-TV decreed that dues check-off provisions are fundamentally different from union-security agreements because employees must voluntarily elect to allow dues check-off, even where the contract contains a union-security clause. The Board also noted that precedent established subsequent to Bethlehem Steel confirms its assertion. Specifically, the Board referenced its decision in American Nurses’ Assn. that union security and dues checkoff are “distinct and separate matters.” Thus, where a state permits union-security clauses and the collective bargaining agreement in fact contains a union-security clause, unilateral termination of a dues check-off provision after contract expiration still

117 Id. at *7-8.
118 Id. at fn 21, fn 5.
119 Id. at *7.
120 Id.; citing Bluegrass Satellite, Inc., 349 NLRB 866, 867 (2007) (“By contrast, an employee's participation in dues checkoff is entirely voluntary; “employees cannot be required to authorize dues checkoff as a condition of employment,” even where a contract contains a union-security agreement”).
121 Id. at *7; American Nurses’ Assn., 250 NLRB 1324, 1324 fn. 1 (1980).
violates the Act so long as the dues check-off provision is independent of the union-security clause.

The Board’s decision in *WKYC-TV* underscores the importance of correctly wording dues check-off authorization provisions to survive contract expiration. Most importantly, the language in the collective bargaining agreement should make it clear that the dues check-off provision is independent of the union-security agreement. The dues check-off provision should not reference the union security clause or the obligation to maintain membership in the union for it to have effect. In addition, language emphasizing the voluntary nature of dues deduction is useful and consistent with the Board’s decision in *WKYC-TV*. Thus, the dues check-off provision should state that deductions are limited to employees who authorize it. In essence, drafters are well advised to take care to use appropriate language to separate the dues check-off provision from the union-security agreement.

Drafters will also benefit by using language that indicates dues-deduction serves an independent purpose. For instance, the collective bargaining agreement could include language stating, “the employer will check-off dues from employees’ paychecks in order to encourage administrative convenience.” Alternatively, the agreement could state that “dues check-off is necessary to limit the solicitation of dues payment during working hours or on company property.” To be sure, drafters can get creative in adopting any language that emphasizes an independent reason for dues-deduction. Ultimately, the goal should be to draft a collective bargaining agreement with an explicitly independent dues check-off provision. Where the dues check-off provision achieves an independent purpose and is clearly unconnected to the union-security clause, it’s less likely an opposing party will successfully argue that a dues check-off provision implements the union-security clause.

In addition, the Board underlined that its decision in *WKYC-TV* had prospective effect only. The Board explained that its general policy is to apply its decisions retroactively “to all pending cases in whatever stage,’ unless retroactive application

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122 *WKYC-TV*, supra note 20, at fn 5 (“Deductions shall be limited to such Employees from whom the Corporation has received written authorization to deduct said dues and/or fees”).

123 *Id.* at *2.*
would work a ‘manifest injustice.’”124 Here, where the Employer relied on fifty-years of Board precedent, the Board found that retroactive application would certainly result in manifest injustice.125 Accordingly, the Board found that the Employer did not violate Sections 8(a)(5) and (1) under Bethlehem Steel and its progeny.126

Indeed, in several cases decided the same week and subsequent to WKYC-TV, the Board reaffirmed the decision’s prospective effect.127 In Nebraskaland, Inc., a case decided immediately after WKYC-TV, the Board applied Bethlehem Steel in finding that an employer did not violate the Act by discontinuing a dues check-off provision.128 The court acknowledged that in WKYC-TV it held that “an employer, following contract expiration, must continue to honor a dues-checkoff arrangement established in the contract until the parties have either reached agreement or a valid impasse permits unilateral action by the employer.”129 However, the Board also emphasized that it decided to apply the rule adopted in WKYC-TV prospectively.130 As a result, the Board affirmed the ALJ’s finding that the employer’s conduct did not violate Sections 8(a)(5) and 8(a)(1).

The Board’s decision in Nebraskaland, Inc., underscores one of the two major effects of the Board’s decision in WKYC-TV. Specifically, that the Board will only hold an employer liable for violating Sections 8(a)(5) and 8(a)(1) if it refuses to honor a dues check-off provision after its decision in WKYC-TV. The other major impact, as noted supra, is the Board’s holding that employers in non-right-to-work states violate Sections 8(a)(5) and 8(a)(1) when they discontinue dues check-off post-contract expiration. Ultimately, the Board adopted the Ninth Circuit’s decision in Executive Bd. of Las Vegas v. N.L.R.B. (Hacienda III) and expanded it to apply to states that permit union-security agreements. Clearly, the Board’s decision in WKYC-TV had an immediate effect on the Board’s treatment of dues check-off provisions after a collective bargaining agreement expires. However, as discussed infra, the Board’s about-face in WKYC-TV on

124 Id. at *10; citing SNE Enterprises, 344 NLRB 673, 673 (2005).
125 Id. at *11.
126 Id.
128 Nebraskaland, Inc., supra note 124.
129 Id.
130 Id.
December 12, 2012, may affect more than just an employer’s duty to honor a dues check-off provision after contract expiration.

Section 4. Potential Secondary Effects of the Board’s Decision WKYC-TV, Inc.

The Board’s decision in WKYC-TV could affect more than the Board’s treatment of dues check-off provisions post-contract expiration. For instance, the Board has continuously held that no-strike clauses, arbitration clauses, and management-rights clauses also do not survive contract expiration. However, in light of the Board’s decision in WKYC-TV, could one of these collectively-bargained for clauses be next to experience the newfound, post-contract longevity of dues check-off provisions? Naturally, labor practitioners are left to wonder, what is the next shoe to drop?

Notably, the Board in WKYC-TV distinguished dues check-off provisions from no-strike, arbitration, and management-rights clauses. The Board explained that no-strike, arbitration, and management-rights clauses, similar to dues check-off provisions, are mandatory subjects of bargaining. Also like dues check-off provisions prior to WKYC-TV, earlier Board decisions demonstrate that no-strike, arbitration, and management-rights clauses do not survive contract expiration. However, the Board in WKYC-TV noted a crucial difference between dues check-off provisions and no-strike, arbitration, and management-rights clauses. Specifically, the Board stressed that, “In agreeing to [no-strike, arbitration, and management-rights] arrangements… parties have waived rights that they otherwise would enjoy in the interest of concluding an agreement, and such waivers are presumed not to survive the contract.” In other words, once the contract expires, the parties' waiver of rights they are otherwise entitled

131 Id. at *3, *10.
132 Id. at *3.
133 Id.
134 Id.; Citing Sterling Drug, Inc., Hilton-Davis Chem. Co. Div., 185 NLRB 241, 242 (1970) (“the Board held that parties have no postexpiration duty to honor a contractual agreement to arbitrate, reasoning that such an agreement ‘is a voluntary surrender of the right of final decision which Congress has reserved to the [ ] parties’ because arbitration is, ‘at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize’”); Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d 1111, 1114 (D.C. Cir. 1986) (“For similar reasons, a contractual no-strike clause normally does not act as a clear and unmistakable waiver of the union's right to strike after the contract expires”); Beverly Health & Rehabilitation Services, 335 NLRB 635, 636 (2001) (“The Board has also held that a management-rights clause normally does not survive contract expiration, because ‘the essence of [a] management-rights clause is the union's waiver of its right to bargain. Once the clause expires, the waiver expires, and the overriding statutory obligation to bargain controls’”).
to exercise also expire. Consequently, the duty to refrain from unilaterally changing employment terms and conditions post-contract expiration does not apply to no-strike, arbitration, and management-rights clauses.

In contrast, dues check-off provisions do not require the union to waive any statutory or non-statutory right. As the Board indicated in *WKYC-TV*, dues check-off is “simply a matter of administrative convenience to a union and employees whereby an employer agrees that it will establish a system where employees may, if they choose, pay their union dues through automatic payroll deduction.” Unlike no-strike, arbitration, and management-rights clauses, the employer does not fundamentally receive the surrender of any rights from the union in exchange for a dues check-off agreement. Thus, a plain reading of the Board’s decision in *WKYC-TV* strongly suggests that the Board will not change course on no-strike clauses, arbitration clauses, and management-rights clauses.

With regard to arbitration clauses, it’s worth highlighting that the Board relied on its holding in *Bethlehem Steel* in explaining why arbitration clauses do not survive contract expiration. Specifically, the Board explained:

“Our view in this regard is not unprecedented. We have also declined to apply Katz to unilateral abandonment of union-security and dues-checkoff provisions following contract expiration because they, like arbitration, are purely creatures of contract. See *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962).”

Notably, the Board’s decision in *WKYC-TV* rejects the notion that dues check-off provisions are subject to termination at contract expiration because they are “purely creatures of contract.” Instead, as noted *supra*, the legal justification for excepting arbitration provisions from the *Katz* rule corresponds to the union’s waiver of rights.

Arguably, labor practitioners could creatively draft free-standing arbitration clauses similar to dues check-off provisions described *supra*. For instance, there may be situations where arbitration provisions do not involve the waiver of some other statutory or non-statutory right, such as a no-strike clause. Under those circumstances,

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135 Id.
136 Id.
138 Id.
a labor practitioner could draft an arbitration clause highlighting its independent status. Where there is no waiver of any specific right in exchange for inclusion of an arbitration provision, the Board’s discussion in WKYC-TV loses its force. Theoretically, the creative arbitration-clause drafter could reasonably argue the arbitration provision is no different from a stand-alone dues check-off provision. How this argument plays out before the current board, or subsequent boards, is impossible to predict. Indeed, the secondary effects of the Board’s decision in WKYC-TV will only become clear in years to come.

**Conclusion. Have we come to the end of the road with dues check-off provisions?**

From 1962 until December, 2012, the NLRB majority steadfastly and consistently ruled that an employer’s obligation to deduct union dues expired with the contract. Employers could lawfully unilaterally cease honoring dues check-off provisions without violating Sections 8(a)(5) and 8(a)(1). After a “fifteen year dialogue” with the Ninth Circuit in the Hacienda trilogy, as characterized by the Board in WKYC-TV in 2012, the Board overturned fifty years of precedent and held that an employer’s obligation to check-off union dues continues after the collective bargaining agreement expires.

Naturally, the Board’s decision in WKYC-TV had immediate consequences for labor law practitioners. Specifically, the Board’s decision underlined the importance of separating dues check-off provisions from union-security clauses in collective bargaining agreements. The Board explained that where dues check-off provisions are unrelated to a union-security clause, they presumptively survive contract expiration. However, the Board also emphasized that the decision only applied prospectively. Accordingly, unions seeking to challenge employer’s unilateral termination of dues check-off provisions prior to December 12, 2012, are left without a remedy. Nevertheless, in the future, failure to continue deducting dues after a contract expires will violate Section 8(a)(5) and 8(a)(1) of the Act.

The Board’s decision also left many unanswered questions for potential impact on other exceptions to the Katz doctrine. As a practical matter, the Board’s decision in WKYC-TV seems to undercut the possibility of this current Board extending post-contract survival rights to arbitration provisions, as well as management-rights and no-
strike clauses. As noted supra, the Board’s discussion in WKYC-TV suggests that the waiver of statutory rights associated with the above-referenced clauses precludes the Board from likening them to dues check-off provisions. However, as also explained above, creative contract drafting could open the door for the Board to reverse its course on arbitration provisions as well.

In the dynamic world of labor-relations, only time will tell the long-term effects of the Board’s decision in WKYC-TV. Ultimately, the Board’s decision in WKYC-TV proves one thing: there are areas of Board law, including fifty-years of Board precedent, which labor practitioners can successfully challenge through diligence, creative argument, and a little help from the Circuit Courts.
Samples Dues Check-Off Authorization

You are hereby authorized and directed to deduct from my wages, commencing with the next payroll period, an amount equivalent to dues and initiation fees as shall be certified by [the Union], and remit same to [the Union].

This authorization and assignment is voluntarily made in consideration for the cost of representation and collective bargaining and is not contingent upon my present or future members in [the Union]. This authorization and assignment shall be irrevocable for a period of one (1) year from the date of execution or until the termination date of the agreement between the Employer and [the Union], whichever occurs sooner, and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and [the Union] written notice of revocation bearing my signature thereto.

[The Union] is authorized to deposit this authorization with any Employer under contract with it and is further authorized to transfer this authorization to any other Employer under contract with it in the event that I should change employment.

This authorization will remain in effect in the event that I am laid off, leave work on a leave of absence or separated from employment with my present Employer. I authorize deductions to resume upon the resumption of employment. If I have not requested an Honorable Withdrawal Card while on leave or layoff status with the Company, then upon my recall from leave or layoff, the Company will also deduct in addition to current dues (1) all delinquent monthly dues that are owed during the leave or layoff period, but not to exceed three months past dues, and (2) any past due initiation fee arising from employment with the Company.

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139 Henry M. Willis, Schwartz, Steinsapir, Dohrmann & Sommers LLP, modified this sample language.